

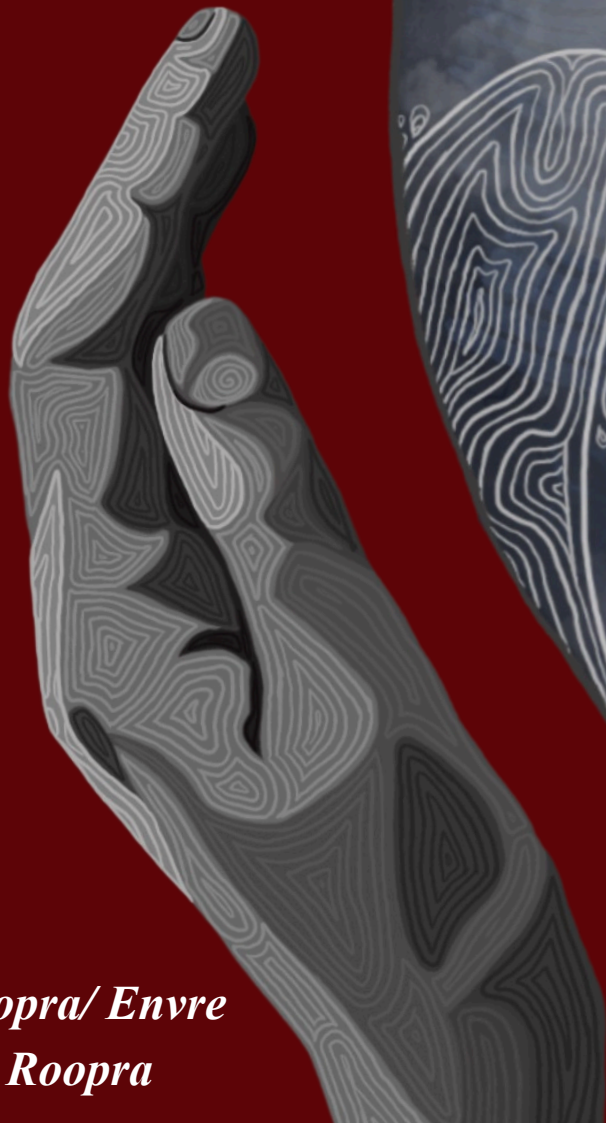
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Acknowledgement & Thanks

Simon Fraser University's three campuses occupy the unceded traditional territories of the x^wməθk^wəyəm (Musqueam), S^kw^xwú7mesh Úxwumixw (Squamish), səlilwətaʔl (Tsleil-Waututh), qícəy (Katzie), k^wik^wəłəm (Kwkwetlem), Qayqayt, Kwantlen, Semiahmoo and Tsawwassen peoples. We recognize and support the return of territorial sovereignty to the Indigenous peoples of these lands.

This volume is dedicated to every single person involved in its creation. The *Gadfly* team acknowledges and praises each and every hard-working author featured within this issue, as your work is unquestionable in its rigour. We appreciate your perseverance throughout the editing process, and we thoroughly enjoyed watching your submission evolve into what is reflected in this issue. We want to also recognize your willingness to revise, rethink, and push your arguments further. Your commitment is ultimately what gives this issue its depth and robustness as an undergraduate journal.

To our editing team, the journal would have never seen another volume come to light without your excellence. The feedback and dedication each editor gave to each author strengthened not only the individual pieces, but the intellectual integrity of this entire volume. All editors involved with the editing process truly exemplify the collaborative nature of student scholarship, and the *Gadfly* executive team can not thank each and every one of you enough for your tenacity.

Finally, to you, the reader of this issue, thank you for engaging with the arguments held within these pages. We truly hope that you are left with a sense of curiosity and inspiration for the questions that matter most, and are most importantly continuing to critically think as participants in our shared political life.

The views and ideas from papers within this issue reflect only those of the contributing authors, not Gadfly, Gadfly staff, or the Department of Political Science at Simon Fraser University.

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Letter from the Team

This year, as we wrap up a new volume of Gadfly, we would like to look back to where we came from. This school, rich in political history and struggle from its beginnings in the 1960s, gave rise to a student body that was too critical. While the Vietnam war and the Civil Rights movement shook the western world, it was Simon Fraser University students that rose in struggle to demand change, to assume the role of critical thinkers. We were the ones leading the future of this university, not being led by it. A body of student creators.

As we look back at the work put into this volume of the Gadfly Journal, we feel this agitation. A collection of writers, thinkers, workers, demanding change. A change we are meant to bring. Every submission to this journal is a voice—a critical voice. We study political science for a reason. Unbearable to the powers that be. At times annoyingly critical of the problems we see around us. Not for the sake of criticism itself, but for the inevitability of progress. We demand change because we see it around us.

The diversity of this volume speaks to the variety of the authors who contributed to our journal. We invite the reader to use the work in this volume as a stepping stone in their own journeys through the topics discussed here. The point of this collection of works is the retangling of interest of the reader in political issues of the day that have aroused the contributors of our publication. We invite the reader to be critical of our work as well. Critical, in good faith, of the subjects we have discussed, or have failed to. No assumption is too sound, no norm too stable not to be questioned. The purpose of this publication is critical thinking for the sake of betterment.

We hope that the reader can see the gift that is a stinging Gadfly, the gift of change and arousal. It is the purpose of this journal to spark thinking that is unbearably fresh to the stabilities of today's world. We hope the reader sees that the purpose of this publication is not to merely interpret the politics of today, but to force it into uncomfortable, yet necessary, action.

The Gadfly Executive Team,

Lisa Kim and Artin Safaei

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Legal Analysis

| Lost in Translation: Examining the Constitutionality of Alberta's New Anti-Trans Legislation

Annika Puls

Keywords: *Legal analysis, Canadian Charter of Rights and Freedoms, equality rights, 2SLGBTQIA+*

While protecting children has been a long-time issue within both the social and political spheres, the discourse has only shifted to centre trans individuals within the last decade or so. This has led to a resurgence of anti-trans rhetoric around the world, including in Canada, under the guise of protecting vulnerable youth. The resurgence of this rhetoric can be seen in three bills proposed by the Alberta government, which mainly aim to restrict inclusive education, gender-affirming care for youth, and the presence of transgender girls in sports.

In this paper, I focus on the healthcare and sports aspects of Alberta's proposed legislation, specifically through the lens of sections 7 and 15 of the Charter of Rights and Freedoms. I argue that the proposed legislation would be found to be infringing sections 7 and 15, and following a step by step analysis using the Oakes test, would not be upheld as a reasonable limit under section 1 of the Charter.

Introduction

The objective of protecting children is a longstanding issue within both social and political spheres, and one that oftentimes draws much debate on how we can best execute this. However, it has only been within the last decade or so that this conversation has shifted to largely centre the role of transgender individuals in this matter. As trans individuals have become increasingly visible throughout this short time period, Canada has begun to see a resurgence of anti-trans rhetoric, particularly in relation to protecting children (Bellemare et al., 2021). The ‘parental rights’ movement specifically has gained much traction recently via anti-trans ideology. While ‘parental rights’ have become increasingly popular among those who hold conservative values, notably within the United States, growing opposition to inclusion policies in Canada resulted in the 1 Million March 4 Children, a protest that occurred in September 2023 that widely advocated against LGBTQIA2S+ inclusion in schools (Benchetrit, 2023; Mason & Hamilton, 2023). According to the Canadian Anti-Hate Network (2023), these mobilizations have coincided with the sharp rise in anti-LGBTQIA2S+ policies and platforms within Canadian political parties.

However, while ‘parental rights’ movements have been largely influential in the creation of anti-trans educational legislation, such as the disclosure policies in New Brunswick and Saskatchewan, this is not their only goal. Along with inclusive education, gender-affirming care for youth and the presence of transgender girls in sports are perhaps the most substantial issues these groups oppose. Similarly, these are the three main policy areas that were introduced in February of 2024 by the Alberta Government in an announcement titled, ‘Preserving choice for children and youth’. In October of 2024, *Bills 26, 27, and 29* were introduced in the Alberta legislature, which aim to amend health and education statutes, as well as create an act to promote

safety in sport. As of current writing (December 2, 2024), these bills have not been signed into law, meaning that there is still possibility for slight changes within the proposed legislation.

Considering that inclusion, affirmation, and care for transgender youth continues to be a highly contentious issue, it is no surprise that these bills have generated much controversy across the nation. While some support the proposed restrictions on trans care, others vehemently oppose these policies, claiming they undermine the *Charter* and citing them as a “risk of severe harm” (Law Faculty, Universities of Alberta and Calgary, 2024). The question that I seek to answer in this paper asks: would Alberta's proposed *Preserving Choice for Children and Youth* legislation be upheld if tested in court, or does a child's constitutional right to equality and self-expression outweigh concerns toward youth-decision making? While there have been numerous bills targeting LGBTQIA2S+ communities within the United States over the last several years, the few examples of anti-LGBTQIA2S+ legislation in Canada are still relatively recent, meaning there are few court rulings, and little legal or academic scholarly work on the matter. Given that these are the areas that are most lacking in terms of legal and scholarly analysis, I plan to focus on the healthcare and sports aspects of Alberta's proposed legislation, specifically through the lens of sections 7 and 15 of the *Charter of Rights and Freedoms*. I argue that the proposed legislation would be found to be infringing sections 7 and 15, and would not be upheld as a reasonable limit under section 1 of the *Charter*.

I begin the paper by outlining my intended contribution to the literature on this topic, before moving on to provide an overview of both the legislation in question and a small selection of relevant court rulings. I then outline my method of analysis, and examine potential violations of s.7 and s.15 of the *Charter* in the proposed legislation. Once infringement is established, I use the *Oakes* test to analyze whether these laws indicate a reasonable limit under s.1 of the *Charter*,

accounting for potential objectives and arguments that may be cited by the Alberta Government while defending this legislation. Finally, the conclusion notes areas for future research, as well as limitations within my own research and analysis.

Contribution

The amount of literature examining issues that transgender youth face is not as extensive as many other areas of scholarship. Even so, there is a substantial base of research discussing the creation of safe environments for trans kids, educating their peers, and even the effects of certain health procedures. However, an area that is extremely lacking is the translation of increasing anti-trans sentiment into legislation, and the constitutional legitimacy of these policies. This is particularly true within the Canadian context.

Canada has only seen two bills explicitly targeting trans youth prior to Alberta's proposed legislation, both of which functioned as pronoun and name disclosure policies. Given that all three examples of anti-trans policy in Canada have been proposed or enacted within the last year and a half, there has not been enough time for constitutional challenges to proceed from start to finish, meaning that there is no direct legal precedent to inform the potential outcome of a challenge to legislation such as Alberta's *Bill 26* and *Bill 29*.

By focusing specifically on the constitutionality of Alberta's proposed anti-trans legislation, my research aims to fill the gap on legal issues related to transgender youth, specifically within the Canadian context. Since we are all bound by the *Charter of Rights and Freedoms* in Canada, my findings do not only apply to Alberta's situation, but could be relevant to other jurisdictions as well.

What is Bill 26?

Bill 26, introduced as *Health Statutes Amendment Act, 2024 (No. 2)* in October, claims to, “preserve choice for minors identifying as transgender or gender diverse” according to Alberta Health Minister Adriana LaGrange, involving amendments to Alberta’s *Provincial Health Agencies Act, Public Health Act, Health Information Act, and Health Professions Act* (LaGrange, 2024). The text of the bill itself includes an amendment to section 1 of the *Health Professions Act* outlining definitions of gender dysphoria and gender incongruence, as well as defining a minor as a person under 18 years of age. The text goes on to outline ten examples of “sex reassignment” surgery and proposes the addition of section 1.91 to the *Health Professions Act*, which states:

1.91 A regulated member shall not perform a sex reassignment surgery on a minor. (p. 10).

Immediately following section 1.91, section 1.92 outlines a blanket ban on the use of puberty blockers or hormone therapy for transgender individuals under the age of 18. There are no exceptions listed within the law itself, as these are instead left to be granted by the Minister of Health. The text reads:

1.92(1) A regulated member shall not prescribe a Schedule 1 drug within the meaning of the *Pharmacy and Drug Act*, or any other drug identifies in the regulations, to a minor for the purposes of hormone therapy, including puberty suppression and hormone replacement therapy, for the treatment of gender dysphoria or gender incongruence except in accordance with an order of the Minister under section 1.93.

(2) The Minister may make regulations identifying any drug as a drug for the purposes of this section. (p.12)

This total ban of puberty blockers and hormones is not in accordance with the original policy ideas outlined in the *Preserving Choice for Children and Youth* (2024) announcement. In

the February 2024 announcement, the government aimed to ban the use of blockers and hormones for youth 15 and under, while 16 and 17 year old teens would be allowed these treatments under parental, physician, and psychologist approval. There was also an exception made in this announcement for youth 15 and under who had already begun treatment to continue on that path. While the Alberta government has publicly indicated the intention for Ministerial exceptions for youth in these situations, these exceptions are currently listed as ‘next steps,’ and are not included within *Bill 26* itself. Therefore, it is possible that the Alberta government may not honour these exceptions.

What is Bill 29?

The *Fairness and Safety in Sport Act*, also known as *Bill 29*, was introduced by Alberta Minister of Tourism and Sport Joseph Schow with the intention of “ensuring a major step in ensuring fairness, safety, and inclusivity in sport for Albertans” (Schow, 2024). The bill, which applies to all organizations governing sport in Alberta, requires the implementation of fairness and safety policies via section 3(1). According to section 3(3), these policies must address:

- (i) Eligibility requirements to participate in the relevant sport;
- (ii) Processes or methods for determining whether individuals meet the eligibility requirements to participate in the relevant sport;
- (iii) Any other matters specified in the regulations (p.5).

Additionally, section 4(1) of *Bill 29* includes reporting requirements, requiring sport’s governing boards to inform the Minister of complaints related to board policies, requests for mixed-gender leagues, establishment of mixed-gender leagues, and other matters within the Ministry’s jurisdiction (p.5). Section 6 of the bill is dedicated to protection from liability, assuming the act is implemented in “good faith” (p. 6). Within the text itself, the meaning of

good faith is not clarified. Although the text of *Bill 29* does not explicitly ban transgender women or girls from participating in sports with their cisgender peers, it seems to provide an avenue for organizations to do so if they wish. At the very least, organizations would be forced to implement eligibility measures under *Bill 29*. Despite the text of the bill itself not explicitly singling out transgender women and girls, Minister Schow stated that the legislation sought to “ensure biological female athletes are able to compete in biological female-only divisions” in the first reading of the bill on October 31, 2024.

LGBTQIAS+ Legal Protections

Given that the *Charter of Rights and Freedoms* was drafted in 1982, transgender individuals are certainly not mentioned as a protected group within the text of the document itself. While sexual orientation was added as a prohibited ground of discrimination in 1996, transgender people did not receive formal protection under the *Canadian Human Rights Act* until 2017, when an amendment was made to add gender identity and expression to the Act.

Vriend v. Alberta (1988) and *Egan v. Canada* (1995) are both considered foundational SCC judgements in the fight for same-sex rights. The judgement in *Vriend* (1988) found that the exclusion of sexual orientation in provincial human rights legislation violated s.15(1) of the *Charter*, while the *Egan* (1995) judgement led to sexual orientation being “read in” as an equivalent ground of discrimination under s.15. These cases are often cited as groundbreaking for LGBTQIA2S+ rights in Canada, and while they certainly were in terms of sexual orientation, there is no mention of transgender individuals. In fact, it was not until 2023 that transgender individuals in Canada were recognized as “undeniably a marginalized group” by the Supreme Court of Canada, who specifically noted that trans people occupy a “unique position of

disadvantage in our society” (*Hansman v. Neufeld*, 2023, para 84-85).

New Brunswick and the Canadian Civil Liberties Association (CCLA)

One of the few examples of legal action related to anti-trans legislation in Canada is a lawsuit filed by the Canadian Civil Liberties Association (CCLA) against the Government of New Brunswick regarding amendments to *Policy 713*. This policy, originally enacted in 2020 to support queer and trans youth, was revised in July 2023 to require parental consent for youth to use a preferred name or pronouns at school.

According to the CCLA (2024), the latest update on this case is from May of 2024, although given the recent New Brunswick election, it is unlikely that the case will proceed any further. In October 2024, the CCLA stated that they, “welcome the commitment by the Premier-elect of New Brunswick to reverse changes to *Policy 713*,” citing them as having caused, “significant harms to trans and gender diverse students” (para 2). Considering that the only currently accessible material from this case is a briefing on the CCLA’s issue with *Policy 713*, and that the case may be dropped entirely, it is not tremendously helpful in determining how Canadian courts may react to anti-trans legislation.

Saskatchewan and Section 33

Taking direct inspiration from New Brunswick’s *Policy 713* amendments, the Government of Saskatchewan passed *Bill 137*, also known as the *Parent’s Bill of Rights* in October of 2023, which took a very similar structure to the pronoun and name disclosure required in *Policy 713*. However, a constitutional challenge was launched against *Bill 137* before

it was signed into law by the University of Regina Pride Centre, who argued that the bill violated the s.7 and s.15 rights of transgender youth. At the preliminary stage, the Saskatchewan Court of King's Bench found that youth affected by *Bill 137* would 'suffer irreparable harm' mentally and physically if the policy were implemented, placing an injunction that would prevent the implementation of the bill until court proceedings were finalized (para 98).

Instead of obeying this injunction, the Saskatchewan government invoked s.33 of the *Charter*, also known as the notwithstanding clause, to pass the bill regardless of its potential s.7 and s.15 violations. According to the BC Civil Liberties Association (BCCLA), an intervener in the case, Saskatchewan asked for the University of Regina Pride Centre's challenge to be dismissed, arguing that the courts no longer had jurisdiction in the matter due to invoking s.33. Ultimately, the Saskatchewan Court of King's bench found that, "the notwithstanding clause does not mean that courts cannot still issue a declaration as to whether Charter rights are violated," although this does not have any effect on the actual implementation of the bill (BCCLA, 2024, para 3).

Similar to the New Brunswick case, *UR Pride Centre v. Saskatchewan* (2023) did not quite reach the point of determining the constitutionality of Bill 137, but the acknowledgement of irreparable harm that this bill puts forth is the closest thing to trans youth-specific legal precedent currently available in Canada. Although this was pertaining to an education based pronoun disclosure bill, the same principles could be applied to other forms of anti-trans legislation. Currently, Alberta does not seem to be at risk of invoking s.33 to pass their own anti-trans legislation, although if they did, the situation would likely play out similarly to how it has in Saskatchewan.

Healthcare Decision-Making for Youth

Since *Bill 26* specifically targets gender-affirming care for youth, turning to legal precedent on youth decision making is helpful to contextualize this issue. *A.C. v. Manitoba* (2009) centers on an issue involving a 14 year old Jehovah's Witness who feels that her right to medical decision making was violated after being treated against her wishes. The judgement notes that, "young people should not automatically be deprived of the right to make decisions affecting their medical treatment," and should instead be entitled to a degree of decision making based on their developing understanding (para 45).

This judgement, despite being made based on a child who wished to refuse treatment, applies equally to transgender youth with mature decision making abilities who are seeking treatment. This precedent sets out that even if they have not reached the age of majority, youth should always be entitled to a certain degree of healthcare decision making, depending on their age and understanding. This judgement does not detract from the involvement of parents and physicians, but rather establishes and maintains a level of autonomy for youth.

Method of Analysis

In performing my analysis, I will first establish violations of sections 7 and 15 of the *Charter of Rights and Freedoms* using previously established legal tests. Once I have established these violations, I will determine if the legislation remains constitutional as a reasonable limit under section 1 by performing the *Oakes* test on both pieces of legislation. This involves analyzing the text of *Bills 26* and *29*, as well as the inclusion of evidence supporting the benefits of gender affirming care, healthcare decision making, and inclusive sports policies. I will also consider potential counter arguments that the Alberta government would use to portray their

legislation as a reasonable limit of *Charter* rights under section 1.

Establishing Charter Violations: Section 7

Section 7 of the *Charter* states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Simply put, laws may infringe on life, liberty or security of the person, but only if these laws accord with the principles of fundamental justice. According to Florence Ashely (2024), laws violate these principles if they are “arbitrary, overbroad, and grossly disproportionate” (p. 94). I would argue that both *Bill 26* and *Bill 29* meet this criteria.

As University of Alberta and University of Calgary Law Faculty pointed out in their February 2024 letter to Premier Danielle Smith, “imposing a medical decision onto youth by prohibiting standard-of-care interventions is a serious violation of their section 7 right to life, liberty, and security of the person” (p. 4). Security of the person is particularly at risk under *Bill 26*, given that trans youth are already at a much higher risk for anxiety, depression, self-harm, and suicide (Being Safe Being Me, 2020). Additionally, research shows that gender-affirming experiences such as access to care and using a chosen name help mitigate these factors, and so banning these options is sure to cause harm (Russell et al., 2018).

Bill 29 may threaten the security of the person by threatening the privacy of all women and girls, cisgender or not through the process of ‘gender verification’. A 9 year old girl was verbally harassed in BC last year at a track meet with a man aggressively seeking to prove that she was not transgender, a move that had left the girl traumatized and sobbing (Winston & Strachan, 2023). Regardless of whichever verification processes Alberta is to implement, they

have the potential to be deeply intrusive and undermine personal security.

Given that both bills appear to undermine life, liberty and security of the person, are they in accordance with the principles of fundamental justice, or do they fall under the arbitrary, overbroad, and grossly disproportionate category? *Bill 26* creates a complete ban with no exceptions on gender-affirming care for youth, effectively enacting the exact opposite of typical care standards for trans youth set out by the Alberta Medical Association and Canadian Pediatric Society (2024). Considering the disregard shown toward medical advice, it is clear that this bill is arbitrary and overbroad. This bill, although broad in its banning of care, is hyper specific in who it targets, leading to grossly disproportionate effects on the very small percentage of transgender youth in Alberta.

Additionally, *Bill 29* is extremely overbroad in its text, allowing sports organizations to enact “gender verification processes” however they see fit. This too, is completely arbitrary, and not based on common practice or scientific advice. Additionally, these laws will grossly and disproportionately impact cis and trans girls alike, depending on what verification they are forced to undertake in order to participate in sport.

Establishing Charter Violations: Section 15

Section 15 of the *Charter* outlines equality rights, stating:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

The Supreme Court of Canada uses a two-step test in determining s.15 violations, which was last reaffirmed in *R. v Sharma* (2022). The two steps in determining a violation are:

1. Creates a distinction based on enumerated or analogous grounds, on its face or in its impact;
2. Imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

Bill 26 easily meets both criteria. It creates a clear distinction in medical treatment between cisgender and transgender youth, by stating that certain procedures and drugs are not to be prescribed for the purpose of gender-affirming care. I want to be clear that some of the banned gender-affirming procedures and drugs within *Bill 26* are still available to cisgender youth if necessary, such as puberty blockers and breast reductions. By creating a transgender specific ban, the bill denies care in a manner that reinforces the marginalization of trans youth in comparison to their cisgender peers.

Bill 29 does not necessarily create a clear distinction between cisgender and transgender girls in the text of the bill itself, but based on the Minister of Sport and Tourism's promise to ensure 'biological female athletes are able to compete in biological female-only divisions' during the First Reading of the bill, it seems clear that the impact of the bill intends to create this division. According to the Alberta Law Faculty (2024), "the right to equality stands for the proposition that differential treatment cannot be based on needless speculation or stereotype, but must be rooted in clear evidence of need and necessity" (p. 4). Jones et. al's (2016) review of literature on transgender individuals and sport found that neither trans men nor trans women had an inherent athletic advantage, meaning that the creation of biological female-only leagues is not a necessity at this point in time. The participation rates of transgender youth in sports are already relatively low, it seems clear that Bill 29 is only furthering that burden.

What is the Oakes Test?

According to the Government of Canada, the *Oakes* Test, originally defined in *R. v Oakes* (1986), sets out that a “limit on a Charter right must be ‘reasonable’ and ‘demonstrably justified’” (Charterpedia, 2024). The test has become well-established over the years, and is now essential in determining reasonable limits on *Charter* rights under section 1. The *Oakes* Test consists of two overarching questions, with the second split into three elements:

1. Is the legislative goal pressing and substantial? i.e., is the objective sufficiently important to justify limiting a Charter right?
2. Is there proportionality between the objective and the means used to achieve it?
 - a. "Rational Connection": the limit must be rationally connected to the objective. There must be a causal link between the impugned measure and the pressing and substantial objective;
 - b. "Minimal Impairment": the limit must impair the right or freedom no more than is reasonably necessary to accomplish the objective. The government will be required to show that there are no less rights-impairing means of achieving the objective “in a real and substantial manner”
 - c. "Final Balancing": there must be proportionality between the deleterious and salutary effects of the law

Oftentimes, for the sake of simplicity, the *Oakes* Test is listed as four individual criteria that need to be met, rather than two questions with subsections. I will be following this format in my own work, and have split my analysis of each individual criteria into sections titled: Pressing and Substantial Objective, Rational Connection, Minimal Impairment, and Proportionality.

A Reasonable Limit?

Having established that *Bills 26* and *29* would impair the s.7 and s.15 rights of transgender youth in Alberta, I now turn to the *Oakes* Test to determine if these impairments could be considered reasonable under s.1. The first step is determining a pressing and substantial objective for each bill. For *Bill 26*, I assume that this would be protecting children and youth from irreversible health decisions, while for *Bill 29* the objective is in the title, preserving fairness in women's and girls' sports. These objectives are both pressing and substantial in my opinion. Children do need guidance and protection to a certain extent in medical decision making, and as *A.G. v Manitoba (2009)* noted, youth are entitled to a certain level of autonomy in their decision making, but this is carefully balanced based on their maturity level, and must include consultation with parents and physicians. As for *Bill 29*, promoting participation in sport for girls has been a goal for decades. During the Committee of the Whole meeting in the Alberta Legislature on November 26, 2024, MLA Julia Hayter cited statistics from Canadian Women & Sport stating that one in three girls leave sports in their teens, for many complex reasons. Therefore, the Alberta Government's objective with these bills can be considered pressing and substantial, passing step one of the *Oakes* test.

Rational Connection

The second step of the *Oakes* test is establishing a rational connection between the law itself and the objective. Starting with *Bill 26*, I do not find the complete ban on gender-affirming care for youth to be rationally connected to the objective of protecting youth from irreversible health decisions. First the majority of the "sex reassignment" surgeries included in section 9 of the *Health Professions Act* are already not happening on minors. MLA Court Ellingson

specifically noted in his speech to the Alberta Legislature that “no bottom surgeries being performed on anyone under the age of 18” in Canada today, a fact which can be verified through the Canadian Pediatric Society. The MLA also noted that explicitly banning these surgeries could send a message that this is currently common medical practice.

Additionally, *Bill 26* only attempts to ban these procedures for the purpose of treating gender dysphoria. It does not apply to cisgender youth who may be in need of the same procedures. For example, a cisgender teen girl may seek out a breast reduction to alleviate back pain. This ‘irreversible’ procedure would be allowed, while a transgender teen boy would not be able to obtain the same care. If the true objective is to protect all children from these life-altering decisions, then why does the bill not apply equally to all children?

Much of the discussion on gender-affirming care tends to center surgery, but an important part of Alberta’s blanket ban includes puberty blockers, which are entirely reversible. The American Academy of Pediatrics (2018) details that blockers have been used since the 1980s to delay precocious puberty, but are effective in preventing the development of secondary sex characteristics until 16 years old to allow gender-diverse youth time to explore their identities. If the blockers are stopped, puberty will proceed as normal. Therefore, banning blockers is not preventing children from accessing an irreversible health decision.

The Alberta government may argue in defence that they believe in taking a “watchful waiting” approach to gender-diverse youth rather than a gender affirming one, which involves therapy and waiting until youth are approximately 16 to take any gender-affirming action. However, this would be a misconception, as puberty blockers play an instrumental role in this approach, allowing youth the time to make a decision on their gender identity without experiencing the irreversible effects of puberty (Ashley, 2019). Additionally, puberty blockers

can remove the need for invasive, irreversible surgeries for transgender individuals later in life.

Bill 26 does not allow for exceptions, regardless of parental, physician, or psychologist consent. First, this is surprising to see from a party that often boasts parental rights, and second, I would argue that informed consultation involving parents and physicians is the rational way toward obtaining the best care for a child. A study by Clark et al. (2020) outlined the importance of shared decision making in the process of gender affirming care, noting “supportive relationships, open communication, role agreement, decision agreement and adequate time” as key conditions (p. 578). If the Alberta government were truly interested in preserving choice for youth, and preventing youth from making life-altering medical decisions alone, the rational step to take would be to further encourage shared decision making, and follow standard medical practice as set out by the Alberta Medical Association, Canadian Pediatrics Society, and American Academy of Pediatrics.

Bill 29 may contain even less rational connection to its objective of promoting fairness in girls’ sports, and more broadly encouraging participation. To encourage participation in sport, the Alberta government may consider providing greater funding to female divisions, or figure out a way to alleviate the pressure of, “socialization, gender expectation, lack of consideration for social identities, structural barriers, and psychosocial barriers” that MLA Hayter cites as being influential in her speech to the Alberta Legislature. Instead, *Bill 29* sets out broad guidelines to create “gender verification” processes and “eligibility requirements” for girls to join sports. At best, these requirements have the ability to add a significant amount of red tape and hassle to joining sports for young girls and their families. At worst, these requirements could cause immense harm.

The text of *Bill 29* does not outline how organizations are to verify gender, meaning that

organizations have the freedom to implement whatever regulations they would like, regardless of how invasive or traumatizing they are. This could range anywhere from verifying birth certificates to deeply personal bodily examination, which is highly problematic, especially for minors. Requirements like this would jeopardize the safety of all women and girls in sports, regardless of their sex assigned at birth. There could be an additional impact on women of colour, who are already often considered insufficiently feminine, and will now constantly have their gender questioned, possibly in unsafe ways. The previously cited example out of BC, involving the gender questioning of a nine year old girl, is only the tip of the iceberg.

To further disprove the connection between fairness in sport and excluding transgender women and girls, I will turn to research by Veronica Ivy and Aryn Conrad (2018), where their analysis of the science, policies, and law of trans women in sports found, “no relationship between endogenous testosterone and performance, even for women.” Additionally, they found that there is no scientific basis to impose a testosterone limit on women in sport, regardless of whether they are cisgender, transgender, or intersex (p. 137). Furthermore, they explain that even if there was a relationship between testosterone and performance, much larger advantages are permitted in competitive sport such as “height, metabolic mutations, socioeconomic status, coaching, access to facilities, etc.” (p. 138). According to scientific study, transgender women and girls do not compromise the fairness or safety of sports, meaning *Bill 29* has no form of rational connection to its pressing and substantial objective.

Minimal Impairment

Although both pieces of legislation have already failed the *Oakes* Test by failing to meet rational connection standards, it is still worthwhile to examine it through the lens of the

remaining two steps. Having said that, I strongly believe that both *Bills 26* and *29* would fail the minimal impairment requirement as well. The ban on gender-affirming care in *Bill 26* is extremely broad, and outlaws virtually every form of care that transgender individuals seek, including puberty blockers, hormone therapy, and surgery. Although the ban is hyper specific in its targeting of trans youth, one could argue that it attempts to enforce the most impairing legislation possible. The bill bans every form of gender-affirming care for youth under the age of 18, no exceptions.

In order to be considered minimally impairing, the Alberta government would need to work backwards from a full ban. Considering that most surgery was not available to youth under 18 anyway, that portion is not heavily impairing on the rights of trans youth. However, a minimally impairing approach to puberty blockers and hormones would include provisions that allow for shared decision making between the child, parents, physicians, and psychologists, who can determine what is best for the child based on their unique situation. *Bill 26* in its current state is a blanket ban, and does not account for mature minors aged 16 or 17, or the potential mental harm that could arise by removing access to treatment for youth who are currently on blockers or hormones. I cannot think of a more intrusive impairment to gender-affirming care than this one.

Bill 29 is similar to *Bill 26* with quite a broad scope, but is also extremely vague in its phrasing. While the intention of the bill is clear from the *Preserving Choice for Children and Youth* announcement, as well as the commentary from members of Alberta's United Conservative Party, the bill itself does not provide a detailed explanation of what eligibility requirements will look like, or how they will be enforced. There are also broad protections from liability included within the act, which specifically provide complete protection for anyone enforcing it in "good faith" (s.6). However, good faith is not defined.

Considering the wide scope of this bill, and the potential of the eligibility requirements to be extremely intrusive, I do not think that *Bill 29* can be considered to be minimally impairing *Charter* rights. Depending on the severity of eligibility requirements and their enforcement, which will be fully protected from liability, safety and equality could be severely limited. If the Alberta Government is dead set on separating transgender girls from cisgender girls in sports, the most minimally impairing way to do this would be to create separate divisions, and allow girls to join by self-identifying themselves as cis or trans. This still violates *Charter* equality rights, but could somewhat mitigate the risk of safety. Unfortunately, given the vague nature of the text within *Bill 29*, I cannot be completely sure of what it will look like in action at this point.

Proportionality

The final step of the *Oakes* Test seeks to determine whether the benefits of a law outweigh the harms caused by its infringement of *Charter* rights. For both *Bill 26* and *Bill 29*, this is clearly not the case. As noted by the American Academy of Pediatrics (2018), Canadian Association of Pediatrics (2024), and Alberta Medical Association (2024), removing access to gender-affirming care leads to an increased risk of anxiety, depression, self-harm, and even suicide for trans youth, behaviour that they are already at an elevated risk for. This is a very clear harm stemming from *Bill 26*, and one that I do not find to be proportionally outweighed. The only realistic benefit of this law is clear guidelines on gender-affirming care for health professionals, which certainly do not measure up to the harm caused by the bill.

I outlined the potentially catastrophic harms that *Bill 29* could cause for women and girls in sports when discussing rational connection, and I do not feel that these harms are outweighed by any benefits either. The research done by Ivy and Conrad (2018) proves that transgender

women and girls are not a threat to the integrity of sport, leaving this bill with virtually no benefits. The vague nature of enforcing eligibility criteria and the complete protection from liability are extremely concerning, and the harm presented here heavily outweighs any benefits. With the *Oakes* Test completed, neither *Bill 26* or *Bill 29* can be considered a reasonable limit, and should be struck down as unconstitutional

Conclusion

The Alberta Government has recently introduced multiple bills targeting trans youth, becoming the first jurisdiction in Canada to suggest or implement such all-encompassing legislation on the issue. *Bill 26*, also known as the *Healthcare Amendment Act*, would enact a blanket ban on gender-affirming care for youth under 18 with no exceptions, while *Bill 29*, the *Fairness and Safety in Sport Act*, would create eligibility requirements for women and girls in sport, with the ultimate goal of removing transgender women and girls. I established *Charter* infringements for both pieces of legislation, finding them in violation of the s.7 right to life, liberty, and security of the person, as well as the s.15 right to equality. I then performed the *Oakes* Test, where I found that both bills had pressing and substantial objectives, but did not contain rational objectives, impair the infringed *Charter* rights as minimally as possible, or carry proportional benefits and harms. Considering this outcome, I was able to conclude that neither *Bill 26* or *Bill 29* can be considered constitutional, and would be struck down by the courts.

My findings, although centered around the legitimacy of Alberta's anti-trans legislation, have broader implications for the state of anti-trans policy in Canada. Since the *Charter* applies to all Canadians and all legislation in Canada, the lack of constitutionality found in Alberta's anti-trans laws sends a message as to what is acceptable under the *Charter*, and what is not. My

findings indicate that a simple disagreement with the trans lifestyle is not a good enough reason to enact anti-trans legislation, and instead points to the need for research and scientific fact to solidify the reasoning and connection behind the law and its objectives.

I faced several limitations within my research process, due to my limited scope and time. While I would have liked to discuss all three of Alberta's anti-trans bills, this simply would not have been possible while maintaining a narrow enough scope for this paper. Another limitation is the recent nature of the legislation. Both bills have been debated multiple times in the Alberta Legislature in the last month, leading to new information and slight changes here and there. The legislation will likely pass soon, however it is possible that there will be some changes in the implementation of these policies. Additionally, although they have not indicated it so far, the Alberta Government could enact the notwithstanding clause, leaving no grounds for the legal challenges I have predicted here.

These limitations within my own work lend themselves well to future research opportunities. Assuming these bills are enacted in their current form, there is research to be done on how they impact queer and trans youth in Alberta. Organizations including Egale and Skipping Stone announced their intention to take legal action in Alberta in October, meaning that there will be an opportunity to research how the courts actually respond to challenges of these bills.

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Legal Analysis

| From Constitution to Living Land: Environmental Rights and Indigenous Sovereignty in Canada and Chile

Constance Ruan

Keywords: *Indigenous rights, land sovereignty, environmental justice, constitution, judicial reasoning*

This paper presents a comparative case analysis between Canada and Chile to examine whether a constitutionally protected right to a healthy environment strengthens Indigenous land sovereignty. The analysis focuses on judicial interpretations of s.35 within the Charter of Rights and Freedoms and Article 19 of the Chilean Constitution.

The author adopts an in-depth, small-N qualitative analysis of legal cases adjudicated by the supreme courts of the two countries, arguing that the right to a healthy environment entrenched in the Constitution embodies a stronger protection of Indigenous land sovereignty. Furthermore, considering Indigenous Traditional Ecological Knowledge (ITEK) in judicial rulings can further uphold Indigenous rights to land sovereignty.

1. Introduction

In November 2021, Clayton Thomas-Müller, an environmental activist, revealed to CBC News (2021) in South Sarnia, Ontario, that Indigenous communities endure a systematic inequality of living in a polluted environment due to the lack of control over their land. Indigenous people are disproportionately living in an unhealthy environment. Much pollution-associated infrastructure, such as mines and pipelines, was located on Indigenous lands, resulting in greater exposure to lethal chemical materials among Indigenous communities than non-Indigenous populations. The significant disproportionality leads to a crucial research question in studies of Indigenous rights: “*Does a Constitutionally Protected Right to a Healthy Environment Strengthen Indigenous People’s Land Sovereignty?*” Based on an in-depth analysis of the 9 collected cases, I argue that a constitutionally protected right to a healthy environment can strengthen Indigenous land sovereignty by incorporating Indigenous Traditional Ecological Knowledge (ITEK) into judicial rulings.

Canada has a progressive Constitutional framework in which fundamental rights, such as rights to life, security, liberty, and equality, are universally applied to everyone and entrenched in the highest law of the country. Although the right to a healthy environment is not explicitly codified in the Constitution, Worstman (2019) argues that the extensive set of rights included in the Constitution overlaps with environmental protection. Despite this, Canada’s environmental record has led to a substantive deficiency in healthcare delivery nationwide. Some existing constitutional rights, including the right to life, security, and liberty and the rights of Indigenous people, are expected to be adversely impacted by climate change and environmental pollution. Ultimately, Indigenous people are disproportionately affected by environmental degradation. Chile was selected to compare with Canada because both countries share key

similarities: **1)** they have diverse Indigenous populations, a history of colonialism and Indigenous land dispossession; **2)** the incorporation of guidelines from influential international treaties, particularly UNDRIP and ILO-Convention 169, into domestic laws in protecting Indigenous rights; and **3)** ongoing environmental contamination and climate change challenges. A key difference is that the Chilean *Constitution Act, 1980*, guarantees the right to a healthy environment. This difference provides a valuable basis for analyzing the legal impact of constitutional environmental rights on Indigenous land sovereignty.

This paper begins with a literature review to identify the research gap. The literature review compares judicial rulings in Indigenous environmental disputes between Canada and Chile, where the right to a healthy environment is codified in the Constitution. Based on the literature review, I will hypothesize why a constitutionally protected right to a healthy environment can strengthen Indigenous land sovereignty and why considering ITEK in judicial rulings can reinforce a more equitable process. I will then introduce the selected legal cases, along with the case selection criteria, the research method, and its limitations. The cases will then be analyzed in both countries in accordance with two different legal frameworks adopted in Canada and Chile to identify the decisive factor in judicial outcomes. Finally, I consider alternative explanations and the counterargument to examine other causes of the judicial rulings to refine the argument.

2. Literature Review

2.1 Indigenous Rights Challenges within the Canadian Constitutional Framework

Since the enactment of the Charter of Rights and Freedoms, Indigenous rights have become a contentious issue in the legal system. In the late 1990s, reconciliation appeared more

frequently in official discourse. Government agencies stated that reconciliation with Indigenous people involves developing respectful relationships, acknowledging past injustices, and working towards a future of mutual equality (Crown-Indigenous Relations and Northern Affairs Canada, 2024). This gave rise to discussions of whether section 35 of the *Charter of Rights and Freedoms* broadens the scope of Indigenous rights or perpetuates former colonial rules. Section 35 specified the Crown's duty to consult with Indigenous communities about conduct that may adversely impact their rights or title and to accommodate their interests in certain circumstances. In many cases, the SCC has reinforced this duty. However, whether these judgements strengthen Indigenous land sovereignty remains unclear.

The core contention surrounding Indigenous land sovereignty in Canada centres on which party possesses the final authority to interpret s. 35 interpretation. While s.35 affirms existing aboriginal and treaties, it allows the government to infringe the rights under certain circumstances when a significant public benefit is identified (Brideau, 2019). The SCC has opposed absolute Indigenous land sovereignty when an infringement aligns with fundamental interests of a large non-Indigenous population (*Tsilhqot'in Nation v. British Columbia*, 2014). In contrast, Indigenous scholars uphold absolute land sovereignty based on a holistic approach, claiming that the land is a living entity that nurtures life over generations (Kimmerer, 2013; Turner, 2014). The reciprocal relationship between Indigenous people and the land makes Indigenous communities experienced stewards. This contention necessitates an examination of how the judicial branch interprets s.35. Examining the scope of Indigenous rights under s.35 of the *Constitution Act, 1982* provides a more nuanced explanation of why indigenous communities are disproportionately affected by environmental pollution.

McCrossan (2019, p.96) stated that the SCC does not recognize an Indigenous community's persisting authority and power over their land. Judges often signify the most important level of control of the Crown, overlooking how Indigenous people relate to their land in the pre-colonial stage. Judicial members found it challenging to understand what the land means for Indigenous people from the ITEK perspective and when prioritizing the Crown's interest. On the other hand, since 2019, the federal government has committed to implementing the rationale of the *Declaration on the Rights of Indigenous Peoples (UNDRIP)* in domestic laws (Mason, 2024). Article 29 of the UNDRIP recognizes Indigenous rights to the conservation and protection of the environment. The federal government's action plan stems from Article 29, supporting Indigenous people's right to a healthy natural environment with Indigenous ways of knowing to protect their lands and resources (Mason, 2024, p.13). In 2023, Canada recognized the right to a healthy environment following a resolution of the UN General Assembly. It incorporated the resolution into the *Canadian Environmental Protection Act (CEPA)*, 1999 amendment (Mason, 2024, p.5). Nevertheless, the effect of the amendment on environmental protection in Indigenous communities was left unanswered in Mason's work.

2.2 A Constitutionally Protected Right to a Healthy Environment in Chile

Chilean domestic law incorporated environmental protection and Indigenous rights much earlier than Canada. Since 1980, Article 19 of the *Chilean Constitution* has guaranteed the right to "live in a pollution-free environment." Indigenous communities have successfully invoked the Constitutional provision to defend their culture against environmental disruptions (Cespedes, 2013, p.71).). The distinction of environmental protection between Chile and Canada is that Chilean domestic law incorporates several international agreements to protect Indigenous rights.

Specifically, *ILO-Convention 169*, the *Indigenous and Tribal Peoples Convention (1989)*, played an essential role in enriching the Chilean domestic legal system as one of the most critical changes to modern indigenous-environmental law.

The *Chilean Constitution* reflects Indigenous people's right to lands, resources, and self-determination enshrined in *ILO-169* and the *Indigenous and Tribal Peoples Convention (1989)*. Indigenous people in Chile have successfully used Article 19 of the Constitution and *ILO 169* provisions that were incorporated in domestic law in environmental trials to challenge the power of big corporations and governmental authorities in domestic courts (Cespedes, 2013, pp.73-74).

2.3 Land Sovereignty and Environmental Degradation

Indigenous people have experienced ongoing challenges in regaining control of their lands. Indigenous scholar Leanne Simpson (2014) suggests that land sovereignty is an inherent right in her pedagogy theory, encompassing the governance and stewardship of land and resources while reflecting cultural, spiritual, and social dimensions. Indigenous communities transmit life skills and traditions that are learned from the land across generations. ITEK sometimes contradicts the Western school of thought in a colonial society. For example, Indigenous communities traditionally view land not merely as a resource for economic benefit but as an integral part of their identity, culture, and spiritual practice (Fernández-Llamazares et al, 2019). The land is a living entity that requires stewardship to maintain balance and sustainability. This view often contradicts mainstream economic models prioritizing immediate benefits and development goals (Simpson, 2014; Turner, 2014; Kimmerer, 2013). Over the years, Indigenous land sovereignty has steadily weakened due to the environmental challenge of land

degradation. Environmental pollution has disrupted traditional practices, disconnecting Indigenous peoples from their cultural heritage and ancestral knowledge.

According to Fernández-Llamazares et al.'s (2019) findings on the impact of pollution on Indigenous communities, except for health and environmental degradation, non-material cultural dimensions of Indigenous people's way of life are also affected. For example, herbicide treatments have contaminated plants used by Aboriginal tribes for different cultural uses. Other traditional cultures, such as harvesting local plants for sustenance, ceremonial purposes, or drinking from their historical water source, also increase exposure to toxic pollutants. Pollution has jeopardized their traditional knowledge system, as activities associated with collecting wild foods serve crucial community roles. Pollution-related concerns regarding wild food consumption impact their cultural practices (Fernández-Llamazares et al., 2019, pp.227-228). Pollution also affects spiritual well-being. In many First Nations' perspectives, water is a living and sentient being or a spiritual resource that must be kept clean from pollution. In contrast, from a Western scientific perspective, drinkable water may have some acceptable contaminants (Fernández-Llamazares et al., 2019, p.330). Based on these examples, Indigenous people's unique knowledge system requires some level of recognition when resolving an environmental dispute, given the distinction between mainstream science and ITEK.

3. Theory

As noted in the literature review, Indigenous communities experience varying levels of success in litigating environmental disputes in courts between Canada and Chile. Although much literature does not examine whether these disparities are attributable to the presence of a constitutionally protected right to a healthy environment, Chilean Indigenous communities have

successfully argued their rights to land governance in accordance with Article 19 of the constitution. While a constitution establishes the supreme set of rules of a country, it is reasonable to suggest that such a constitutional guarantee can enhance the protection of Indigenous land sovereignty. Additionally, given the epistemological distinction between ITEK and Western environmental paradigms, including ITEK in judicial rulings may counterbalance the Crown's interests that conflict with Indigenous claims, reinforcing a more equitable and culturally sensitive adjudication process. Therefore, considering ITEK's perspective within a constitutional framework that guarantees a right to a healthy environment can further strengthen Indigenous land sovereignty.

4. Method of Analysis

I will assess the effect of the independent variable: a constitutionally protected right to a healthy environment, on the dependent variable: the protection of Indigenous land sovereignty. The intervening variable is the consideration of ITEK in judicial rulings. I apply Mill's method of difference by comparing court cases from Canada and Chile. The case selection criteria for this research are as follows: **1)** the foreign case must originate from a jurisdiction where the right to a healthy environment is constitutionally guaranteed, **2)** the case involves an Indigenous community experiencing negative environmental impacts on their territory, **3)** the case must have been decided by the Supreme Court to ensure finality and avoid potential misunderstandings from lower court rulings that could be appealed, and **4)** the dispute is related to Indigenous communities asserting their rights to land and resource governance. I will perform a small-N, in-depth qualitative analysis by examining the judicial reasoning of nine selected cases. Limiting the case numbers can provide a better in-depth analysis.

I selected six Canadian cases to analyze judicial reasoning in Indigenous environmental disputes. I included *Haida Nation v. British Columbia (Minister of Forests) (2004)* and *Taku River Tlingit First Nation (TRTFN) v. British Columbia (2004)* as both were adjudicated before Canada endorsed the UN Declaration in 2010 (Government of Canada, 2024). Most importantly, *Haida (2004)* established a fundamental legal principle regarding the duty to consult for similar cases afterwards. Additionally, I selected *Tsilhqot'in Nation v. British Columbia (2014)*, *Mikisew Cree First Nation v. Canada (2018)*, *Southwind v. Canada (2021)*, and *Saskatchewan (Environment) v. Métis Nation (2025)* to examine the judicial trend in Indigenous environmental disputes between 2010 to 2019, when Canada acknowledged and began incorporating the principles of the UN Declaration into domestic law. I also selected three Chilean cases to analyze judicial reasoning within a constitutional framework that protects the right to a healthy environment. The cases of *Aqua Mineral Chusmiza v. Comunidad Indigena de Chusmiza Usmagama (2009)*, *Machi Francisca Linconao Huircapan v. Sociedad Palermo Itda (2009)*, and *Compañía Minera Nevada Spa v. Superintendencia del Medio Ambiente (2022)*.

Each of them directly invoked Article 19 of the Chilean constitution, offering valuable insight into how the Chilean supreme court interprets environmental protections in disputes involving Indigenous communities. If the thesis is correct, Chilean judges will not only rule in favour of the Indigenous community but also consider Indigenous people's unique perspectives on environmental issues in their reasoning. In contrast, Canadian judges will still rule in favour of Indigenous communities in certain cases, but they will prioritize upholding the Crown's sovereignty and interests under the common law. If the thesis is incorrect, judges of both countries will rule in favour of the governmental agencies, prioritizing state authority over Indigenous rights and overlooking the distinctiveness of Indigenous traditional knowledge.

The methodology has limitations. While a small-N study provides an in-depth understanding of judicial rulings of the selected cases, the findings may lack generalizability in a broader context. A quantitative data analysis is required to examine an extensive set of cases from countries with a constitutionally protected right to a healthy environment, developing a more comprehensive assessment of judicial trends in Indigenous environmentalism. Moreover, due to the absence of documents in English translation in the Chilean Supreme Court, I use peer-reviewed articles and materials from international research institutions that have translated the judgments into English to analyze the judicial reasoning. This may limit the scope of direct legal interpretation and cause interpretive biases inherent in secondary sources, potentially affecting the depth of the case analysis.

5. Analysis

5.1 Analysis of Results: Constitutional Supremacy v. Analogous Grounds

I argue that the judicial ruling approach between Chile and Canada diverges with respect to Constitutional Supremacy and Analogous Grounds. As the right to a healthy environment is entrenched in the highest law of Chile, Chilean judges rely on Constitutional Supremacy in rulings. In contrast, Canadian judicial ruling is based on the Analogous Ground. Although analogous ground is typically used in s.15 of the Charter determining the scope of discrimination, I find it useful in s.35 interpretation. It allows judges to actively analyze whether the Crown's consultation is *meaningful*, as well as whether a significant public interest is identified. In the absence of a constitutionally protected right to a healthy environment in Canada, Canadian judges must align environmental threats with violations of s.35 on an analogous ground, providing courts with discretion to justify infringements on Indigenous rights.

Before determining the environmental threat, the Crown must fulfill the duty to consult with Indigenous communities, which was assured in *Haida (2004)* and *Taku River (2004)*. If the court deems the consultation meaningful and accommodating, governmental infringements will likely be justified in courts. *Haida (2004)* set a precedent for subsequent cases on the Crown's duty to consult when a conduct may adversely impact Indigenous rights under s.35. The SCC ruled in favour of the Haida Nation for the absence of consultation and provided a guideline for the duty to consult. The level of consultation and accommodation required is proportionate to the claim's strength and the seriousness of the contemplated governmental action's adverse impact on the claimed right. If consultation or accommodation is found to be inadequate, the government decision can be suspended or set aside (*Haida Nation v. British Columbia, 2004, para.37*). Notably, following the principle established in *Haida (2004)*, in *Taku River (2004)*, the SCC ruled in favour of the BC government and upheld the approval of the mining project to build a road in the TRTFN's traditional territory. Given that the province was aware of the TRTFN's claims through its involvement in the negotiation process, the court unanimously concluded that the Crown's obligation to consult was engaged. Despite acknowledging that the mining project may adversely affect the substance of their cultural practices (*Haida Nation v. British Columbia, 2004, para.21*).

The *Tsilhqot'in (2014)* case is a landmark decision that established Aboriginal title for the Tsilhqot'in First Nation and recognized their rights to a vast territory in BC. The court declared that the BC government had breached its duty to consult through its land use planning and forestry authorizations (*Tsilhqot'in Nation v. British Columbia, 2014, para.153*). It acknowledged that the courts need to be careful not to distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts (para.32). On the other hand, the SCC

noted that governments can infringe Aboriginal title lands for ‘compelling public interests’ if the Crown has undertaken the procedural duty to consult and accommodate (para.77). While justices acknowledged that the *Forest Act* no longer applies to Tsilhqot’in lands given the establishment of Aboriginal title, Chief Justice McLachlin stated that the Act is open to amendments to extend its application to lands under Aboriginal title if it complies with applicable constitutional restraints (para.116).

Although s.35 imposes the Crown with the duty to consult meaningfully, the government retains the ultimate authority to make final decisions on actions that may negatively impact Indigenous rights if such actions serve a “compelling” objective or align with fundamental public interests (McCrossan & Ladner, 2016; *Tsilhqot’in Nation v. British Columbia*, 2014, para.44). The duty to consult does not extend to the legislative process, as established in *Mikisew* (2018). While Indigenous communities can still seek judicial review after enactments, precedents set in cases such as *TRTFN* (2004) and *Tsilhqot’in* (2014) provide governments with legal grounds to justify infringements on Aboriginal title, especially when such actions are deemed necessary to fulfill a compelling public objective. Although Justices Abella and Martin stated in their concurring reason that the purpose of the duty to consult is to reconcile with the pre-existing Indigenous societies, which is the “fundamental objective of the modern law of aboriginal and treaty rights” (*Mikisew Cree First Nation v. Canada*, 2018, para.63), they did not conceptualize **reconciliation** and **meaningful** consultation.

Most recently, the SCC ruled in favour of the Métis Nation–Saskatchewan (MNS) regarding uranium exploration permits, which were argued to constitute an abuse of process, given their ongoing Aboriginal title litigation initiated in 1994. The SCC unanimously concluded that the duty to consult serves as an interim measure to protect Indigenous rights pending final

determinations, so the courts should facilitate, not impede, the resolution of Aboriginal claims (*Saskatchewan (Environment) v. Métis Nation*, 2025, para.40). After reviewing the past proceedings of litigations, the court declared that the MNS's judicial application does not constitute an abuse of process whose doctrine focuses on the integrity of the adjudicative functions of courts (para.55). This ruling reflects the Canadian courts' reliance on procedural protections, such as consultation duties, rather than on substantive constitutional guarantees like a right to a healthy environment. While such rulings can offer temporary relief, they may fall short of long-term, enforceable protections grounded in constitutional supremacy.

On the contrary, Chilean judges are bound by the codified statutes in the constitution to uphold Indigenous rights in environmental matters. Constitutional supremacy not only provides a strong argument for Indigenous communities but also allows judges to incorporate Indigenous perspectives on land and resource management into their reasoning to ensure greater protection for Indigenous rights. In *Chusmiza (2009)*, the Indigenous Aymara and Atacama communities in northern Chile challenged Agua Mineral Chusmiza SAIC's action to bottle and sell water from a source on their ancestral lands. They alleged the company had illegally deprived them of their lands and water sources and violated their rights in ILO-Convention 169 (Cespedes, 2013, p.76). The Chilean Supreme Court ruled in favour of the Indigenous communities and recognized the "ancestral water rights," aligning with their rooted traditions. Judges acknowledged that Indigenous communities had relied on the water since time immemorial, affirming that their right to water use predates any constitutional framework. They confirmed the Aymara and Atacama communities' ability to register these rights, thereby enriching the scope of Indigenous rights protection (Business and Human Rights Resource Centre, 2013). Moreover, the court reaffirmed that Indigenous rights extend to lands traditionally used by Indigenous communities for cultural

and spiritual practices, including ceremonies and sacred water recognition (Tomaselli & Hoffman, 2016, p.7).

The case of *Machi* (2009) involves a similar issue to *Haida* (2004), where the government granted a logging permit for native trees close to land belonging to the Mapuche Indigenous community. The court found that logging activities had damaged sacred Mapuche sites (menocos) close to the Cerro Rahue hill in the Araucanía region, adversely affecting the collection of herbs and the practice of traditional medicine. Judges not only referred to Article 19 of the constitution, ascertained the Indigenous claim to a healthy environment in their territory, but also adopted Articles 8 and 13 of the *ILO-Convention 169* to emphasize the importance of indigenous cultures and spiritual values of their relationship with the lands or territories. Following the constitutionally guaranteed right with consideration of the irreversible environmental damage to Indigenous lands and non-material cultural dimensions, the Chilean Supreme Court ruled in favour of the Mapuche community and ordered the cessation of logging activities (Tomaselli & Hoffman, 2016, pp.8-9).

The *Pascua Lama* case involves Barrick Gold Corporation, a Canadian mining company, centred on gold and silver mining projects in the Atacama region. The project threatened glaciers, which are crucial for the region's water supply (Cavallo, 2013, pp.28-29) and contaminated rivers used by Indigenous Diaguita communities. The Diaguita Indigenous communities argued that the mining project would damage their ancestral lands and disrupt their way of life. Following Chile's First Environmental Court's decision to permanently close the Pascua Lama project due to significant environmental violations in 2013 (Mining Technology, 2019), the Supreme Court upheld this ruling in 2022, emphasizing the project's violation of Article 19 of the constitution given by its detrimental impact on land and water resources critical

to the Diaguita community and its adverse effects on their traditional way of life (Mining Technology, 2022).

The analysis reflects a distinction between Canada and Chile in Indigenous environmentalism legal cases. Although s.35 of the *Constitution Act, 1982*, recognizes Indigenous rights to govern their land and imposes a duty on the Crown to consult with Indigenous communities, Canadian courts often allow future governmental infringements if they are deemed to serve a compelling public objective. This judicial flexibility contrasts with Chile, where the constitutionally protected right to a healthy environment constrains judicial discretion and mandates stronger protections for Indigenous rights, allowing courts to prioritize Indigenous interests in environmental disputes.

5.2 Analysis of Results: Compelling Objectives v. Indigenous Perspectives (ITEK)

As I argued in the previous analysis, governments can infringe Aboriginal titles after undertaking meaningful consultation if a compelling objective justifies the action. In *TRTFN (2004)*, the mining company's project proposal was assessed under the Environmental Assessment Act that sets out the purposes of environmental projects, which is to promote sustainability by protecting the environment and fostering a sound economy and social well-being (para.5). This leads to a critical discussion: do the compelling objectives, such as a sound economy and social well-being, contradict or align with Indigenous perspectives on land and resource management? To assess whether court rulings strengthen Indigenous land sovereignty, it becomes crucial to understand how ITEK and Indigenous perspectives on environmental issues differ from mainstream, state-driven objectives.

In *Southwind (2021)*, the SCC again emphasized the importance of consultation to accommodate Indigenous interests and demands. The Crown had breached this fiduciary duty by

failing to act in the best interests of Lac Seul First Nation (LSFN) when expropriating the land. To remediate the destruction of the traditional lands of LSFN, the SCC ruled that compensation should be based on the full economic value of the land taken to deter further wrongdoings and foster trust in the fiduciary relationship (*Southwind v. Canada*, 2021, para.66), establishing a precedent for how compensation should be calculated for past land seizures. The SCC ruled that compensation cannot be limited to land expropriation but also to lost economic opportunities (para.131), concluding that a hypothetical value of the lost opportunities must be considered in future cases when the Crown has not fulfilled the fiduciary obligations. Similarly, in *Taku River* (2004), the Supreme Court upheld the British Columbia government's actions, reasoning that the consistent financial assistance provided to the TRTFN, as well as their participation in many project meetings, constituted meaningful consultation and adequate accommodation of Indigenous interests (para.38).

As previously discussed, Indigenous peoples do not merely perceive land as an economic resource from the mainstream views but as a living entity: an educator, a spiritual guide, and a sacred home with intergenerational significance (Turner, 2014). During the colonial stage, the entire system of knowledge, practice, and belief that was fundamental to Indigenous people was scrutinized within the framework of Western thought. The dominant knowledge systems suppressed their traditional environmental practices, disrupted their relationship with the land, and led to long-lasting challenges in regaining their rights and sovereignty over their territory (Turner, 2014; Simpson, 2014). Thus, awarding financial compensation for economic opportunities may be unlikely to repair the intergenerational damage caused by disconnecting Indigenous communities from their lands. Article 11 of the UNDRIP recognizes Indigenous peoples' cultural, intellectual, religious, and spiritual property and their right to practice their

traditions. Similarly, Article 26 affirms Indigenous rights to the lands and resources they have traditionally owned; states should give legal recognition and protection to these rights. When Canada began incorporating the UN Declaration into domestic law, it represented progress in reconciliation, which has been reflected in *Southwind (2021)* and *Saskatchewan (Environment) (2025)*. Yet, the deep-rooted tension between Indigenous perspectives (ITEK) and common law interests presents challenges for courts, making it difficult to resolve this conflict thoroughly. As a result, Canadian courts have to uphold the Crown's sovereignty over Indigenous claims, as seen in the selected cases. Conversely, a constitutionally protected right to a healthy environment offers greater flexibility for Chilean judges to interpret the law, allowing for more thoughtful, rather than merely practical, protections of Indigenous interests in their rulings.

6. Alternative Explanations: Common Law Nature v. Civil

Code

An alternative explanation for Indigenous land sovereignty is the difference between the Common Law and Civil Law systems. The Common Law tradition, followed in Canada, relies on judicial precedent and case law. From the nine Canadian cases discussed above, *Haida (2004)* established a lasting precedent on the duty to consult Indigenous communities. This principle has been referenced in subsequent cases, including *Southwind (2021)*, *Mikisew (2018)*, and *Saskatchewan (Environment) (2025)*, where courts reiterated the process of meaningful consultation and outlined the justifications for violating s.35 when the Crown's action serves compelling objectives. In contrast, Chile's Civil Law system is primarily based on codified statutes, allowing judges greater flexibility in interpreting solid legal provisions. As seen in the

three cases above, this flexibility allows judges to incorporate Indigenous knowledge in their rulings without being strictly bound by precedent as in Common Law systems.

The Common Law system can be a double-edged sword in this context. Supposing the SCC revises the meaningful consultation principle in the future and begins incorporating Indigenous knowledge and perspectives into its rulings, this change will be solidified in subsequent cases, thereby continuously upholding Indigenous land sovereignty. Conversely, the Civil Law system allows judges to adjust their rulings on a case-by-case basis without being bound by precedents. It gives them more flexibility to adapt to new perspectives, such as ITEK, but also makes the consistency of rulings potentially less stable over time. On the other hand, judges within the Common Law system must adhere to existing rules, even if they wish to adopt more progressive reasoning when adjudicating Indigenous land disputes. This becomes challenging without a constitutionally entrenched right as the supreme rule of the country. Therefore, this alternative explanation cannot become the leading argument, given the supreme role of the Constitution in guiding judicial decisions.

6.1 Alternative Explanations: Public Opinions

Another alternative explanation for the differences in judicial analysis is public opinion towards Indigenous rights. Judicial rulings often prompt legislative action to reinforce their decisions. Fuentes et al. (2025) conducted a survey in the Chilean Congress to evaluate the level of recognition of Indigenous rights. The result revealed more than 40% of parliamentarians support a plurinational approach to resolving Indigenous rights disputes. The approach implies recognizing and accepting Indigenous people as collectives with rights over their territories because of their pre-dated occupations, establishing a unique relationship with the environment

(Fuentes et al., 2025, p.34). Similarly, Reconciliation Canada (2016) conducted an online survey to assess the public's attitude toward reconciliation with Indigenous communities. The result reflects a positive attitude among the non-Indigenous population towards a progressive action for reconciliation. The result showed that 59% of the non-Indigenous respondents agreed to recognize Indigenous perspectives, based on ITEK, on lands and environments, and 45% believed that reconciliation means including Indigenous ITEK and perspectives in public decision-making.

Both countries demonstrated a positive attitude toward strengthening relationships with Indigenous communities. If public opinion is a decisive factor in Indigenous land sovereignty, Canadian judges can be influenced by shifting societal attitudes. However, this influence is not evident in the selected cases. Although judges reinforced the Crown's duty to consult in all cases, they are open to future governmental infringements when the duty is undertaken, and a compelling public objective can justify the infringement. Hence, despite both countries having similar public attitudes, the collected cases show that the influence of public opinion on judicial rulings in Canada remains insignificant. Unlike a constitutionally embedded right to a healthy environment, Canadian judges are not obligated to uphold absolute sovereignty over Indigenous land claims. Instead, they must balance Indigenous rights with broader governmental objectives, often justifying infringements when aligned with compelling public interests. Conversely, Chilean judges are constitutionally bound to prioritize environmental protection, strengthening judicial support for Indigenous land sovereignty. This distinction implies how constitutional frameworks shape the extent to which Indigenous environmental claims are upheld. While Canada emphasizes reconciliation through consultation, the Chilean constitution mandates stronger judicial alignment with Indigenous stewardship in environmental disputes.

7. Counterargument: Accepting the Oral Tradition as Evidence in Court Ruling

A counterargument to my thesis is the inclusion of Indigenous perspectives on environmental issues in judicial disputes. *Delgamuukw v. British Columbia (1997)* and *Tsilhqot'in Nation v. British Columbia (2014)* affirmed that oral traditions are legitimate evidence in Indigenous land claims, acknowledging their central role in transmitting culture, knowledge, and history. These cases, especially *Tsilhqot'in Nation (2014)*, were deemed as game changers regarding the perceived power held by Indigenous communities to govern their lands. Nevertheless, the SCC simultaneously clarified that Aboriginal title does not confer absolute sovereignty; governmental infringements may still be permitted when justified by a compelling public objective. While oral traditions are an essential tool to pass along knowledge in Indigenous communities throughout generations, the recognition of oral traditions as evidence enables the inclusion of ITEK and Indigenous worldviews in legal reasoning. However, it does not restructure the existing legal framework, which is grounded in constitutional doctrines that prioritize the Crown's interests and sovereignty.

As McCrossan and Ladner (2016) indicated, the validation of Indigenous knowledge systems may hold limited effects when courts continue to uphold the state's overriding authority. Even with expanded evidentiary inclusivity, Canadian jurisprudence may fall short of fully protecting Indigenous land sovereignty in the face of competing governmental objectives. Therefore, this counterargument partially refutes my thesis by illustrating that the incorporation of Indigenous perspectives on environmental issues, such as the acceptance of ITEK, strengthens Indigenous land sovereignty. Instead, the inclusion of ITEK can promote a more equitable legal

proceeding but does not guarantee land sovereignty. Judicial recognition is constrained by constitutional frameworks that ultimately permit governmental infringements under justified objectives. On the other hand, this counterargument also reaffirms my central thesis: that a constitutionally protected right to a healthy environment can strengthen Indigenous land sovereignty. When courts are bound by the supreme law, as in the case of Chile, they are obligated to declare the violation of a healthy environment unconstitutional, reinforcing judicial accountability and fostering stronger protection for Indigenous land sovereignty, as seen in Chilean jurisprudence.

8. Conclusion

Based on the qualitative analysis of the nine selected cases, Chilean judges tend to incorporate Indigenous perspectives on land and resource management into their adjudications, guided by a constitutionally protected right to a healthy environment. Alongside the public discourses regarding reconciliation in Canada, judges have taken a more activist approach in upholding Indigenous rights entrenched in s.35. Yet, Canadian courts are restrained within the Common Law system, constraining the inclusivity of Indigenous traditional knowledge in judicial decisions.

My thesis is **partially** supported by the selected cases. With a constitutionally protected right to a healthy environment, Chilean judges upheld Indigenous rights and incorporated their traditional perspectives on environmental issues into their rulings. Canadian judges ruled in favour of Indigenous communities in my selected cases and assured their rights and protections. In the absence of a constitutionally protected right within the Common Law system, Canadian

judges have to prioritize the Crown's sovereignty over Indigenous perspectives. This constrains judicial capacities to strengthen Indigenous land sovereignty. While the inclusion of ITEK regarding environmental concerns can promote an equitable judicial process, it does not guarantee Indigenous land sovereignty, as supported in *Delgamuukw (1997)* and *Tsilhqot'in Nation (2014)*. Judicial consideration of Indigenous traditions is still scrutinized by the Common Law system that prioritizes the Crown's interests and sovereignty.

This paper is subject to several limitations, as discussed in the methodology section. The small number of cases analyzed and language barriers in accessing original Chilean Supreme Court documents may restrict the generalizability of the findings to broader contexts. Future research should expand the case selection to include a wider range of jurisdictions with constitutionally protected rights to a healthy environment through a quantitative study to establish a more comprehensive assessment of judicial trends in Indigenous environmentalism. Conducting detailed textual analyses of Chilean cases using direct translations is necessary for developing a more refined comparison based on the findings of this study.

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Legal Analysis

| To Defer or Not to Defer: Analyzing the Differences Between the Canadian Federal Court and Supreme Court Cases on the *Safe Third Country Agreement*

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Keywords: *Deference, judicial reasoning, Supreme Court of Canada, legal research, immigration*

In 2023, the Supreme Court of Canada (SCC) contradicted the Federal Court decision on the Safe Third Country Act (STCA), ruling it as constitutional. The STCA allows Canada to send asylum seekers back to the USA if that was the country they first entered. This has resounding and potentially dangerous impacts on asylum seekers as well as on Canadians who are increasingly concerned with immigration.

This paper answers the question of why the Federal Court and Supreme Court decisions were different. By comparing the two judicial decisions, I argue that the Supreme Court showed more deference to the federal government than the Federal Court (FC) did. Deference is defined in this paper as the weight a judge gives to the decision of the legislative and executive branches. This argument adds to the literature by connecting two sides of the debate on whether the SCC is generally deferential or not.

This research provides information for those who continue to bring cases against the STCA about how the SCC and FC differ. The paper begins with background on the topic, a literature review which includes my argument and relevant cases, and then my findings and analysis using judicial reasoning. I conclude with weaknesses in my research and its significance for Canadians.

Background

As one of the two neighbors of America, Canada is preparing for a surge of crossings by asylum seekers; crossings which are more dangerous than ever (Shingler, 2024). This danger is due to the *Safe Third Country Act* (STCA) between the United States and Canada (Shingler, 2024). This statute says that Canada can send any asylum seekers arriving from the US back to America because it is considered a safe country (Canada-U.S Safe Third Country Agreement, 2003). The Supreme Court of Canada (SCC) ruled that the STCA did not violate the *Charter of Rights and Freedoms* in 2023, contrary to the decision from the Federal Court (FC) (*Canadian Council for Refugees v. Canada* (CCR), 2023, [1]). This decision leaves the Canadian government in a position to further control and reduce the flow of refugee claimants. This has many implications for Canadians who are increasingly concerned about immigration (Enviro-nics Institute, 2023, pp. 1-2) and for those asylum seekers directly affected by these restrictions. This decision could change the lives of many vulnerable people which is why it is important to understand why this decision was made.

This led to the research question: Why is there a difference in decisions over the constitutionality of the STCA between the Federal Court judge and the unanimous Supreme Court? There are two major differences in issues of law. First, whether the s. 7¹ violations align with the fundamental principles of justice or not. Second, the difference in dealing with concurring s. 7 and s. 15² claims. The latter is addressed now.

Current literature indicates that attempts by the SCC to clarify how to deal with s. 15 claims have failed (Bateman, 2012, p. 593). Additionally, while others have argued that s. 7 can

¹ This section of the *Charter* guarantees the right to life, liberty, and security of the person.

² This section of the *Charter* guarantees the right to substantive equality.

be used in place of s. 15 when the claims are made concurrently (which is often), s. 7 does not lead to any significant difference with such equality claims (Kang & Kang, 2016, p. 255). The SCC in this case explicitly states why they came to a different reasoning than the lower court. First, that they do not want to continue the dangerous trend of ignoring s. 15 claims in favor of s. 7 rights as it implies one is better than the other (*CCR v. Canada*, 2023, [180]). They agree that the lower court's decision was logical based on precedent, but the s. 15 claims should return to a lower court to be considered on their own ([181]³). Of note, the SCC did not provide any principles or guidelines for the lower court to deal with s. 15 which will make this topic interesting for future research.

The s. 7 claims are the focus of this research as it is not clear from an initial reading of the case why this difference exists. This paper argues that the Supreme Court of Canada shows more deference to the federal government than the lower court throughout the judicial reasoning leading to different decisions. Additionally, this paper contends that the reason the Supreme Court of Canada is more deferential to the federal government is because it involves international law. This paper will proceed by first examining the current scholarship and then lays out the argument. Next, the key precedents and the key differences between the judgements are summarized before an analysis of the cause of these differences using the judicial reasoning as evidence. Finally, the paper explores alternative explanations and ends with where this decision leaves Canada and weaknesses in my research.

Literature Review

What is Deference?

For this research paper, it is important to understand what conception of deference is used. Epistemic deference is, “the weight which courts should attribute to the decisions of non-judicial institutions” (Foley in Daly, 2012, p. 7). This definition is the norm for scholarship on this topic which Foley (2012) distinguishes from alternative kinds of deference that have relevance in other areas of legal research (p. 7). The 2023 *CCR* case, focuses on the federal government’s decision to allocate the USA a safe country rather than authority ([40]). This research will proceed through comparing the differences in the SCC and FC judicial reasoning to the definition of epistemic deference.

There is an ongoing debate among scholars in this area about whether the SCC has had a general trend of showing deference to the federal government (Mullan, 2001; Dassios & Prophet, 1993; Knox & Isaac, 2006; Danay, 2016). One side of the debate argues that SCC decisions have had a trend of showing deference. Mullan (2001) focuses on deference to administrative decisions and argues that this trend began before the *Charter* era, extending back to the 19th century (p. 406). Dassios and Prophet (1993) argue that there has been a general trend of deference across all areas of law, even following the development of the *Oakes*³ test (p. 290).

The alternative argument is that SCC decisions have not had a trend of showing deference when it comes to administrative law and criminal law. Knox and Isaac (2006) argue that in cases where Indigenous law and administrative law overlap, the SCC has had a confusing record of decisions, failing to show sufficient deference (p. 487). Danay (2016) argues that in cases of administrative law, the SCC has increasingly shown less deference to the

³ The *Oakes* test is a 4-part test created by the SCC to determine whether or not a statute which has been proven to violate the *Charter*, is still an acceptable limit on rights under s. 1.

government (p. 603).

MacIvor (2013) states that criminal law, because it is an area of expertise for many judges/justices, is exempt from the general deference that courts show the government, specifically on the “rational connection” step of the *Oakes* test (p. 79). Hogg (2012) points out that many important cases which expanded the interpretation of s. 7 rights, such as adding overbreadth as a violation of fundamental justice, were criminal cases (pp. 198 & 201 & 204-5). Expanding the *Charter* is an example of not deferring to the government. This work adds a new perspective that brings the two sides of the debate together: the SCC shows deference, but in non-administrative and non-criminal law cases. In this paper, the focus is on international law, which has limited scholarship related to deference.

The Argument

The thesis is based on a mix of arguments from the above scholarship as well as additional articles which focus on analyzing a single case. Dassios’ and Prophet’s (1993) argument that there has been a general trend of deference irrespective of the area of law alongside the other scholarship that suggests there is not a trend of deference in administrative/criminal law leads to the conclusion that areas of law outside these two should show a general trend of deference. The s. 7 claims in the *CCR v. Canada* case are substantive and involve non-criminal statutes with explicit avoidance of administrative issues (2023, [53]). Thus, this case lands within the areas of law that the SCC decisions have generally shown deference.

Knox and Isaac (2006) show that the SCC has stated that they will show greater deference to the federal government in cases of Indigenous law because of the level of expertise

required (p. 487). It makes sense to apply this to cases involving international law because international law is similar to Indigenous law in theoretically relevant ways. First, Indigenous law involves a number of treaties between various First Nations and Canada which are relevant to legal reasoning. Similarly, international law involves numerous treaties with other nations which form a separate source of law that the SCC would have to consider. Third, the federal government is responsible for negotiating Indigenous and international treaties as well as consulting with First Nations as well as diplomatic relations with other countries. Thus, international law requires a level of expertise from the federal government similar to Indigenous law. This brings about the argument that the SCC would show deference to the government in a case involving refugee claimants as well as a treaty with the US.

Finally, the argument is based on the article by Rangaviz (2011) who makes the normative argument that the federal government showed too much deference in *Canada v. Khadr* (2011, p. 254). While this paper does not include a normative argument, the way Rangaviz (2011) analyzes his data is similar to the research method in this paper. First, it is important to distinguish between two different concepts of deference. One concept is the outcome of a case: did the SCC decide that a statute or action was constitutional? If so, this is deferring to the federal government. This is separate from the concept of deference defined above in the literature review. This second concept of deference applies to the actual judicial reasoning which led to the outcome of a case. Rangaviz (2011) analyzes the legal reasoning behind a single case and distinguishes between the outcome and what led to the outcome. He argues that the SCC showed too much restraint in their role throughout the reasoning which led to an outcome of ruling that the government actions were constitutional (pp. 254 & 268). This paper replaces his concept of restraint with deference because the focus is on legal reasoning

rather than on the role of justices, however the method of analyzing the different steps the Courts took to arrive at their decision is similar.

Evidence that would support the thesis is if the Supreme Court of Canada cites different precedents⁴ in their decision which was more deferential to the government than the precedent cited in the lower court decision. Alternatively, the thesis would be supported if both decisions cite the same cases, but the SCC judgement has clear reasoning favoring deference to the federal government. If there is no identifiable reasoning indicating deference from the SCC judicial reasoning, then there is no proof. Evidence that would weaken the thesis is if there was a clear error by the lower court judge in evaluating evidence which impacted their reasoning. This would mean it is possible the SCC was not more deferential but had corrected a legal error. Other evidence that could weaken the thesis is if there was an intervener in the SCC case which brought a new perspective that changed the course of the decision.

Previous Cases

There are three cases relied on the most in the *CCR v. Canada* case. The first is *Canada v. Bedford* (2013), which explains the principles of fundamental justice. In this case, there were three sections of the Criminal Code which engaged the s. 7 rights of sex workers by banning certain actions that would help sex workers protect themselves ([60]). A person's s. 7 rights are violated if the engagement of s. 7 violates the principles of fundamental justice ([94]). To review this, the Court will establish the legislative purpose of the impugned statute and evaluate whether it complies with the principles of fundamental justice: gross disproportionality and overbreadth ([93]). *Bedford* explains that gross disproportionality is a matter of the impact of the statute

⁴ This is plural.

([109]) while overbreadth focuses on the scope of a statute ([112]). The decision in *Bedford* (2013) was that the violations of s. 7 did not align with these principles ([140]).

The second case is *Suresh v. Canada* (2002), which sets out the concept of foreseeable consequences. In the case of *Suresh* (2002), it was determined that it was unconstitutional to deport someone who would likely face torture ([1]). Although this effect had not happened yet, nor would agents of Canada carry out this effect directly, it was determined that this consequence being foreseeable was enough evidence to show causality ([54]). The third case was *Canada v. PHS Community Services Society* (2011). This case developed the precedent surrounding “safety valves” in statutes. In *PHS* (2011), the Court determined that it was unconstitutional for the Minister to withhold an exemption from the Criminal Code for Insite, a safe injection site ([3]). The Court determined that the existence of these exemptions are a safety valve which prevent the Criminal Code from being applied to situations which would lead to violations of s. 7 ([113]).

Findings: The Differences

There were three issues of law decided on by the SCC in this case. First, that the sections of the *STCA* which allow Canada to deem the US a safe third country are not *ultra vires* (*CCR v. Canada*, 2023, [30]). Second, that these same sections align with the fundamental principles of justice and therefore are not unconstitutional ([30]). Third, that the s. 15 claims should return to the Federal Court for consideration ([30]). As mentioned above, the third issue of law will be better examined when the s. 15 claims are dealt with in the lower court. The Federal Court had similar reasoning and the same decision on the question of *vires*. Thus, the focus of the review is on the second issue of law.

Before any examination of the differences, a summary of the reasoning behind the

judgment on the question of *vires* is necessary. The Federal Court judge determined that a previous decision in the Federal Court of Appeal (FCA) in 2008 on this statute determined that it was not *ultra vires* (2020, [74]). This judge argued that the new arguments did not meet the threshold to overturn the 2008 decision specifically on the issue of promulgation (2020, [74]). The consideration of promulgation is about whether events that took place after the law was enacted should be considered when reviewing the issue of *vires* (*CCR SCC*, 2023, [52]). The SCC determined similarly to the FC that this issue must be determined based on the situation at the time of promulgation and not after and cited the same FCA case ([54]).

The first difference over whether the s. 7 violations were in line with the fundamental principles of justice was due to the usage of different standards of review. Both courts agreed that the applicable principles of justice were overbreadth and gross disproportionality. However, the lower court used both *Bedford* (2013) and the “shock the conscience” standards of review to make their determination (*CCR FC*, 2020, [136-37]). They determined that the violations of the claimants s. 7 rights were disproportionate and went on to a s. 1⁵ analysis of the statute ([140-41]). Their determination was that the violations were not a reasonable limit on the claimants rights ([150]). The SCC relied only on the *Bedford* principles to determine whether the statute was constitutional (2023, [121 & 127]). Using this, the SCC determined that the statute was not overbroad or disproportionate ([163]). The SCC then proceeded to do a short, and incomplete, analysis of s. 1 ([165-71]).

Another difference between the two judgments stems from different interpretations of the legislative purpose of the *STCA*. The lower court used the purpose of the *STCA* as it was laid out in the FCA 2008 case:

“ . . . the sharing of responsibility for the consideration of refugee claims with countries

⁵ This section of the *Charter* states that all rights guaranteed within the *Charter* are subject to reasonable limits.

that are signatory to and comply with the relevant articles of [the *Refugee Convention* and the *Convention Against Torture*] and have an acceptable human rights record” (2020, [119]).

Whereas the SCC used various sources of evidence including the *IRPA*, the *STCA*, and international treaties, to lay out their own interpretation of the legislative purpose:

“ . . . to share responsibility for fairly considering refugee claims with the United States, in accordance with the principle of *non-refoulement*” (2023, [139]).

The last two differences relate to a difference in interpretations of the evidence. The SCC states that the lower court made three errors that could not be ignored. First, that the FC did not properly weigh the presence of the safety valves in the *IRPA* and erred in deeming these safety valves illusory (2023, [148 & 160]). Second, the SCC states that the FC erred in their judgment that there was evidence that detention was automatic ([86]). Third, the SCC states that the FC erred in determining there was a real risk of *refoulement* rather than a speculative one ([102]).

Analysis

International Law

When discussing international law in relation to this case, it is important to note that the *Safe Third Country Act* is a treaty which is separate from the domestic legislation, whereas the *International Refugee Protections Act* brings it into effect ([2]). The SCC focuses on the latter ([4]), whereas the FC focuses on the former (*CCR FC*, 2020, [8]). The difference manifests most strongly when the SCC determines the legislative purpose, which is argued below. Since the SCC focuses on the *IRPA*, international law is less central to the judicial reasoning than is the case for

the FC. This can be seen where the SCC makes a point to explain that they are not entering into a discussion on whether the *IRPA* aligns with international law (*CCR SCC*, 2023, [4]), suggesting that differing levels of deference would not be due to a presence of international law. Thus, this part of the thesis would be better studied in a case where international law is more central to judicial reasoning.

Legislative Purpose

While both the FC and SCC decisions reference the *Bedford* (2013) precedent, there is a difference in the application of its principles due to the SCC's unique interpretation of the legislative purpose. This demonstrates that the SCC is more deferential to the federal government. The FC judge states that the section of the purpose which matters for determining whether the *STCA* is overbreadth or disproportionate is the "sharing responsibility" aspect (2020, [122]). This contrasts with the SCC which states that ultimately, in regards to the detention and medical isolation, it is a matter of determining whether the American system is fair (2023, [142]). The SCC's focus on fairness allows them to come to the determination that it is fine if the American system is different, so long as it is fair ([142]). Thus, the presence of different risks in the American system does not necessarily mean that the system is unfair.

This is in contrast to the FC which, by focusing on responsibility sharing, hinges their determination of what is fair on a comparison between the American system and the Canadian system (2020, [128]). To the FC, since detention is different from what happens in Canada, it is not fair ([128]). This shows less deference to the federal government than the SCC's focus on fairness because it lowers the burden of proof to the claimant. The claimant now has to prove not that the outcome of claiming asylum is different, but that the different outcome violates their s. 7

rights. This is an example of greater epistemic deference as the SCC weighs the decision to designate America as safe with greater weight than the FC did by giving the federal government the benefit of the doubt.

“Shook the Conscience”

One of the main differences between the two decisions, being the different standards of review used, demonstrates the different levels of deference shown by the two courts. The reasoning behind why the SCC did not use the “shocks the conscience” review also shows a different level of deference. The SCC determined that the “shocks the conscience” standard is to be reserved for administrative law or the individual decisions made by the government officials that carry out the statute (2023, [118]). As stated in Danay (2016), the SCC has shown more deference in cases involving administrative law (p. 603). This gives an indication that the lower court had chosen a standard of review that shows less deference to the federal government. In fact, the SCC states that there is plenty of room for a future case in which the individual decisions involved with carrying out the provisions of the *IRPA* are challenged ([118]). Thus, the choice in standard of review indicates a different level of deference shown to the initial decision that America was safe.

The *Bedford* (2013) principles standard of review used by the SCC is also a more deferential standard of review than “shocks the conscience” because it raises the threshold of proof for the claimant. The FC decision stated that gross disproportionality could be determined using the claimant: Ms. Mustafa (2020, [137]). Ms. Mustafa was detained and medically isolated “in an abnormally cold facility” for three weeks alongside criminals and given a diet that did not respect her religious needs (*CCR SCC*, 2023, [17]). The FC said that this was enough to “shock

the conscience” of an average Canadian (2020, [137]). The *Bedford* principles ask the claimants to prove that the s. 7 violations are both disconnected from the legislative purpose, which includes the presence of safety valves, and that the negative effects are grossly disproportionate (*CCR SCC*, 2023, [127]). Thus, even if a claim sounds alarming, as Ms. Mustefa’s did to the trial judge, this is not enough to say that her s. 7 rights were violated according to the *Bedford* (2013) principles. By raising the threshold of proof for the claimant, the SCC is giving the benefit of the doubt to the federal government, thus, showing deference to their decision that America is safe. I believe it is relevant to add a reminder that the SCC sent the s. 15 claims back to the lower court as these are relevant to Ms. Mustefa’s claim regarding her religious needs. A case involving equality rights may lead to different results.

Section 1 Analysis

Because the FC had determined that the *STCA* violated the claimant’s rights, the FC decision has a complete analysis of these violations using the *Oakes* test. The SCC does not cover a complete s. 1 analysis, however, the portion that the SCC covers demonstrates that the SCC was more deferential. The fact that the FC evaluated the violations according to s. 1 of the *Charter* is already proof of this. This is because, as stated by the SCC, when a case moves from proving s. 7 violations to proving reasonableness, the burden of proof shifts ([165]). Rather than the claimant proving individual harms done, the state must prove that they did their due diligence when creating this law. By not reaching a s. 1 analysis, the SCC lowered the burden of proof for the state, giving them the benefit of the doubt. Thus, the SCC remained more deferential to the state’s decision to designate the US as a safe country.

Additionally, there is proof that had a reasonable limits test been carried out, the SCC

would have been more deferential to the government than the FC. The SCC implies that, although the burden of proof is shifted to the government, it is not a high threshold. They imply this by stating that the government can use the presence of safety valves, even if they are imperfect or illusory for some individuals, to pass the minimal impairment stage of the *Oakes* test ([170]). In fact, the SCC says that even if an individual can prove their s. 7 rights are violated and that the safety valves are out of reach, the violations can still be ruled a reasonable limit so long as the safety valves work for most people ([171]).

This is in direct contrast to the FC which ruled that the government's evidence failed to justify violations of s. 7. The FC states that the *STCA* failed on both the minimal impairments and proportionality steps of the *Oakes* test (2020, [149]). Rather than note the safety valves, the FC pointed out that the government had failed to justify why the non-exempt refugee claimants should be treated so disproportionately ([148]). Nor had the government proved that there was a fair review process for those who were detained, while also not proving that Canada's could not handle this group of refugee claimants ([146-7]). These requirements set out by the FC judge show a high threshold of proof for the government to meet. It could be argued that the FC considered more evidence because their s. 1 analysis was complete. However, the fact that the SCC made a pointed effort to explain how the safety valves could justify the s. 7 violations proves that the SCC had a lower threshold of proof for the government. Thus, they once again showed deference to the government's decision to designate America as safe.

Alternative Explanations

One major difference which can be attributed to an alternative explanation is the matter of interpreting the evidence of the case differently. Namely, the error the FC had made in ruling

that the safety valves written into the *STCA* were illusory. Because the FC had determined that these safety valves were inaccessible, they had no effect on the application of the *Bedford* standard (2020, [130]). However, when the SCC had taken these into account, they determined that the risk of *refoulement* was mitigated by the safety valves and, thus, the *IRPA* was not overbreadth or disproportionate (2023, [163]). This is a difference that could be attributable to an error by the FC judge and not due to a different level of deference. This does not prove the thesis wrong, however, it does add nuance to the original thesis: it is likely that both errors and different levels of deference contributed to the different decisions.

One other alternative explanation that is plausible would be if there were new interveners in the SCC case that had not intervened in the FC case. Importantly, there was no list of interveners for the FC identified during this research to compare to the list from the SCC. Additionally, there was no evidence in the judicial reasoning provided by the SCC that they considered evidence that the FC had not. Even if there was evidence of new interveners, the presence of new affidavits would not change the thesis for two reasons. First, if the new affidavits explain why the SCC had different interpretations of evidence this would not change the addition made above that errors in fact-finding are part of the explanation of the different outcomes. Second, if new affidavits were introduced, they would be introduced to the legal reasoning that has already been evaluated. Thus, they could explain why the SCC and FC had differences in legal reasoning, but that does not change that the SCC had more deferential legal reasoning.

Conclusion

In sum, the evidence suggests that the Supreme Court of Canada showed more deference to the federal government than the Federal Court at various levels of their judicial reasoning leading to different decisions on the constitutionality of the *STCA/IRPA*. The use of the “shock the conscience” standard of review by the FC allowed them to lower the burden of proof for the claimants. When compared to the demands of the *Bedford* (2013) principle on the claimant, it is clear that the SCC was more deferential to the federal government. The different interpretations of the legislative purpose of the *STCA* led the SCC to focus on how fair the American refugee system was while the FC focused on the differences between the American and Canadian systems. This allowed the SCC to be more deferential to the government. Finally, the different approaches to the s. 1 analysis proved that the SCC was more deferential. The SCC demanded less evidence than the FC on the effects of the *STCA* by focusing on the overall usefulness of the safety valves written into the *STCA*. This shows deference to the federal government. There are also differences in the legal reasoning caused by errors in fact-finding made by the FC which contributed to this outcome.

This paper connects two sides of a debate on whether the SCC shows deference or not by showing a case, which was not administrative and not criminal, where the SCC was more deferential than the Federal Court. Further research into whether the existence of international law in a case matters for when the SCC shows deference is warranted. While there was no specific evidence in this case that the existence of international law was why the SCC showed more deference, it is still a viable explanation. There are a number of cases which involve a more complex mix of international law and refugee policy that could be analyzed and/or compared. For example, *R v. Hape* (2007) analyzes the cross between criminal law, the *Charter*, and international law principles such as sovereignty and international human rights (*R. v. Hape*, 2007,

SCC).

The *STCA* creates a more restrictive immigration policy in Canada. For asylum seekers this can mean a number of different things. For some, it may mean a return to an unsafe place. This research provides information for the Canadians and asylum seekers concerned for the status of the *STCA*, especially those that continue to bring cases to the courts over the next few years. What kinds of arguments work and how the SCC operates differently from the lower courts are important to know as we see the s. 15 claims case sent back to the Federal Court. There will likely be procedural cases brought against the government officials that must carry out the *STCA*, especially as immigration policy shifts with the Trump presidency. These cases may end up with a very different result for the *STCA*, so concerned citizens should pay careful attention to the results.

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Safe Third Country Agreement between Canada and the United States of America, 5

December 2002, Can TS 2004/2 (entered into force 29 December 2004).



Perspectives on Democratic Change

| Thinking Outside the Ballot Box: How Indonesian Democracy Can Inform American Electoral Reform

Samantha Baryer

Keywords: *Electoral reform, electoral college, Indonesian democracy, proportional representation, comparative politics, United States elections*

This paper employs a political comparative analysis of two of the largest democracies in the world: Indonesia and the United States of America, and examines how the latter can take lessons from the former amid overwhelming calls for electoral reform. It critiques key aspects of the American system that undermine the principles of democracy, such as the Electoral College, ‘faithless electors’, gerrymandering and inconsistent voter identification laws.

In response, this study proposes a reformed model through comparative analysis of Indonesia’s transition from indirect to direct vote, as well as other key players in the success of their democracy, such as proportional representation, open-list systems, efficient election day procedures and a centralized election committee. This study argues that, despite structural differences (such as the entrenched two-party system and unique constitutional considerations), Indonesia offers valuable insight in conversations around American electoral reform.

Although recognizing the downfalls of the American system, this paper does not advocate for a full system uphaul, but rather contributes to ongoing discussions around reform processes by identifying possible transferable practices from a comparable democracy.

Introduction

Electoral reform has long been debated in the United States of America, primarily due to an integral part of the process: the Electoral College. The Electoral College utilizes an intermediary ('electors') to vote on behalf of its citizens, with each state being designated a certain number of electors based on the number of senate and congressional members in the state (Wheeler, 2020). Rather than using the 'popular vote', which designates a winner entirely based on who obtains the majority (or plurality, in some jurisdictions), the United States' electoral method opens itself up to several criticisms. The structure of the Electoral College, coupled with unsatisfactory Congressional election methods, creates opportunity for corruption and unfairness thereby undermining the legitimacy of electoral results and the concept of democracy in the country (Wheeler, 2020). With 65% of the United States population believing in the move towards using the popular vote (Kiley, 2024), discussion around the reform of the Electoral College is not only increasingly relevant but also reflective of a broader social demand for a more representative and equitable democratic process.

One of the questions when discussing American electoral reform is what a reformed process would look like. The United States' system could stand to take lessons from the Indonesian process. Indonesia implements a variety of electoral policies that can inform possible election reform in the United States, particularly: (1) a direct voting approach, (2) presidential and legislative elections that utilize a multi-party, proportionally representative and open-list system, and (3) strong election process efficiency through universal voter identification, election day holidays, and implementing the oversight of a centralized general election commission.

Criticisms of the United States Electoral System

Electorally, the United States is a unique country. The U.S. presidential election process utilizes the Electoral College, a system in which citizens of every state vote for their preferred candidate, and, in turn, the state appoints “electors” who cast votes on behalf of the state’s citizens. 48 out of 50 states use a “winner-takes-all” system, where all the electors vote for the majority candidate, entirely disregarding the people’s votes of the minority candidate.

Due to inaccuracies of estimation in the decennial US Census (Jacobsen, 2023) and inability to change the Electoral College elector make-up every time there is an election, this system creates a disparity between the actual votes a candidate receives and the “elector votes” a candidate receives. This inconsistency was especially highlighted in the 2016 presidential election, in which candidate Hillary Clinton received three million more votes than her opposition candidate, Donald Trump, but the latter won the election with 77 more electoral votes. To put it simply, Clinton received 2% more votes than Trump from actual citizens (the popular vote), but Trump received 15% more electoral votes from the Electoral College, securing him the presidency (Jacobsen, 2023). This is not the only time this has occurred. The loss of the ‘popular vote’ for a candidate that won the presidency has happened four other times in the history of the United States. Katherine Shaw from the Michigan Law Review demonstrates how fragile the presidency is, drawing the example of the 2020 U.S. Presidential election:

“...just forty-four thousand more Trump votes across Arizona, Georgia, and Wisconsin would have resulted in a 269–269 tie in the Electoral College. If that had happened, the House of Representatives, voting by state delegation, would likely have handed Donald Trump the presidency” (Shaw, 2022).

When former President Joe Biden won the 2020 election, he led the popular vote by a difference of seven million, and earned 306 electoral votes (Jacobsen, 2023). In a country of over three-hundred million persons, forty-four thousand votes comes out to roughly 0.15% of the United States population. This small percentage would have had the power to shift the electoral college vote to 269-269, which would have led to a close call between presidencies. The fact that 0.15% of the United States population has the power to shift the electoral college vote by 37 votes (6.8%) calls into question whether such a system is a legitimate electoral process for use in a democratic country (Jacobsen, 2023).

Delving further into the disparities of the Electoral College system, the regulation of electors (or lack thereof) is another point of contention. When electors are appointed to cast a ballot for their state's chosen candidate in a *seemingly* ceremonial role, they have the option to undemocratically vote for someone else without severe legal consequences (in most states). In 2020, there were three of these "faithless electors" from Washington, who were given \$1000 fines. This was the extent of their punishment (Wheeler, 2020). It is one thing for the presidency to be fragile enough that a margin as small as 0.15% could alter it so drastically, but it is another entirely for an intermediary to vote against citizens' wishes without consequence. While Wheeler (2020) asserts that past elections have not been altered by faithless electors, the threat that this could one-day happen due to a lack of legal barriers is enough to reduce faith in the American process. This ability, and therefore threat, should not exist in a democracy. Citizens cannot have faith that their votes will matter, make a difference, or be accurately represented in the electoral college, which can affect rates of voter turnout, due to disbelief in the value of voting.

The legislative elections in the United States are not barred from the aforementioned criticisms. Every two years, a third of the senate seats and the entirety of the House of

Representatives are up for re-election (Pruitt, 2024). The House of Representatives hold initial ‘primary’ elections to select their candidate. As with most processes in the United States, each state has the authority to dictate how the primaries work. Some states partake in a closed election (meaning only party members can vote) while others allow any registered voters to vote (International Foundation for Electoral Systems, 2024b). This highlights a level of inconsistency amongst the voting process, as can also be seen in voter identification laws or accepted forms of voting varying amongst states. After the primaries, citizens are allowed to vote for their candidate of choice to take a seat in the House. The Senate is voted using the same method as the House of Representatives, however, they hold office for six year terms rather than two year ones. Each party returns one candidate, which only leaves two options on the ballot: a Republican or Democrat. While independents are welcome to run, they face the same issue as the presidential election independent candidates: gaining enough traction from voters (International Foundation for Electoral Systems, 2024b).

The most pressing problem in legislative elections is gerrymandering, defined as manipulating electoral districts to favour a certain party (Duignan, 2025). There are several forms of gerrymandering such as malapportionment, which allows legislative candidates to represent constituencies with largely different populations. Despite malapportionment being outlawed, ‘partisan gerrymandering’ still exists. This is where districts are drawn to favour certain parties, so long as the populations in these districts remain equal (Keena et. al, 2019). Certain types of voters are grouped into certain districts, allowing specific parties to acquire more seats through a complex process of strategic district drawing. This is one of a variety of gerrymandering tactics that work to dilute certain votes and empower others, leading to manipulated advantages for certain parties (Keena et. al, 2019). This can lead to an

unrepresentative house that is manipulated in a way to block legislation from moving through. Gerrymandering removes faith from elections and interferes with the democratic process through inaccurately electing individuals via a series of ‘technicalities’. For these people to represent the American population in the legislature does not uphold the values of democracy.

Indonesia’s Electoral System as a Lesson for the United States

Indonesia is the third largest democracy in the world, with valuable lessons that can be used to inform election reform in the United States. The Indonesian government is headed by a President, who is voted in through a direct simple majority vote (Asian Electoral Resource Center, 2025). A simple majority requires that the winner has 50% plus one of total votes, while direct means that no intermediary votes on behalf of citizens. In Indonesia, some years have had only two candidates (ex. 2014 & 2019), while some years have had 3 candidates (ex. 2009 & 2024). In the event that no party is able to secure the simple majority, a second round election (also known as a run-off election) is held between only the top two candidates. Whoever wins this majority, wins the presidency. This has only happened once in Indonesia, in 2004, where none of the four original candidates could secure the majority (Asian Electoral Resource Center, 2025).

There is a major distinction between Indonesia’s presidential elections and the United States’: the direct vs. indirect voting process. An indirect vote ultimately allows the few to decide for the many, which has affected the United States in the form of ‘faithless electors’ and disproportionate representation. Additionally, an indirect vote does not accurately reflect the population’s candidate choice. The direct voting process used in Indonesia is superior in that it removes the middle man, effectively reducing the possibility of faithless electors to sway the

vote. It also removes the possibility that a disproportionate number of designated proxies (or electors) can minimize certain votes and sway the election further. In the Indonesian process, every vote is worth the same weight. To put simply, it would be the equivalent of using, exclusively, the popular vote in the United States. Such a change would more accurately reflect the wishes of the population and reduce opportunity for manipulation, faithless electors and discrepancies. If the United States used the Indonesian model, the 2016 presidential election would have resulted in a different president.

The second major distinction is the use of a simple majority, which is less important in the United States context. The United States suffers from a two-party system, where there are only Republican or Democratic candidates to choose from. While independents are welcome to run, they cannot gain the traction needed to secure the presidency. Having a two-party system negates the need for a simple majority rule, but does highlight a different issue: who can become president? In Indonesia, a multi-party system is used. Indonesia boasts many political parties, with 148 registered in the 1999 election year (Muliawan & Sumantri, 2020). However, a smaller number of parties than those who registered actually participate in the elections. Using 2024 as a case study, Indonesia had 74 parties who were eligible to register for the election, with only 24 actually applying (BPS-Statistics Indonesia, 2025). In the end, 18 total parties were approved to run for the legislative elections. However, only 3 candidates for president were provided. This is due to the fact that many parties in Indonesia work in coalitions or alliances (all supporting one candidate to be president) and that to run for president, a party must have 20% of seats in the legislature from the previous election (International Foundation for Electoral Systems, 2024a).

Having multiple presidential candidates from varying parties each year simply offers citizens more choice. There is no opportunity to get strongly affiliated to one party, as can often

be seen in the American political sphere. While three options are not a significant step up from two, if other parties could make headway in America, a simple majority rule could be implemented. Compounded by having more than two candidates, such a process would yield a more 'conclusive' president, accurately voted in by the majority of the country.

Also required in Indonesia is a legislative election. Indonesia uses a bicameral system, meaning that two chambers make up the national legislature. The first chamber, the Dewan Perwakilan Rakyat Republik Indonesia (DPR) is made up of 575 Members of Parliament who are elected by proportional representation and an open-list system (International Foundation for Electoral Systems, 2024a). Proportional representation is an electoral style that allocates a proportional amount of seats in the House based on the percentage of nation-wide votes (Protect Democracy, 2023). In Indonesia, there are 77 (84 in 2024) constituencies, with varying numbers of Members of Parliament depending on population. To give an example, in a constituency that is meant to return 4 MP's, if one party wins 51% of votes, they would be given 2 seats in this district (International Foundation for Electoral Systems, 2024a). The United States, however, operates on a winner-takes-all principle, which, in this scenario, would mean that the party that won 51% of votes would be awarded all 4 seats (International Foundation for Electoral Systems, 2024b). The biggest advantage of a proportional representation system is that it does not 'waste votes' (Pin Communications, 2025). All individuals in Indonesia have a say when they vote in a legislative election, because their vote (whether part of the majority or not) directly decides the MP make-up.

In Indonesia, the average voter turnout is 76%, with the country routinely entering the 80% range (International Foundation for Electoral Systems, 2024a). Such a voter turnout is incredibly high in contrast to the United States, which consistently yields turnouts in the 50%

range (International Foundation for Electoral Systems, 2024b). While it cannot be certain, such a high turnout in Indonesia could be attributed to the fact that Indonesians can be confident their vote will translate to the final delegation of seats in Parliament.

Furthermore, Indonesia utilizes an open-list system, meaning that each person can vote for an overarching party, but is also permitted to vote for the candidate within said party that they would prefer to take the seat. An open-list proportional electoral system is superior in a number of ways. Firstly, open-list provides a level of transparency. Knowing the names of the candidates who would take up office, as well as being provided options from each party, gives more power to voters in that they can further partake in legislature makeup. It also mitigates manipulation by parties, because an individual must win (rather than the party as a whole) to take up a seat. This would successfully interfere with the opportunity for placing certain candidates in the House to sway legislative processes. While the United States does provide candidate names, they do not provide the option to choose from multiple candidates under the same party in each electoral district. Doing so would create more accountability, transparency, and agency for United States citizens.

There is an additional point beyond the fundamentals of the Indonesian electoral process to consider: they are incredibly efficient, resulting in high voter turnouts. In 2024, out of 270 million Indonesian residents, 204 million were registered to vote (BPS-Statistics Indonesia, 2025), which is 75% of the country. It is important to note here that this 75% does not exclude those underage or ineligible to vote, meaning that the percentage of eligible voters who registered would likely be a higher number. There are several aspects of the Indonesia process that likely contribute to this high turnout, including election day holidays, electronic identification, and a centralized election commission.

In Indonesia, all elections are held on one day, commonly referred to as the “Festival of Democracy” (Al-Jazeera, 2024). This day is a national holiday, meaning all Indonesians have the day off from work and can vote in their local constituency at any time of the day. This effectively mitigates practical reasons for not voting, including work or academic obligations, or the potential to miss voting due to polls closing by the time their obligations are over (Al-Jazeera, 2024).

A part of the process that helps election day go smoothly is a universal identification system. Each Indonesian over the age of 17 has an electronic biometric card (e-KTP) that identifies them, which is a compulsory piece of identification for Indonesians (Maria, 2025). This effectively aids in election day ease and reliability, as compared to the United States. Varying voter identification laws mean individuals can vote multiple times or vote in constituencies that they do not belong to, both of which can alter results. A universal identification means every individual is identified accurately when they vote, and is kept track of in the election system.

Lastly, with the use of a centralized election commission, the Komisi Pemilihan Umum (KPU), elections are regulated across the entire nation. Their purview includes deciding who can run in elections and enforcing policies (Asian Electoral Resource Center, 2025.). Such efficiency lends itself well to the democratic process. The United States could, additionally, take steps to implement such efficiency if choosing to operate under the electoral college system, to increase fairness and voter turnout, and reduce gerrymandering or manipulation. While talking about these implementations in depth is outside the scope of this paper, it is important to recognize that Indonesia’s elections are strong outside of simply utilizing open-list proportional representation, and that these are useful considerations in generic electoral reform conversations.

Limitations of the Indonesian Electoral Model

While the aforementioned factors make Indonesia an incredibly strong case study for American reform, it is not a perfect system. Firstly, the Indonesian process is quite complicated. Voters are asked to vote for all levels of government (local, regional, national and presidential) on the same day. With an already stacked ballot to accommodate all these elective bodies, the use of open-list representation gives citizens even more choice within each election. While this objectively is an asset in a democracy, it assumes that voters are educated in all levels of government, have knowledge of eligible candidates, or, frankly, care about voting for every person in power. A complicated system is not friendly to the general public, and may deter people from voting in the American context through being unable to fully understand all in which they are voting for. Additionally, while corruption tactics such as gerrymandering can be mitigated by centralized election committees, it is not guaranteed that these committees would be nonpartisan (Firdaus & Idrus, 2024). In fact, the KPU in Indonesia has been accused of unfairness, fraud and manipulating the 2024 general election (Firdaus & Idrus, 2024). While centralization lowers the risk of inconsistencies, which can lead to a decrease in corruption tactics, these factors are not mutually exclusive.

Furthermore, proportional representation is a broad term that can be implemented in a variety of ways (Difford, 2021). To calculate the number of seats given to a certain party, different mathematical formulae are used. While Indonesia uses the *Sainte-Lague* method of seat allocation, who is to say this is superior to other forms such as the *D'Hondt* or *Hare* methods? Some sources cite that while the *Sainte-Lague* method is better than the *D'Hondt*, it is inferior to the *Hare* (Difford, 2021). Each jurisdiction may benefit more from different methods of seat

allocation, and Indonesia's model may not happen to apply well to the American system. While this is not an exhaustive list of all the possible drawbacks of the Indonesian system, they demonstrate that elections do not have a universal approach, and there are important factors for the United States to consider when choosing to implement proportional representation.

Similarities & Challenges

Informing electoral reform with examples from Indonesia cannot have merit unless they are comparable case studies. On the most basic level, the United States and Indonesia share logistical similarities. Firstly, they have similar populations. The United States has a population of 336,794,243 persons, and Indonesia has a population of 281,562,465 persons (United States Census Bureau, 2024). While there is a roughly 50 million difference between the two countries, they are close in ranking, as the United States ranks the third most populous country in the world and Indonesia follows behind at fourth (United States Census Bureau, 2024). Governing over a similar level of individuals in a democracy allows Indonesia's processes to be more logistically sound. For example, an earlier argument was, to increase voter turnout and election efficiency, the United States could have all elections and ballot casting on one day (which would be a national holiday, similar to Indonesia). Citizens would take off work, head to the ballot box and cast their vote for presidential and legislative elections, all in the same 8 hours across the entire country. If Indonesia had a population of, for example, 20 million, it would be easy to disregard this point as it is inherently easier to coordinate a significantly smaller population.

However, with a similar population, the United States could learn from Indonesia. An argument can be made that such a feat is actually *more* difficult in Indonesia, due to its archipelagic terrain. It may be more difficult to send out staff, coordinate with different islands,

receive the votes, etc. from a country with separate land masses. While the United States does have Hawaii and Alaska to consider, 48 out of 50 states are contiguous. Indonesia also operates under three different time zones while still managing to coordinate voting on the same day (BPS-Statistics Indonesia, 2025). However, Alaska and Hawaii cannot be removed from this point. Hawaii, particularly, would be difficult, as it operates three hours behind California, which operates three hours behind New York. Time zones would span 6 hours in time, whereas Indonesia only spans 3. This could make coordination more difficult, but not impossible in the United States.

Moving into political structure, Indonesia and the United States both operate on a presidential system, which sees the president as head of state and head of government. They separate their presidential and legislative elections, meaning that the legislature's makeup does not directly decide who is head of government (like the Canadian system does, for example). Such a framework makes Indonesia equipped to be a strong case study, because reform based on its model would not require changes to the outcomes of each election, or to combine them into one. However, Indonesia operates under a multi-party system, while the United States has worked under a two-party system since quite quickly after the country's independence and has had the two parties we see today since the 1850s (Pruitt, 2024). This is a fundamental difference that could make reform difficult to implement. For example, pushing a simple majority (like the Indonesians use) would be redundant, seeing as when only two parties are competing, someone is going to obtain the majority (or get quite close when factoring in votes for Independent candidates) (Pruitt, 2024). In 2020, Biden won the popular vote by 51.3%, securing a simple majority (Lindsay, 2020).

However, what decides the presidency is *not* the popular vote, which circles us back to the Electoral College. To implement a simple majority rule, the United States would need to have multiple parties, which can likely only occur under a reform of the Electoral College (Wheeler, 2020). Moreover, while Indonesia's process can suggest open-list systems with more candidate options, more parties to choose from, and simple majority voting, this is all also entirely contingent on if the United States will implement direct voting. To do so would require removing the Electoral College, a concept ingrained in the U.S. Constitution. Reforming the Electoral College based on the Indonesian electoral system poses a challenge not only due to the United States' two-party system and far larger population, but because the current system must be abolished rather than improved on.

Indonesia strengthens its use as a case study for the United States in that it has experience in moving from indirect to direct voting. After 30 years of political stability for Indonesia's 2nd president, Suharto, the 1997 Asian Financial Crisis worked as a catalyst for his demise. While the attitudes surrounding Suharto's rule were that it was a corrupt hold of power and undemocratic, Indonesians did not rise up until the financial crisis hit (Bjornlund & Cowan, 1999). It was at this point that Indonesians, who were struggling to make ends meet, demanded a new individual in power.

Indonesians took to the streets to protest this, resulting in violence and riots. Until 1998, the President was unilaterally appointed by the People's Consultative Assembly (Majelis Permusyawaratan Rakyat, or MPR). After pushback from the population and the move to a full democracy, the first presidential election took place in 1999, but was done via indirect vote by the members of Parliament. Members of the elected legislature voted for the candidate they wished to see as president, with Abdurrahman Wahid winning (Bjornlund & Cowan, 1999). In

2004, the MPR added new amendments to the 1945 constitution, which reformed the election process to a direct vote, leading to what we see in Indonesia today. While the legislature in the United States is, indeed, made up of elected candidates, electors are not voted by the population and are, instead, appointed. This is an experience Indonesia knows well and has taken grand steps to fully reform.

The United States has already seen similar precursors to election reform as Indonesia. With most of the middle class plagued by economic crisis and the nation facing increasing political unrest, as highlighted by the 2021 United States Capitol mob attack and the 2024 assassination attempt of Donald Trump, the United States may be on the precipice of its own reform era (Kiley, 2024). While it would be a significant challenge to combat constraints such as the two-party system and the dependence on the electoral college, Indonesia's similar experiences can educate the United States, who may need it very soon.

Conclusion

Electoral reform is a formidable undertaking for any nation, especially for one as complex and constitutionally entrenched as the United States. With an outdated system that they remain the only users of, coupled with the social pressure for reform, the Electoral College and the entire United States election system needs edits. This paper has highlighted how Indonesia's positioning as a large-scale, comparable democracy presents a strong case for potential transferable practices that could reform the American system. Indonesia's transition from indirect to direct voting, its use of proportional representation, open-list systems, and centralized election procedures offer insightful lessons that can guide American reform. While no electoral system is without flaws, Indonesia's model demonstrates that large-scale reform is possible and can be

both democratic and functional. Drawing these comparative insights does not require the United States to administer an entire system overhaul or replication of Indonesia, but rather invites necessary discussion as to not just reforming the American process, but how to do so. Moving forward, the U.S. must analyze whether its electoral system truly reflects democratic ideals and if not, what steps they are willing to take to get there.

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Perspectives on Democracy

| The Case Against Referendums on Electoral Reform

Ryan Campbell

Keywords: *Electoral reform, referendums, direct democracy, liberal democracy, Canadian democracy*

What are the consequences of applying direct democracy to the issue of electoral reform, particularly in a Canadian context? This paper reviews academic literature and historical precedents both in Canada and abroad to evaluate the merits of using direct democracy as a tool to enact electoral reform. While referendums are often perceived as more democratic and as a safeguard against self-interested politicians, they exhibit critical flaws: susceptibility to misinformation, status quo bias, and a lack of accountability. These flaws are particularly pronounced in complex, low-salience issues like electoral reform.

By contrast, historical and international examples suggest that successful and enduring electoral reforms are most often the result of multiparty consensus within representative frameworks. Referendums on questions of electoral reform risk ossifying outdated institutions and excluding minority voices—undermining the democratic growth necessary to maintain legitimacy in an evolving society.

Introduction

Since the start of the 21st century, there has been a shift in deciding questions of democratic reform in Canada by direct democracy and referendum, rather than the legislative process of representative democracy. Which of these two approaches is better for Canadian democracy?

Canada's institutions at Confederation contained many intentional non-democratic elements (Pilon, 2017). By expanding the franchise, strengthening independent oversight of elections and electoral boundary delimitation, and providing voters with the protection of the secret ballot, Canada's institutions grew and evolved into a liberal democracy. This comes with only one exception; These reforms occurred through representative democratic institutions, rather than direct democracy, and international examples of electoral reform by referendum are quite rare.

Proponents of referendums argue this approach has advantages on issues such as politicians' self-interest and democratic legitimacy, but evidence for this is mixed. At the same time, referendums bring their own deficits on minority rights and by entrenching the status quo. Overall, shifting the process of reform to direct democracy risks halting or stalling the democratic growth that has contributed to Canada's success.

Canada's Historical Background

Canada was not a full democracy at the time of Confederation, and this design was deliberate (Pilon, 2016). Fathers of Confederation were opposed to what they viewed as mob rule of too much democracy, particularly in the forms of a broader franchise and the generally more

populist institutions prevailing in the United States (Underhill, 2008). Democracy, in their view, required management by trustworthy elites.

Management of democracy took several forms. By excluding women, Indigenous people, renters and others from voting, and by putting themselves in charge of redistricting, politicians were able to choose their voters as much as voters were able to choose their politicians (Perrault, 2021). Canada's first elections were administered at a local and level, and when complaints of electoral fraud were made these were adjudicated not by courts but by elected officials themselves. Without a secret ballot, voters could be bribed or threatened with professional reprisals or violence to induce them to vote a specific way (Perrault, 2021).

Gradually, each of these impediments to what are now recognized as democratic norms was removed, through adopting the secret ballot and providing for judicial review of election results in 1874, by expanding suffrage in 1918, 1948, 1955 and 1960, establishing Elections Canada in 1920, and by introducing independent redistricting commissions in 1964, Canada gradually became more democratic in nature (Goldberg, 1988). These democratic reforms were made through the delegated decision making of representative democracy, with BC's successful referendum on women's suffrage in 1916 as the only exception (Goldberg, 1988). Changes were not always consistently for the better, as there are many instances of politicians revoking the right to vote from unpopular minorities as late as the 1940s. Still, more improvements were made, leading to Canada adopting the norms of liberal democracy and culminating in 1982 with the inclusion of democratic rights in Section 3 of the *Charter*.

Since the early 20th century, there have been debates on switching electoral systems, often from a single-member-plurality (or first-past-the-post) electoral system to proportional representation. Prime Minister Mackenzie King had promised to introduce proportional

representation in both the 1920s and 1930s, and Prime Minister Pierre Trudeau had made a similar pledge in 1979 and 1980 (Fair Vote Canada, 2025). In the 1920s Liberal and United Farmers governments in Manitoba, Alberta and Ontario had promised to adopt proportional representation (Jansen, 2004). In Manitoba and Alberta this led to the adoption of proportional representation electing MLAs from the major cities and single-winner preferential electoral system in more rural areas. British Columbia eventually adopted a single-winner preferential electoral system for its 1952 and 1953 elections. By the mid 1950s, all three of these provinces had returned to single-member-plurality (and in the case of British Columbia, plurality-at-large) voting as their electoral system (Jansen, 2004).

British Columbia, Prince Edward Island and New Brunswick had also used plurality-at-large voting for some or all of their electoral districts before switching to single-member plurality after courts found their district boundaries violated Section 3 of the Charter with respect to equality of population (*Dixon v. Attorney-General of British Columbia*, 1989, *Harvey v. New Brunswick*, 1993, *MacKinnon v. Government of PEI*, 1993). None of these proposed changes had involved any form of direct democracy such as a referendum.

Beginning in the early 21st century, multiple provinces began holding referendums on replacing their single-member-plurality (or first-past-the-post) electoral systems with a form of proportional representation. Seven referendums have been held in the provinces of British Columbia, Ontario and Prince Edward Island since 2005. Majorities voted in favour of electoral reform in two of those instances. Despite this, the reforms were not implemented due to failing to meet a supermajority requirement in British Columbia in 2005 (B.C. to Hold Second Referendum on Electoral Reform 2005) (Boegman, 2018) and due to low turnout in PEI in 2016 (Sinclair, 2016).

Referendums on Electoral Reform in an International Context

Only two OECD countries owe their electoral systems to the results of a referendum: Switzerland and New Zealand (Pilon, 2023). In all other instances, countries legislated reforms as part of a multiparty agreement on electoral reform, or had their electoral system imposed by a foreign power. Despite both Switzerland and New Zealand having strong, robust democracies, the circumstances of their reform may not be applicable to the Canadian context.

The most applicable example is New Zealand (New Zealand History, 2021). The state first held a referendum in 1992 asking voters to state a preference for changing the voting system or not, with a second question asking voters to choose between four different alternatives to single-member plurality. 84.7% of those who voted supported changing the electoral system, whereas 70.5% of whom preferred a mixed member proportional option, constituting an outright majority. Still, the government declined to respect the results of the referendum, and held a new referendum to coincide with the 1993 election. The legislation for this referendum was structured such that a majority vote would be binding, and ultimately it passed with 53.9% in favour and 46.1% against, a margin of 7.8% (New Zealand History, 2021).

In the case of both unsuccessful referendums in British Columbia in 2005 and Prince Edward Island in 2016, the margin of support for proportional representation exceeded the support for proportional representation that saw it successfully implemented in New Zealand in 1993. This reform has withstood a subsequent referendum on its repeal in 2011, winning by a larger margin than 1993, but again by a lower margin than proportional representation had in British Columbia in 2005.

In Switzerland, proportional representation was adopted in 1918 by means of a popular initiative, an institution whereby citizens rather than politicians set the terms of a binding vote. Even in the Swiss case, proportional representation had been rejected by parliament by a vote of 120-14 that same year and had failed two previous referendums (Lutz, 2004).. In those previous referendums, opponents had argued that by virtue of giving no party overall control of the parliament, it would lead to chaos and anarchy. By 1918, with Switzerland amid general strikes, food shortages and martial law, those arguments may have understandably been less effective (Lutz, 2004). Referendums on women's suffrage were less successful, with the last failed referendum being held in 1959 before finally succeeding in 1971 (The Swiss Confederation, 2025).

If international precedent is to be cited, then electoral reform by referendum is exceedingly rare, as often as part of a dire crisis with food shortages and riots as not. This does not seem desirable in a Canadian context. Even in the singular New Zealand case, it requires Canadian politicians to respect a positive vote for reform to a greater degree than they have to date.

Politicians' Self-Interest and Status Quo Biases

One argument made for a referendum is that if electoral reform is left in the hands of politicians, they will reform the electoral system out of self-interest rather than the public's interest (Thompson, 2022). If the informal convention of governing parties not unilaterally changing the electoral system is broken, the concern is politicians will use this power to exclude their opponents. As was seen in Canada's early history, politicians may undermine democratic principles when presented with the opportunity and the assurance of an advantage.

However, this concern can as easily be applied to incumbent politicians, perpetuating an unjust status quo to promote their chances of re-election. Politicians may also set the terms of a referendum in a self-serving way, either designing it to promote their preferred reform, or to kill reforms they oppose. It also does not follow that because politicians may do the wrong thing, that they must do the wrong thing, or that political self-interest will always align with a regression in democratic norms (Thompson, 2022).

Referendums have a known status quo bias. This is a well-studied problem, with scholars such as Leduc (2009), and Lupia and Johnston (2001) arguing that for any referendum on any subject, support for change typically declines by an average of 20% over the course of the campaign. Opponents of change have an inherent advantage through a combination of disinformation and fearmongering worst case scenarios that may not be realistically expected to come to pass. This is further reinforced by firms that specialise in running referendum campaigns refusing to take on initiatives polling below 70% support (The Campaign Workshop, 2024). For a contentious issue, a referendum gives supporters of the status quo a significant advantage.

Politicians elected by the status quo have a stake within the norm, this being particularly acute for politicians from the largest parties (Arnesen et al., 2021). Any impactful change to how we count votes will change who is elected and who is not. Politicians who come out ahead under the current process may not necessarily come out ahead in an alternate process. This is true at the aggregate level, where a party that is overrepresented compared to their vote share thanks to single-member plurality voting might see its seat totals cut by proportional representation. This issue is worse in the localized versions of proportional representation often proposed in Canada. Due to geographic polarisation, parties will win an oversized share of their seats in their strongholds, with these oversized wins offset by other parties' own strongholds (Arnesen et al.,

2021). For example, in 2017, the BC NDP won 4 of 4 Burnaby seats with slightly less than 50% of the city-wide vote (Elections BC, 2017). Under proportional representation, they would win 2 of 4 seats, halving their seat total in Burnaby.

Politicians' direct stake in electoral reform creates a situation where even within parties that ostensibly support electoral reform, there will be large segments of the caucus with strong incentives to undermine or otherwise block reform. Party leadership that may have seen an advantage in electoral reform which would benefit them in opposition may find their enthusiasm wane once in government. A generous view of referendums in this context is that they present a chance at advancing electoral reform while managing internal caucus divisions. A more cynical interpretation is that these mechanisms allow parties to block reforms that no longer serve their interests while avoiding the appearance of doing so.

Politicians control the terms of the referendum. Politicians interested in the status quo have imposed additional supermajority requirements (Office of the Premier, 2005). They have the ability to determine the referendum question wording, restrict the campaign activities of opponents (Yarr, 2018), and ultimately structure the referendum in such a way to achieve a desired outcome. This propensity to try to engineer a specific result by setting the terms of the referendum can cut both ways, as Miljan (2019) argued in that the 2018 BC referendum, the government had intended to bias the results in favour of change but had unintentionally shifted the result for the status quo.

There is validity to the concern that politicians may regress democracy when given the chance. This concern is particularly acute under the present single-member plurality electoral system, where a party may control a majority of a legislature's seats with far less than a majority of the popular vote. As an alternative, most countries have looked towards broad, multiparty

agreements to ensure reforms are made based on public interest. Ultimately, these agreements have stood the test of time (Pilon, 2023).

The Democratic Process

Another argument in favour of referendums on electoral reform is that referendums are inherently democratic (Setälä, 1999). This brings in deeper questions of what democracy is and why citizens value it. Misak and Talisse (2004, 2021) put forth a pragmatic argument that the deliberative nature of democracy is more likely to lead to decisions that are broadly (and morally) ‘correct.’ Other scholars like Dahl (1998), perceive democracy through the principles of equality and majority rule.

Smith (2009) and Altman (2010) both argue that referendums are desirable on both points. Referendums encourage and provide an opportunity for public debate, fostering the deliberative process valued by Misak and Talisse (2004, 2021). While a vote for a representative could be cast for a variety of reasons and issues, referendums directly measure popular support, and by this standard, a majority vote in a referendum is inherently democratic. Despite these arguments, the practicality of how referendums unfold in practice limit their applicability.

Inherent in the deliberative process is the thoughtful discussion and consideration of diverse points of view before arriving at a collective decision. Contentious referendums can have deficits both in the quality of the debate and the degree to which citizens engage in that debate prior to voting (LeDuc, 2011). The quality of debate suffers when proponents and opponents engage in deceitful or dishonest messaging, resulting in a less informed public. This problem is inherent to all referendums and contributes to an estimated status-quo bias of 20% in the process

no matter the topic of the referendum, however it is especially acute on the issue of electoral reform, where polls suggest the public has very low levels of pre-existing knowledge (LeDuc, 2011).

Because there are hardly any regulations against spreading disinformation or misinformation about a referendum, there is also little to no means by which to hold bad faith actors to account (Lupia, 2016). Additionally, since electoral reform is typically a low-salience, low-information subject for voters, there is a strong likelihood that voters will not participate in the referendum discourse at all (LeDuc, Bastedo, & Baquero, 2008). This is extremely exemplified by polls from the 2009 BC referendum that showed only 40% of voters were even aware the referendum was occurring just three weeks prior to receiving their ballot at the polling station (Ipsos, 2009). With large swaths of the public voting based on their initial reaction to the wording of the referendum or a vaguely heard advertisement, the referendum process shifted from a process of deliberation to a game of crafting the right question to elicit the government's desired response.

The issue of uninformed voting can be partially averted by shifting the referendum timing from one simultaneous to an election to a stand-alone vote. That shift itself creates new problems however with biased turnout and low participation. As mentioned earlier, low participation has also been used as a justification to ignore a positive result from the vote, creating an additional barrier to reform.

The problem of voter education may not be so dire in the case of referendums on other issues. As an example, the *Venice Commission Code of Good Practice on Referendums* states that in any referendum, the consequences of a vote should be clear to the voter (Alivizatos et al., 2020). If the referendum question involves a decision on raising neighbourhood property taxes

to pay for a new community centre, the consequences are straightforward: a ‘yes’ vote means property taxes increase and a community centre is built, and a ‘no’ vote means taxes stay the same and no new community amenities are built. Electoral reform does not lend itself to this simplicity. The body of research on the consequences of electoral system design is vast, and voters lack familiarity with even the consequences of the current electoral system (Fair Vote Canada, 2025).

Legitimacy Concerns

Perhaps the strongest argument in favour of referendums is made by Butler et. al (1994), who argue that the outcome of a referendum will be viewed as legitimate by the public, whereas contentious reforms may risk undermining confidence in democracy without such a mandate. This argument is predicated on political actors and the public ‘buying in’ to the referendum process to give it legitimacy. This assumption may not necessarily be true, especially in the Canadian context where referendums are less common and more novel. It also fails to consider the slow erosion of public support for democracy occurring under the status quo.

Democracy can be fragile, and many democracies including Canada are currently experiencing a decline in democratic satisfaction (Wike & Fetterolf, 2024). In this context, changing the electoral system comes with risk. While most Canadians are satisfied with our current democracy, this satisfaction continues to decline. Mishandling electoral reform risks undermining public support and accelerating this trend of decline. Reforms that do not have sufficient popular support may also face reversal from subsequent governments. At the same time, support for democracy has eroded faster in countries with majoritarian electoral systems

like Canada's than in those with proportional electoral systems, so simply doing nothing carries its own risks (Wike & Fetterolf, 2024).

Referendums may be appealing for their ability to resolve differences between elites by turning to a direct mandate from voters. However, this presupposes that a mandate from voters will be broadly viewed as legitimate by society and its various political actors. This is not necessarily the case. As seen in British Columbia in 2018, opponents of reform devoted a significant amount of time and energy to attacking the process itself as a 'stacked deck in a rigged game' in part due to its use of a simple majority threshold (McElroy, 2018). Majority votes in 2005 in British Columbia and 2016 in Prince Edward Island were not viewed as sufficiently legitimate to be binding, with governments in each case choosing to set aside the results and run a new vote under new terms. For Canadian opponents of reform, it seems that while a majority vote referendum is a legitimate means to block electoral reform, it is not enough to enact it (McElroy, 2018). In that context, referendums are only a tool to solidify the status quo.

Legitimacy of Multiparty Agreements

Most countries reform their electoral systems by means of a multiparty agreement on a specific package of reforms (Pilon, 2023). Under this model, either a constellation of political parties runs on a common program of electoral reform or otherwise agrees to a package of reforms after the election (Pilon, 2023).

Dawood (2016) suggests that for reforms to be legitimate, they should follow the norms of political neutrality, consultation, and deliberation. By including both government and opposition parties, ideally with a combined majority or supermajority of the popular vote, Dawood (2016) argues a multiparty agreement on reform gives legitimacy by guarding against

the perception that reforms are being made in the partisan self-interest of a governing party. Many of the strongest democracies in the world arrived at their electoral system precisely in this manner without negative repercussions, suggesting that such an approach could work in Canada as well.

While it remains to be seen if the Canadian public would accept such an approach, Quebec's attempt at reform shows promise. Quebec's multiparty agreement built on the work of an earlier all-party committee that operated alongside an eight member citizens' committee (Barnes, 2009). This process added legitimacy to the electoral reform through the values of consultation and deliberation as well as political neutrality (Barnes, 2009). While the recommendation of this committee to adopt a mixed-member proportional electoral system was not immediately acted upon, results came through the lead up of the 2018 provincial election in Quebec. Four of the five largest parties signed an agreement to reform Quebec's elections to a system of mixed-member proportional representation as previously recommended, with only the Quebec Liberals dissenting (Tyrrell, 2018).

The Coalition Avenir Québec party won the election in 2018, initially beginning the work on such reforms. While the Coalition Avenir Québec eventually reneged on this promise, mainly by proposing a referendum and then by scrapping the project entirely, that was not done in the face of widespread public opposition.

Minority Rights

The concepts of democracy and majority rule are inherently linked; however, an important distinction can be made between the issue-by-issue majority decisions of direct democracy, versus the horse-trading and coalition building of representative democracy (Strom,

1997; Zimmermann & Just, 2000). Whereas the process of building a sufficiently large coalition of voters to win an election and govern gives the opportunity for minorities to bargain and advance issues of concern and salience to them, direct democracy does not facilitate such bargaining. Under direct democracy, voters do not typically organise themselves into blocs that exchange support on one issue for support on another issue of importance to them. Instead they are expected to vote on an issue-to-issue and voter-to-voter basis, with the minority viewpoint losing on each policy question.

Referendums offer no such protection to minorities (Qvortrup, 2014). This ‘tyranny of the majority’ is particularly concerning given that the subject in question is whether or not political minorities should have a right to representation (Gamble, 1997). Majoritarian systems such as single-member-plurality exclude minority viewpoints by design, whereas proportional representation guarantees representation to minorities that reach a specified (either de facto or de jure) threshold of support. Supporters of the largest parties can conspire to magnify their own representation in the legislature by maintaining rules that underrepresent or completely exclude smaller parties from winning representation.

Political minorities are often by their nature unpopular, meaning this fear of pitting the majority against the minority is realised in practice. For example, in the United Kingdom’s 2011 referendum on adopting a single-winner preferential electoral system (‘alternative vote’), the new system was expected to boost representation for the smaller Liberal Democrats (Helm, 2011). Opponents fixated not on the merits of the system, but on the unpopularity of this smaller party and their leader. This process of oversimplification of complex issues while marginalising minority voices has been highlighted by Clark (1998) as a particular concern with direct democracy.

Representative democracy accommodates minority interests through bargaining, while direct democracy promotes the interests of the median voter; this dynamic is acknowledged by both supporters and detractors of each (Knight & Schwartzberg, 2020). While critics of this bargaining dynamic such as Cooter (2002) argue that this process can lead to instability and corruption, they acknowledge the inherent efficiency with respect to advancing minority interests. Ultimately for an issue as fundamental as democracy itself, this protection of minorities is essential.

Importance of Democratic Renewal

Overall, democratic institutions reflect the values of the time when they were created. Canadian institutions were created at a time where democracy and inclusion were not valued as they are today. Scholars such as Dahl (1988) argue that because democratic institutions derive their legitimacy from the consent of the governed, as society evolves, institutions must adapt to reflect the current values and expectations of the populace to maintain this legitimacy. Canada has been successful at managing that process in many regards; few would argue that achieving universal suffrage was damaging. If society continues to evolve, as seems likely, then it follows that institutions will need to continue to evolve (Dahl, 1988).

Additionally, society continues to evolve. Global migration and changes in communication technology are creating a more diverse world. When Canada was founded, a Member of Parliament would find himself representing constituents who spoke one or two languages, and who potentially practiced a faith. Today, on each of these measures, politicians are expected to represent constituents from dozens if not hundreds of backgrounds. That greater

diversity will naturally seek expression politically, calling into question whether majoritarian institutions are adequately expressing and reflecting those diverse views.

If institutions do not evolve with society, then public trust in those institutions may erode. When democratic institutions function well, they mediate conflict, promote social cohesion, and generally promote the wellbeing of society. Outdated institutions risk undermining these functions and reverting to autocracy (Sandberg & Lundberg, 2012). An extreme version of the risk of static institutions continues to progress in the United States. Drutman (2020) describes that situation as a ‘two-party doom-loop,’ where entrenched institutions create a cycle of negative polarisation and partisanship, ultimately creating an increasingly dysfunctional political and societal landscape.

As in the Swiss example, a crisis can lead to positive change, however it can also lead to authoritarianism and other breakdowns as extreme as civil war. While Canada may not be in such a dire situation, avoiding such a scenario in the future will require a critical view of existing institutions and how they may be improved.

Conclusion

The simplest and most direct argument for or against a referendum on electoral reform is expedience. Proponents of a given electoral reform should want a referendum when it is more likely to succeed than an alternative approach, and oppose holding a referendum when there are other, better means to achieve it. By the same token, opponents of said electoral reform may filter their views through a lens of whether that favours or hinders their side. To some extent this linking the question of the merits of electoral reform to the question of how to accomplish electoral reform is unavoidable. Moving away from the merits of a specific reform brings in

broader issues of democracy and democratic renewal, and what process is best to undertake such work.

Has democracy been perfected in Canada? Should our present system be set in stone, unlikely to change without a major crisis? Or should it be allowed to evolve and grow with time? If Canadian democracy is perfect, then the only utility of referendums on democracy is as a means to legitimise the status quo. If Canadian democracy is imperfect, as seems likely, then referendums will only impede that evolution, freezing out minority voices that should be more fully expressed and risking regression and reversal of democratic progress.

That is not to say referendums are wholly without merit. On issues where the consequences of a decision are clear and minority rights are not impacted, or when change may have irreversible consequences, then they may be an appropriate tool. The question of electoral reform satisfies none of these criteria.

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Perspectives on Democracy

| From Hope to Authoritarianism: What Factors Led to the Decline of Democracy in Turkey?

Matthew Reddock

Keywords: *Populism, democracy, authoritarianism, institutions, economics, rhetoric*

This essay examines the erosion of democracy in Turkey, challenging the common assumption that economic prosperity leads to the democratisation of national politics. The paper focuses on three key identifiers of Turkey's democratic backsliding: weak democratic institutions, the political manipulation of financial crises, and the effective use of rhetoric to marginalise opposition.

Turkish President Erdoğan is a skilled politician who can manipulate his political environment to consolidate his hold on power. He is not unique in this regard. Turkey serves as a reminder to the world that democratic institutions can be gradually dismantled through the misuse of democratic processes. By examining Turkey's recent political trajectory toward autocracy, the once assumed reality that economic prosperity brings political liberalisation is no longer guaranteed.

As democratic nations and their safeguards begin to buckle under mounting pressures, the consequences of institutional neglect and decay are serious. Ultimately, the Turkish case highlights the importance of safeguarding democratic norms, even in ostensibly stable and economically successful countries.

Introduction

The rise of populism has increased concern for the welfare of democratic nations. This uneasiness is reflected in the numerous and diverse publications, as both academic and non-academic fields discuss this phenomenon. The contemporary populist movement poses a challenge to democratic nations because its leaders frequently espouse an autocratic style of leadership (Weyland, 2020). Populist rulers in different parts of the globe, including the current Turkish leader, Recep Tayyip Erdoğan, have succeeded in dismantling democracy. The Turkish example is particularly relevant to study as it runs contrary to the belief that wealthier democracies are protected from dictatorship.

According to this maxim, as Turkey became wealthier, its citizens should have been able to keep their leader in check. Economic data indicate that the reverse has occurred in Turkey; as the country's GDP has grown, authoritarian rule has also intensified (Brownlee, 2016). Academic scholars provide three main reasons for the dismantling of democracy in Turkey: the weakness of democratic institutions, the manipulation of an economic crisis by its authoritarian leader to gather popular support, and the use of rhetorical strategies to discredit the opposition. Turkey's erosion of democracy under Erdoğan illustrates that even economically prosperous democracies are not immune to authoritarianism when institutional measures are weak, and populist leaders manipulate crises and public perception.

Leading Arguments

A democratic government may slide into authoritarian rule when weakness in its democratic institutions leaves it open to manipulation. According to Przeworski et al. (1996),

parliamentary governments are more stable than presidential ones because their stronger checks and balances help constrain populist leaders in their bid for power. They argue that democracies endure longer than presidential systems due to the nature of the parliamentary system. One of the key reasons that presidential governments fall into autocracy and authoritarianism is that presidents typically have more power than prime ministers (Przeworski et al., 1996). Turkey is a prime example of how a country that appeared to be heading towards democracy and liberalisation fell short and has now retreated to a unitary presidential republic.

According to Weyland (2020), near-democratic institutions may be fragile because their constitutions are relatively flexible, making them more susceptible to legal transformation and dismantling. Weak democracies tend to share several common characteristics; following Levitsky and Way's (2002) argument, horizontal accountability is one of the key traits of a weak democracy. By having subpar checks and balances on government overreach, executives can exploit the system and exhibit abusive, powerful, strongman tendencies. Evrensel (2024) highlights similar concerns raised by observers about Turkey's constitution, specifically the inadequate checks and balances, restricted parliamentary oversight, and diminished judicial independence.

Levitsky (2002) also emphasises that divisions among ruling elites significantly contribute to the collapse of democracy. When elites lack a shared understanding of commitment to democratic practices, they may fail to support and maintain democratic institutions. Some elites view excessive bureaucracy and unnecessary regulations as obstacles to economic, political, and social progress. As a result, they may advocate for the removal of such things, a move that heralds the beginning of democracy's downfall. As McLauren and Cop (2011) note,

In Turkey, the failure to develop an elite settlement on key issues – including the functioning of Turkish democratic institutions, the very controversial issue of the role of religion and rights of religious groups and the treatment of ethnic minority groups – has meant elite disagreement on the basic rules of the regime and unwillingness to defend democratic rules. (p. 514)

In contrast with Turkey, Spain and Greece have both recently experienced periods of authoritarian rule. [EP1] As a result, when these countries faced economic crises, their citizens were more cautious about supporting radical political parties, aware of the dangers such choices could pose. This historical awareness may have contributed to their full transitions into stable democracies. Unlike Spain and Greece, McLauren and Cop argue (2011), Turkey lacks a shared national memory of traumatic authoritarianism:

Turkish elites and ordinary citizens do not share the same widespread historical memory of brutal civil war followed by severe government repression that the Spanish elites and citizenry share, nor do the elites themselves have a shared experience of repression, as in the case of Greece, and this is likely to have produced widely varying levels of willingness to compromise to save democracy. (p. 502)

According to scholars, another key factor in the shift from democracy to authoritarianism is a regime crisis, which can generate popular support for authoritarian leaders while highlighting the “weakness” of democratic leadership in managing the crisis (Levitsky & Way, 2002). Time and again, democratic countries face political and economic crises that lead to widespread frustration with the government in power. Extreme political parties, normally on the fringe, thrive in these environments. As people grow desperate for a solution, extremist parties, both left

and right, garner support as they advertise themselves as the party with the only viable solution. The authoritarian leader may succeed in overcoming acute, severe crises such as an economic crisis. This gives populist leaders broad popular support and helps them remove the remaining obstacles to power (Weyland, 2020).

As crises build up over time; often crises appear to come out of nowhere when, in fact, they are a result of longstanding neglect and denial. As Levitsky and Way (2002) explain, "A third path to competitive authoritarianism was the decay of a democratic regime. In these cases, deep and often long-standing political and economic crises created conditions under which freely elected governments undermined democratic institutions " (p. 61).

According to Castaldo (2018), another reason why populist figures succeed in crises is that they present themselves as separate from the ruling elites. The authoritarian leader may use a crisis, such as an economic crisis, as a way to appeal to the populace by presenting himself as 'one of the people' and 'anti-establishment', which makes him look strong, in comparison to the lost credibility of the democratic establishment due to economic crisis, which makes the democratic establishment look weak (Castaldo, 2018, p. 474)

When countries face a crisis, it is not uncommon for populations to lose faith in democratic institutions and seek alternative forms of leadership. Crises can undermine confidence in existing governments, paving the way for authoritarianism by increasing the appeal of strong, decisive rule. A clear example of this is the Weimar Republic. Faced with severe economic hardship and a dysfunctional government, the German people sought a replacement regime that would restore national pride and stability (Ziegler, 2022). In doing so, they created the conditions for Hitler and his party to rise to power, ultimately plunging Germany

into one of the darkest chapters of its history. As Tansel (2018) points out, Turkey is no exception to this pattern; Turkey's embrace of authoritarianism was also fueled by economic turmoil.

Capitalising on this discontent, Erdogan employed populist strategies that included the promise of economic revival. Turkey experienced a major financial crisis in 2001 and, “by 2002, the dominant precepts of centrist party politics were exhausted and the public showed no inclination to further support what was a failing economic and political programme” ... “voters were ready to embrace an alternative which the recently established AKP would come to represent” (Tansel, 2018, p.201).). In Turkey's history, the rise of the AKP has marked the beginning of a new era. It exhibits patterns of 'delegative democracy', characterised by strong personalised rule, weakened institutional checks and crisis-driven legitimacy (Taş, 2015, p. 777). Erdogan has made highly effective use of these economic crises to label any sign of opposition “a matter of national security” and to weaken laws and “separation of powers” (Taş, 2015, p. 778).

Scholars such as Hintz (2016) discuss another strategy used by Erdogan to transition from democracy to authoritarian rule, specifically through the marginalization of opposition and dissident social groups. In Turkey, rhetorical strategies with abusive and disparaging speech were used to marginalise, demobilise, and discredit the opposition. Anyone who expressed discontent (e.g., Gezi protesters) was identified as inherently dangerous to Turkey. Anyone opposing the authoritarian leadership was labelled a “terrorist”. Authoritarians in Turkey also employed conspiracy theories about a Western-supported coup to bring the motives of protestors into question (Hintz, 2016).

Marginalising opposition groups and dissident social groups is a hallmark of an authoritarian government. Stalin, Mao, Hitler, Pol Pot, and various colonial powers have relied on oppression to maintain control over their populations. In many authoritarian societies, criticism of the ruling body is not tolerated. President Erdogan solidified his authority by centralizing control over the government, weakening and dividing the opposition, and increasing pressure on the media and civil society (Weyland, 2020). This intolerance to dissent became especially pronounced after the Gezi Protests in 2013. "Intolerance to criticism and the increasing securitisation of dissent reached a new dimension as a result of the Gezi Protests in 2013" "In 2015, the AKP-controlled parliament passed a new security law that expands the power of the police and further limits the right to demonstrate and assemble" (Gunay, 2016).

In extreme instances, power-hungry leaders may portray themselves as divine and superior to everyday citizens and therefore have the unique privilege of following the law only when it suits them. Throughout history, monarchies and oligarchies have claimed that their rulers possessed a divine lineage or were chosen by the gods. Umar (2024) states that Kingship in the Ancient Near East was regarded as divinely ordained. Any form of question or opposition to what the ruler(s) wished could be deemed treason against the state and therefore against the gods. Although Erdogan does not claim divine power, Yilmaz et al. (2023) argue that Turkey's ruling Justice and Development Party (AKP) uses religion to legitimize its repressive policies and discredit the opposition by framing it as a security threat. Erdogan presents himself as the true voice of the nation's key interests. "In delegative democracies the political ruler is projected as 'the embodiment and interpreter of the high interests of the nation.... Any opposition to the ruler then, is apt to be interpreted as treason.'" In Erdogan's discourse, all opposition figures are dehumanised, demonised and excluded from the Turkish nation (Taş, 2015, pp. 784 - 785).

Evaluating the Research

This study identifies that scholars highlight the need to critically examine Turkey's decline from a relatively wealthy democracy to authoritarianism. The explanations offered by scholars for the decline of democracy in Turkey are compelling and can coexist; they are not mutually exclusive. All three theories have gained widespread currency amongst scholars and are discussed in a variety of academic papers. The two most commonly occurring reasons given for the dismantling of democracy and transition to authoritarianism in Turkey are the role of acute crisis and institutional weakness. The third reason given is the use of rhetoric by authoritarian leaders to marginalise their opponents, appears less often in the papers reviewed. Weyland (2020) suggests that it is necessary for both the institutions within a democracy to be weak and for the country to be undergoing a severe crisis for its government to slide from democracy to authoritarianism. "This wide-ranging investigation shows that populist efforts to dismantle democratic institutions and promote authoritarianism succeed only under special conditions. Two sets of factors need to coincide" (Weyland, 2020, p. 390). The use of pejorative rhetorical language by authoritarian leaders may be a common occurrence but is not as frequently cited as a reason for Turkey's democratic demise.

As Levitsky and Ziblatt (2018) point out, most present-day democracies are not destroyed through violent overthrows of authority. Instead, democratic institutions are gradually dismantled. Turkey, with its slow erosion of democracy, is a prime example of this occurrence; Erdogan used his position of power and his electoral popularity to dismantle Turkey's democratic institutions. As Weyland (2020) aptly states, he "misuse(s) democracy to abolish democracy" (p. 390). Weyland (2020), McLaren and Cop (2011), and Levitsky and Way (2002), all discuss the weakness present in certain democratic institutions and the ability of autocrats to circumvent the

legislature. Weyland (2020) provides several clear examples of institutional weakness in Turkey, including the lack of effective sanctions for rule breakers and the removal of obstacles to constitutional change.

Levitsky and Way (2002) do not refer to Turkey directly in *The Rise of Competitive Authoritarianism*, but do discuss commonalities of competitive authoritarian regimes, such as the malleability of institutions present in weak democracies. Levitsky and Way (2002) argue that weak democracies have fewer checks and balances and are therefore more vulnerable to abusive, power-hungry leaders. Weyland (2020), and McLaren and Cop (2011) refer to the same characteristics of weak democracies and apply them specifically to Turkey. Levitsky and Way (2002) further highlight the use of political and economic crises by democratically elected leaders to strengthen autocratic practices. Weyland (2020), Levitsky (2002), Castaldo (2018), Tansel (2018), Taş (2015), and Baykan (2018) all point to Erdogan's manipulative use of crises in his bid to consolidate power, with Baykan providing detailed examples of Erdogan's strategy. Authoritarian leaders, like Erdogan, understand the importance of projecting an image of strength. Leaders who successfully navigate a crisis may enhance their popularity and their reputation for trustworthiness. By emphasising their achievements and disparaging democratic institutions, they can cement their grip on power.

Placing the Turkish case within a broader global context, as Weyland (2020) does, is crucial and contributes significantly to the importance of his paper. Autocrats worldwide employ similar strategies to dismantle democratic systems. Early identification of these strategies is crucial as it makes democratic breakdown easier to combat (Levitsky, 2018).

Conclusion

It is widely believed that wealthy democracies are immune to authoritarian rule. Yet Turkey's recent political trajectory challenges this belief. The three commonly cited reasons for Turkey's democratic decline are the institutional weakness of its democracy, the impact of an acute economic crisis, and President Erdoğan's strategic use of divisive rhetoric to marginalise opposition. Scholars studying Turkey agree that the institutional fragility of its democracy and financial turmoil are central to the fall of Turkey's democracy, with some scholars highlighting rhetorical manipulation as a significant contributing factor. None of the arguments presented by the scholars in my research contradict each other; the absence of major disagreement among scholars makes these explanations particularly compelling.

While Turkey's transition may appear unusual, it is far from inexplicable. On the contrary, it is well understood by political scholars. Researching countries like Turkey is crucial to understanding how democratic regimes can erode from within. Democratic backsliding is not a relic of the past; it is a present and ongoing risk. The widespread belief in the invulnerability of democratic institutions fosters complacency in governments and citizens, gradually undermining the democratic principles they are meant to protect. Often, the warning signs of democratic erosion become evident only after considerable damage has occurred. Populist leaders who claim to be the "true" voice of the people can accelerate this damage by eroding institutions and deepening divisions within society. History shows us that overconfidence among the political elite rarely ends favourably. Turkey's case not only exposes the internal weaknesses that can undermine a democracy but also serves as a warning. It reminds us that vigilance, institutional strength, and public awareness are essential to safeguard democracy and prevent the slow rise of authoritarianism.

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The Politics of Inequality

| The Thralls of Capitalism in Vancouver: How Neoliberalism and Settler Colonialism Criminalize the Unhoused

Isabella Dansereau

Keywords: *Neoliberalism, settler-colonialism, unhoused, criminalization, hostile architecture, displacement*

This paper considers the houselessness crisis in Vancouver as a case study highlighting how a history of settler colonialism and a federal shift towards neoliberalism in Canada feed the social issue closer to home. By analyzing current municipal funding in Vancouver, this paper highlights the government's approach to reducing social support programs and implementing external funding models in their place, while continuously boosting funding for police task forces.

It explores how governmental and political actors socially construct criminal activity and public safety concerns to justify the displacement of unhoused people. The paper also explores how the expansion of police task forces focused on patrolling streets, as well as the city's development of hostile architecture, work to achieve this goal of displacing unhoused populations under the guise of protecting public safety.

Additionally, by reflecting on the history of property and how access is governed, the paper connects settler colonial systems with the issue of houselessness. Settler colonialism has fueled the development of private property which allows access to shelter to be denied and creates houselessness as a social phenomenon. Public property then becomes the only space for unhoused people, who are restricted and policed within it. Ultimately, the paper argues that neoliberal and settler-colonial frameworks criminalize unhoused people within the Canadian context, justifying under-funding for social supports and over-funding for a police-based approach that fails to adequately address the issue.

To those who have been made to feel invisible, your worth is not a negotiation.

Introduction

The unhoused population has increased an average of 7.7% annually for the last 10 years in Vancouver, creating a houselessness crisis (Crompton et al. 2024). As this issue gets worse, encampments continue to grow and migrate throughout the Metro Vancouver region. Despite the visibility and proximity of this crisis, Canadian governments fail to adequately address it. Rather, neoliberal ideology shifts blame onto individuals and responsibility onto community partners, who receive limited funding in the form of grants. Additionally, there continues to be a surge of forced removal and encampment displacement at the hands of the Vancouver Police, as well as the emergence of public architecture which creates a hostile environment for unhoused people. The way in which the unhoused are excluded from access to shelter and governed within public space also reflects the settler colonial notion that land can be privatized and restricted. Ultimately, Canada continues to fall back on neoliberal and settler colonial frameworks which criminalize the unhoused and justify an inadequate response centred around policing.

The Neoliberal Ideology within Canada

Over the last three decades, neoliberalism has become increasingly entrenched in Canadian society, leading to the abolition of many social support programs. In fact, this ideology has a unique way of eliminating social support by minimizing government spending and market regulation, replacing them with individualized solutions and notions of proportionate opportunity. Ultimately, neoliberalism advocates for free markets in which public services and social goods, such as health care and housing, become commodities (Knuttila, 2022). It posits that everyone may participate in these markets if they acquire the capital necessary to do so,

which, apparently, simply involves working hard enough (Ramos and Stanbridge, 2012). In practice, however, neoliberalism polarizes income levels, often to the point that disadvantaged groups can no longer afford to meet their basic human needs (Donnan, 2014), and with minimized social support, the gravity of these issues is magnified.

The myth of meritocracy is deeply intertwined with neoliberal ideology, as it justifies rolling back social supports and rolling out individualized solutions for social issues. Meritocracy describes a system in which one gains access to opportunities and resources through their individual skills and abilities (Ramos and Stanbridge, 2012). Within this framework, it is assumed that opportunities for and success within education, work, income, and social connection are granted based on effort and skill. Thus, if someone has high social or class status it is seen as the result of their individual competence, regardless of their pre-existing access to resources and capital. Similarly, if one struggles with unemployment, or is unable to find housing, it is presumed to be the consequence of an individual failure, which must be rectified by individual means (Ramos and Stanbridge, 2012). For this reason, houselessness is often viewed as the result of a deficiency in competence. The pitfall of meritocracy is that it fails to consider one essential truth which is guaranteed by existing systems: we do not all start out on an even playing field. Thus, when social goods are replaced with free markets, the existing resources of more privileged groups increase twofold, while the less advantaged are expected to create their own solutions.

The Canadian Social Housing Program

The Canadian social housing program is an important example of a social support program that has been slashed under a neoliberal government (Begin, 1999). Over the time

period when it was in effect, the Federal Co-operative Housing Program built nearly 60,000 homes for low-income Canadians, ensuring access to housing for those at risk of losing it. Mulroney's federal government terminated the housing program in 1992 and froze social housing expenditures completely in 1993 (Begin, 1999). The Federal Co-operative Housing Program is only one of many social support programs terminated due to the shift towards neoliberalism in Canada.

In lieu of a social housing program, the Canadian government currently implements external funding models, often on the provincial and municipal levels. In Vancouver, this consists of minimal funding in the form of *Homelessness Services* (HS) Grants, which are given to community partners who are expected to offer necessary services. HS grants are intended to provide funding to Vancouver-based non-profit organizations which host events and run projects to support those experiencing homelessness in Vancouver (City of Vancouver, 2025). The 2024 HS Grant Report shows that 34 applicants applied for grants, with a total funding request of \$99,920. The Grant Report reflects that the council of Vancouver was recommended to approve funding of \$43,000 to be allocated to 17 of the 34 non-profit organizations, each receiving a maximum of \$3000. (City of Vancouver, 2024). Thus, the amount of funding recommended for approval was less than half of the already shockingly low amount requested by non-profit organizations striving to support the unhoused.

A common argument in defence of this approach to cutting social programs and funding external organizations is that it is more efficient. The argument often goes as follows: governments have thousands of issues to address, and a limited capacity to do so. Instead of

addressing each issue directly, governments can save time and money by funding external organizations who work to solve certain issues. This ensures that governments can focus their time directly on the issues deemed most important, while others still receive attention from the organizations that are funded to address them. This argument would suggest that, instead of funding a federal social housing program, it is more efficient and fiscally responsible for provincial and municipal governments to provide funding to non-profit organizations designed to support low income and unhoused people. However, as we can see by analyzing the amount of funding provided through HS grants, these organizations are underfunded and lack sufficient resources. In contrast, government agencies including municipal police continue to receive disproportionately generous funding to police unhoused populations instead.

The City of Vancouver's Response

In April of 2023, the Vancouver Police Department (VPD) spent \$409,536 and allocated dozens of police officers to assist city crews in an eight-day long decampment project, during which unhoused peoples, their tents, and their belongings were forcefully removed (Howell, 2024). This single project aimed at displacing unhoused people in the Downtown Eastside received over 9 times the amount of funding that was allocated for HS Grants for the entire year in 2024. With a funding disparity this significant, it becomes clear that the government's focus lies in policing the unhoused, rather than supporting them. Friedman explains this attitude perfectly; we do not want the unhoused around, and yet, housing and feeding them is expensive and we do not want to pay for it. Thus, we call the police to make them go away (2022).

When explaining the decampment project, the Mayor of Vancouver, Ken Sim, stated that, “our commitment to the safety and well-being of our community guided our decisions to address encampments in the Downtown Eastside in April 2023...” (Howell, 2024). Citing concern for community well-being as the cause of the decampment project, Sim frames unhoused encampments as public safety hazards (Howell, 2024). Unhoused people and their encampments are commonly constructed as dangerous and unsanitary, which contributes to the idea that they pose a threat to the public. The perceived threat that unhoused populations pose is often over-emphasized, meanwhile the real dangers of being unhoused are disregarded. Consequently, the response to houselessness often consists of increased policing, which further stigmatizes unhoused populations. Constructing encampments as harmful and unsafe to the broader community, while ignoring the lack of access to safe and affordable housing, works to justify this criminalized response (Brimoh et al. 2023) and maintain the ideologies which fuel the underfunding of social supports and overfunding of policing.

In February of 2025, Vancouver Mayor Ken Sim and Police Chief Adam Palmer announced a \$5 million funding boost for the VPD, with the goal of increasing police presence in the Downtown Eastside; the area where the unhoused population has become most concentrated. Sim and Palmer described the funding boost as a “long-term initiative to dismantle organized crime” (Fumano, 2025). Once again, citing crime prevention as the main objective for increasing police presence in an area with a large population of unhoused people directly links their presence with criminal activity, further criminalizing the unhoused and justifying their displacement. This approach rarely does anything other than momentarily patch the issue, because houselessness is a chronic condition and chasing the unhoused away is only a temporary solution (Friendman, 2022). The unhoused will continue to occupy public space when they lack

access to private space; thus, a meaningful solution would require adequate shelter. Unfortunately, neoliberal spending seems to only afford band aid solutions. When explaining the VPD's funding boost, Sim stated that "from a fiscally responsible perspective, it's probably the best investment we can make." (Fumano, 2025), revealing his approach of funding what is seen as the most cost efficient, rather than effective.

It is not only under-funding and over-policing that drives the criminalization of the unhoused. In 2019, a surge of urban designs began appearing in Vancouver, which reflect a hostile attitude towards unhoused people (Mussett, 2019). These designs include spiky or wavy metal installments placed on ledges, colourfully painted boulders placed under shop awnings, and arm rests placed in the middle of benches. While the City of Vancouver states that these designs are for artistic or practical purposes, they conveniently prevent people from lying down, sleeping, or seeking shelter on benches and under covered areas. Vancouver's assistant director of development planning Jason Olinek states that he is not aware of any policy implicitly or explicitly designed to be hostile towards unhoused people. Olinek does, however, mention that the city analyzes projects through the *Crime Prevention Through Environmental Design* (CPTED) framework. This framework's aim is to eliminate design features that may elicit illegal activity, such as loitering (Mussett, 2019). Public architecture, then, is designed to discourage the presence of people who are perceived as criminal threats. Since unhoused populations are criminalized, the development of architecture aimed at discouraging criminal activity is also aimed at discouraging the presence of unhoused people. Citing crime prevention as the objective of developing hostile architecture thus functions as a loophole for implementing anti-houseless designs.

The Criminal Justice System and the Unhoused

Some may argue that assumed drug use and engagement with other criminal activity justifies public safety concerns and police-based approaches to houselessness. To address this argument, we must analyze the nature of intersection between unhoused populations and the criminal justice system. According to Public Safety Canada (2008), unhoused people are most likely to be charged with property-related offences which meet survival needs. The most common forms of property crimes involve commercial theft and trespassing. Commercial theft in this context involves shoplifting items like food, clothing, and hygiene products, as well as items to be re-sold for cash. Trespassing often takes place on abandoned properties, where unhoused people seek to fulfil their need for shelter, especially in the colder winter months when the streets become increasingly inhospitable (Public Safety Canada, 2008). Much of the property crimes committed by unhoused people are committed as a means of survival. With access to safe housing, the need to commit such crimes would decrease by no small measure.

Unhoused people are also most frequently charged with violations of municipal bylaws, such as loitering and panhandling (Public Safety Canada, 2008). Terence Lester (2023) outlines two groups of municipal bylaw ordinances which target unhoused populations: Anti-Homeless Ordinances and Quality of Life Ordinances. Anti-Homeless Ordinances prohibit activities such as standing, sitting, and resting in public spaces, as well as camping, panhandling, and food-sharing. It is important to note that these ordinances often prohibit activities that people engage in daily within their own homes. No one bats an eye when you spend your Sunday laying on your living room couch. It is not an issue when you pitch a tent in your backyard or pay to do

so in a provincial park. People often ask their friends and acquaintances for money to fundraise to meet a personal goal, or to help a loved one in need. It is considered an act of kindness when you share your extra cookies with your neighbour. When these activities are enacted in public space by someone unhoused, though, they become bylaw violations. Thus, we see that unhoused people are criminalized simply for having no access to private property. Quality of Life Ordinances include activities that are linked to behaviours deemed uncivil, such having a dog off leash, smoking in parks, or drinking in public (Lester, 2023). Although many people partake in these activities daily, unhoused people are disproportionately targeted because of increased visibility.

Unhoused people that are involved in drug-related offences are often charged with possession for personal use (Public Safety Canada, 2008). I must note that drug detoxification and treatment programs are difficult to access. In many cities including Vancouver, treatment centres lack resources and are backed up with long waitlists. Additionally, the results of treatment are generally short lived when clients are released to the streets without stable housing (Public Safety Canada, 2008). The issue of substance use is an important and nuanced one which has become increasingly relevant in Vancouver; however, this paper lacks the resources to properly analyze this issue. Instead, I suggest that it is important to consider that struggling with substance use issues does not make one disposable. Substance abuse is an illness which, like any other, requires adequate treatment and compassion. Unhoused people who struggle with substance use deserve to be housed, a condition which is necessary for lasting recovery (Lester, 2023).

Being unhoused is often a condition which fuels engagement in the aforementioned offences and makes rehabilitation much harder. Therefore, attempting to reduce involvement by

increasing policing is inadequate, because policing does not effectively address the issue of being unhoused. Additionally, the view that unhoused people are inherently dangerous and undeserving of help overlooks the human worth, value, and belonging of unhoused people, and encourages the notion that they deserve to be unhoused and/or discarded (Lester, 2023).

While neoliberal ideology has a significant hand in criminalization and displacement, so too does settler colonialism. We must acknowledge that houselessness only exists within the framework of land ownership where there is a distinction between private and public property, allowing people to be excluded from property which is private and restricted within that which is public. This division emerged in Canada through the process of settler colonialism, when land was divided and relationships with land were restricted to the relationship between an owner and their property (Brimoh et al. 2023). Assertion of private property has thus functioned to allow colonizers to displace Indigenous peoples and claim their land, making existence on or passage through unceded territory a legally punishable offence (Gardner and Ansloos, 2022).

The privatization of housing depends on the privatization of land as property; thus, houselessness as a social phenomenon was born out of the settler colonial process. Just as the development of private property has been (and continues to be) used to restrict and outlaw Indigenous presence, it excludes unhoused people from shelter, banishing them to public spaces, where they are targeted and policed. Unhoused presence is restricted within public spaces when cities pass laws and policies that prohibit unhoused people from occupying them. Governments do not implement laws and policies that explicitly state their aim to restrict unhoused people from using public space. They do, however, fund police task forces aimed at dismantling unhoused encampments under the guise of protecting public safety, and implement policies such

as the CPTED framework, which focus on eliminating architecture that provides room for sleeping, which, apparently, elicits illegal activity.

Conclusion

In this paper I have explored how neoliberal and settler colonial frameworks in Canada criminalize the unhoused and justify a police-centred response, rather than one focused on rehabilitation. While some may argue that assumed involvement with criminal activity justifies police-based approaches, I argue that the majority of the crimes that unhoused people commit stem from being unhoused, and thus addressing these crimes requires adequate rehabilitation efforts. Police-based approaches punish unhoused people for committing crimes of survival, which does not address the issue of being unhoused and is therefore ineffective. Moving forward, there are plentiful things which offer promising steps towards re-housing our neighbours: further literature critically analyzing neoliberal and settler-colonial ideologies and policies, as well as how political actors criminalize and socially construct unhoused populations, social movements aimed at destigmatizing unhoused people, and transformative policies striving to house and rehabilitate them.

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The Politics of Inequality

| The Psychological and Educational Impact of Violence on Palestinian Children

Malk Ouj

Keywords: *Palestinian children, trauma, occupation, education, identity, structural violence*

This article explores how structural violence under Israeli occupation affects the psychological development and educational experience of Palestinian children. Drawing on developmental psychology, human rights reports, and trauma studies, this paper argues that chronic exposure to military surveillance, displacement, and fear creates a pervasive environment of emotional distress. It begins by mapping the everyday conditions of structural violence, checkpoints, home raids, and school disruptions, and then traces how these conditions produce psychological trauma, including PTSD, anxiety, and learned helplessness.

The paper demonstrates how trauma directly impairs learning, disrupts classroom engagement, and erodes a child's connection to identity and the future. By framing trauma not as a byproduct of conflict but as an embedded, structural force, the analysis presents the ways in which occupation interrupts childhood, the generational continuity of culture, aspirations, and mental health. Understanding this psychological cost is crucial to any conversation on justice, education, and the future of Palestinian society.

Introduction

In the occupied Palestinian territories, childhood unfolds in a context shaped by military control, instability, and systemic restrictions. For many Palestinian children, life is dominated by checkpoints, constant surveillance, and the persistent threat of violence. These conditions are not temporary or exceptional. Unlike many global conflict zones marked by state collapse or sporadic violence, the Israeli occupation is institutionalized through formal legal, military, and bureaucratic systems. This structural entrenchment makes daily hardship a predictable and enduring aspect of childhood in the occupied territories and embeds political violence into the most intimate aspects of everyday life. These realities are part of a broader political system that reaches into homes, schools, and public spaces, influencing how children grow, learn, and relate to the world around them.

This paper examines how Palestinian children living under Israeli occupation experience chronic emotional distress, such as fear, anxiety, and grief, all stemming from prolonged exposure to structural violence. It argues that this trauma not only disrupts psychological development and impairs learning but also severs children's connection to cultural identity, erodes their sense of belonging, and undermines their ability to envision a meaningful future.

Early childhood represents the formative stage in which emotional resilience begins to develop. When those years are marked by instability and trauma, the impact is not only personal, but collective. Understanding how occupation shapes the inner lives of Palestinian children offers a deeper view into how political violence operates beyond physical force. It reveals the psychological cost of ongoing conflict, and how it shapes the generation that inherits it.

Everyday Realities

Children in the West Bank and Gaza Strip live under a military occupation that structures their daily routines, interrupts their access to education, and exposes them to repeated trauma (Thabet & V Ostanis, 2012). These are not occasional incidents. They are the foundation of their environment. A study of preschoolers in Gaza found that 98 percent had directly heard the sound of shootings, 88 percent had personally witnessed shooting, and 89 percent had seen images of mutilated bodies on television (Thabet & V Ostanis, 2012). This exposure is not limited to passive observation. Many children have lost family members, experienced home raids, or witnessed military operations in their neighborhoods (B'Tselem, 2022). Massad et al. (2011) found that 65 percent of mothers in their study reported that their children showed severely impaired emotional and psychosocial functioning. Their children's health-related quality of life (HRQOL) scores was not only lower than those of children in the United States, but also lower than scores among children with chronic illnesses in other low-income contexts.

What does this mean? It means that violence does not simply interrupt children's lives but rather it defines them. It penetrates the very architecture of daily life, producing a generation for whom instability is the norm. Observing these effects as more severe than those found in other low-income conflict-affected areas shows that what is happening in Palestine is not a generic tragedy of war, but a particular system of political violence.

These conditions interfere with childhood development. Chronic exposure to violence alters how children understand safety, trust, and social connection. It creates a baseline of anxiety and hypervigilance, which disrupts emotional regulation, memory, and attention—core components of both learning and identity formation. Children raised in continuous stress develop

altered neural pathways associated with emotional regulation and attachment (Qouta et al., 2007), making their ability to bond with others or focus in school more fragile.

Access to education is also shaped by the occupation. School attendance is often interrupted by curfews, military operations, or settler harassment. Ramahi (2015) notes that political instability not only disrupts physical access to schools but also alters their internal structure. The imposed curriculum, combined with militarized settings and limited pedagogical freedom, creates an environment that stifles emotional development and critical thought. Many parents choose to withdraw their children from school—especially girls—due to checkpoint risks or fear of harassment. This compounds psychological trauma with educational loss.

Trauma and Mental Development

Psychological trauma in childhood is not limited to sadness or fear. It includes long-term disruptions to memory, emotional regulation, learning, and identity formation. In the case of Palestinian children, the effects of trauma are especially severe because the conditions that produce it are ongoing and unavoidable.

In Gaza, where more than half the population is under the age of 18, studies consistently show high levels of PTSD, anxiety, and behavioral difficulty. Thabet et al. (2014) found that 60.5 percent of children surveyed showed moderate or severe PTSD symptoms. Common reactions included nightmares, hypervigilance, and fear of being alone. These are not isolated emotional events. They represent how fear becomes a child's default mode of being.

This leads to difficult questions. What kind of adult emerges from a childhood of constant anxiety? These are not just psychological hurdles. They alter how a child sees themselves, others, and the world. Massad et al. (2011) showed that emotional distress in preschoolers was linked to

lower scores in both physical and psychosocial health. These children struggled with memory, attention, and impulse control—skills critical for learning.

When trauma impairs a child's capacity to focus or self-regulate, they cannot fully engage with school or with the broader social structures that education connects to. Ultimately, when these psychological injuries are left unacknowledged, they quietly calcify into the adult psyche.

Effects on Education and Learning

For many Palestinian children, school does not provide the emotional refuge or structure it ideally should. Instead, educational spaces often reflect the instability and fear present in the broader environment. Continuous exposure to violence shapes students' emotional states, interferes with concentration, and inhibits cognitive development, these are all factors that are essential for meaningful engagement in learning.

Empirical studies support this link between trauma and academic disruption. Al-Krenawi et al. (2009) found that repeated exposure to political violence in Gaza was associated with significantly lower academic achievement and increased dropout rates. These outcomes highlight how trauma undermines not only mental health but also children's educational trajectories. Beyond psychological stress, schools in the West Bank and Gaza often face infrastructural and resource-related constraints. Overcrowded classrooms, inadequate learning materials, intermittent electricity, and damaged buildings are common. In some cases, schools have been used as temporary shelters during military escalations, further disrupting routine and safety. These conditions compromise both the learning process and students' sense of security.

Teachers are also affected. Many have experienced trauma themselves and are tasked with managing both educational responsibilities and the emotional needs of their students

without proper training or support. Children with trauma-related behavioral issues or learning difficulties are often mislabeled as defiant or inattentive, rather than being recognized as needing specialized care—care that is typically unavailable in these settings.

The long-term effects are considerable. Students subjected to prolonged fear and instability often leave school with diminished confidence, underdeveloped academic skills, and unresolved psychological stress. Girls are disproportionately impacted, with many withdrawn from school due to fears surrounding checkpoints or family concerns about safety. These gendered patterns of disengagement further entrench inequality and limit long-term opportunities. In this context, the classroom becomes not a site of growth, but another domain affected by the broader political and structural violence of occupation. Educational deprivation thus becomes one of the most enduring and overlooked consequences of childhood under occupation.

Identity and Belonging

The trauma of occupation does not stop at disrupting mental health or education. It penetrates the core of identity formation, shaping how children understand themselves, their community, and their place in the world. In early childhood and adolescence, identity is formed through relationships, language, routine, and cultural memory. But for Palestinian children living under military occupation, these developmental building blocks are consistently undermined. Home is often unstable, public spaces are surveilled, and educational materials may be censored or disconnected from Palestinian history. As a result, children struggle to form a stable sense of self. Thabet et al. (2014) found that adolescents who experienced trauma reported difficulty with long-term planning, emotional regulation, and attachment to others.

Khamis (2015) also observed that children and adolescents living under siege exhibited emotional detachment and a narrowed view of the future. Many were not simply struggling with emotional pain but had internalized a worldview in which aspirations felt unrealistic. This is not a sign of personal failure but an understandable psychological adaptation to an environment where unpredictability, threat, and restriction are constant.

The erosion of cultural connection further destabilizes identity. When families are displaced or fragmented and traditional narratives are excluded from formal education, children are cut off from their historical and communal roots. This absence can leave young people feeling unanchored. However, amid this fragmentation, some children still find ways to reclaim their voices. The Tamer Institute for Community Education, for example, creates spaces for young people to write, draw, and reflect. These acts of expression allow children to construct personal narratives that defy the silence and restriction imposed upon them. As one student from Jerusalem reflected, “I was merely a student living with hopes, dreams, and personal identity. I always doubted that one day I’d be able to express it” (Tamer Institute, 2020). Her statement captures a fundamental truth about growing up under occupation: voice itself becomes a form of resistance.

Despite the profound emotional and structural challenges they face, many Palestinian youth continue to show forms of resilience that are rarely acknowledged in public discourse. This resilience does not imply recovery or emotional ease. Rather, it reflects an ability to navigate a daily environment shaped by control and unpredictability. Young people continue to attend school when they can. They care for siblings. They participate in cultural and religious life. They assert their identity in subtle, meaningful ways even when doing so carries emotional or physical risk.

These children are not passive recipients of trauma. They grow into individuals who resist the fragmentation imposed on them by asserting connection, memory, and care. Some become educators, artists, or community workers who guide others through the same systems they endured. Others challenge the occupation directly through documentation, scholarship, or organizing. In each case, they resist not only the occupation of land, but also the occupation of mind and narrative. They challenge the systems that tell them who they cannot be, and in doing so, affirm a future rooted in dignity, memory, and shared struggle.

Conclusion

The psychological impact of the Israeli occupation on Palestinian children cannot be understood in isolation from the broader structures that produce it. This paper has shown that trauma is not a byproduct of war or conflict alone. In the Palestinian context, it is embedded in daily life—shaped by checkpoints, military incursions, home demolitions, disrupted schooling, and the erosion of cultural identity.

These experiences do not simply create moments of distress. They shape how children think, feel, learn, and imagine. The effects are long-term and cumulative. Emotional regulation, cognitive development, and self-perception are all compromised when a child grows up in an environment that offers neither safety nor continuity. For many, education is not a stable path forward but another space shaped by instability. Identity is formed not through exploration and freedom, but through interruption, censorship, and inherited grief.

Yet despite these conditions, Palestinian children and youth continue to assert themselves—through persistence in school, participation in community life, creative expression, and care for others. These acts should not be romanticized, but they must be recognized. They

reflect not only resilience, but a refusal to surrender meaning, memory, and hope in the face of structural violence.

Understanding trauma in this context requires acknowledging that healing cannot occur without justice. No intervention in mental health, education, or development can succeed while the underlying system of occupation remains intact. If children are to grow into adults with the psychological resources to contribute to their communities, they must first be granted the right to live without fear, restriction, or erasure.

The future of Palestinian society depends not only on material reconstruction but on the restoration of emotional and psychological foundations. That work begins by listening to those who have grown up carrying more than their share of silence, and by recognizing that the right to belong, to learn, and to imagine should never be conditional.

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The Politics of Inequality

| A Gender-Based Policy Analysis of Violence Against Women in India

Simran Sekhon

Keywords: *Violence against women (VAW), gender-based policy, patriarchy, intersectionality, legal reform, structural inequality*

This paper explores the pervasive issue of violence against women (VAW) in India through a gender policy analysis framework. It argues that VAW is deeply rooted in patriarchal systems that view women as subordinate and deny them autonomy, which is further reinforced by legal, social, and cultural structures.

Using a case study approach, the paper investigates key manifestations of VAW in India, including female foeticide, child marriage, acid attacks, and honour killings, and analyzes how intersecting factors such as class, caste, religion, and rural living exacerbate women's vulnerability. The methodology includes a critical evaluation of existing policies like the Pre-Natal Diagnostic Techniques Act, the Prohibition of Child Marriage Act, and the Criminal Law (Amendment) Act, assessing both their strengths and limitations. Despite the presence of legal frameworks in India, poor enforcement, corruption, and social complicity continue to undermine progress.

The paper concludes that while awareness has grown in these policy areas, implementation remains weak. It recommends institutional capacity-building, inter-agency collaboration, and increased funding for gender-based programs to improve survivor support, prevention, and legal redress. Ultimately, addressing VAW in India requires a holistic and intersectional policy response that dismantles entrenched gender hierarchies and empowers women as autonomous individuals.

Introduction & Overview of Gender Issues

Violence against women (VAW) is deeply intertwined with systems of power, control, and the objectification of women for societal or familial interests. Gender-based violence extends beyond physical acts of aggression, encompassing verbal, instrumental, psychological, economic, and social forms of harm (Harbishettar & Math, 2014). At its core, it is a violation of basic human rights. Rather than a number of isolated incidents, violence against women is a reflection of patriarchal structures embedded in social expectations, cultural traditions, policies and the law, and institutions that perpetuate these notions (Yadav, 2023). These systems actively contribute to gender inequality by consistently placing men in positions of power, and defining the status of women in relation to their roles as daughters, wives, or mothers. VAW thus functions as a mechanism of control and oppression, silencing a woman's right to self-determination by deeming her incapable of choosing her own identity and life outcomes.

In India, these patriarchal systems have historically prescribed rigid gender roles and reinforced women's subordination through customs and social norms that prioritized men's authority and women's dependence. Despite constitutional guarantees of equality and some progressive gender laws, these structures continue to shape women's experiences of discrimination and violence in a country that is home to one of the world's largest female populations (Lawrence & Hensley, 2023).

This paper examines the issue of violence against women through a focused case study of India, analyzing existing gender policies and the broader socio-cultural and economic conditions that influence them. India offers a compelling context due to its expansive legal protections for gender justice and the persistent implementation gaps that undermine its effectiveness. The paper

concludes with policy recommendations aimed at advancing gender equality and dismantling entrenched patriarchal norms.

Case Study: Historical Context, Factors, & Implications

India's current gender landscape cannot be understood without acknowledging its historical and cultural foundations. Practices such as dowry, child marriage, preference for the birth of sons, educational and employment restrictions on women's agency, and the historical custom of *sati* – where widows were coerced to immolate themselves on their husbands' funeral pyres – illustrate how women's social worth was long tied to male authority, reputation, and family honour (Lawrence & Hensley, 2023). Although *sati* was officially banned in the late 1980s, the ideology that a woman's identity and virtue are defined by her relationship to men still persists. Reinforced by the illusion of preserving traditional values, the model of femininity emphasizing domesticity, dependence, and purity has continued to shape societal expectations and justify gendered control in the country.

First, the *Indian Constitution* guarantees equality before the law and equal protection of the laws under Article 14, establishing a foundational principle that no individual should face arbitrary discrimination. Article 15 explicitly prohibits discrimination on grounds of religion, race, caste, sex, or place of birth, signalling an intent to eliminate the structural inequalities. Together, these provisions represent a constitutional vision of substantive equality that sought to dismantle patriarchal and caste-based hierarchies; however, their implementation has often fallen short of transforming social realities (Lawrence & Hensley, 2023). In addition, laws such as the *Protection of Women from Domestic Violence Act* (2005) and the *Prohibition of Child Marriage Act* (2006) demonstrate legislative attempts to address gender-based violence.

However, deep-rooted patriarchy often renders these laws ineffective in practice. The intersectionality of sexual orientation, class, religion, caste, socioeconomic level, culture, and rural living heightens the oppression that these women endure, and creates a poly crisis of multiple political, social, and economic shocks (Yadav, 2023). For instance, Dalit women face a dual oppression that is both gendered and caste-based, increasing their risk of sexual violence, often with little recourse due to societal and institutional apathy (Mukhopadhyay & Chanda, 2022). Muslim women, especially in conservative settings, may face community-specific restrictions on mobility, financial independence, and education. Women in conflict zones may be especially vulnerable, where law enforcement is weak and sexual violence is used as a weapon of control (Mukhopadhyay & Chanda, 2022). Ultimately, long-term implications for these pervasive issues cause physical, psychological, and sexual harm on the victims. The persistence of patriarchal practices suggests that legal reforms have been primarily symbolic, functioning as tools of international legitimacy and recognition rather than instruments of structural change affecting lived realities. This discrepancy exposes how the Indian state's gender policies often operate within a patriarchal logic, prioritizing public image and modernization narratives over grassroots empowerment.

Second, India has record numbers of sex-selective abortions, and the UNFPA 2021 report estimates that approximately 460,000 girls are missing at birth each year due to female foeticides (Yadav, 2023). This refers to the deliberate killing of a fetus through the termination of pregnancy, due to the reason that the gender of the unborn child is female. Therefore, the female to male sex ratio of the country is skewed. Despite laws such as the *Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act* (1994) which criminalize the use of ultrasound technology to determine fetal sex, weak enforcement, and corruption especially in rural regions

allow the practice to continue (Lawrence & Hensley, 2023). This reflects the limitations of legal interventions and the enduring patriarchal preferences for sons as well as the overt pressure towards women to produce male heirs to the family’s inheritance. The persistence of sex-selective abortions reflects the deep-seated commodification of women’s reproductive roles.

Rather than being autonomous citizens, women are valued in terms of their contribution to patrilineal inheritance. This points to how patriarchal capitalism intersects with modern technology to perpetuate gendered violence, especially through covert medicalized discrimination.

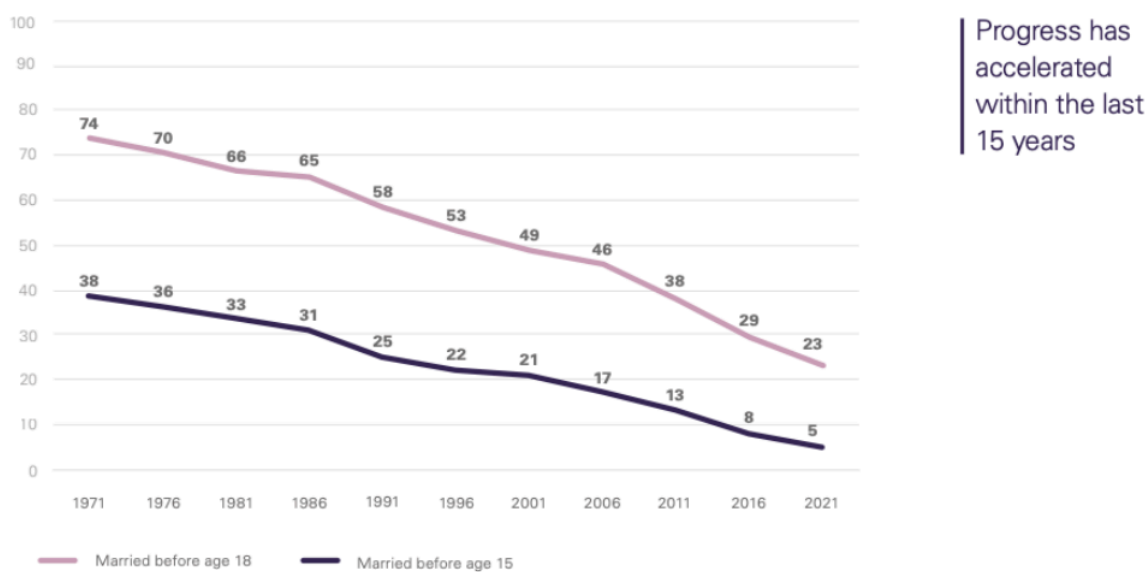


FIG. 17 Percentage of women aged 20 to 24 years who were first married or in union before ages 15 and 18

As pictured above, while India is progressing in reducing the numbers of forced child marriages, the country still has the largest total number of child brides in the world married before the age of 18, accounting for approximately 34% of the global data (United Nations Children’s Fund, 2023). A woman’s risk of being forced into child marriage is exacerbated by economic pressures, lack of education, and residing in northern Indian states like Uttar Pradesh,

Bihar, and Rajasthan (Yadav, 2023). These marriages are tied to dowry practices to relieve the family of financial stress, as girls are viewed as a burden and liability. Institutional failure by local law enforcement and community pressure based on traditions and customs contributes to systemic inequality. For child brides, early pregnancies and childbearing is typical around adolescence, and the likelihood of these women completing their education declines (United Nations Children's Fund, 2023).

The large age gap between the man and the woman presents an unbalanced power dynamic due to a difference in educational levels, financial security, and expectations of traditional responsibilities and gender roles. Most women are not welcome to divorce their partner or return home to their parents, and cannot find social support either to gather the courage to leave (Sabri & Rameshkumar, 2022). Therefore, threats and duress by husbands are common, and domestic violence also becomes more prevalent as women lack the knowledge or agency to consult legal action, even justifying its use at times (Sabri & Rameshkumar, 2022). The culmination of these issues allows men to assert dominance in the relationship, and use women only for nonconsensual sex or bearing children. Thus, child marriage should not be understood solely as a cultural relic but as a structural mechanism through which economic precarity and gendered dependency are managed. Legal frameworks targeting the symptom without addressing root causes, such as dowry, inheritance inequality, and women's unpaid labour, can only produce surface-level change.

Another gender-based issue in India concerns acid attacks, often committed by men seeking revenge against women rejecting romantic or sexual advances, marriage proposals, or attempting to leave abusive relationships (Lawrence & Hensley, 2023). In these cases, acid is thrown on the woman in an attempt to 'mark' them permanently and destroy their value relative

to beauty and marriage proposals. India reports more than 200 acid attacks annually and accounts for over half of all global acid attacks (Acid Survivors Foundation India) (Yadav, 2023), with many more cases unreported due to stigma, fear, and a lack of trust in the legal system. A well-known case is of Laxmi Agarwal, a 15 year old attacked in 2005 in Delhi by a man twice her age after rejecting a marriage proposal (Lawrence & Hensley, 2023). Her prominent advocacy and media coverage of the case led to a Supreme Court ruling in 2013 regulating acid sales and mandating compensation for survivors, yet the chemical substance remains widely accessible in open markets and medical support for survivors is inadequate. While *Indian Penal Code* (IPC) sections 326A and 326B criminalize acid attacks, the National Crime Records Bureau data reports conviction rates at only 20-30% (Harbishettar & Math, 2014).

These attacks represent a systemic method of punishing women for exercising agency, particularly in the context of rejecting male authority and dominance. The disfigurement, trauma, and social isolation that follow serve as tools of long-term control, leaving survivors with no access to justice, livelihood, or healthcare. In this way, acid attacks function to terrorize women into submission and reinforce deeply patriarchal norms that define their value through appearance and subservience. They reflect a gendered regime of control where women's autonomy is met with violence intended to permanently mark deviation from submissive norms. The low conviction rates highlight how the legal system not only fails to protect women but also reproduces gender hierarchies by normalizing male impunity.

Lastly, an extreme form of gender-based violence in India is honour killings, which are murders carried out to protect a family's honour. These are triggered by inter-caste or inter-religious marriages, premarital relationships or pregnancies, or a woman's defiance with family-imposed norms or marriages (Mukhopadhyay & Chanda, 2022). The woman is perceived

as bringing shame and dishonour to the family and tarnishing their reputation in society, further confirming the nation's perceived supremacy of men (Mukhopadhyay & Chanda, 2022). The latest available data reports 25 cases of honour killings in India each in 2019 and 2020, with the number rising to 33 cases in 2021 (Harbishettar & Math, 2014). It is important to note that these are not entirely accurate numbers; many killings are underreported or labelled as suicides and accidents.

Additionally, *khap panchayats*, informal legal caste councils in states like Haryana, Uttar Pradesh, and Rajasthan, play a central role in regulating community matters like marriage and gender norms (Lawrence & Hensley, 2023). They were formed with the intention to resolve disputes at the village level, before formal courts were accessible. While *khaps* have no legal authority under Indian law, their influence persists in rural areas due to social conditioning, lack of education, and fear of social ostracization. They endorse and justify honour killings, which normalizes this act for local families (Yadav, 2023). The Supreme Court of India has declared *khap*-ordered killings illegal and a violation of constitutional rights, yet local police avoid intervention due to political pressure and caste loyalties. Ultimately, honour killings illustrate the collision between formal legal modernity and informal patriarchal governance. The endurance of *khap panchayats* signifies that authority over women's sexuality remains privatized within family and caste structures, where state institutions defer to social norms rather than rights-based frameworks. This highlights the state's selective enforcement of law, one that prioritizes social stability over gender justice.

Thus, India remains regressive in its treatment of women due to the tension between progressive legal frameworks and patriarchal customs that continue to dictate women's roles and punish deviation through cultural and social dominance. Ultimately, the persistence of these acts

of VAW reflects a justice system that fails to deliver swift or adequate punishment, along with societal attitudes that condone or minimize violence against women. Victims are often blamed or stigmatized, and perpetrators are supported by family and community structures, reinforcing a cycle of impunity. Collectively, these forms of violence demonstrate how women in India are denied individual agency at every stage of their life – controlled first by fathers, then by husbands, and finally by sons. The Indian state simultaneously promotes gender equality as a marker of modernization while enabling patriarchal governance at the local level. Women's bodies become sites where the tension between law and custom is negotiated, often to their detriment. True reform thus requires not only legal instruments but a reimagining of citizenship that centers women as agents rather than dependents within the national order.

Evaluation of Existing Gender-Based Violence Policies

Legal systems in India marginalize women through lengthy trials and court cases, slow policing procedures, hostile cross-examinations, disbelief and doubt in women's claims, and even acquittals or light sentences for the guilty. The experiences of many women are silenced, and they are victim-blamed for their circumstances. For example, with regard to acid attacks and gang rapes, the question is often what clothes the woman was wearing, what time of day it was, and whether she provoked any man to commit those actions (Lawrence & Hensley, 2023). This resurfaces psychological trauma for the women, and ultimately discourages other victims from pursuing justice for themselves. As such, the following analysis will examine current policies, identify their strengths and weaknesses, and their impacts on gender inequality.

The *Pre-Conception and Pre-Natal Diagnostic Techniques Act* (1994) prohibits sex selection before or after conception and regulates the use of prenatal diagnostic techniques

(Harbishettar & Math, 2014). The strengths of this policy are that its scope covers diagnostic centres and health practitioners, requires the mandatory registration of ultrasound machines, and penal provisions include being convicted in jail and the suspension of one's license. On the other hand, one weakness of the legislation includes poor implementation and enforcement, which leads to a mismatch between conviction rates and illegal sex-selective abortions. Authorities fail to monitor clinics efficiently, which operate due to bribery, corruption, and connections in society, and often bypass national healthcare and human rights standards and laws. Ultimately, this policy fails to enhance gender equality by ignoring the loopholes or gaps where corrupt individuals can continue to engage in female foeticides, either by requesting the procedure or performing it. It does not directly address the patriarchal systems that place a stronger importance on sons over daughters.

Secondly, child marriages remain illegal under the Prohibition of Child Marriage Act (2006) (Harbishettar & Math, 2014), which sets the legal age of marriage at 18 years for girls and permits such marriages to be voidable at the option of the minor. This empowers minors to annul marriages, punishes those who perform or permit child marriages, and appoints Child Marriage Prohibition Officers in each district. However, this law is not only ignored in rural areas of India, but the families of child brides and community leaders rarely face consequences due to political connections, caste ties, and status power in society (Mukhopadhyay & Chanda, 2022). Additionally, the implementation of child marriage laws is complicated by India's religious diversity, which recognizes separate personal laws for Hindus, Muslims, Christians, and other communities (Mukhopadhyay & Chanda, 2022). This leads to legal ambiguity between national civil law and protections of religious custom. In conservative or rural areas where religious leaders hold significant authority, this deters progress towards gender equality by legitimizing

child marriage, thereby reducing women's access to education, increasing the rates of child or adolescent pregnancies, and reinforcing financial dependence on men.

The Criminal Law (Amendment) Act (2013) (Harbishettar & Math, 2014) introduced Sections 326A and 326B to the *Indian Penal Code (IPC)* to specifically criminalize acid attacks and state them as “non-bailable offenses”, marking a significant legal acknowledgment of this gendered form of violence. Section 326A prescribes a minimum ten-year imprisonment for perpetrators who cause permanent or partial damage, deformity, or disfigurement to another person by using acid, and mandates that the offender bear the medical expenses of the survivor. Section 326B, on the other hand, criminalizes *attempts* to throw or administer acid, even when no physical harm occurs, recognizing the psychological terror and coercive intent behind such acts. Compensation for survivors is further supported through the Nirbhaya Fund, established after a 2012 Delhi gang rape case, to finance rehabilitation and medical care for victims of gender-based violence. Despite these provisions, conviction rates remain low, acid remains easily accessible for ordinary citizens, and victims are denied or delayed compensation from the Nirbhaya Fund in many cases (Harbishettar & Math, 2014). The legislation also fails to recognize the emotional and psychological harm that acid attacks result in; survivors face barriers to medical care and rehabilitation into society. The impact on gender equality is that survivors often remain stigmatized and unsupported in society, and find it difficult to continue education or work with an altered physical appearance.

While there is no standalone national law that criminalizes honour killings, individuals are punished under general homicide provisions (Section 302) of the *Indian Penal Code* (Harbishettar & Math, 2014). Additionally, the *Protection of Women from Domestic Violence Act* (2005) (Sabri & Rameshkumar, 2022) addresses both intimate partner violence and provides

protection to women from any kind of abuse that takes place within their family. The strengths of both of these policies are that they create judicial recognition of the issue, and courts have called for the dismantling of 'khap panchayats' through heavily enforced police action. However, the lack of a singular, uniform law that criminalizes honour killings creates a flawed judicial procedure for these cases. Local police often collude with families or khap leaders, which leads to perpetrators receiving minimal or no punishment. This signals the continued control over women's autonomy, and reinforces gender hierarchy in the nation. In conclusion, while there are legislative frameworks and policies that exist to address significant gender-based issues in India, they are poorly implemented and enforced due to a failure of applying legal ramifications to citizens. Legal reforms have efficiently raised awareness and public discourse, but have failed to follow through and provide tangible outcomes.

Recommendations to Enhance Gender Equality

Based on the analysis of current policies in India addressing VAW, several comprehensive and evidence-based reforms are urgently needed. These recommendations not only aim to strengthen protections for women but also directly address state capacity deficits such as the lack of institutional coordination, underfunding, and weak enforcement that undermine India's gender policies. An institutional and multi-stakeholder collaboration initiative is essential to foster an integrated and intersectoral response, as no single agency can effectively tackle the intersecting and systemic forms of gender-based violence in the country.

First, establishing inter-agency task forces at the state and district levels, comprising police officers, state-independent judiciary officials, healthcare professionals, welfare departments, women's commissions, local governments, and NGOs, would fill the existing

coordination gap. Currently, many cases of gender violence collapse due to fragmented communication between police, courts, and social services despite effective laws in place. Through joint task forces, information-sharing protocols and survivor-centered referral systems could be institutionalized, reducing bureaucratic delays and ensuring that victims receive timely medical, legal, and psychological assistance and rehabilitation services. This model not only enhances institutional efficiency but also redistributes the burden of enforcement across multiple state actors, relieving pressure on overstretched local police units and courts.

To operationalize this collaboration, increased funding, outreach capacity, and trained professionals must be directed toward District Legal Services Authorities (DLSAs), responsible for providing free legal aid to survivors of child marriages, acid attacks, and honour killings, many of whom currently have no access to independent legal counsel. This would provide equal access to justice in rural and low-income regions. A proactive measure that can be implemented are legal literacy camps and awareness programs to educate women about their rights and entitlements, further alleviating state capacity constraints by enabling women to self-advocate and improving reporting rates. Furthermore, investing in gender-responsive budgeting can help the state optimize the allocation of its financial resources and measure the effectiveness of its policies. By tracking expenditures on women's safety initiatives, such as crisis shelters, survivor rehabilitation programs, building more NGOs that employ women, and hosting workshops in community centres for advancing skill sets for women's financial independence and education, the government can make evidence-based adjustments rather than reactive spending. This approach directly addresses fiscal inefficiency, one of the core issues of weak governance. NGOs and women's organizations should also be financially supported to deliver localized programs such as life skills training, group therapy, and sex education in schools and post-secondary

institutions, extending state reach into communities that public agencies cannot consistently access.

An illustrative example of how coordinated models can strengthen state capacity is Maharashtra's Integrated Anti-Human Trafficking Units (IAHTUs) (Yadav, 2023). These units combine the efforts of police officers, NGOs, social workers, and child protection services. Since their expansion in 2011, the IAHTUs have been credited with significantly improving rescue rates, victim identification, and prosecution of traffickers. According to the Ministry of Home Affairs, over 1,300 IAHTUs have been established across India, and a 2019 evaluation reported that districts with active units saw a 20-30% increase in the number of trafficking survivors rescued and rehabilitated, compared to districts in the nation without them (Yadav, 2023). These units have also improved coordination between law enforcement and civil society, leading to more sensitive handling of victims and better post-rescue care.

By modeling broader anti-violence initiatives, such as domestic violence intervention units or acid attack response teams, on the IAHTU framework, India could create scalable, adaptable systems that alleviate administrative overload and improve policy coherence across sectors. These partnerships would not replace the state's role but rather reinforce it, allowing government agencies to work more efficiently with civil society. In doing so, they enhance the state's capacity to fulfill constitutional promises of equality and justice. Ultimately, such initiatives demonstrate that institutional collaboration and community partnerships are not only feasible but essential to transforming gender equality from a legislative ideal into an operational reality, one where women's safety, autonomy, and dignity are upheld through a capable and coordinated governance structure.

Conclusion

While there are a plethora of gender-based issues in India that were not discussed above, this paper emphasized and examined the key forms of violence against women. All of these issues in the context of violence against women reflect deep and pervasive structural inequalities. Even in more developed and progressive regions of India, many gender stereotypes, role expectations, and norms are deeply entrenched. The individuals that comprise a woman's social support system, including closest friends and family, tend to ultimately discourage them from pursuing legal routes. The cultural expectation is to suffer in silence and not question anything, as this exacerbates aggression and violence. However, this belief and the state's failure to legislate are the primary tools that feed into violence against women, and convey the state's reluctance to confront tradition and progress. Therefore, it is critical to implement a holistic policy that addresses the intersectional factors of violence against women, and establishes authority at state levels, and increases funding for women's safety programs.

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