POTENTIA

Journal of International and Public Affairs ▪ Fall 2023 ▪ Issue 14
Revue des affaires publiques et internationales ▪ Automne 2023 ▪ No. 14

Table of content | Table des matières

Foreword | Avant-propos

Dear readers,

With great pride, we present the fourteenth edition of the Centre for International Policy Studies (CIPS) graduate journal, *Potentia: Journal of Public and International Affairs*.

This year's issue brings together several research papers, policy briefs, and a book review, which dive into relevant societal, political, environmental, and theoretical issues discussing different topics, and opportunities in the international political sphere.

We were able to create the 2022-2023 edition of *Potentia* due to the efforts of the editorial team and the many reviewers who took part in the peer-review process. We want to thank each member of the editorial team for their dedication and commitment to this project. This is the fifth year using the peer review process, and we would like to thank each reviewer who supported this undertaking. In addition, we would like to thank Dr. Rita Abrahamsen, Former Director of CIPS, Dr. Alexandra Gheciu, Director of CIPs, and Dr. Anna Bogic, CIPS Centre Coordinator, for

Chers lecteurs et lectrices,

C'est avec une grande fierté que nous vous présentons la quatorzième édition de la revue du Centre for International Policy Studies (CIPS), *Potentia*: Journal of Public and International Affairs.

Le numéro de cette année rassemble plusieurs documents de recherche, des notes d'orientation et un compte rendu d'ouvrage, qui se penchent sur des questions sociétales, politiques, environnementales et théoriques pertinentes en abordant différents sujets et opportunités dans la sphère politique internationale.

Nous avons pu créer l'édition 2022-2023 de *Potentia* grâce aux efforts de l'équipe éditoriale et des nombreux réviseurs qui ont pris part au processus d'évaluation par les pairs. Nous tenons à remercier chaque membre de l'équipe éditoriale pour son dévouement et son engagement dans ce projet. C'est la cinquième année que nous utilisons le processus d'évaluation par les pairs, et nous tenons à remercier chaque évaluateur qui a soutenu cette

their support, guidance, and advice.

Lastly, we would like to thank the academic community and our readers for their continued interest in *Potentia.*

We hope that the articles in this edition provide understanding and insight into different issues worldwide.

Sincerely,

Devon Cantwell-Chavez, Liam Richardson, and Anna Soer

Editors-in-Chief, 2022-2023

entreprise. En outre, nous tenons à remercier Mme Rita Abrahamsen, ancienne directrice du CIPS, Mme Alexandra Gheciu, directrice du CIPS, et Mme Anna Bogic, coordinatrice du centre CIPS, pour leur soutien, leurs conseils et leurs avis.

Enfin, nous tenons à remercier la communauté universitaire et nos lecteurs pour leur intérêt constant pour *Potentia*.

Nous espérons que les articles de cette édition vous permettront de comprendre et d'appréhender différentes questions dans le monde entier.

Cordialement,

Devon Cantwell-Chavez, Liam Richardson, and Anna Soer

Rédactrices en chef, 2022-2023

Editorial Team | L'Équipe de rédaction

Reviewers | Relecteurs

Ali Arslan
Bilkent University

Drew Cagis
University of Alabama

Anthony Calacino
University of Texas at Austin

Andrew Carr
The New School for Social Research

Natalie Dewar
University of St. Andrews

Piers Eaton
University of Ottawa

Diana Elhard
Northwestern University

Allegra Fullerton
University of Colorado Denver

Jordan Geise
University of Utah

Amy Gilmore
University of California, Irvine

Juan Pablo González

Gabriella Gricius
Colorado State University

Kunal Panda
Sciences Po

Pauline Sarrazin
Université du Québec en Outaousais

Hatti Sellers
Louisiana State University

Diego Vega
University of Texas at Austin

Sam Villanove
University of Ottawa

Angelica Krystel von Kumberg
Georgetown University

Spenser Warren
Indiana University Bloomington

Ilyssa Yahmi
Temple University

New York University

Laure Gosselin
Université Laval

Research Papers | Travaux de recherche

Gender Politics in Central and Eastern Europe: Reassessing EU Policymaking in Light of Russian Sharp Power and the Full-Scale Invasion of Ukraine

Ioana Zamfir[*], University of Toronto

Abstract:

Politicians in Hungary, Poland, Romania, and Russia have long used anti-LGBTQ+ rhetoric and policies to distance themselves from the West and posit themselves as defenders of 'traditional family values'

[*]Biography: Ioana Zamfir is currently an MA student at the Centre for European, Russian, and Eurasian Studies of the Munk School of Global Affairs and Public Policy at the University of Toronto. Her research, supported by SSHRC and the Mark Gayn Scholarship, considers the history of queer subculture in Belarus, Moldova, and Ukraine from the early 1980s to the late 1990s to understand underrepresented sexual minorities, multifaceted Soviet identity, and the impact of the 1990s on the development of queer communities. She received an Honours BA in history and international development from McGill University. In her work at the Political Capital Institute, Budapest, she tackled issues of the rise of the far-right in Europe, authoritarian influence in Europe, and Russian disinformation. Contact information: i.zamfir@mail.utoronto.ca

Biographie : Ioana Zamfir est actuellement étudiante en maîtrise au Centre for European, Russian, and Eurasian Studies de la Munk School of Global Affairs and Public Policy de l'université de Toronto. Sa recherche, financée par le CRSH et la bourse Mark Gayn, porte sur l'histoire de la sous-culture queer en Biélorussie, en Moldavie et en Ukraine, du début des années 1980 à la fin des années 1990, afin de comprendre les minorités sexuelles sous-représentées, l'identité soviétique à multiples facettes et l'impact des années 1990 sur le développement des communautés queer. Elle est titulaire d'une licence d'histoire et de développement international de l'université McGill. Dans le cadre de son travail au Political Capital Institute, à Budapest, elle s'est penchée sur les questions de la montée de l'extrême droite en Europe, de l'influence autoritaire en Europe et de la désinformation russe. Coordonnées : i.zamfir@mail.utoronto.ca

against western 'degeneracy.' In 2022, amid Ukraine-EU rapprochement, Volodymyr Zelenskyy announced the potential legalization of same-sex partnerships in Ukraine, where homophobia remains commonplace. The EU, however, has yet to recognize that institutionalizing minority rights at the structural and legislative levels alone is insufficient to prevent discrimination against national minorities. This study concerns the way in which Putin and Patriarch Kirill have in the recent past invoked gender politics to justify Russia's 2022 invasion of Ukraine. This research addresses the impact of Russian shows of solidarity with European critics of such 'moral decay,' namely that the Kremlin has used moral opposition to the West to polarize, confuse, and destabilize countries where state, national church, and national identity are intertwined. Finally, this study suggests that Ukraine is an opportunity for the EU to recognize the insufficiency of legal change on its own to resolve discrimination against sexual minorities. Rather, the EU must commit to adapting its conditionality to the individual circumstances of prospective member states.

Keywords: LGBT, Ukraine, Russia, EU, Gender Politics

Résumé:

Les politiciens hongrois, polonais, roumains et russes utilisent depuis longtemps une rhétorique et des politiques anti-LGBTQ+ pour se distancer de l'Occident et se poser en défenseurs des " valeurs familiales traditionnelles " contre la " dégénérescence " occidentale. En 2022, dans le cadre du rapprochement Ukraine-UE, Volodymyr Zelenskyy a annoncé la légalisation potentielle des partenariats entre personnes de même sexe en Ukraine, où l'homophobie reste monnaie courante. L'UE doit toutefois encore reconnaître que l'institutionnalisation des droits des minorités aux niveaux structurel et législatif ne suffit pas à prévenir la discrimination à l'encontre des minorités nationales. Cette étude porte sur la manière dont Poutine et le patriarche Kirill ont récemment invoqué la politique du genre pour justifier l'invasion de l'Ukraine par la Russie en 2022. Cette recherche aborde l'impact des manifestations de solidarité de la Russie avec les critiques européens de cette "décadence morale", à

savoir que le Kremlin a utilisé l'opposition morale à l'Occident pour polariser, confondre et déstabiliser les pays où l'État, l'église nationale et l'identité nationale sont entrelacés. Enfin, cette étude suggère que l'Ukraine est l'occasion pour l'UE de reconnaître l'insuffisance des changements juridiques pour résoudre la discrimination à l'encontre des minorités sexuelles. L'UE doit plutôt s'engager à adapter sa conditionnalité aux circonstances individuelles des futurs États membres.

Mots-clés: LGBT, Ukraine, Russie, UE, politique de genre

On September 30, 2022, at the signing of treaties on the accession of the Donetsk and Luhansk "People's Republics" and Zaporizhzhya and Kherson regions to Russia, Putin made sure to include in his speech marking this annexation:

> Now I would […] want to address also all citizens of the country […]: do we want to have here, in our country, in Russia, "parent number one, parent number two and parent number three" (they have completely lost it!) instead of mother and father? Do we want our schools to impose on our children, from their earliest days in school, perversions that lead to degradation and extinction? Do we want to drum into their heads the ideas that certain other genders exist along with women and men and to offer them gender reassignment surgery? Is that what we want for our country and our children? This is all unacceptable to us. We have a different future of our own. (The Kremlin, 2022)

Why would Putin, in a speech celebrating the illegal annexation of Ukrainian regions, make note of non-heteronormative sexuality and include anti-gender mobilization? Similar comments were made on February 24, 2022, when the Kremlin announced Russia's full-scale invasion of Ukraine, during President Putin's New Year address, and in the Victory Parade address on May 9, 2023 (The Kremlin, 2022a). There is an unwavering consistency in the rhetoric used to justify the war in Ukraine as protecting Russian traditional values and ensuring the survival of the Russian nation (Mole, 2016). Deeply rooted historical theories and understandings of Russia's place in the world have been utilized by Putin and his close associates to legitimize imperialist and expansionist aspirations.

With time, politicians in Hungary, Poland, and Romania employed similar anti-LGBTQ+ rhetoric and policies to distance themselves from liberal values and to present themselves as defenders of traditional family values against the West's 'degeneracy'. The respect of LGBTQ+ rights has become a litmus test for a country's broader human rights record and been subject to direct political contestation as Russia champions its 'sexual sovereignty' over the West and presents a political and cultural model against the European Union's

(hereafter, EU) universal liberal value system (Slootmaeckers et al., 2016).

Moral opposition to the West has created a dangerous cleavage. Eastern Europe wants economic advantages and freedom of movement, but simultaneously rejects the EU's presumed moral superiority, which leaves space for Russia to indirectly exploit and fuel far-right influences and discourse. The rise of stigmatizing and discriminatory attitudes in Central and Eastern Europe (hereafter, CEE) against LGBTQ+ is welcomed by a Russian leadership that provides the appropriate language to spread polarizing messages. This study will analyze how gender politics in the EU have moulded into a source of instability not only for each country's internal affairs but for the EU itself, since its values system—upon which it was built and rests to this day—is continuously undermined from within by Russian sharp power.

Russia's portrayal of itself as the vanguard of traditional values takes root in Orthodox religious thought and draws from intellectual traditions such as Slavophilism, Russian Messianism, and Eurasianism (Edenborg, 2023). This discourse is intertwined with state patriotism drawing on concepts of sovereignty, security, and stability to legitimize both Putin's regime and his aggressive, encroaching foreign policy. Russia's use of this rhetoric has become especially dangerous since it has been used to justify aggression against Ukraine since 2014 (Young, 2022).

Understanding how Russian sharp power operates in the EU and in Candidate states, and addressing this urgency contributes to the preexisting literature in two ways. First, this study examines the origins of the Kremlin's ideological roots in relation to the Kremlin's and the Russian Orthodox Church's (hereafter, ROC) speeches to analyze mentions of nonconforming sexual orientation for foreign policy purposes. The Russian strategy proves efficient to fuel discriminatory rhetoric against queer people, polarize public opinion within the EU and Candidate states, and promote legislation similar to Russia's on "anti-LGBTQ+ propaganda."

Relatedly, the article responds to the paucity of attention on the challenges posed by Ukrainian admission to the EU and abidance by EU conditionality politics. The case studies of Hungary

and Romania expose how backlash to EU liberal values can emerge in instances where the EU unilaterally pushed for its own values system, disregarding local historical and cultural specificities. Rising grievances in CEE exemplify the EU's lack of consideration for reinforced traditional values system and consequent reversal of EU policies of inclusivity. Noting the viability of the Kremlin's divisive rhetoric on gender politics in Europe, Ukraine's membership candidacy is an opportunity for Brussels to learn from past mistakes and to consider historical precedents of reversals back to traditional gender norms and the impact of the current war on LGBTQ+ issues.

I further argue against the absolutist notion that the political and ideological cartography that divided Europe between East and West during the Cold War truly collapsed after the end of communism. When pushing for the respect of minority rights in countries of the former Eastern bloc, the EU's policies uphold a certain teleological character whereby western Europe is more advanced and meant to 'help' its 'backward' neighbour reach similar levels of cultural and political agency, 'proper' European culture (Blagojević et al., 2011; Butterfield, 2013; Dumančić, 2013; Todorova, 1997). LGBTQ+ communities are still in the process of emerging and taking form, and so EU policymaking should therefore begin reflecting the plurality and complexity of queer experiences in CEE (Kulpa, 2011). Brussels' disregard for the non-linear nature of emancipation when pushing for the respect of minority rights has provided the opportunity for backlash to EU norm diffusion.

The remainder of the study is structured as follows. The next section outlines the Kremlin's use of the mocking term "Gayropa", its historical roots, and its greater significance for EU politics and Russian sharp power. It is followed by an analysis of public opinion on homosexuality in countries where the state, national churches and national identity are deeply intertwined. It demonstrates the region's vulnerability to Russian divisive rhetoric and the urgent need for the EU to take greater note of it. The last section expands on the challenges posed by historical precedent and the ongoing war in Ukraine for LGBTQ+ rights in Ukrainian society in light of its Candidate status, granted June 23, 2022 (*Ukraine*, 2023). The case study of Ukraine exposes factors which make changes at the legal and institutional level insufficient for a true, socially widespread

respect of sexual minority rights in countries with high rates of homophobia.

*"*Gayropa" or the threat of western degenerate values

Public narratives expressed through speeches may not always indicate policy changes, but they do shed light on leaders' perception of their own actorness and legitimacy, especially in relation to other states and international players (Bacon, 2012). Language and narratives provide significant transfer points to negotiate one's place on the global playing field and indicate critical discursive reference points around which internal and foreign policy choices are made (Foucault, 1976; Light, 2015). It is therefore vital to undertake an analysis of "Gayropa," one of the Kremlin's main rhetorical tools to discredit nonconforming identities.

Introduced in Russian media in the second half of the 2010s, "Gayropa" has been employed by political, religious, and public supporters of the regime to further the claim that Russia is a unique Eurasian civilization that is distinct from the West and, therefore, has the legitimacy to protect its values in its supposed sphere of influence (Riabov & Riabova, 2014a; Riabova & Riabov, 2019). "Gayropa" reflects a rhetorical tool in Russian nationalist discourse that associates western Europe with demasculinization, portraying it as a degenerate civilization due to the acceptance of homosexuality, same-sex marriages, and the breakdown of traditional gender norms, contrasting this with Russia's adherence to moral principles and the preservation of societal 'normalcy'. The EU is undermined through the "Gayropa" propaganda, championed in Russian media channels broadcasted in the Russian Federation and in para-states that emerged out of the collapsed of the Soviet Union (O'Loughlin et al., 2016).

In the post-Cold War era, Russia was in search of its place and significance in the new geopolitical landscape. Riabov and Riabova explain that the roots of "Gayropa" are found in the political, economic, and psychological chaos that followed the collapse of the Eastern Bloc (Riabov & Riabova, 2014b). The dependence on the West during the 1990s, especially in terms of foreign aid and foreign advisers, came to be perceived as Russian "collective de-

masculinization". The weakening of its international standing as an economic, military, and ideological superpower pushed the former Soviet empire to feel as though it had to restore its moral sovereignty. Male and national pride was deeply intertwined with the idea that Russia would once again gain self-determination to decide its own fate. Thus began the revival of a society with a conservative values system that embraced patriarchy.

"Gayropa" inherently implies a power hierarchy, at the top of which Russia reigns high and mighty (Riabov & Riabova, 2014b). By portraying itself as the embodiment of masculine features of strength, independence, and rationality, Russia has legitimized its imperial aspirations by defending its morally superior nation that protects traditional values and the integrity of the heterosexual family (Riabov & Riabova, 2014a). Putin has utilized this rhetorical tool to posit gender politics in existential terms, implying the necessity of "re-masculinization" and the consequent delegitimization of western liberal values. Naydenova explains how Russia, as a successor of the Soviet empire, has never acted as a traditional "nation-state." It holds its own political, social and cultural traditions, which it seeks to extrapolate beyond its internationally recognized borders, turning it into a 'country-civilization' (Naydenova, 2016).

Russianness was rehabilitated and a post-Soviet version of the messianic idea established. In Putin's use of "Gayropa" to demonstrate the West's incompatibility with the *Russkiy mir* (Russian World) and/or Orthodox civilization or "Holy Rus," LGBTQ+ issues have been instrumentalized to rally support from voters in the EU or Candidate countries. Traditional Orthodox values are, therefore, mobilized to oppose the West's influence in Russia's former sphere of influence. In the Kremlin's eyes, non-heterosexuality is then not only a moral but, more importantly, an identity threat. Eidenbord identifies the 2010s in Russia as a period of discourse institutionalization when discrimination against sexual minorities, permitting domestic violence, and promoting traditional values became entrenched in Russian legislation (Edenborg, 2023). Able to promote an alternative to the universal liberal system of human rights by upholding itself as the stronghold of Orthodoxy and the bastion of traditional values, Russia has championed the rhetoric of anti-liberalism: dismissing the liberal values of political correctness and

permitting, if not actively encouraging, sexism and homophobia. The risk then becomes that the struggle for the respect of sexual minority rights is simplified and framed within a neo-ideological rivalry that pins one system of values against another, making them mutually exclusive and rendering the rights of sexual minorities only permissible within the liberal one.

With homosexuality perceived as contravening Orthodoxy, anti-LGBTQ+ mobilization serves as a defense of collective national identity rooted in ethno-religious nationalism (Edenborg, 2023). Katherine Verdery explains how nationalists have constructed 'family values' as the natural cornerstone of solidarity and social justice within the nation (Verdery, 1996). Political sovereignty and cultural autonomy of the nation based on religious and traditional values are standing ground to 'foreign' liberalism. Pride and the respect of the rights of sexual minorities are largely linked with European integration and its human rights conditionality, ideas not considered part of the wider culture and identity of countries like Hungary, Romania, and Russia.

Public Opinion, Religion, and Views on Homosexuality: Our God, No 'Western Degeneracy', Russia as a "Protector"?

To tackle the viability of "Gayropa" in CEE, we must consider the effects of the collapse of socialism on ethnonationalism, the rising role that religion plays in the region since 1989 and its correlation to views on homosexuality. Following the collapse of the Iron Curtain, Eastern Europe experienced a rise of nationalism rooted on each country's founding myths and on the resurgence of their respective religious institutions after many decades of Communist suppression (Tarta, 2015).

The 1990s in CEE were characterized by chaotic liberalization policies after the collapse of the socialist regimes. Simultaneously, the EU perceived the implementation of LGBTQ+ rights as a litmus test for a country's human rights record and alignment with EU politics (Slootmaeckers et al., 2016). Locally, sexual minorities' rights have also been understood as a yardstick to evaluate progress for the western model of modernity (Woodcock, 2011). While these rights have gained great symbolic value, they have also perpetuated

a demarcation between the 'traditional East' and 'progressive West' (Butterfield, 2013; Dumančić, 2013). The EU expects countries seeking membership to abide by western liberal norms, which the former socialist states have grasped very well and were willing to fulfill anti-discrimination and equal rights requirements should they be granted EU Member State status (Buyantueva & Shevtsova, 2020). The adoption of inclusion policies is rendered ineffective by the lack of a comprehensive understanding of the national historical and cultural dynamics at play in the decriminalization of homosexuality (Tarta, 2015). Scholars such as Mizielińska describe the disjunction that ensued whereby CEE countries were 'catching up' with the West, only for western countries to perceive CEE as 'lagging behind' or 'dragging progress down' (Mizielińska, 2011). Analyzing Poland's politics on gender and sexuality, she explains how there was no clear grasp on the EU's side that the meaning of queerness is relative to the time and space analyzed, and that translating western experiences of queer liberation to other contexts risked disregarding local specificities. The backlash to the perceived "external invasive pressure" was noted in Hungary, Poland, Romania, Serbia, and Ukraine (Blagojević et al., 2011; Bonacker & Zimmer, 2020; Dima, 2020; Kent & Tapfumaneyi, 2018; Mizielińska, 2011; Woodcock, 2011).

While scholarship has problematized the EU's approach, for example regarding the emphasis put on visibility, there is yet to be change within EU structure. Non-heteronormative sexualities were largely invisible during the communist period and appeared in the public sphere in TV shows, the music industry, magazine stands, and festivals only after the disintegration of the Eastern Bloc (Fejes & Balogh, 2013). It led to a direct correlation of homosexuality with the evils of the West that came with economic liberalization policies. The sociohistorical specificities that made for an intolerance of queerness in the public space are not considered in EU policy toward post-socialist countries (Balogh, 2011; Fejes & Balogh, 2013). EU-promoted LGBTQ+ initiatives rooted in the increased visibility of the community are set within a context of strengthening religious and anti-EU sentiments that blame LGBTQ+ activists, EU policymakers, and liberal politicians for forming a "corrupt" alliance against the traditional family. Beyond the aforementioned countries, this phenomenon was noted in Bulgaria and Slovakia, thus pointing to a

widespread regional phenomenon overlooked at the EU level (Lorencová, 2013; Panayotov, 2013). To understand what social and cultural configurations are available to the queer communities of Eastern Europe, one must understand the national contexts in which they are formulated and operate.

The experiences of western queer liberation cannot be extrapolated to an environment that does not share the same sociohistorical experiences as value conflicts are highly probably, hindering positive development for the groups in receipt of international aid. This discussion on the complicated nature of the EU's approach to the respect of minority rights within the Union and for Candidate countries provides the background for a more in-depth analysis of the impact this has had on gender politics in CEE. The following section tackles the current conflict of values and the way in which the Kremlin and the Russian Orthodox Church can exploit it to spread their anti-LGBTQ+ and pro-traditionalist rhetoric abroad.

Due to the lack of social cohesion and established political and legal institutions after the collapse of Communism, newly established local authorities had little on which to build solidarity (Mole, 2016). Appealing to ethnicity, historical rights, and religious authorities, state authorities created a cohesive social body and legitimized their hold on power. The establishment of such a discourse was also possible in the absence of a strong civil society that could resist a nationalist formulation of identity rooted in the rejection of perceived "others." Understanding the nation as an extended kin group that shares features of biology, culture, language, religion is tied to patriarchal conceptions of the family that naturalize the traditional public and private roles of women and men (Yuval-Davis, 1997). Religion and tradition came to be seen as a constancy in rapidly changing and unstable political and economic environment (Lorencová, 2013). Rooting national narratives in traditional values and the patriarchal family, threatened by sexual and ethnic minorities, results from the transition to western liberalism in the 1990s, enduring legacies of socialism, and the nature of the post-socialist political system that utilizes preexisting social phobias for political gain (Kuzio, 2015; Mole, 2016).

Poll results from the Pew Research Centre expose the fact that in Orthodox-majority countries a median of 68% of the population believe their culture is superior, whilst in Catholic-majority ones, this number stands at 45% (Sahgal & Cooperman, 2017).[1] Furthermore, in the former, the relation between religion and national identity is stronger in the latter: a median of 70% of the population believes being Orthodox is "very or somewhat important to truly share national identity" (Sahgal & Cooperman, 2017). The feeling of superiority and tying religion to national identity makes people more inclined to defend their culture and their values, especially if they are led to believe threats from a foreign values system exist. Centuries-old national churches in the predominantly Orthodox countries surveyed is a contributing factor to high popular support for religious institutions to play a role in public life. The Kremlin can more easily exploit anxieties in these countries by leveraging their desire to protect national identity, leading to a positive response to Russia's rhetorical use of traditional values against the West.

In his speeches, Patriarch Kirill appeals directly to skeptics of Putin's political stance. Religion is utilized as a cross-class cleavage to trigger the sense of national pride and identity that will thereafter mutate into a more favourable view of Russia and Putin. The Kremlin has employed religion to reinforce the idea of Russia as the stronghold of Christianity and the bastion of traditional culture.

> What exists in the Donbas is a rejection, a principled rejection of the so-called values that are now being offered by those who lay claim to global domination. Today, there is a certain test for loyalty to that power, a certain pass into that "happy" world, the world of excessive consumption, the world of illusory freedom. […] It's a gay parade. The demand to hold a gay parade is in fact a test for loyalty to that powerful world, and we know that if people or countries resist this demand, they are excluded from that world and treated as alien. (Young, 2022)

[1] https://www.pewresearch.org/religion/2017/05/10/religious-belief-and-national-belonging-in-central-and-eastern-europe/.

Where the intertwinement of the state and the church is more prevalent, the higher the likelihood of widespread negative attitudes towards homosexuality. The Pew Research Centre exemplifies how, in Orthodox traditional countries, the stronger the traditional and conservative mindset is, the less probable people will be to accept homosexuality (Sahgal & Cooperman, 2017). Studies have confirmed the direct correlation between the strength of religious belief and intolerance to non-heteronormative sexualities (Rowatt et al., 2009; Takács & Szalma, 2019; Whitley, 2009). The politicization of sexuality leads to a division of society between the "sick" and the "healthy," between those who have betrayed tradition and the nation, and those who have remained loyal. As described by Sremac S. and Ganzevoort, R. R., ethno-nationalism and religious institutions rely on the principle of exclusion to create a 'sacred-social order' that intertwines notions of national threats, national preservation, the biological survival of a population, and moral defense, effectively furthering their own conception of national identity (Sremac & Ganzevoort, 2015). In this process of nation-building, we see an idealization of masculinity that puts the family on a pedestal as the bedrock of a 'healthy' nation.

In CEE, many countries view Russia as a necessary force to balance western influence while simultaneously accepting a form of cooperation with the U.S. and its allies: Romania stands at 52% and 82%, respectively; Hungary, 44% and 63%; and Ukraine, 22% and 62% (Sahgal & Cooperman, 2017).[2] In turn, the percentage of people who agree there is a value conflict with western countries (Romania: 68%; Hungary: 58%; Ukraine: 38%) demonstrates a significant level of discordance between EU liberal values and national traditional ones, creating another cleavage easily exploitable by Putin and the ROC. The universalization of the liberal value system is negatively responded to by CEE countries, perceiving it as an imposition from outsiders, delegitimizing their culture and targeting their religious values as backward, traditional, inferior, and incompatible with the 'developed' European ones.

A change in people's mindset and values system is a long process that requires a heartfelt commitment on the EU's part to

[2] https://www.pewresearch.org/religion/2017/05/10/religious-belief-and-national-belonging-in-central-and-eastern-europe/.

understand the culture and history of each Member State, acknowledging the reasons why there might be ongoing backlash to EU policies and membership requirements. In collaboration with local activists and organizations, a greater grasp of how it informs current politics and public opinion is vital. Greater dialogue and involvement with local parties will discredit the image that values of inclusivity are solely imposed from abroad and enable western hegemonic methodologies to adapt into effective initiatives that take root in each respective local circumstances rather than in western experience.

Case Studies (Russia, Hungary and Romania): What lessons can be learned to avoid the same from happening in Ukraine?

In 2013, Russia established the most discriminatory law against LGBTQ+ people since 1993, when homosexuality was decriminalized under former President Boris Yeltsin. The 2013 Anti-Gay Propaganda Law was passed unanimously by the Russian Parliament and consists of amendments to the Law on the Protection of Children. The law appeals to the conservative base that Putin has long drawn domestic support from, and champions 'traditional' values as it is "aimed at protecting children from information promoting the denial of traditional family values" (Stella et al., 2016). This law limited the promotion of "nontraditional" sexual relations to minors; anyone under the age of 18 could not have access to any information concerning non-heteronormative sexualities.

On November 24, 2022, exactly nine months after initiating the Russian full-scale invasion of Ukraine, the Kremlin took a step closer to criminalizing homosexuality by extending the aforementioned law: no matter the age, it has become illegal to publicly promote homosexuality (Ebel, 2022). On November 30, 2023, the Russian Supreme Court enabled the Justice Ministry to effectively ban the "international LGBT movement" now considered an "extremist organization" (Meduza, 2023). These laws are utilized to harm sexual minorities for political gain and employed as a sharp power tool in foreign policy. One of the November 24th bill's architects, Alexander Khinshtein, commented: "LGBT [rights] today are an element of hybrid warfare, and in this hybrid warfare we must protect our values, our society and our children" (Davis, 2022). The discourse spread today takes root in the late 1990s and early 2000s when two

interlinked storylines defined the way in which the Kremlin would approach non-heteronormative sexualities: the challenge to traditional values represented a threat to security and national sovereignty, and Russia's children needed protection from 'imported' and harmful ideas from the West (Edenborg, 2023).

Anti-Gay Propaganda laws in Hungary and Romania

Inspired by Russia's 2013 Anti-Gay Propaganda law, Hungary and Romania followed suit in 2021 and 2022, respectively. Russia's "Gayropa" rhetoric is notable through the implementation of similar legislation in both countries committed to limiting, through legal and institutional means, information on sexual minorities to "protect" children from harmful values.

In Hungary, on June 17, 2021, the Parliament passed legislation known as the Child Protection Act that limits access to any content dealing with homosexuality or gender change to people under 18 (Szakacs, 2021). Fidesz, the ruling party headed by Viktor Orbán, Prime Minister of Hungary, promotes a Christian-conservative agenda, explaining why the act was appended to a separate, widely backed bill that strictly penalizes paedophilia. Doing so makes it much harder for opponents to vote against since the protection of children is a class-cutting cleavage. Orbán has championed himself, in a scarily similar way to his counterpart Putin, as the protector of traditional values and of children threatened by 'homosexual propaganda' coming from the 'decaying West' (Rédai, 2022).

Romania, in February 2022, took steps to mimic its neighbour after an amendment to the Romanian Child Protection Law was proposed—a similar method to the Russian and Hungarian method. Seven parliamentarians from the Democratic Alliance of Hungarians in Romania (UDMR) proposed a bill to prevent "child abuse" (Verseck, 2021). In May 2022, the amendment was adopted without a vote by the Romanian Senate. This law has not yet been ratified and awaits a vote in the Chamber of Deputies. Two former Members of Parliament from Alliance for the Union of Romanians (*Alianța pentru Unirea Românilor*, AUR), a right-wing populist political party in Romania, proposed another discriminatory bill as an amendment to the law to combat pornography that would prohibit films, music,

cartoons, photographs with gay content from reaching people under 18 years old (Păcurar, 2023). LGBTQ+ issues are thus utilized as a political tool to exploit already existing negative attitudes toward non-conforming sexual identities.

The tropes of sovereignty, security, and gender ideology (and their intertwinement) are irrefutably present in these three countries' anti-LGBTQ propaganda laws. These political and rhetorical tools serve efficiently to appeal to ideological nationalists while also alerting a broader audience concerned with family values and religious conservatism that their way of life is directly undermined and threatened (Edenborg, 2023). Focusing on family, gender, and sexuality permits restrictive regulations of sexual orientation and creates strict morals norms on social reproduction and socialization. Russia, Hungary, and Romania are mobilizing legally and institutionally against a perceived to be "decaying" West. Engaging in this type of narrative opens the door to Russian propaganda and the Kremlin's disinformation campaigns, which have been following a coherent, homogenous rhetoric. Russia has been able to utilize the lack of a concerted effort to reconcile EU universalist liberal values with local values conflicts to its advantage. A broader lesson needs to be learned by the EU regarding Russia's manipulation of gender politics and use of it as sharp power to fuel dissatisfaction with values of inclusivity, and by extension values of the EU. While there is no international agreement on what 'traditional values' in fact consist of, the Kremlin has nevertheless been successful in employing and promoting this shared storyline to enable common action between a numerous and diverse number of groups worldwide against LGBTQ+ issues.

Ukraine: The Risks and How to prevent Russia's Manipulations

In the context of the ongoing war in Ukraine and LGBTQ+ soldiers' sacrifices to fight invading Russian troops, there have been greater calls to grant same-sex couples equal rights to marry and start a family, since same-sex marriage and civil unions are not legally recognized. In August 2022, due to certain privileges that only relatives or a spousal partner can have (the right to visit a hospitalized partner, share property ownership, claim their partner's body if killed, etc.), a petition that garnered 25,000 signatures from all

over Ukraine urged President Zelenskyy to support same-sex marriage (Levenson, 2022). The Ukrainian constitution, which defines marriage as "based on the free consent of a woman and a man," cannot legally be modified during wartime (Pietsch, 2022).

The state's response to the petition was positive as Zelenskyy affirmed that "in the modern world, the level of democracy in a society is measured, among other things, by the state policy aimed at ensuring equal rights for all citizens" (ibid.) EU-Ukraine rapprochement since February 24, 2022 has given Zelenskyy greater incentive to legalize same-sex partnerships as a show of Ukraine's readiness to join the European community (*Ukraine*, 2023). Since the beginning of the full-scale invasion, the Ukrainian President has framed Ukraine's ability to defend itself as a fight for democracy and western values against Russia.

Inna Sovsun, an opposition lawmaker in the liberal party Holos and an advocate for LGBTQ+ rights, wrote on Facebook that "The response is more positive than it could have been. […] But at the same time — not clear enough. […] Why are they not presented for discussion and not submitted to Parliament?" (Sovsun, 2022). She recommended civil partnerships as an "acceptable interim alternative." There have been, however, conservative members within Servant of the People, Zelenskyy's party, who had previously called for a law fining "homosexual propaganda." In 2021, LGBTQ+ rights activists held the first UkrainePride Rave in front of the office of the Ukrainian President to protest a bill proposed by members of Servant of the People that they equated to the 2013 Russian Anti-Gay Propaganda Law (Benigni, 2023). LGBTQ+ rights are polarizing within the region, especially in post-socialist countries, and implementing changes only at the legal level, disregarding local sensibilities, could potentially fuel future problems and grievances.

Russia's full-scale invasion of Ukraine has galvanized the national sense of pride and Ukrainian identity first ignited by Euromaidan in 2014. The wave of demonstrations and protests to affirm Ukraine's place in the European community and the ensuing conflict in the Donbas since 2014 contributed to this new sense of civic identity as it changed people's attitudes toward political participation. Everyday people became activists and actors of change, which made Ukrainian

identity mean more than ethnic or linguistic characterization, and evolve into a more pronounced sense of a civic duty to protect and preserve the independence of their country (Kulyk, 2016; Onuch, 2015).

Despite gaining greater visibility during the Euromaidan, LGBTQ+ people have experienced more violence by far-right groups, which have emboldened since armed conflict began in 2014. A popular opinion among LGBTQ+ activists in Ukraine is that the issue of sexual minority rights was put on the backburner as the war in the Donbas took precedence (Martsenyuk, 2016). Military escalations have in some ways reinforced the patriarchal system, again rendering LGBTQ+ people as a threat to the stereotypical male role of the defender of the nation (Phillips, 2014). Civil society has denounced the inaction of the police and of the overall justice system to investigate and punish hate crimes against LGBTQ+ people. The police classify instances of harassment as cases of hooliganism, largely because anti-LGBTQ discrimination has not been formally written into law (Benigni, 2023). Activists in the candidates states of Albania, Bosnia and Herzegovina, and Serbia have also put forth similar complaints with regard to the lack of cooperation on the part of the police and the limited capacity of the judicial system to hold accountable perpetrators of hate crimes (Slootmaeckers & Touquet, 2016).

Russia's war against Ukraine has also compromised the networks that had previously existed, as these cities have been devasted by Russian bombings, are under Russian occupation, or have been evacuated. Organizations such as Other (Inna) in Kherson had to relocate and to reorient its activities to humanitarian aid for the community. Additionally, volunteers have left, buildings have been taken over by pro-Russian forces, and friendly law-enforcement bodies have vacated or been dismantled (Benigni, 2023). In the non-government-controlled areas of the so-called Donetsk "People's Republic" and Luhansk "People's Republic", homophobia has risen since 2014 because of Russian influence, leading to the increased use of derogatory terms such as "Gayropa" on the news and instances of "corrective rape", notably at the hands of the anti-LGBTQ+ movement *Occupy Pedophilia* (Ibid). In Crimea, on the other hand, the anti-gay propaganda law is in vigour as the territory

falls under Russian legislation. Local safe spaces have also disappeared as they have been destroyed or networks disrupted by people fleeing, further hindering the possibility to ensure the protection of the LGBTQ+ community within broader Ukrainian society.

It is important to note Crimea's place as the second most accepting region of homosexuality, after Kyiv, in 2007 (Martsenyuk, 2017). Cities like Kherson, Zaporizhzhiya, Luhansk, and Kharkiv in Eastern Ukraine, currently devastated by the war, were part of a wider hub for the emerging LGBTQ+ community in the East, which was more active and had more organisations than in western Ukraine. The temporary occupation of the eastern Ukrainian territories starting in 2014 is critical to consider for EU policy on human rights in Ukraine as Russian disinformation and the "Gayropa" propaganda have had detrimental effects on queer networks established since Ukraine's independence.

Ukraine was one of the most intolerant countries regarding homosexuality and same-sex marriage of the CEE countries polled by the Pew Research Centre: in 2018, 85% of the population were strongly opposed to same-sex marriage and in 2020, less than 10% of the population agreed that homosexuality should be accepted by society (Pew Research Center, 2018; Poushter & Kent, 2020).[3] In the appendix to the report done in 2020, a table representing the acceptance of homosexuality over time exemplifies that in Ukraine the percentage decreased from 17% in 2002 to 14% in 2019 (Poushter & Kent, 2020). It is simply not feasible to overlook this widespread hostility to meet EU standards without expecting a future backlash as seen in Hungary, Romania, and even Ukraine itself with its anti-LGBTQ+ propaganda law proposal. This would provide rich and multifaceted opportunities for Russia to exploit divisions within society, at a time when the Ukrainian government is looking for deeper cooperation with the EU. This is a phenomenon that already has precedent, with the Russian government's backing of anti-

[3] https://www.pewresearch.org/religion/2018/10/29/eastern-and-western-europeans-differ-on-importance-of-religion-views-of-minorities-and-key-social-issues/; https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/.

LGBTQ+ rights movements in post-Maidan Ukraine (Bonacker & Zimmer, 2020).

Ukraine can be susceptible to such rising polarization and a revival of traditional values in times of economic, social, and political instability as there is a precedent to it in the 1990s. After gaining independence in 1991, Ukraine was the first former-Soviet republic to decriminalize homosexuality. During the transition in the 1990s, men found themselves in charge of their destiny again without interference from the state; however, the structural problems they faced also limited their ability to take full advantage of this newfound liberty, leading to what scholars describe as a crisis of masculinity during Ukraine's first decade of independence (Riabchuk, 2017). In demographic terms, men have been at a disadvantage in comparison to women in Ukraine due to their shorter life expectancy and higher rates of alcoholism and suicide (ibid). Consequently, there was a perceived need to go back to the true traditional Ukrainian values which the Soviet state was held guilty for having erased. The Berehynia and the Cossack ideal emerged in the post-Soviet period as a reversal back to 'true' Ukrainian femininity and masculinity (Bureychak, 2017). The Berehynia is based on the idea of matriarchy as inherent to Ukrainian society and understands this type of woman to be a symbolic matriarch and guardian of Ukrainian national culture and ethnic identity (Kis, 2017). The Cossack ideal presents the militaristic ideal, the devotion to state principles, and heroic masculinity as a return to the gender roles disrupted by Soviet rule. The role of the Church is also important to consider when thinking about the prominence of traditional gender roles as it emphasized the role of the man as the breadwinner and that of the woman as the family guardian. Such a phenomenon was not unpredictable. Nationalist politics in the post-socialist period did emphasize women returning to their 'proper' role as caretakers in the private sphere to reverse the damage done to the nation and to 'natural' gender relations by Soviet power (Verdery, 1996). Less opportunities for employment, deterioration of living standards, and men's higher rate of mortality sharpened the perception that these ideal models of the man and the woman were necessary to protect recently acquired independence.

Considering the various national specificities tied to culture, history, and regional dynamics in Ukraine, developing an action plan in

collaboration with local actors possessing relevant experience and expertise can enhance the efficiency of EU policies. This approach minimizes the likelihood of backlash by organically rooting these policies in local initiatives. A profound grasp of Ukraine's national history and its ramifications for LGBTQ+ individuals is imperative for implementing effective, comprehensive, and enduring changes. This, in turn, counters assertions that LGBTQ+ rights are imports incongruent with Christian 'traditional' values.

Conclusion

In the context of the war in Ukraine and considering historical precedents of reversals back to traditional conceptions of female and male gender roles, pushing for Ukraine to abide by EU standards of human rights is important, but it must consider the historical traditions that exist and what grievances might arise from the end of the war. Such factors must be considered, especially as the period of reconstruction and competing postwar priorities will put the rights of sexual minorities on the backburner. Conditionality politics could have (as previously experienced in Hungary and Romania) unintended consequences for the Ukrainian LGBTQ+ community, since it demands of a people polarized on the topic to unite and respect a minority they, at best, do not consider their own and, at worst, perceive as sinners and a threat. Additionally, the homophobic rhetoric is promoted by political parties or groups that have little or no political representation in government or the Parliament, but which own national and regional media outlets to spread their message (Shevtsova, 2020). Due to the lack of major independent media outlets not owned by oligarchs or specific political powers, Ukrainian public opinion is ever more susceptible to fostering these non-heteronormative sexualities if the message diffused supports anti-LGBTQ+ discrimination.

Some member states and candidate countries are suffering from 'enlargement fatigue' and doubts regarding the absorption capacity of the EU have been raised. Candidate countries are dependent on domestic factors, which limit or challenge EU integration, and on pressure from the EU to abide by the Copenhagen criteria and thus prioritize the respect of human rights (Slootmaeckers & Touquet, 2016). In Eastern European and Balkan countries, the universal

human rights discourse clashes with notions of national identity that resonate more deeply with the national population (Mole, 2016). Therefore, as the enlargement process becomes increasingly more politicised, a better sociohistorical understanding of local LGBTQ+ communities and rights is required to produce comprehensive and long-lasting changes that will override claims that LGBTQ+ people are a foreign import and incompatible with Christian 'traditional' values. If ignored, this value schism will once again be utilized by political parties, Russian sharp power that offers the rhetoric to fuel polarization will gain ground, and the queer community will once again be at the mercy of a political environment divided between tradition and liberal values.

By justifying the war as a necessary means to protect a shared system of values and tying it to the survival of the nation against the threat of the propagation of western politics in Ukraine, Putin, Kremlin officials, and the Russian Orthodox Church are able to make CEE societies relate to the fight against intruding western values. Specific meanings are attached to non-heteronormative sexuality because post-socialist countries all share their first societal exposure to LGBTQ+ people and issues in the 1990s amidst political and economic transition, thus making it easier to associate queerness with a foreign character. The Kremlin can capitalize on this perception and claim moral leadership as well as social and political hierarchies, legitimating discrimination truth-regimes. This rhetoric is not designed to create outright pro-Russian public opinion and national governments per se, but rather to signal allegiances to critics of the 'moral decay' that has ensued from EU intervention in internal affairs of Member States. Patriarch Kirill and Putin exploit critics of the EU's universalist application of liberal values and their grievances to enhance conflict with the EU and to polarize and destabilize countries where the state, national churches, and national identity are deeply intertwined.

As a result of the communist past and its legacies, ethnic nationalism has come to play a crucial role in CEE politics. Letting these forces operate will leave sexual minorities at the mercy of ethnonationalist states that seek conformity over the respect of human rights. The case of Ukraine offers the EU an opportunity to address its own past naivety by considering local history and culture, imperatively relying on grassroot initiatives and actors to counter the

argument that LGBTQ+ are foreign and ensuring that other institutional means are taken to protect LGBTQ+ people, i.e. anti-discrimination laws and meaningful enforcement of such legislation. The lingering cultural and institutional legacies of socialism must be considered; one cannot discount how this impacts the nature and strength of public mobilization and social attitudes toward homosexuality in CEE. The possibilities and limits of visibility for sexual minorities must be assessed with this sociohistorical past in mind while also noting rising religious and anti-EU sentiments in the region, and the Kremlin's ability to fuel said attitudes. The struggle for minority rights must also account for social and economic inequalities in Europe that, due to globalization and neo-liberalization, should go beyond legislative changes like legalize same-sex marriage and civil partnership to promote positive rights such as the right to work, sex education, and sexual health, indicative of the greater struggle for equality. This drive to promote equality must incorporate the experiences and desires of local LGBTQ+, catering for different national specificities in this diverse region with the active participation of these communities.

These issues have taken on added significance given Ukraine's ongoing accession talks. In November 2023 the European Commission recommended that formal negotiations begin. Under such circumstances, it is imperative that the EU adapt its existing rigid and inflexible criteria to consider Ukraine's sociohistorical specificities that explain present negative attitudes to non-conforming sexual identity. Simply promoting legal change as the solution for the respect of minority rights is not sufficient to ensure widespread societal acceptance and avoid Russian-enhanced anti-discrimination discourse. The EU's *modus operandi* must be reassessed to counter the pervasiveness of Russia's use of gender politics as a way to legitimize discriminatory attitudes toward sexual minorities and consequently fuel anti-EU sentiment. Failure to do so will result in the same patterns of hostility, grievance and susceptibility to Russian discourse that are already placing immense pressure on European solidarity and undermining the viability of the very values that the EU wishes to see flourish in these countries.

References

Bacon, E. (2012). Public Political Narratives: Developing a Neglected Source through the Exploratory Case of Russia in the Putin-Medvedev Era. *Political Studies*, *60*(4), 768–786. https://doi.org/10.1111/j.1467-9248.2011.00939.x

Balogh, A. P. (2011). Kinging in Hungarian Lesbian Culture. *Journal of Lesbian Studies*, *15*(3), 299–310. https://doi.org/10.1080/10894160.2010.530145

Benigni, E. (2023). Queer/LGBTQI+ Rights in Ukraine: Striving for Equality through Feminism, Resistance, and the War. In S. A. Belleza & E. Dundovich (Eds.), *Queer Transnationalities Towards a History of LGBTQ+ rights in the Post-Soviet Space* (pp. 189–209). Pisa University Press.

Blagojević, J., Kulpa, R., & Mizielinska, J. (2011). Between Walls: Provincialisms, Human Rights, Sexualities and Serbian Public Discourses on EU Integration. In *De-Centring Western Sexualities: Central and Eastern European Perspectives* (pp. 27–42). Routledge.

Bonacker, T., & Zimmer, K. (2020). The Localization of Sexual Rights in Ukraine. In R. Buyantueva & M. Shevtsova (Eds.), *LGBTQ+ Activism in Central and Eastern Europe* (pp. 153–

183). Springer International Publishing. https://doi.org/10.1007/978-3-030-20401-3_7

Bureychak, T. (2017). Masculinity in Soviet and Post-Soviet Ukraine: Models and Their Implications. In O. Hankivsky & A. Salnykova (Eds.), *Gender, Politics and Society in Ukraine* (pp. 325–361). University of Toronto Press. https://librarysearch.library.utoronto.ca/discovery/fulldisplay?docid=cdi_scopus_primary_609272818&context=PC&vid=01UTORONTO_INST:UTORONTO&lang=en&search_scope=UTL_AND_CI&adaptor=Primo%20Central&tab=Everything&query=any,contains,Masculinity%20in%20Soviet%20and%20Post-Soviet%20Ukraine:%20Models%20and%20their%20implications&offset=0

Butterfield, N. (2013). Sexual Rights as a Tool for Mapping Europe: Discourses of Human Rights and European Identity in Activists' Struggles in Croatia. In N. Fejes & A. P. Balogh (Eds.), *Queer Visibility in Post-Socialist Cultures* (pp. 11–33). Intellect Ltd.

Buyantueva, R., & Shevtsova, M. (2020). Introduction: LGBTQ+ Activism and the Power of Locals. In R. Buyantueva & M. Shevtsova (Eds.), *LGBTQ+ Activism in Central and Eastern Europe* (pp. 1–19). Springer International Publishing. https://doi.org/10.1007/978-3-030-20401-3_1

Davis, C. (2022, October 27). *Russia moves to ban "LGBT propaganda" among all ages | Reuters*. Reuters. https://www.reuters.com/world/russias-parliament-passes-law-banning-lgbt-propaganda-between-adults-2022-10-27/

Dima, R. (2020). Trends of Homophobic Activism in Romania, or 'How to Turn Religious Convictions into a Referendum and Still Fail.' In R. Buyantueva & M. Shevtsova (Eds.), *LGBTQ+ Activism in Central and Eastern Europe* (pp. 185–208). Springer International Publishing. https://doi.org/10.1007/978-3-030-20401-3_8

Dumančić, M. (2013). Hiding in Plain Sight?: Making Homosexuality (In)visible in Post-Yugoslav Film. In N. Fejes & A. P. Balogh (Eds.), *Queer visibility in post-socialist cultures* (pp. 57–80). Intellect Ltd.

Ebel, F. (2022, November 24). Russia advances bill to criminalize 'promoting' LGBTQ relationships. *Washington Post*. https://www.washingtonpost.com/world/2022/11/24/russia-lgbtq-duma-laws/

Edenborg, E. (2023). Anti-Gender Politics as Discourse Coalitions: Russia's Domestic and International Promotion of "Traditional Values." *Problems of Post-Communism*, *70*(2), 175–184. https://doi.org/10.1080/10758216.2021.1987269

Fejes, N., & Balogh, A. P. (2013). Introduction: Post-Socialist Politics of Queer In/visibility. In N. Fejes & A. P. Balogh (Eds.), *Queer Visibility in Post-Socialist Cultures* (pp. 1–8). Intellect Ltd.

Foucault, M. (1976). *Histoire de la sexualité volume 1: La volonté de savoir*. Gallimard (Bibliothèque des Histoires).

Kent, L., & Tapfumaneyi, S. (2018, October 19). *Hungary's PM bans gender study at colleges saying "people are born either male or female."* CNN Wire Service. https://librarysearch.library.utoronto.ca/discovery/fulldisplay/cdi_proquest_wirefeeds_2122476797/01UTORONTO_INST:UTORONTO

Kis, O. (2017). (Re)Constructing Ukrainian Women's History: Actors, Authors, and Narratives. In O. Hankivsky & A. Salnykova (Eds.), *Gender, Politics and Society in Ukraine* (pp. 152–179). University of Toronto Press.

Kulpa, R. (2011). Nations and Sexualities – 'West' and 'East.' In R. Kulpa & J. Mizielinska (Eds.), *De-Centring Western Sexualities: Central and Eastern European Perspectives* (pp. 43–62). Routledge. https://librarysearch.library.utoronto.ca/discovery/fulldisplay?docid=cdi_scopus_primary_255394958&context=PC&vid=01UTORONTO_INST:UTORONTO&lang=en&search_scope=UTL_AND_CI&adaptor=Primo%20Central&tab=Everything&query=any,contains,nations%20and%20sexualities%20-%20west%20and%20east&offset=0

Kulyk, V. (2016). National Identity in Ukraine: Impact of Euromaidan and the War. *Europe-Asia Studies*, *68*(4), 588–608. https://doi.org/10.1080/09668136.2016.1174980

Kuzio, T. (2015). Competing Nationalisms, Euromaidan, and the Russian-Ukrainian Conflict. *Studies in Ethnicity and*

Nationalism, *15*(1), 157–169. https://doi.org/10.1111/sena.12137

Levenson, M. (2022, August 2). *Zelensky Says Civil Partnerships For Same-Sex Couples May Become Legal*. The New York Times. https://www.nytimes.com/2022/08/02/world/europe/zelensky-same-sex-marriage.html#

Light, M. (2015). Russian Foreign Policy Themes in Official Documents and Speeches: Tracing Continuity and Change. In D. Cadier & M. Light (Eds.), *Russia's Foreign Policy* (pp. 13–29). Palgrave Macmillan UK. https://doi.org/10.1057/9781137468888_2

Lorencová, V. (2013). Taking Off a Cloak of Invisibility: The Clash of Discourses about Sexual Difference in Slovakia. In N. Fejes & A. P. Balogh (Eds.), *Queer Visibility in Post-Socialist Cultures* (pp. 83–104). Intellect Ltd.

Martsenyuk, T. (2016). Sexuality and revolution in post-Soviet Ukraine: LGBT rights and the Euromaidan protests of 2013-2014. *Journal of Soviet and Post-Soviet Politics and Society*, *2*(1), 49–74.

Martsenyuk, T. (2017). Ukrainian Societal Attitudes towards the Lesbian, Gay, Bisexual, and Transgender Communities. In A. Salnykova & O. Hankivsky (Eds.), *Gender, Politics and Society in Ukraine* (pp. 385–410). University of Toronto Press. https://doi.org/10.3138/9781442685871-019

Meduza. (2023, November 30). *Russian Justice Ministry bans 'LGBT movement' as 'extremist organization.'* Meduza. https://meduza.io/en/news/2023/11/30/russian-justice-ministry-bans-lgbt-movement-as-extremist-organization

Mizielińska, J. (2011). Travelling Ideas, Travelling Times: On the Temporalities of LGBT and Queer Politics in Poland and the 'West.' In J. Mizielińska & R. Kulpa (Eds.), *De-Centring Western Sexualities: Central and Eastern European Perspectives* (1st ed., pp. 85–106). Routledge. https://doi.org/10.4324/9781315576107-6

Mole, R. C. M. (2016). Nationalism and Homophobia in Central and Eastern Europe. In K. Slootmaeckers, H. Touquet, & P. Vermeersch (Eds.), *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and*

Prejudice (pp. 99–121). Palgrave Macmillan UK. https://doi.org/10.1057/978-1-137-48093-4_5

Naydenova, N. (2016). *Holy Rus*: (Re)construction of Russia's Civilizational Identity. *Slavonica*, *21*(1–2), 37–48. https://doi.org/10.1080/13617427.2017.1319120

O'Loughlin, J., Toal, G., & Kolosov, V. (2016). Who identifies with the "Russian World"? Geopolitical attitudes in southeastern Ukraine, Crimea, Abkhazia, South Ossetia, and Transnistria. *Eurasian Geography and Economics*, *57*(6), 745–778. https://doi.org/10.1080/15387216.2017.1295275

Onuch, O. (2015). EuroMaidan Protests in Ukraine: Social Media Versus Social Networks. *Problems of Post-Communism*, *62*(4), 217–235. https://doi.org/10.1080/10758216.2015.1037676

Păcurar, B. (2023, February 15). *Doi parlamentari ex-AUR cer interzicerea „propagandei" gay prin lege, pe modelul Viktor Orban: „Mie nu îmi plac homosexualii" [Two ex-AUR MPs call for ban on gay "propaganda" by law, along the lines of Viktor Orban: "I don't like gay people"].* Digi24. https://www.digi24.ro/stiri/actualitate/doi-parlamentari-ex-

aur-cer-interzicerea-propagandei-gay-prin-lege-mie-nu-imi-plac-homosexualii-2252913

Panayotov, S. (2013). Neutralizing Visibility: Bulgarian Strategies for Justifying Inequality. In N. Fejes & A. P. Balogh (Eds.), *Queer Visibility in Post-Socialist Cultures* (pp. 155–171). Intellect Ltd.

Pew Research Center. (2018). *Eastern and Western Europeans Differ on Importance of Religion, Views of Minorities, and Key Social Issues*. Pew Research Centre. https://www.pewresearch.org/religion/2018/10/29/eastern-and-western-europeans-differ-on-importance-of-religion-views-of-minorities-and-key-social-issues/

Phillips, S. D. (2014). The Women's Squad in Ukraine's protests: Feminism, nationalism, and militarism on the Maidan. *American Ethnologist*, *41*(3), 414–426. https://doi.org/10.1111/amet.12093

Pietsch, B. (2022, August 4). *Zelensky floats civil unions amid gay marriage push in Ukraine*. The Washington Post. https://www.washingtonpost.com/world/2022/08/04/ukraine-zelensky-gay-marriage/

Poushter, J., & Kent, N. (2020). *The Global Divide on Homosexuality Persists*. Pew Research Center. https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/

Rédai, D. (2022, March 31). *How children became a tool in Orban's anti-LGBTQ propaganda*. CNN. https://www.cnn.com/2022/03/31/opinions/hungary-orban-lgbtq-referendum-redai/index.html

Riabchuk, A. (2017). Homeless Men and the Crisis of Masculinity in Contemporary Ukraine. In O. Hankivsky & A. Salnykova (Eds.), *Gender, Politics and Society in Ukraine* (pp. 204–222). University of Toronto Press. https://librarysearch.library.utoronto.ca/discovery/fulldisplay?docid=cdi_walterdegruyter_books_10_3138_9781442685871_012&context=PC&vid=01UTORONTO_INST:UTORONTO&lang=en&search_scope=UTL_AND_CI&adaptor=Primo%20Central&tab=Everything&query=any,contains,Homeless%20men%20and%20the%20crisis%20of%20masculinity%20in%20contemporary%20Ukraine&offset=0

Riabov, O., & Riabova, T. (2014a). The decline of Gayropa? *Transit – Europäische Revue*, 1–11.

Riabov, O., & Riabova, T. (2014b). The Remasculinization of Russia?: Gender, Nationalism, and the Legitimation of Power Under Vladimir Putin. *Problems of Post-Communism*, *61*(2), 23–35. https://doi.org/10.2753/PPC1075-8216610202

Riabova, T., & Riabov, O. (2019). The “Rape of Europe”: 2016 New Year’s Eve sexual assaults in Cologne in hegemonic discourse of Russian media. *Communist and Post-Communist Studies*, *52*(2), 145–154. https://doi.org/10.1016/j.postcomstud.2019.04.004

Rowatt, W. C., LaBouff, J., Johnson, M., Froese, P., & Tsang, J.-A. (2009). Associations Among Religiousness, Social Attitudes, and Prejudice in a National Random Sample of American Adults. *Psychology of Religion and Spirituality*, *1*(1), 14–24. https://doi.org/10.1037/a0014989

Sahgal, N., & Cooperman, A. (2017). *Religious Belief and National Belonging in Central and Eastern Europe*. Pew Research Center. https://www.pewresearch.org/religion/2017/05/10/religious-

belief-and-national-belonging-in-central-and-eastern-europe/

Shevtsova, M. (2020). Fighting “Gayropa”: Europeanization and Instrumentalization of LGBTI Rights in Ukrainian Public Debate. *Problems of Post-Communism*, *67*(6), 500–510. https://doi.org/10.1080/10758216.2020.1716807

Slootmaeckers, K., & Touquet, H. (2016). The Co-evolution of EU’s Eastern Enlargement and LGBT Politics: An Ever Gayer Union? In K. Slootmaeckers, H. Touquet, & P. Vermeersch (Eds.), *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (pp. 19–44). Palgrave Macmillan.

Slootmaeckers, K., Touquet, H., & Vermeersch, P. (2016). Introduction: EU Enlargement and LGBT Rights—Beyond Symbolism? In K. Slootmaeckers, H. Touquet, & P. Vermeersch (Eds.), *The EU Enlargement and Gay Politics* (pp. 1–16). Palgrave Macmillan UK. https://doi.org/10.1057/978-1-137-48093-4_1

Sovsun, I. (2022, August 2). *Dumaiu, pislia peremohy Ukrainy u viini nas zdyvuie statystyka reiestratsii shliubiv. Cherez ryzyk*

vtratyty zhyttia, zdorovia ta maino ukraintsi ta ukrainky [I think after Ukraine's victory in the war, we will be surprised by the statistics of marriage registration. Due to the risk of losing life, health and property, Ukrainians and Ukrainians] [Image attached] [Opinion] [Facebook]. https://www.facebook.com/sovsun.inna/posts/476726804280071

Sremac, S., & Ganzevoort, R. R. (2015). The Interplay of Religious and Sexual Nationalisms in Central and Eastern Europe. In S. Sremac & R. R. Ganzevoort (Eds.), *Religious and Sexual Nationalisms in Central and Eastern Europe* (pp. 1–14). Brill. https://doi.org/10.1163/9789004297791_002

Stella, F., Taylor, Y., Reynolds, T., Rogers, A., Stella, F., & Nartova, N. (Eds.). (2016). Sexual Citizenship, Nationalism and Biopolitics in Putin's Russia. In *Sexuality, Citizenship and Belonging: Trans-National and Intersectional Perspectives* (pp. 25–44). Routledge. https://doi.org/10.4324/9781315752563-8

Szakacs, G. (2021, June 15). *Hungary's parliament passes anti-LGBT law ahead of 2022 election | Reuters*. Reuters.

https://www.reuters.com/world/europe/hungarys-parliament-passes-anti-lgbt-law-ahead-2022-election-2021-06-15/

Takács, J., & Szalma, I. (2019). Social Attitudes towards Homosexuality in Hungary and Romania. *Intersections. East European Journal of Society and Politics*, *5*(1), 71–99.

Tarta, M. (2015). In S. Sremac & R. R. Ganzevoort (Eds.), *Religious and Sexual Nationalisms in Central and Eastern Europe: Gods, Gays and Governments* (pp. 33–51). Brill. https://doi.org/10.1163/9789004297791

The Kremlin. (2022a, June 17). *Address by the President of the Russian Federation*. President of Russia. http://en.kremlin.ru/events/president/news/67843

The Kremlin. (2022, December 18). *Signing of treaties on accession of Donetsk and Lugansk people's republics and Zaporozhye and Kherson regions to Russia*. President of Russia. http://en.kremlin.ru/events/president/news/69465

Todorova, M. N. (1997). *Imagining the Balkans*. Oxford University Press.

Ukraine. (2023, February 10). European Council - Council of the European Union.

https://www.consilium.europa.eu/en/policies/enlargement/ukraine/

Verdery, K. (1996). *What was socialism, and what comes next?* Princeton University Press. https://doi.org/10.1515/9781400821990

Verseck, K. (2021, November 8). *Will Romania step up anti-LGBTQ legislation like Hungary?* Dw.Com. https://www.dw.com/en/will-romania-step-up-anti-lgbtq-legislation-like-hungary/a-58832262

Whitley, B. E. (2009). Religiosity and Attitudes Toward Lesbians and Gay Men: A Meta-Analysis. *International Journal for the Psychology of Religion*, *19*(1), 21–38. https://doi.org/10.1080/10508610802471104

Woodcock, S. (2011). A Short History of the Queer Time of 'Post-Socialist' Romania, or Are We There Yet? Let's Ask Madonna. In *De-Centring Western Sexualities: Central and Eastern European Perspectives* (1st ed., pp. 63–84). Routledge. https://doi.org/10.4324/9781315576107-5

Young, C. (2022, March 9). *Blaming the Ukraine Invasion on … the Gays?* Cato Institute.

https://www.cato.org/commentary/blaming-ukraine-invasion-gays

Yuval-Davis, N. (1997). *Gender & nation*. SAGE.

On the Taming of State: Dominant Caste Elites and Caste-based Reservation in India

Raj Deol[*]*, Simon Fraser University*

[*] Biography : Raj Deol is a Master's candidate at the School for International Studies at Simon Fraser University, his current research focuses on caste, social inclusion and development. He is a development practitioner who has previously worked with several UN agencies in South Asia on issues of gender equality, disaster resilience, and migration. Raj's research interests include gender-responsive development, labour migration, transformative social inclusion in governance and state-building and the nexus between transnational social movements and equitable development.

Biographie : Raj Deol est candidat à la maîtrise à la School for International Studies de l'Université Simon Fraser. Ses recherches actuelles portent sur les castes, l'inclusion sociale et le développement. Praticien du développement, il a précédemment travaillé avec plusieurs agences des Nations unies en Asie du Sud sur les questions d'égalité des sexes, de résilience aux catastrophes et de migration. Les recherches de Raj portent sur le développement sensible au genre, la migration de la main-d'œuvre, l'inclusion sociale transformatrice dans la gouvernance et la construction de l'État et le lien entre les mouvements sociaux transnationaux et le développement équitable.

Abstract: In India, state builders' vision was to create a caste-equal society, which was institutionalized by including a reservation policy in the Indian Constitution. However, scholars from various disciplines have demonstrated that caste-based reservations have been ineffective and insufficient in achieving social equality. This paper argues that dominant caste elites played an influential part in taming the state to their caste-based interest, undermining caste-based reservation policy. Adopting a historical approach, this paper examines the role of dominant caste elites in the state apparatus and analyzes how elites tamed the state to undermine caste-based reservation policy. Rather than elite capture of the state broadly, the terminology of "taming" is used to showcase how various categories of elites limit the Indian state's capacity for caste equality. The essay is structured into three sections, each focusing on a distinct historical period shaped by the state ideology: British Raj, characterized by colonial rule; Independent India, represented by Nehruvian state-directed development; and Neoliberal India, characterised by market reforms and liberalization.

Keywords: Caste, Elite Capture, Social Exclusion, State-building, State Capacity, Reservation Policy, Affirmative Action

Résumé: En Inde, les bâtisseurs de l'État avaient pour objectif de créer une société où les castes seraient égales, ce qui a été institutionnalisé par l'inclusion d'une politique de réservation dans la Constitution indienne. Toutefois, des chercheurs de diverses disciplines ont démontré que les réserves fondées sur la caste ont été inefficaces et insuffisantes pour parvenir à l'égalité sociale. Cet article soutient que les élites dominantes de la caste ont joué un rôle influent dans l'adaptation de l'État à leurs intérêts de caste, sapant ainsi la politique de réservation fondée sur la caste. Adoptant une approche historique, cet article examine le rôle des élites de caste dominantes dans l'appareil d'État et analyse la manière dont les élites ont apprivoisé l'État pour saper la politique de réservation basée sur la caste. Plutôt que la capture de l'État par les élites au sens large, la terminologie de "domestication" est utilisée pour montrer comment diverses catégories d'élites limitent la capacité de l'État indien à assurer l'égalité entre les castes. L'essai est structuré

en trois sections, chacune se concentrant sur une période historique distincte façonnée par l'idéologie de l'État : Le Raj britannique, caractérisé par la domination coloniale ; l'Inde indépendante, représentée par le développement dirigé par l'État de Nehruv ; et l'Inde néolibérale, caractérisée par les réformes du marché et la libéralisation.

Mots-clés: Caste, captation des élites, exclusion sociale, construction de l'État, capacité de l'État, politique de réservation, action positive.

Just before India awoke to freedom, Jawaharlal Nehru (1946, p. 520) proclaimed equality to be fundamental in the making of modern India – "She must get rid of the exclusiveness in thought and social habit which… has stunt[ed] her spirit and prevent[ed] growth, today caste… has no place left in it." Nehru's vision, together with Dr. B. R. Ambedkar's hard-fought struggle for Dalit rights, led India to enshrine caste-based reservation in the Indian Constitution. Caste-based reservation is an affirmative action policy that provides quotas for oppressed castes[4] in areas of political representation, public education, and government postings. The intent of affirmative action was to provide redressal to oppressed castes for age-old traditions of oppression propagated through casteism (Chandola, 1992).

Much of the state-building and caste literature on India reveal a tension between three discourses – this tension presents a puzzle. First, modern Indian state-builders demonstrated a clear commitment to creating a just and caste-equal society (Nehru, 1946; Tashneem, 2021; Ramesh, 2022). Second, the vision of a caste-equal society was institutionalized through the inclusion of reservation policy in the Indian Constitution. Third, however, caste-based reservation has failed and rendered an ineffective and insufficient measure for achieving social equality (Vasavi, 2018; Mukhopadhyay, 2015; Virmani, 2014). The puzzle is thus: given that there was a clear intent to create a caste-equal society and the subsequent institutionalization of affirmative action, why did the implementation of caste-based reservation fail? In this paper, I argue that the dominant

[4] Though there are hundreds of caste communities, for the purpose of this paper, I categorized them into two groups. In this paper, I refrain from using terminologies such as upper or lower caste; rather, I use dominant and oppressed caste to signal caste groups based on power relations. Dominant caste groups include people of the Brahmins, Kshatriyas and Vaishyas castes who had greater power and access to resources than the oppressed castes. I use the terminology *oppressed caste* to describe caste communities that are fell outside of the Hindu varna system and are marginalized based on caste understanding of impurity and pollution. In legal language, caste-based reservation provisions were given to Schedule Castes (Dalits) and Tribal Castes (Adivasis).

caste elites[5] played an influential part in taming the state to their caste-based interest, undermining caste-based reservation.

Before diving into the analysis, it is crucial to clarify the conceptual definitions and theoretical inspiration behind this paper. This paper takes inspiration from subaltern studies scholars, such as Partha Chatterjee (1993) and Anupama Rao (2009), to understand that caste is not just a social institution but also a political institution. Through this lens, the Indian state is an agent in shaping and managing caste hierarchies and inequalities. In this regard, caste-based reservation is understood as a state-led mechanism to undo the historical injustices of caste inequality. Therefore, a goal of Indian state-building is the ability to address the caste inequality problem. By articulating it in the Indian Constitution, caste-based reservations were imagined providing a foothold for caste emancipation through oppressed caste representation in the state realm. The vision was that politicians, bureaucrats and scholars from oppressed castes would have a strong influence on the state to implement more caste emancipatory policies.

State-focused scholars have theorized elite dominance to explain the disparity in social development; they have also reviewed dominant elites' reaction to the process of social transformation to retain their economic, social, cultural and symbolic power (Chibber, 2003; Pal & Ghosh, 2007; Desai & Dubey, 2012). Institutional scholars have roughly defined elite capture as powerful groups in the state and society that use their influence to capture public institutions and resources for their benefit (Fukuyama, 2014; Robinson & Acemoglu, 2012).

Much has been written about elite capture of the state and its role in weakening state capacity. Though I take inspiration from the above definitions, I explore the novel argument that dominant caste elites "tamed" the Indian state to weaken caste-based reservation. Rather than elite capture broadly, dominant caste elites disciplined the state

[5] Caste is fundamental in understanding the nature of elites in India. The power and organization of economic, social and political Indian elitism are defined by caste. As such, they are unique and different to the elite makeup in other regions, which are predominantly defined by class.

during the 20th century to limit the outcomes of caste-based reservation. I argue that the act of taming the state is a case specific to India. While the concept of elite capture, in a broad sense, pertains to interest groups using the state to advance their own economic and social interests, as discussed by Fukuyama (2014) and Robinson & Acemoglu (2012), the notion of elite taming represents a more nuanced perspective. Elite taming can be better understood as interest groups strategically manipulating or constraining the state to limit economic and social benefits for others. More specifically, this practice of taming necessitates that elites take measures to restrict the state's influence in a manner that hampers the ability of other groups to garner influence on the state. In India's context, I argue that the primary objective of caste elites is to thwart the advancement of caste emancipation, enabling them to maintain their dominance while preventing any alteration of the existing elite status quo by the state. Consequently, taming the state can be categorized as a form of elite capture, albeit one with distinct characteristics and objectives.

I take a historical approach in this article to examine the role of dominant caste elites in the state apparatus and analyze how elites tamed the state to undermine caste-based reservation. The sections laid out in this essay discuss three distinct historical periods divided between state ideology, namely: *British Raj* – state based on colonial rule, *Independent India* – state based on Nehruvian state-direct development and *Neoliberal India* – state based on market reforms and liberalization. The first section reviews how caste was institutionalized in state structures during British colonial rule and highlights the making of dominant caste elites in colonial governance. The second section starts by portraying the statist visions of two modern Indian state-builders, Nehru and Ambedkar, on the issue of caste inequality. The section then explains the political settlement struck between elites and subalterns. It goes on to discuss how dominant caste elites in the Nehruvian state sought to minimize the implementation of reservation policy through patronage politics and bureaucratic capture. Finally, the third section demonstrates how elite caste-class power in the 1990s supported the Indian state's neoliberal integration and how this undermined caste-based reservation.

British Raj: Institutionalization of Caste and the Making of Caste Elites

In 1857, the first independence rebellion by Indians took place against colonial rulers. The shocking challenge to their power left an impressionable mark on British colonial governors. The Mutiny of 1857 brought revelations: the British rulers' ignorance of local context and culture and a lack of local elite support needed to be rectified (Bandopadhyay, 1990). Though the rebellion resulted in the British colonial victory, the British knew a new strategy for governing India was needed. Subsequently, India was officially placed under the sovereign control of the British government. The British's strategy of controlling and governing the Indian masses hinged on understanding how Indian society functioned and seeking support from local elites. At the center of their policies was the institutionalization of caste and administrating rule through dominant caste elites.

South Asian historians have pointed to colonial structuring and formalization of caste to explain caste divisions throughout 20th century and contemporary India (Bayly, 1999; Cohn, 1987; Drik, 2001). British Raj transformed caste from a loosely defined social hierarchy into a rigidly structured and officially sanctioned system backed by the authority of "science" (Riser-Kositsky, 2009). It is important to note, however, that the caste system existed prior to British rule. Caste is a construct of Hinduism, and it has made its mark across religious, ethnic, and cultural identities (Sana, 1993; Guha, 2013). It structured a stratified society (Mencher, 1974). Importantly, the nature of the caste system was not homogenous across the sub-continent; it functioned differently in different regions during different periods. The institutionalization of caste changed that (Srinivas, 1957). This rigid and singular classification of caste had a profound impact on the governance, policies, institutions, and bureaucracy of the colonial state.

In their pursuit to understand Indian society, the state of British Raj commissioned ethnographic studies and a census to count the Indian population based on their caste. British officials believed understanding caste and religion was the key to ruling India well (Cohn, 1987). To them, if they were to govern effectively, they

needed to collect systematic information about the nature of caste (Cohn, 1987). With their newfound modes of scientific classification, the British Raj officials became the masterminds behind a rigid hierarchy of social ranking for the caste system (Javed, 2021). Amid the complex chaos of caste in Indian society, the British became the pioneers of a caste ranking system that suited their own agenda (Javed, 2021). Not only did the explicit display of the caste system bring forward the caste discourses of purity and pollution, but it also made caste a fundamental tool of colonial governance and state development. Javed captures the importance of caste at the heart of British colonial governance:

> State operations were run keeping the caste system as the centre of gravity. This enhanced the presence and value of the caste system in the life of a common individual because it was backed by institutions and authenticated by authorities. The caste system did not see the limelight this much before being recognised by the British in [the] legitimate form. (2021, p. 52679)

In this context, the colonial rule period remains relevant to the evolving role of dominant caste elites in the Indian state. Particularly relevant are the following questions: how might the colonial policies favor the dominant caste elites, how might the colonial fixation on caste shape bureaucracy, and how might colonial context necessitate the origins of caste-based reservation? And what would the colonial legacy mean to the failures of caste-based reservations to come? Most importantly, I argue that this period is particularly relevant to study as the colonial state machinery was to be inherited by independent India.

How colonial knowledge of Indian society and caste was produced is particularly important to the role dominant caste elites would play in Indian statecraft. In their quest for knowledge production, the Raj sought help from the dominant caste group of Brahmins in the census and ethnographic exercises. This gave dominant caste elites an upper hand and a certain status in colonial governance. Such significance and privilege over other local populations in many areas, especially South India, had not been enjoyed by Brahmins before (Javed, 2021). During the caste enumeration exercise, the Raj

started determining which castes commanded higher social ranks (Riser-Kositsky, 2009). It is no surprise that the resulting social ranking of caste, which dictated the colonial impression of India, was based on the dominant caste's knowledge and interests. It is equally no surprise that the British already looked at dominant caste groups as more educated and sophisticated than the general population. Fundamentally, the colonial state "...highlighted everything related to caste and its norms, reproduced and displayed the languages of the caste, and made the caste look like the only ladder to gain power and influence…" (Bayly, 1999, as cited in Javed, 2021). By relying on Brahminical interpretations of Indian society, colonial knowledge production structured how the state would be governed based on caste hierarchies.

The British officials were not overly concerned with fighting social injustice nor with "bringing civilization" to India, as they claimed. Instead, their underlying aim was to extract as much revenue as possible from their imperial possession (Riser-Kositsky, 2009). As a result, spotlighting caste and fostering caste divisions were tactics in their infamous divide-and-rule playbook. At the core of British intent was the distraction of the masses away from the exploitative nature of colonial rule. Moreover, the creation of thousands of competing caste groups was a calculated benefit for the Raj, making a united anti-British front unlikely and allowing for continued colonial exploitation (Riser-Kositsky, 2009).

The British colonial administration in India sought support from dominant caste elites to quell dissent and legitimize their rule, perceiving them as culturally superior and more receptive to British ideals. This reliance on dominant caste elites was rooted in the colonial state's internalization of Brahminical superiority, as well as a recognition of these elites' pivotal role in maintaining social stability and mitigating anti-colonial sentiments (Bayly, 1999; Javed, 2021).

One concrete outcome of this administrative inclusion was a cardinal shift in hiring practice in the British Indian military state apparatus. In the late 19th century, recruitment in the military was practiced based on caste classification. This was a result of the British's awareness of dominant caste anxieties. Since the beginning of their colonial expansion in India, the British army recruited significant military

personnel from oppressed castes and Dalit communities, providing them with a steady income and opportunities for advancement (Riser-Kositsky, 2009). The East India Company ensured their recruits learnt English, and free education was provided to both soldiers and their families (Riser-Kositsky, 2009). By 1856, a third of the Bombay army was made up of the Mahars, who were considered "untouchables" (Kshirsagar, 1994, as cited in Riser-Kositsky, 2009). However, following the 1857 Mutiny and fearing backlash from dominant caste Hindus, the British government changed its military policy and ceased recruitment of "untouchables" (Kshirsagar, 1994, as cited in Riser-Kositsky, 2009). In their military recruitment, the colonial officials required applicants to declare their caste (Farooqui, 2014). More sinisterly, the official policy of the British Indian military was for their soldiers to maintain distinctive caste identities and foster animosity toward other ethnic groups (Farooqui, 2014). Not only did the colonial state apparatus uphold dominant caste elite interests, but it also actively nurtured caste-based hostility.

The bureaucratic state apparatus, known as the steel frame of British rule, also started incorporating dominant caste groups into service. Ranajit Guha (1998), in his book *Dominance without Hegemony: History and Power in Colonial India,* describes how the British colonial state was able to dominate Indian society without hegemony (cultural leadership or moral authority). His answer was the role of dominant caste elites supporting the colonial power to administrate India (Guha, 1998). The colonial machinery trusted the ability of the dominant caste elites to implement colonial policies. As stated earlier, the British administration felt close to dominant caste Hindus not only because their support was necessary but also because they were seen as educated and loyal to the British Raj. By appointing the dominant caste to positions of authority, the colonial state subsequently made them into elites with influence on the state. To this end, elites in colonial bureaucracy solidified the dual colonial-Brahminical dominance over British India. The steel frame of colonial rule left a stubborn legacy that would challenge caste-based reservations.

By the start of the 20th century, caste elites had amassed status within the colonial government. They started to tame the state to their interest since the elites actively sought to limit opportunities for other

caste groups. Though the Indian civil service exams were based on merit and open competition from the late 19th century, it was the Indian Christians and dominant caste Hindus who performed well (Kirk-Greene, 2000). The reason being caste elites had and were given access to classical Western education. Furthermore, dominant caste elites ensured that other caste groups did not have access to the same English education, hindering efforts to expand primary schooling. Since the main source of revenue for public schooling came from land tax, landed elites had no interest in supporting public education expansion (Chaudhary, 2012). Bureaucratic and urban-educated elites did not want mass education to occur as it would increase competition for government administration jobs (Chaudhary, 2012).

Despite formalizing dominant caste power in colonial machinery, the British did not altogether ignore the plight of the oppressed caste. By the early 20th century, the Raj started granting more rights to oppressed castes in areas of education and social welfare. Colonial governors were more sympathetic to the cause of oppressed caste communities to gain representation as well. In 1915, new rules were introduced to reserve seats and scholarships in the education system, to the extent that education expenses targeting “backwards castes” nearly doubled between 1915 and 1916 (Bandopadhyay, 1990, as cited in Riser-Kositsky, 2009).

To be clear, the interest of the British colonial state was not the emancipation of caste, but rather the intention to educate the “uncivilized” and mold them to adopt English values. Additionally, Bandopadhyay (1990) wrote there was a calculated intention behind the British government's actions, linked to their historical strategy of divide and rule (as cited in Riser-Kositsky, 2009). For Bandopadhyay (1990), it is not shocking that, at a time when nationalist sentiments were gaining momentum, exemplified by Gandhi and the Congress Party, the British increased measures that appeared to be directed towards helping the oppressed caste (as cited in Riser-Kositsky, 2009).

In 1932, then-British Prime Minister Ramsay MacDonald granted *the Communal Award*, which sought to establish separate electorates for oppressed castes. This decision caused political turmoil in the

independence movement; Gandhi, who was already imprisoned, pledged to go on a hunger strike until death if the ruling was not overturned (Riser-Kositsky, 2009). With the keen support of Dr Ambedkar (a national Dalit leader), separate electorates would have ensured oppressed caste folks could vote exclusively for oppressed caste candidates. Gandhi was concerned that separate electorates would permanently divide Hindu society, perpetuate the stigma of untouchability, and hinder the eventual assimilation of untouchables into the Hindu community (Riser-Kositsky, 2009). Ultimately, Dr Ambedkar agreed to the Poona Pact, which retained a set percentage of seats for the oppressed castes but eliminated entirely separate electorates, largely because he feared being held responsible for Gandhi's death (Riser-Kositsky, 2009). The Poona Pact marked the origins of caste-based reservation, thus laying the groundwork for future reservation efforts in Independent India's state-building efforts.

Independent India: Modern State-Building and Elites' Taming of State

As the colonial rulers departed, Nehru and Ambedkar were given the trusteeship to build a modern Indian nation-state. Nehru and Ambedkar represented two major forces in Indian state-building. Nehru was the maiden Prime Minister and leader of the independence movement. Meanwhile, Ambedkar was the first Law and Justice Minister and a significant figure in both the independence and Dalit movements. Both state-builders contended with the caste issue, Ambedkar more so as the leader of the Dalit movement. There is a convergence in their ideas of state action in response to the caste question. However, there is also a fundamental divergence between their approach. Reviewing Nehru and Ambedkar's statist views reveals the intention and approaches used in the making of modern India. Subsequently, the understanding of Nehru and Ambedkar's vision of the state explains what kind of political settlement was formed between elites and subaltern representatives that led to the enactment of caste-based reservations.

Nehru, India's inaugural Prime Minister, envisioned a democratic India where every citizen would be afforded equal opportunities. At

the same time, he acknowledged caste politics and the entrenched nature of caste in society would be the primary barrier to the realization of his vision (Tashneem, 2021). Ambedkar, the chief architect of the Indian Constitution, dedicated his life to fighting for an emancipated caste society. He saw caste as a social evil rooted in religious dogma that perpetuated the marginalization of oppressed castes. The vision of both men was the same: a caste-equal society — one that required state action to redress inequality and free Indian society of caste (Tashneem, 2021; Ramesh, 2022).

However, their approaches were drastically different. Nehru believed modernization and state-direct development would render India caste-equal. He foresaw a future India as a nation with advanced technology and industry, where development would serve as the binding agent that unites the country's diverse population (Khan, 2011). The process of state-led development would modernize not only the Indian economy but also reform people's caste-ist way of thinking (Khan, 2011). This transformation would eventually reduce the significance of caste, religious, and linguistic differences (Khilnani, 2003; Khan, 2011). Meanwhile, Ambedkar saw the state as the guarantor of social justice and believed in the "...sheer transformative capability of the state as an instrument to refashion caste society" (Ramesh, 2022, p. 740). His approach involved a substantial and activist state that deployed institutional tools to coercively remake caste society (Ramesh, 2022). As such, Ambedkar connected the coercive power of the state with the provision of guaranteed representation for Dalits and other oppressed groups (Ramesh, 2022).

The divergence in approach between Nehru and Ambedkar reflected how the negotiation between elites and subaltern representatives played out. For state durability and institutional formation, political economists have emphasized the importance of an "elite bargain" (Dercon, 2022) or a "political settlement" (Khan, 2010). In India's case, the Nehruvian state was based on a political settlement. Some scholars saw the negotiation as a political consensus or compromise (Kothari, 1970; Kaviraj, 2005), implying reservations was merely short-term concession or was not intended to shape the rules of distribution. However, political settlement is more appropriate to describe the pact between elites and subalterns' representatives

because reservation policy was enacted in the constitution – a sign that affirmative action was intended to have a long-term impact on the distribution of power and resources in Indian society. Importantly, the concept of political settlement should not be seen here as different political groups coming to an agreement that has been inked on paper on mutually agreed upon principles. Instead, the political settlement involved a trade-off based on a historic convergence of vastly different expectations of elites and subalterns (Kaviraj, 2005).

To the economic and social elites (predominantly from the dominant caste), the modern centralized Indian state presented an opportunity to expand its power over society in a way that fragmented forms of domination could not satisfy (Kaviraj, 2005). Therefore, they were attracted to the modern state as it mediated their ambitions for economic control. The political and intellectual elites recognized that it was necessary for national groups to engage with the international order of states (Kaviraj, 2005). They understood that this mandatory form of political organization was essential for the viability of any nation. Similarly, subaltern groups, such as oppressed castes and untouchables, saw the modern state as the only means of emancipation from traditional subordination from dominant caste groups (Kaviraj, 2005).

The political settlement involved a trade-off. Dominant caste elites agreed to affirmative action caste policy for the creation of modern centralized India from which they could reap economic benefits (Kaviraj, 2005). Caste-based reservation was essential for state formation to gain legitimacy among the substantially large, oppressed caste population, which was not only socially but also economically deprived (Ahmed, 2009). As a result, the abolition of untouchability and caste-based reservation were enshrined in the Indian constitution — at the same time, caste elites got the chance to govern India, and Nehru was able to roll out state-directed development.

Nehru's administration was entrusted with caste-based reservation and state-directed development as policies for a modern caste-equal India. Why, then, did the independent nation-state fail to redress caste inequality through reservation effectively? The answer is connected to how the Nehruvian state was also characterized by the

pinnacle of the power of India's elites, most of them from dominant caste groups (Sherman, 2022). Clientelism, patronage politics, bureaucratic inertia, and reliance on local kinship networks for policy implementation were tools of state taming used to undermine reservations during the Nehruvian period.

Although Nehru was a Brahmin, there is no doubt that he was committed to increasing the political power and representation of Dalits in India. However, the political motivation that kept him in power and drove the Congress Party's electoral gains undermined his commitment to caste-based reservations. Jaffrelot (2021, p. 6), a political scientist focusing on India, explains that "...when it came time to contest elections, the prime minister resigned himself to relying on local leaders and regional heavyweights, the only ones capable of handing him a victory owing to their patronage networks". These patronage networks were based on not only traditional economic motives, such as land ownership by landed elites or the financial influence of the business elites, but also their caste status, for many of the elites belonged to the dominant castes (Jaffrelot, 2021). By adopting a strategy of clientelism, the Congress party was able to emerge victorious in the elections of 1952, 1957, and 1962 — but this approach compelled Nehru to support conservative figures who did not share his socialist and caste eradication beliefs (Jaffrelot, 2021).

Elites came to tame the state through clientelism during Nehru's time. As Nehru relied on patronage politics to maintain his and the Congress Party's rule, his reliance on elites clouded his commitment to caste emancipation and caste-based reservation. Dominant caste elites within politics and bureaucracy knew affirmative action threatened their status quo positions; they needed to diminish state leaders' political will to effectively implemented reservation or any other policy that could harm their caste-based status. As evidenced, patronage politics prevented Nehru from carrying out land reforms, which was one of the pillars of his election campaigns (Jaffrelot, 2021). Nehru succeeded in garnering the support of the landed elites and safeguarding their interests (Sarker, 2020). For example, under pressure from the landowners' lobby in the Congress Party, led by

Sardar Patel, Nehru abandoned the idea of abolishing *Zamindari*[6] and distributing land in pre-1952 India (Sarker, 2020). Scholars have demonstrated that land distribution is the only institutional reform that could have provided equal representation and equal opportunities at that time. (Sarker, 2020).

Nehru's political background motivated him to protect political elites and create a social habitus for party supporters and decision-makers, which allowed him to maintain governmentality for two decades (Sarker, 2020). Precisely because Nehru fostered the concentration of power among social elites, Nehru's actions solidified a class of power elites from dominant caste groups in India (Sarker, 2020). Additionally, Nehru's government engaged in activities that destabilized its own institutions for electoral gains (Sarker, 2020). To this end, Nehru was complicit in solidifying the elitism of the dominant caste and their power in the state. Sarker gave his verdict on Nehru:

> Nehru's affirmative actions uplifted the economic lives of millions [of] Indians, but he himself invoked the death of the dream of an economically [caste] equal India by adjoining his dream of socialism with [an] elitist model of power. (2010, p. 55)

Beyond national elites, local elites were also involved in taming that state to limit caste-based reservation. Due to the central government's lack of "infrastructural power" (Mann, 2008), Nehru was forced to decentralize policy implementation and rely on local elites. He knew that implementation of ambitious programs by the central government was contingent upon the cooperation of state and local actors since the central government lacked the power to do so on its own (Chakraborty, 2017). However, the cooperation of state and local actors meant the support of local elites was needed to effectively implement Nehru's state-direct development.

[6] Zamindari refers to a system of land tenure that was prevalent during the colonial period in India. Under this system, wealthy landowners (known as zamindars) were granted large tracts of land by the colonial government. Landowners has the right to collect rent from tenant farmers who cultivated the land, part of the revenue collected from tenants was given to the colonial government.

This posed significant challenges to Nehru's caste abolition vision – even in the provinces where his party held power, they did not always share Nehru's priorities, and he struggled to force cooperation through federal or national party pressure (Chakraborty, 2017). This was evident in the ineffective land reform in Congress-led provinces, where powerful local politicians came from the landholding class and dominant castes (Chakraborty, 2017). On caste-based reservation, decentralization diluted the federal state's vision of caste equality, and local elites had influential power over the effectiveness of caste-based reservation. Local elites often resisted the implementation of caste-based reservations.

In the vision of Nehru and Ambedkar, the state is the protagonist in India's pursuit of caste redress. If we were to examine the failures of caste-based reservation, the implementation arm of the state — bureaucracy with its bureaucratic elites — requires significant attention. Nehru's will and any policy implementation heavily depended on the state's bureaucratic machinery. As a result, the reservations based on caste and developmental policies that Nehru pursued were undermined by the fact that he often had to operate through the elitist bureaucracy (Chakraborty, 2017).

Although the colonial bureaucracy (the Indian Civil Service) was abolished in independent India, the modern bureaucracy (the All-India Administrative Service) was essentially the remnant of its colonial predecessor with a new name. Why was this the case? The answer lies in the context of independence. India did not inherit the administrative machinery of the Raj as a deliberate strategy but rather because of the challenges faced by the government in the aftermath of independence. Due to the upheavals caused by partition, the integration of princely states, and the need for socialist nation-building, the new Indian leaders were not able to undertake significant reforms of the inherited bureaucracy (Sherman, 2022).

Colonial bureaucracy was characterized by the extensive makeup of dominant caste elites. This was no different in the aftermath of independence; the All-India Administrative Service mirrored their elitist backgrounds inherited from the colonial setting (Wilcox, 1965, as cited via Chakraborty, 2017). Members of the civil services were

seen as strong repositories of conservatism and were drawn from a small, educated, and often landed elite, which had little in common with poor Indians and Dalits (Chakraborty, 2017).

Beyond the makeup of bureaucrats, Nehru also chose to largely continue with the institutional culture and training processes of the old Indian Civil Service (Chakraborty, 2017). Unfortunately, as a result, the modern bureaucratic institution inherited the design of authoritarian stability rather than democratic reform, which came to hinder Nehru's implementation of caste-based reservation (Chakraborty, 2017). Any attempts at caste redressal, whether within bureaucracy or implementation of caste policies, were impeded by dominant caste bureaucratic inertia, unwilling to change or give up their caste-based power. The bureaucracy itself thwarted attempts at reform by using common tactics of delaying and deflecting (Brown, 1999, as cited in Chakraborty, 2017). Nehru lacked this foresight as he was more inclined towards grand ideas and vision rather than the intricate details of bureaucratic changes (Chakraborty, 2017).

Dominant caste elites utilized bureaucratic inertia to tame the state. One aim of reservation was to create bureaucratic representation for oppressed castes through quotas for government jobs. Bureaucratic elites actively undermined caste-based reservation; they created barriers that prevented the entry and promotion of oppressed caste populations (Doner, 2022). These barriers were rooted in stereotypical caste discourses and elite resistance, perpetuating the stigma and disrespect towards oppressed caste individuals (Doner, 2022). Overlooking institutional inequalities, the bureaucratic elites claimed Dalits suffered from intrinsic deficits and were 'unfit' and 'unsuitable' for civil service (Doner, 2022). As a result, bureaucrats from oppressed castes were relegated to menial posts with minimal promotion opportunities (Doner, 2022).

Further evidence suggests bureaucratic elites had an affinity for an elitist positionality during the Indian bureaucracy application process. The requirements, such as application fees, preparatory services, human capital, a college degree, investments in schooling, and caste-based social/kinship networks, created a caste-class advantage — this inhibited oppressed caste individuals from accessing government postings (Doner, 2022). The kinship

prerequisite and the reliance on preparatory access and financial means favored individuals from elite caste backgrounds (Doner, 2022). Despite the "meritocratic" process and quota system, traditional kinship networks based on caste played a significant role. Brahmins and Kayasthas were the largest caste groups in the Indian Civil Service during the British colonial era, and this continued even after Independence (Baru, 2021). A study conducted in the mid-1980s revealed that over 60 per cent of Indian Administrative Service officers belonged to the dominant castes, with Brahmins making up 37.67 per cent, Kayasthas 9.56 per cent, and Kshatriyas 13.33 per cent (Baru, 2021).

In 1963, though the government job quota for suppressed castes was 12.5 per cent, it was only one to seven per cent filled (Chakraborty, 2017). Bureaucratic elites claimed that there was a shortage of qualified Dalit candidates; however, Dalit representatives argued that this was due to ongoing discrimination, particularly in cases where personal interviews are part of the hiring process (Isaacs, 1967; Chakraborty, 2017). There is evidence that interviews were affected by caste-related bias. Interviewers from dominant castes, acting on their prejudice, preferred candidates from a certain caste-class background (Doner, 2022). It is worth noting that these interviews were required for only the upper echelons of bureaucracy, while manual and menial government jobs had no issues with incorporating Dalits. It is particularly contrasting that Dalits filled more than 17.5% of "low" grade jobs, which included messengers, menials, and flunkeys (Isaacs, 1967; Chakraborty, 2017). Elites co-opted the bureaucracy to ensure genuine outcomes of caste-based reservation, such as equitable representation, were not realized.

To end, a political settlement was the basis on which the modern Indian state was founded — the Congress Party and its political elites obtained legitimacy from the subaltern masses, and caste-based reservation was provided in return as hope for emancipation from caste oppression. However, reservation policy never had the support of the dominant caste population for the simple reason that it cut into elites' near-complete control over politics, government jobs, and educational institutions (Ahmed, 2009). Dominant caste elites felt public realms (including governance, bureaucracy, and public education) rightfully belonged to them, and affirmative action

hindered meritocracy. Though, during the Nehruvian state, dominant caste elites did not oppose reservation in any notably organized and sustained form (Ahmed, 2009), they did, however, tame the state through clientelism and bureaucratic co-option to undermine caste-based reservation.

How post-colonial elites saw the state is pertinent to the bigger picture of why the state had to be tamed. By choosing to apply Partha Chatterjee's (1993) and Frantz Fanon's (2004) post-colonial critiques, it is evident that dominant caste elites were not interested in a radically different design of nation-state, but rather they wanted to inherit the colonial state. Elites wanted to solidify their power through a centralized state by upholding colonial bureaucratic structure and logic of governance. Gopal Guru (2011) makes a point that Indian elites, while attracted to liberal democracy for its potential to reclaim and expand their influence post-colonial rule, primarily prioritized their own interests in contrast to a broader commitment to emancipation for all. Rather than freeing India from the chains of colonial logic, the Nehruvian state was tamed by the elites to replicate the logic to preserve their caste power. This is evidenced by their clientelist approach and inheritance of a colonial bureaucracy that was dominated by dominant caste elites. Through this lens, dominant caste elites were the new colonizers, and oppressed castes continued their role as the colonized. It seems caste-based reservation was merely a tool used by the elites to gain legitimacy from the subaltern masses in the making of a centralized modern Indian state. They had no interest in the emancipation of caste. At the end of the day, the elite taming of the state only solidified the state's inability to challenge the existing structures of caste power and privilege.

The outcome of caste-based reservation in the decades that followed independence was limited. It is no surprise elites maintained their dominance and disciplined the state to undermine affirmative action. The Nehruvian state did not yield a single oppressed caste millionaire, nor did it produce a real layer of bureaucrats from the oppressed castes (Kavraj, 2005). Kavraj describes the limited achievement of reservations, which resulted in "...[a] small segment of upwardly mobile elite from the lowest castes secured for their

communities a symbolic dignity, a staged equality with other bearers of power in state institutions" (2005, p. 13).

Despite their many negative outcomes due to elite taming, caste-based reservations were somewhat successful in yielding a Dalit political representation capable of making demands on the state. Because of reservation, in the late 1970s, parliamentary politics in India underwent a significant transformation. Nehruvian dominant caste politicians espousing ideologies like liberalism and socialism were slowly being replaced by politicians from oppressed castes with vernacular education (Kavraj, 2005). The language of political contestation shifted from Western ideologies of state-led development to a focus on dignity and resentment towards the slow progress of caste emancipation (Kavraj, 2005). As a result of the political representation of oppressed castes, they were able to make demands on the state to study the situation of affirmative action and institute recommendations from the study. Oppressed castes' influence on the state threatened the dominance of dominant caste elites.

Neoliberal India: Dwindling State and the Revolt of Caste Elites

During the early 1990s, India was engulfed in a deeply divided caste debate; widespread protests, municipal shutdowns and riots were common backdrops in the Indian political landscape. This was primarily a reaction to implementing the *Mandal Commission* recommendations. Eleven years prior: in 1979, the Indian state created the Mandal Commission, which was tasked with studying the underrepresentation of lower castes in the country's public sector. In 1980, it released its report recommending increasing the scope and coverage of affirmative action for traditionally disadvantaged groups in government jobs and educational institutions. However, for the subsequent ten years under the elite-dominated Congress government, those recommendations were ignored (Jayal, 2015). In

1990, another government, led by the National Front coalition[7], instituted the *Mandal Commission* recommendations.

The Mandal Commission was an outcome of the surge in political mobilization by the oppressed caste population in India. Their increasing representation in electoral politics facilitated their mobilizations, thanks to caste-based reservation (Ahmed, 2009). Any positive outcome from affirmative action threatens the dominant caste elites' power. Elites saw the Mandal recommendations as an attack on their privilege and a dilution of merit-based selection; they were primarily concerned with losing their monopoly over prestigious government jobs and academic institutions. The backlash was a revolt of the dominant caste groups as they took to the streets, holding massive rallies and staging hunger strikes to demand that the government rescind the commission's recommendations.

Dominant caste elites needed a new strategy to tame the state. Liberalization and market reforms were their new game plan. Their new form of disciplining the state involved chipping away at the Indian state's power and scope. To maintain their dominance, elites look to increase the power and scope of the market. Despite the ongoing contestation of caste-based reservations in the public sector realm, the private sector continued to be dominated by the dominant caste population (Ahmed, 2009). The private sector did not and was not required to adopt the social responsibility of providing affirmative action in employment for oppressed castes. Thus, the corporate sector emerged as a realm that the caste elite could occupy without sharing with historically disadvantaged groups (Ahmed, 2009). Furthermore, elites were able to leverage private corporations' influence within the government and political arena, allowing them to undermine efforts to enforce affirmative action policies in the private sector (Ahmed, 2009). To this end, the private sector was a safe sanctuary for dominant caste elites, and they sought to increase the market's power in relation to the state.

[7] The National Front coalition was a coalition of several parties that sought to provide a third option for voters, it did not include two major parties in India at that time: the Indian Congress Party or Bhartiya Janata Party.

Indian history scholars argue that there is no evidence to suggest that elites' animosity towards *Mandal Commission* directly caused elite preference for market reforms (Babu, 2004). I only agree partly – yes, caste elites' support for neoliberalism has been brewing since the mid-1980s (Ahmed, 2009). But, most importantly, institutionalizing the Mandal recommendations was the breaking point that saw elites heavily rely on liberalization to tame the Indian state and maintain their caste-based dominance.

India's balance of payment crisis in 1991, with heavy pressure from the World Bank and the International Monetary Fund, saw India officially take up the neoliberal path. Like elsewhere, liberalization reform entailed the reduction of the Indian state's role in the economy. Consequently, the government's control over industries and subsidies ceased to exist. India deregulated industries, reduced trade barriers, and allowed for foreign investment. Additionally, the state was subjected to fiscal discipline, focused solely on reducing the national budget deficit. Most fundamentally, within this context, the role of the state shifted from being a provider of public goods and services to a facilitator of private enterprise. Liberalization was perhaps the most aggressive tool that saw the state tamed and in retreat.

Within this overarching context, how did caste elites concretely see liberalization as a means for undermining caste-based reservation? Jaffrelot explains how dominant castes saw in liberalization a new avenue for dominance where they could succeed:

> ...the [dominant] castes are losing ground in the political sphere and in the administration, but the liberalisation of the economy—which coincided with the implementation of the Mandal Commission Report—has opened new opportunities for the [dominant] castes in the private sector, and hence they may no longer regret their traditional monopoly over the bureaucracy being challenged. (Jaffrelot, 2003, p. 494, as cited in Babu, 2004).

In other words, since oppressed caste groups were able to garner influence over the state, the state was no longer the avenue for caste

elites to maintain dominance. As a result, the state had to be aggressively tamed and constrained, and hence power shifted from the state to the market. For elites, a dwindling state meant caste-based reservation was constrained. To this end, caste elites were now less worried about being challenged in the state realm; rather, they were concerned with solidifying their dominance over society through the market.

On the other hand, what did liberalization have in store for the oppressed caste population? As mentioned earlier, the subaltern population saw the state as a guardian of their rights and placed their hope for caste emancipation with the state. This was also the vision of Dr Ambedkar. In contrast to the state, oppressed castes saw society as the source of their persistent marginalization and saw the market as an extension of society (Babu, 2004). So, when liberalization forced the retreat of the state, oppressed castes saw the retreat of their hopes for caste emancipation. Dalits believed the emasculation of the state would lead to the erosion of affirmative action, apathy for Dalit protection and human rights and to the free will of the market to discriminate (Babu, 2004).

To drive the point home, taming the state through liberalization meant constraining the state, which then meant restricting genuine outcomes of caste-based reservation. Since caste-based reservation provides quotas in spaces managed by the state, the retreat of the state means that those spaces were in retreat as well. State and oppressed caste representation in spaces of the state were envisioned as a source to uplift oppressed caste groups and refashion caste society. With the state's power and scope limited, its power over society is then limited as well. This brings us to an essential question – if the original vision is that Dalit representation in state spaces provided a foothold for caste emancipation, then what is left for the emancipatory potential of reservation policy when the state no longer yield influence in society?

Since the Indian constitution guarantees oppressed castes' right to equality, protection and caste-based reservation, the withdrawal of the state is then a direct assault on the rights of oppressed caste groups. The retreat of the state meant caste-based reservation did not provide the basis for caste emancipation. Since the state has less

power and capacity, and affirmative action is only subjected to in the areas of public education, government jobs and political representation, any Dalit representation through quotas within the state will not yield effective policies that could provide the basis for caste equality. What is more, market reforms rendered the Indian state-builders' values of equality, socialism and self-reliance obsolete. To this end, oppressed castes understood liberalization as a dominant caste elite process which sought to diminish their safe haven, the state.

More concretely, caste elites' liberalization strategy of undermining caste-based reservation primarily occurred in two of the three spaces – government employment and public higher education. Prior to market reforms, elites and oppressed castes alike saw employment in government administration as a matter of prestige. Working in the civil service was the epitome of professional success in Indian society. However, as liberalization subjected the state to fiscal discipline, government jobs were limited. Additionally, privatization opened spaces for elites and dominant caste groups to gain well-paid employment in the private sector. Post-reform, public sector employment was no longer as enticing as it used to be, and there was a shift in employment preference and valued jobs from the public realm to the private realm.

The shift to the private realms undermined the intent of caste-based affirmative action precisely because employment quotas did not exist in the private sector. Where current quotas provisions reserved some limited government jobs for the oppressed caste, the growing private sector and its rise in job positions did not cater to the oppressed caste population. Furthermore, elites' dominance in the private sector meant that the private sector did not adopt the social responsibility of taking affirmative action in providing corporate jobs to oppressed caste populations. This is evidenced by the strong opposition from Jamshed Irani, an economic elite and the national president of the Confederation of Indian Industry, in the early 1990s. Speaking for much of the dominant caste elites, he expressed strong opposition to quotas and reservation, stating that it would be unfortunate if legislation were to be introduced (Ahmed, 2009).

Much of Sukhdeo Thorat's research underscores the pervasive presence of economic discrimination within the market realm (Thorat & Attewell, 2007; Thorat & Newman, 2012). These discriminatory practices encompass a wide array of formal and informal barriers that obstruct the entry of subordinate groups into the market and often involve their selective inclusion with unequal treatment (Thorat & Newman, 2007). In essence, the labor market has been and is rife with caste discrimination, occurring in areas such as hiring, wage differentials, working conditions, and access to opportunities for upward mobility (Thorat & Newman, 2007). Furthermore, it can be inferred from Thorat's literature that shifting power to the market realm would have exacerbated economic discrimination, as the market mechanisms themselves perpetuate and intensify caste discrimination, particularly to the advantage of caste economic elites.

There were calls from Dalit politicians and civil society actors to extend affirmative actions in the private sector. However, the extreme influence that corporations have in the state and political landscape thwarted any efforts to expand caste-based reservation in private-sector employment (Ahmed, 2009). Consequently, the rising corporate sector emerged as a space for caste-class elites where they no longer had to contents with caste-based reservations which had tried to threaten their status quo and their monopoly over renowned and well-sought jobs. As a result, with the state constrained, the market was the elites' new safe haven in which caste elites did not have to share with oppressed caste populations (Ahmed, 2009).

The second element of caste-based reservation that caste elites targeted was higher education. Education was held close to Dalit movements. However, the presence of liberalization severely undermined affirmative action in higher education. Higher education was seen as the avenue where oppressed castes groups could gain the agency and qualification needed to work for the state and gain status in society. Historically, educational institutions were elitist caste spaces that excluded oppressed caste groups. The exclusion was based on the notion that oppressed castes were "polluted" based on their traditional occupations. Meanwhile, since education is for the "pure", the right only belonged to dominant castes. To correct this exclusion, quotas in higher education institutions were instituted.

Thus, in recognition of the historical injustices and education as an emancipatory tool, the state was then the guarantor of Dalit higher education.

From the Nehruvian period, higher education was moving from an elite model of higher education to a mass model – there was an increase in India's gross enrollment rate from 1.5 per cent in 1961 to 5.9 per cent in 1991 (Jamkar & Johnston, 2021). Despite the presence of elite dominance post-independence, the state was designed to be the provider of higher education. In the making of a modern nation-state, Nehru emphasized mass education and ensured education was provided to everyone. Specifically, Nehru recognized the role of higher education and research in state-building. As such, his policy expanded higher education through the creation of more technical universities and the expansion of university networks. His policy was mindful that since higher education is made public, the caste-based reservation would increase oppressed caste representation in higher education.

However, liberalization brought with it the privatization of public goods – in which higher education was especially targeted and privatized. During the 1990s, the Indian state allowed more private educational institutions to be established. Furthermore, federal and provincial governments implemented policies that allowed private education institutions to have more financial and policy autonomy to mobilize resources without government regulations (Jamkar & Johnston, 2021). Most importantly, in a ruling, India's supreme court allowed private institutions to eliminate institutional reservation quotas aimed at increasing enrollment of oppressed castes population (Jamkar & Johnston, 2021). Furthermore, state funding for oppressed castes and low-income students was also diminishing; the gradual drop in scholarships, fee waivers and loan policies reduced opportunities for affordable private education (Jamkar & Johnston, 2021). This marked the shift in Indian education, which went from a public good to an increasingly private commodity, without any avail to oppressed caste students.

By making higher education a private commodity, reservation policy was no longer contended with in educational institutions. Higher education was privatized, and prestigious institutions such as the

Indian Institute of Management or the Indian Institute of Technology no longer needed to provide mandatory placements to oppressed caste groups. This meant that caste-class elites now had exclusive access. Higher education was now a space for the dominant caste groups, and they no longer had to share spaces with others. Due to the dwindling opportunities for higher education, oppressed castes had even fewer chances to be competitive in the private sector job market. Not to mention, the lack of higher education also means a limited opportunity to join the Indian bureaucracy. To this end, avenues for mobility in the state and market are further restricted for oppressed caste groups.

Interestingly, discourses of meritocracy were salient; caste elites weaponized the argument of merit against affirmative action. A diverse set of state-focused scholars, from Weber to Fukuyama to Sen, have analyzed the role of meritocracy in making a strong state based on good governance. The argument is that a merit-based bureaucratic system can ensure individuals are given positions of power based on their abilities and qualifications; this would then lead to better decision-making and more efficient governance. However, in India's case, due to a highly stratified society based on caste, merit is exclusively accessed and obtained by dominant caste groups. In India, abilities and qualifications are privileges that are gained based on caste status. Merit is largely accessible only to dominant caste groups through education and caste social networks, while oppressed caste groups are restricted from accessing it. Where the goal of India's state-builders was a caste-equal society, the discourse of meritocracy fails. In India's case, meritocracy fails to recognize the entrenched nature of caste and the marginalisation of the oppressed caste population. To this end, it is rather a contradiction in India's case that meritocracy will help the Indian state to reach its goal of a caste-equal society.

The weakening of affirmative action in government employment and higher education was a result of liberalization. The neoliberal turn ushered in by caste elites was the most aggressive form of state taming as it retreated the state from society. Where the state was envisioned as a power to guarantee the emancipation of oppressed castes, caste elites have rendered the state unable to provide any

promise of caste emancipation. The state now no longer in any serious manner threaten elite dominance.

Conclusion:

The making of modern India is founded on the political settlement that was struck between caste elites and subaltern leaders. The bargain stuck was a consequence of elites and oppressed castes viewing the state as an entity that could uphold their interests. The trade-off in the settlement involved two agreements: first, caste elites were given the legitimacy to govern India and the opportunity to initiate state-led development; second, oppressed castes were given assurances that the state would lead the promise of caste justice through caste-based reservations. The state was the guarantor of caste emancipation – the hope and intended outcome for affirmative actions were that Dalit representation in politics, bureaucracy and education would produce state initiatives and policies that would refashion caste society in India and emancipate oppressed groups from caste marginalization.

Caste-based reservation and its intended outcome threatened caste elite dominance. Since Dalit representation within the state structure would yield policies that tried to challenge caste hierarchy, this threatened the status and power of caste elites. Elites' fears resulted in their intention to restrict the state from being influenced by oppressed caste groups and make sure the state did not have the ability to seriously challenge the caste status quo. In other words, their intention was to undermine the outcomes of caste-based reservation. Since the state was based on the promise of caste emancipation and was also responsible for implementing affirmative action, the caste elites needed to tame the state. Taming meant that the state was disciplined to not provide a serious basis for caste emancipation and ensure oppressed caste groups could not influence the state. Thus, taming the state is actioned through undermining caste-based reservations and limiting its outcomes.

Overall, this paper speaks of the conditions that hindered state-led affirmative action and the promise of caste emancipation. The success of reservation policy is not just about policy design or implementation but rather how other powerful forces in society, the

market and even within the state act against it. Specific to India, economic, social, and bureaucratic elites act against caste-based reservation by taming the state. For affirmative action to yield emancipatory outcomes, not only should the state be a guarantor of justice, but also the state should have a strong capacity and power to combat elites' challenges to the state. The nation-state should be built and developed in a way that any attempt to tame the state is rendered unsuccessful.

References

Ahmed, W. (2009). From Mixed Economy to Neo-Liberalism: Class and Caste in India's Economic Transition. Human Geography, 2(3), 1–15. https://doi.org/10.1177/194277860900200305

Babu, D. S. (2004). India's Liberalisation and the Dalits. Royal Institute of International Affairs.

Bandopadhyay, S. (1990). Caste Politics and the Raj: Bengal 1872-1937. Calcutta: K.P. Bagchi and Co.

Baru, S. (2021). India's Power Elite: Class, Caste and Cultural Revolution. Penguin Random House India Private Limited.

Bayly, S. (1999). Caste, Society and Politics in India from the Eighteenth Century to the Modern Age (The New Cambridge History of India). Cambridge: Cambridge University Press. doi:10.1017/CHOL9780521264341

Chakraborty, S. (2017). Still at the margins: Dalits and the Nehruvian state's efforts against untouchability. Claremont Journal of Law and Public Policy.

Chandola, M. (1992). Affirmative Action in India and the United States: the Untouchable and Black Experience. Indiana international and comparative law review, 3, 101-134. https://doi.org/10.18060/17475.

Chatterjee, P. (1993). The nation and its fragments: Colonial and postcolonial histories (Vol. 4). Princeton University Press.

Chaudhary, L. (2012). Caste, Colonialism and Schooling: Education in British India. Retrieved from https://ssrn.com/abstract=2087140 or http://dx.doi.org/10.2139/ssrn.2087140

Chibber, V. (2003). Locked in Place: State-Building and Late Industrialization in India. Princeton University Press. http://www.jstor.org/stable/j.ctt7s0p1

Cohn, Bernard (1987): 'The Census, Social Structure and Objectification in South Asia' in Bernard Cohn (ed), An Anthropologist among the Historians and Other Essays, Oxford University Press, Delhi, pp 2

Dercon, S. (2022). Gambling on development. Hurst publishers.

Desai, S., & Dubey, A. (2012). Caste in 21st Century India: Competing Narratives. Economic and political weekly, 46(11), 40–49.

Dirks, N. B. (2001). Castes of Mind: Colonialism and the Making of Modern India. Princeton University Press. http://www.jstor.org/stable/j.ctt7rq9d

Fanon, F. (2004). The Wretched of the Earth. 1961. Trans. Richard Philcox. New York: Grove Press, 6.

Farooqui, A. (2014). Sectional President's Address: Divide and Rule? Race, Military Recruitment and Society in Late Nineteenth Century Colonial India. Proceedings of the Indian History Congress, 75, 428–440. http://www.jstor.org/stable/44158415

Fukuyama, F. (2014). Political order and political decay: from the industrial revolution to the globalization of democracy. First edition. New York, Farrar, Straus and Giroux.

Guru, G. (2011). Liberal Democracy in India and the Dalit Critique. Social Research, 78(1), 99–122. http://www.jstor.org/stable/23347205

Guha, S. (2013). Beyond Caste: Identity and Power in South Asia, Past and Present. . https://doi.org/10.1163/9789004254855.

Guha, R. (1998). Dominance without hegemony: History and Power in Colonial India. Cambridge, MA : Harvard University Press

Isaacs, H. R. (1965). India's Ex-untouchables. New York: John Day Company.

Jaffrelot, C. (2003). India's Silent Revolution: The Rise of the Lower Castes in North India. Columbia University Press.

Jaffrelot, C. (2021). Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy. Princeton, NJ: Princeton University Press.

Jamkar, V., & Johnstone, C. (2021). Privatization and Unequal Access in India. International Higher Education, (106), 34-36.

Javed, R. (2021). The caste system in India during British Raj: (1872-1941). International Journal of Development Research, 11(12), 52678-52683. https://www.journalijdr.com/caste-system-india-during-british-raj-1872-1941

Jayal, N. G. (2015). Affirmative action in India: Before and after the neo-liberal turn. Cultural Dynamics, 27(1), 117-133.

Kaviraj, S. (2005). On the enchantment of the state: Indian thought on the role of the state in the narrative of modernity. European Journal of Sociology/Archives Européennes de Sociologie, 46(2), 263-296. http://icspt.uchicago.edu/papers/2005/kaviraj05.pdf

Khan, M. (2010). Political settlements and the governance of growth-enhancing institutions.

Khan, M. (2011). India's Evolving Political Settlement and the Challenge of Sustaining Development.

Khilnani, S. (2003). The Idea of India. London: Penguin.

Kirk-Greene, A. (2000). The Indian Civil Service, 1858–1947. In: Britain’s Imperial Administrators, 1858–1966. St. Antony’s series.

Palgrave Macmillan, London.
https://doi.org/10.1057/9780230286320_5

Kothari, R. (1970). Politics in India (Boston, Little, Brown).

Kshirsagar, R. K. (1994). Dalit Movement in India and its Leaders (1857-1956). New Delhi: M.D. Publications Ltd

Mann, M. (2008). Infrastructural power revisited. Studies in comparative international development, 43, 355-365.

Martyshin, O. (1981). Jawaharlal Nehru and His Political Views. Trans by Sergei Chulaki, Moscow: Progress Publishers

Mencher, J. (1974). The Caste System Upside Down, or The Not-So-Mysterious East. Current Anthropology, 15, 469 - 493. https://doi.org/10.1086/201505.

Mukhopadhyay, D. (2015). Transgressing Caste Indignities through Reservation in Education: Debunking Myths on Systemic Equity and Fairness in India. Asian Journal of Legal Education, 2, 67 - 77. https://doi.org/10.1177/2322005814552758.

Nehru, J. (1946). The Discovery of India.

Pal, Sarmistha and Ghosh, Sugata, Elite Dominance and Under-Investment in Mass Education: Disparity in the Social Development of the Indian States, 1960-92 (June 2007). IZA Discussion Paper No. 2852, Available at SSRN: https://ssrn.com/abstract=998438 or http://dx.doi.org/10.2139/ssrn.998438

Ramesh, H. (2022). B. R. Ambedkar on Caste, Democracy, and State Action. Political Theory, 50(5), 723–753. https://doi.org/10.1177/00905917211069607

Rao, A. (2009). The caste question: Dalits and the politics of modern India. Univ of California Press.

Riser-Kositsky, S. (2009). The Political Intensification of Caste: India Under the Raj. Penn History Review: Vol. 17 : Iss. 1 , Article 3. https://repository.upenn.edu/phr/vol17/iss1/3

Robinson, J. A., & Acemoglu, D. (2012). Why nations fail: The origins of power, prosperity and poverty (pp. 45-47). London: Profile.

Sana, A. (1993). THE CASTE SYSTEM IN INDIA AND ITS CONSEQUENCES. International Journal of Sociology and Social Policy, 13, 1-76. https://doi.org/10.1108/EB013170.

Sarkar, B. (2020). Limitations of Nehruvian Democracy. International Journal of Humanities and Social Science Invention (IJHSSI), 9(9), 54-56. DOI: 10.35629/7722-0909015456. Retrieved from http://www.ijhssi.org/v9i9(SI)/version-1.pdf

Srinivas, M. N. (1957). Caste in Modern India. The Journal of Asian Studies, 16(4), 529–548. https://doi.org/10.2307/2941637

Sherman, T. C. (2022). Nehru's India: A History in Seven Myths. Princeton University Press.

Tashneem, T. (2021). Caste and Untouchability in Jawaharlal Nehru's Literary Masterpieces. Contemporary Voice of Dalit, 0(0). https://doi.org/10.1177/2455328X211009381

Thorat, S., & Attewell, P. (2007). The Legacy of Social Exclusion: A Correspondence Study of Job Discrimination in India. Economic and Political Weekly, 42(41), 4141–4145. http://www.jstor.org/stable/40276548

Thorat, S., & Newman, K. S. (2007). Caste and Economic Discrimination: Causes, Consequences and Remedies. Economic and Political Weekly, 42(41), 4121–4124. http://www.jstor.org/stable/40276545

Thorat, S., & Neuman, K. S. (2012). Blocked by caste: Economic discrimination in modern India. Oxford University Press.

Vasavi, A. (2018). “Government Brahmin” Caste, the Educated Unemployed, and the Reproduction of Inequities. The Impact of Education in South Asia. https://doi.org/10.1007/978-3-319-96607-6_7.

Victoria Bahnken Doner, K. (2022). Seventy Years Later: Caste in the Indian Bureaucracy. Sociology Between the Gaps: Forgotten and Neglected Topics, 7(1), 7.

Virmani, T. (2014). Contesting Community and Nation: Caste, Discrimination and Reservation Politics in India (Doctoral dissertation, York University Toronto).

Wilcox, W. (1965). Politicians, Bureaucrats, and Development in India. The ANNALS of the American Academy of Political and Social Science, 358(1), 114–122. https://doi.org/10.1177/000271626535800113

Stratégies de mobilisation des principes de territorialité et d'identité: gouvernance et indépendance au Nunavut et au Groenland.

Anna Soer[*], University of Ottawa

Résumé

Les principes juridiques de territorialité et de personnalité (identité) ont été fondamentaux dans les stratégies de négociation d'indépendance et d'autonomie au Groenland – Kalaallit Nunaat - et au Nunavut. Ces principes entrent ainsi dans le cadre d'une volonté de lisibilité des intérêts et visions autochtones par les pouvoirs étatiques coloniaux. Bien que des différences existent entre les deux territoires Inuit, tant par leur passé colonial que par leur contexte juridique et constitutionnel contemporain respectif, les techniques politiques se rejoignent en ce point de volonté de lisibilité à travers les pratiques et le langage juridiques : Comment la création et la revendication d'une identité (personnalité) inuit collective est mobilisée à travers les actes juridiques par les gouvernements coloniaux du Canada et du Danemark et par les organisations et individus acteurs de cette volonté de décolonisation ? Devenir Kalaallit Nunaat et devenir le Territoire du Nunavut s'inscrit ainsi dans un rapport de force inégal colonial dont les enjeux se rapportent tant à l'identité culturelle collective Inuit qu'à la gestion de la terre, elle-même fondamentale à l'identité collective et source essentielle d'indépendance économique, qu'à la volonté des deux États de conserver une souveraineté westphalienne sur leur territoire et une identité nationale tournée vers le vivre-ensemble et le respect des droits humains. Ainsi, les revendications d'indépendance et d'autonomie jouent sur un terrain complexe en composant avec ce

[*]Biographie : Anna Soer est candidate au doctorat en études politiques à l'Université d'Ottawa.

Biography: Anna Soer is a PhD candidate in political studies at the Universtiy of Ottawa

rapport de force inégal et le besoin d'auto-détermination décoloniale à travers l'espace juridique.

Mots clés: Kalaallit Nunaat, Nunavut, autonomie, indépendance, droit

Abstract

The legal principles of territoriality and personality (identity) have been fundamental to strategies for negotiating independence and autonomy in Greenland - Kalaallit Nunaat - and Nunavut. These principles are part of a desire by colonial states to make indigenous interests and visions clearer. Although there are differences between the two Inuit territories, both in terms of their colonial past and their respective contemporary legal and constitutional contexts, the political techniques converge on this point of desire for legibility through legal practices and language: how is the creation and claim to a collective Inuit identity (personality) mobilized through legal acts by the colonial governments of Canada and Denmark, and by the organizations and individuals involved in this desire for decolonization? Becoming Kalaallit Nunaat and becoming the Territory of Nunavut is thus part of an unequal colonial balance of power whose stakes relate as much to collective Inuit cultural identity and land management - itself fundamental to collective identity and an essential source of economic independence - as to the desire of the two states to retain Westphalian sovereignty over their territory and a national identity focused on living together and respect for human rights. Claims for independence and autonomy thus play out on a complex terrain, as they come to terms with this unequal balance of power and the need for decolonial self-determination through legal space.

Key words: Kalaallit Nunaat, Nunavut, autonomy, independence, law

Introduction

> "*When finally the storm blew itself out, Osk entered Ank's igloo and asked why people pile stones up so they look like people.*
>
> *Ank replied, "those piles of stones form something called an inushuk. An inushuk is used for three reasons. The first reason is to make the caribou think the stones are men. That way, they will walk away from the stones to where the hunters are waiting. The second is to mark excellent fishing spots. The third is to mark caribou crossings or other places where prey is abundant."*
>
> (Sibbald, 2010)

L'histoire de Andy Sibbald et de son Petit Peuple de l'Arctique canadien illustre la connexion des Inuit à la terre et aux autres êtres vivants peuplant le territoire, ainsi que les dynamiques sociales au sein de leur communauté. L'inushuk, comme représenté sur le drapeau du Nunavut, est un symbole du savoir ancestral inuit en rapport à leurs terres, du passé au présent au futur. L'identité inuit passe ainsi à travers cette connexion, à travers l'Inuit Qaujimajatugangit (IQ), savoirs et pratiques inuit. L'IQ donne les fondations afin d'analyser les dynamiques contemporaines des revendications d'autonomie dans la région, à travers la création du Territoire du Nunavut en 1993, en comparaison avec les revendications d'indépendance au Groenland, Kalaallit Nunaat, territoire inuit en passe de devenir indépendant. Les récentes élections au Kalaallit Nunaat ainsi que la volonté réaffirmée du nouveau gouvernement en faveur de l'indépendance du Danemark, en conjonction avec la décision de Nunavut Tunngavik Inc. de poursuivre des négociations avec le gouvernement fédéral Canadien pour l'instauration d'un *self-government* (Mikijuk, 2021), dessinent les contours d'un avenir proche de l'autodétermination inuit dans la région nordique et Arctique.

Le Nunavut et le Kalaallit Nunaat répondent toutefois à différents contextes politiques, ainsi qu'à différents contextes d'autorité juridique : Kalaallit Nunaat, depuis le passage du *Home Rule Act* en

1978 (Home Rule, 1978) et du *Self-Government Act* en 2009 (Self-Government Act, 2009), est souverain sur des questions sociales, économiques et environnementales à travers son propre gouvernement et parlement. Le Nunavut, à travers l'Accord du Nunavut (Nunavut Act, 1993) et l'Accord sur les revendications territoriales du Nunavut de 1993 (Nunavut Act, 1993; Nunavut Land Claims Agreement Act, 1993), a reçu des droits d'autogestion territoriale dans divers secteurs avec son propre gouvernement, sans pour autant avoir les mêmes droits qu'une province, dépendant ainsi toujours du gouvernement fédéral, et surtout, sans pour autant avoir la capacité de gestion de ses ressources naturelles, contrairement au Yukon et aux Territoires du Nord-Ouest. Un accord de principe de dévolution des pouvoirs de gestion des ressources naturelles a été signé en 2019 et devra prendre effet d'ici cinq ans. L'importance de cette dévolution finale s'ancre dans un contexte d'imposition d'un moratoire sur les forages pétroliers au large de l'Arctique signé en 2016 par les gouvernements fédéraux canadien et américain sans consultation préalable des autorités inuit au Nunavut, provoquant tensions et frustrations quant aux capacités de subsistance économique sur le territoire. Le gouvernement groenlandais, lui, déclare en 2021 bannir l'exploitation pétrolière sur son territoire et ses eaux par conscience environnementale (Buttler, 2021). Le *Home Rule* et le *Self-Government Acts* de 1978 et 2009, et les accords du Nunavut de 1993 répondent à des enjeux socio-politiques et économiques dans des contextes de résistance anticoloniale des communautés autochtones : entre réparation et survie des cultures et pratiques et savoirs autochtones, ces accords de dévolution répondent aux traumatismes et dommages générationnels, historiques et contemporains, liés aux pratiques coloniales canadiennes et danoises, aux relocalisations forcées des communautés, aux enlèvements d'enfants vers des pensionnats et aux expropriations territoriales abusives.

De 1978 à 2021, comment ces revendications de souveraineté ont-elles trouvé écho auprès des autorités gouvernementales à travers les registres politico-juridiques ? Cet article, inspiré des travaux de Natalia Loukacheva (2007), cherche à répondre à la question principale de recherche suivante : *Comment les principes d'identité et de territorialité ont-ils été et sont-ils mobilisés par les gouvernements coloniaux (Canada et Danemark) et par les*

organisations et individus Inuit dans les revendications d'autodétermination au Nunavut et au Kalaallit Nunaat ? L'objectif de cet article est d'offrir une comparaison régionale des revendications autochtones en matière d'autodétermination à travers l'utilisation de concepts juridiques, ceux des principes d'identité et de territorialité, venant en complément à la littérature existante.

La méthodologie de cet article s'appuie sur une analyse de la littérature scientifique existante en juxtaposant les décisions juridiques contemporaines concernant le Groenland et le Nunavut. Ainsi, cet article est une mise à jour critique des travaux fondamentaux en gouvernance autochtone dans l'espace Arctique de Natalia Loukacheva datant de 2007. Les travaux de Loukacheva apportent une comparaison intéressante et rare en 2007 de l'espace continental Arctique Nord-Américain – ainsi, cet article utilise la littérature scientifique existante, ainsi que les rapports gouvernementaux et de la société civile et les articles de loi correspondants, afin d'apporter une vision critique de la mobilisation de concepts juridiques afin de soutenir les efforts d'auto-détermination au Nunavut et au Groenland depuis l'instaurant du Home Rule Act de 1978 et de l'accord sur les revendications territoriales du Nunavut de 1993 à aujourd'hui. Le choix spécifique d'analyse des dynamiques d'auto-détermination au Nunavut et au Kalaallit Nunaat s'articule dans une motivation de mettre en avant les réalités politiques différentes des Inuit vivant dans des contextes nationaux différents divisant les territoires traditionnels Inuit pré-datant l'instauration de ces lignes juridictionnelles et de souveraineté dans l'espace Arctique Nord-Américain.

Le plan de cet article s'articule en trois parties: en premier lieu et second lieu sont exposés les points centraux et tensions derrière les revendications d'ordre d'identité et de territorialité à travers les questions de gestion de ressources naturelles, d'identité collective, et de décolonisation – trois concepts clés dans les revendications d'auto-détermination des représentants Inuit de 1978 à aujourd'hui. Cette exposition des contextes et des complexités derrière l'utilisation et l'instrumentalisation des principes d'identité et de territorialité laisse place, dans la dernière partie de cette recherche, à la discussion, qui s'articule autour d'un questionnement de

l'utilisation de l'identitaire dans la création du groupe dans un contexte national et colonial.

Principe de territorialité: la dualité du territoire tant national que local

Nunavut : un territoire déconstruit

« L'orthodoxie territorialiste veut que le contrôle d'un substrat spatial géométriquement délimité soit la condition nécessaire et suffisante du pouvoir et de la validité de l'ordre juridique. (Otis, 2005) » La souveraineté westphalienne se délimite, se cadre, se façonne à travers une façon de voir l'espace. Celui-ci n'est plus interconnecté, fluide et changeant, mais délimité par « de drôles de lignes sur une carte » (expression de Dr. Keolu Fox). L'autodétermination autochtone s'articule autour des enjeux de la conservation environnementale des territoires qui se traduit par des enjeux de survie des pratiques traditionnelles culturelles et de subsistance (Cambou, 2020; Chartier, 2020; Hicks & White, 2015; Loukacheva, 2007a). La détermination de la délimitation du territoire du Nunavut s'est aussi faite à partir des revendications collectives identitaires : le territoire est construit socialement à partir de l'usage fait et reconnu du territoire afin de réclamer la propriété du territoire et de sa gestion, d'après le *Aboriginal Comprehensive Land Claims Policy* de 1973 (Légaré, 2002). Les deux zones, zone A et zone B (délimitées par l'article 3 du *Nunavut Agreement*), correspondent à l'usage traditionnel inuit des terres. La territorialité du droit s'ancre dans une volonté de prouver le bien-fondé de son existence au sein d'un territoire où le pouvoir de gestion a été soustrait par une puissance colonisatrice. Cette territorialité englobe l'hétérogénéité des individus présents sous un chapeau uniformisant afin de créer une cohésion sociale entre les habitant.e.s. Une cohésion sociale, et donc politique, nécessaire à la création du territoire du Nunavut : la délimitation du territoire répondait au besoin politique dans les années 1970 des Inuit de l'Arctique canadien de l'Est de se rassembler sous un groupe politique fort et soudé afin de mettre leurs droits sur la table de discussion fédérale (Loukacheva, 2007a, 2007c). La défense des droits à l'autodétermination des Inuit est passée par la formation d'un groupe politique capable de rassembler les habitant.e.s, tout comme le rassemblement socio-politique fait au

Groenland contre l'autorité coloniale danoise, à travers le territoire. Avant de proclamer son autodétermination, autant faut-il savoir d'où à où s'applique cette autodétermination, rejoignant cette « orthodoxie territorialiste » décrite par Otis (2005). Le territoire se voit créé par le besoin de cohésion socio-politique, et le territoire crée en contrepartie la cohésion socio-politique, une relation d'imbrication qui s'inscrit tant dans une tradition autochtone d'écosystème-plus-que-humain que comme faisant face au système politico-légal colonial canadien.

Les territoires arctiques canadiens n'ont été centraux à la politique de souveraineté régionale du gouvernement fédéral qu'après la Seconde Guerre Mondiale face aux tensions géopolitiques avec l'URSS et les États-Unis durant la guerre froide. Le pôle Nord, et donc le Nord canadien, devient un lieu de proximité entre les deux blocs, générant tensions, militarisation, et contentieux de souveraineté territoriale pour le Canada, dont pour le Passage du Nord-Ouest (Huebert, 1999). Les années 1950 ont ainsi vu la naissance du programme de relocalisation forcée de 93 Inuit aux îles canadiennes de l'Extrême-Arctique, où des familles inuit ont été séparées de force, où elles y ont trouvé pauvreté, alcoolisme, et impossibilité de subvenir à leur besoins, alors que l'abondance de prises de chasse et de pêche et l'union de leurs familles, ainsi que la possibilité d'un retour après deux ans avaient été promis par les autorités canadiennes (Madwar, 2018; Tassinari, 1995). Revenant ainsi à la doxa de la souveraineté territorialiste, la stratégie du gouvernement fédéral a été une stratégie d'occupation coloniale afin de justifier son autorité et sa propriété du territoire nordique : l'occupation par des autochtones présents dans la région depuis des temps immémoriaux peut ainsi justifier leur souveraineté territoriale, puisque les Inuit sont Canadiens et considérés comme la responsabilité du gouvernement fédéral depuis 1939 (Hendersen & Bell, 2019). Deux pierres d'un coup : les Inuit étant dorénavant sous la responsabilité fédérale, et le gouvernement canadien craignant pour sa souveraineté dans l'Arctique en temps de Guerre Froide, le déplacement forcé de ces familles a servi à dédouaner le gouvernement de ses responsabilités sous couvert de bonté humanitaire, promettant abondance de gibiers et de cueillettes, et a renforcé sa présence dans la région (région aujourd'hui appelée

Nunavut) (Dahl et al., 2000; Kulchyski & Tester, 2007; Tassinari, 1995; Tester & Kulchyski, 2011)

La mainmise forte du gouvernement fédéral sur ces terres de l'Arctique devenait fondamentale dans les stratégies d'autodétermination inuit de la région. Les négociations des années 1970 aux années 1990 de la part d'organisations et leaders Inuit du Nunavut ont tenu compte de ces enjeux. Jose Kusugak, le Président de Nunavut Tunngavik Incorporated durant la négociation des accords du Nunavut, le dit très clairement : la décision de créer un gouvernement public territorial non-basé sur l'appartenance ethnique s'inscrit dans un système politique compréhensible par et pour les autorités fédérales (Loukacheva, 2007b, p.39 ; Kusuguk, 2000). Les rapports démographiques en faveurs des Inuit dans la région qui deviendra le Nunavut ont fait que l'utilisation d'un système de gouvernance, par essence colonial puisque d'origine occidentale, pu être acceptée. De facto, ce gouvernement public basé sur le territoire et non sur l'ethnie aura de toute manière comme majorité constitutive des Inuit à plus de 80%. Ce fut là un exercice d'équilibre entre l'idéal décolonial d'auto-gouvernance et la réalité pragmatique d'accommoder un rapport de force inégal. L'appropriation du vocabulaire juridique et politique occidental par les organisations et leaders inuit démontre la capacité d'adaptation des groupes subversifs au sein de la machine fédérale : en apparence contradictoire, la libération passe par l'insertion dans le fédéral et son épistémologie linguistique. La décision de la Cour Suprême du Canada de 1939 ([1939] SCJ No 5 (QL) — [1939] 2 DLR 417) de déclarer les Inuit comme responsabilité fédérale ancre les intérêts des Inuit dans ceux du Canada de manière indissociable pour ce pays se décrivant comme 'nordique' et 'arctique' .

Pour les Inuit, l'autonomie territoriale à travers le *Land Claims Agreement* (LCA) voulait se traduire par un renforcement de leur droits culturels et sociaux (Loukacheva, 2007b), une mesure politique de protection identitaire passant par le contrôle de la terre. Bien que le LCA définit les droits des Nunavummiut quant à l'utilisation des terres, ce même Accord définit par l'article 2 le transfert des intérêts et titres quant à la terre, mer, et à ses revenus, ce qui a par exemple rendu possible la décision unilatérale du Premier Ministre Trudeau d'imposer un moratoire sur les forages

pétroliers dans les eaux de l'Arctique (Nunavut Land Claims Agreement Act, 1993). Un accord de principe à propos de la dévolution des pouvoirs de gestion des ressources n'a été signé qu'en 2019, alors que le protocole servant de cadre à cet accord de principe a été signé en 2008 (The Government of Canada et al., 2008, 2019). Le Yukon a les pleins droits de gestion depuis 2003 et les Territoires du Nord-Ouest depuis 2014. Les dynamiques de la création du Nunavut à travers les accords, accords de principe, et actes signés reflètent les manœuvres de négociations et d'ajustement des ambitions d'auto-gouvernance des Inuit en fonction des pressions politiques coloniales fédérales (Coulthard, 2018; White, 2009). L'élaboration même du LCA demandant le transfert des droits traduit une mentalité de souveraineté fédérale : le droit et les procédures politico-légales canadiennes servent les intérêts du gouvernement colonial encadrant l'autodétermination autochtone et en instaurant une réputation internationale de mise en œuvre d'obligations internationales. La détermination des communautés et organisations inuit a permis le contournement de ce cadre colonial à travers l'appropriation du jargon et des pratiques juridiques et légales pour défendre leurs droits et intérêts.

Kalaallit Nunaat : l'indépendance face au 'bon colonisateur'

Le principe de territorialité s'est appliqué au Groenland à travers l'expérience ratée de développement régional dans les années 1950-1970. La perspective coloniale paternaliste du Danemark envers sa colonie nordique s'est réduite à un monopole économique de la région, pour lequel l'Intrux, l'instruction Danoise de 1782, précisait cette nature de monopole économique. Les Kalaallit sont absents de la Constitution danoise de 1849. L'Intrux de 1782 précisait l'exclusivité commerciale avec le Groenland et détaillait un code de conduite particulier avec les habitants autochtones : interdiction de mariages mixtes, interdiction de vendre de l'alcool ou tout autre substance, ou d'accomplir tout acte pouvant 'corrompre et mettre en péril le bien-être des Inuit'. Seuls les serviteurs du Roi pouvaient avoir accès à l'île et établir un contact avec les communautés locales. Ce paternalisme, où le Danemark était seul aux manettes concernant l'exploitation des ressources, et où l'idée derrière cette colonisation était d'apporter civilisation en dehors de tout contact ou d'investissement, met en lumière, dès 1782, la relation coloniale

entre les deux territoires et peuples : une relation essentialiste, réductrice d'un idéal civilisateur (Loukacheva, 2007a; Rytter, 2008). L'image du 'bon colonisateur' (Herolf et al., 2015) s'est ainsi construite à travers cet idéal, un Danemark bénévole souhaitant préserver les Inuit de toute corruption. De même, l'affaire de Cour Permanente de Justice Internationale de 1933 où ni le Danemark, ni la Norvège, et ni la Cour Permanente de considèrent les Inuit vivant sur l'ile a façonné ces rapports coloniaux paternalistes dénigrant et ignorant l'humanité et le pouvoir d'action des Inuit dans leur pluralité et diversité. Alors que le Canada s'est retrouvé forcé dans son rôle de colonisateur de prendre en charge les intérêts des Inuit, le Danemark a utilisé des principes mercantilistes afin de structurer les dynamiques sociales groenlandaises, cela afin de conserver son monopole. Une contradiction est apparente : la préservation de la 'pureté' autochtone contre les influences néfastes européennes a vu naître une restructuration des dynamiques sociales inuit afin de mieux régner. Modifier les dynamiques sociales inuit afin d'en faire des Danois modèles, ou les préserver de toute influence ? La logique de souveraineté westphalienne apparaît à travers les conceptions du territoire groenlandais et de l'identité collective nationale. L'insertion du Groenland au sein du Royaume du Danemark s'est inscrite à travers deux registres : l'insertion des Kalaallit à travers le modelage d'une identité collective nationale et l'insertion du territoire au sein d'un narratif national où suite à la décolonisation formelle onusienne (UNGA Resolution 114, 637(VII)), le Groenland est désormais une région danoise. La souveraineté du Danemark tient tant sur son contrôle de son territoire que sur sa capacité à créer une communauté sur laquelle gouverner. La gouvernance s'établit en relation avec les habitants du territoire et le territoire lui-même. Se plaçant comme un 'bon colonisateur' protectionniste, le Danemark évacue la question du traitement des Inuit sous l'excuse de la préservation, bien que le gouvernement rende dépendante la population locale. La supposée absence de violence esclavagiste coloniale justifia l'image idéalisée du Danemark.

Le dix-neuvième siècle voit la restructuration de la vie sociale, politique, et économique groenlandaise, à travers une standardisation linguistique, et la création de bureaux administratifs (des Bureaux des Gardiens) d'abord entièrement composés de Danois, puis modifiés en 1911 en conseils provinciaux composés

exclusivement de Kalaallit. Ce siècle, à travers l'établissement de ces structures politiques et sociales, a vu la consolidation d'un esprit national Kalaallit, ce qui a servi de fondation pour l'écriture des futures *Home Rule* et *Self-Governments Acts*. L'écart croissant et criant entre les populations autochtones locales et les élites danoises ont permis à l'élite inuit de consolider un programme politique nationaliste (Loukacheva, 2007a). La Seconde Guerre Mondiale a ajouté une pierre à cet édifice de construction nationale. La position géostratégique du Groenland a amené les États-Unis à conclure un accord pour la construction d'une base aérienne à Thule en 1941. Le Danemark étant à ce moment conquis par l'Allemagne nazie, l'Ambassadeur Henrik Kauffmann autorise la construction de cette base militaire afin de défendre les colonies danoises d'invasions allemandes. Le traité est conclu pour rester en vigueur tant qu'une menace aux intérêts de l'Amérique du Nord existe. L'adhésion du Danemark à l'OTAN en 1949 a cimenté l'implantation des forces militaires américaines au Groenland. Deux puissances coloniales dans un jeu de *Big Power Politics* prenant l'espace en territoire colonisé. L'intégration du Groenland comme partie intégrante du Royaume danois et non plus une colonie avec la nouvelle Constitution de 1953 a renforcé la relation paternaliste coloniale, à travers l'intensification de l'immigration danoise et la continuité de politiques économiques unilatéralement implantées par les autorités danoises. Les deux décennies 1950 et 1960, alors qu'une amélioration des conditions de vie était attendue, n'ont pas apporté d'équilibre entre les communautés autochtones et non-autochtones, bien que les habitants Kalaallit soient considérés comme égaux devant la loi sous la nouvelle Constitution. L'éducation et les opportunités professionnelles étant décevantes, les postes à responsabilités et qualifiés sont restés majoritairement occupés par des travailleurs danois. La sédentarisation forcée ou encouragée par les autorités étatiques des Kalaallit vers des centres urbains dans le Sud-Ouest de l'île a transformé les dynamiques sociales et économiques des communautés et a renforcé la dépendance envers les autorités étatiques. Cependant, la concentration territoriale a aussi permis l'enracinement des luttes indépendantistes inuit culminant dans les années 1970 avec la création de partis politiques Kalaallit. L'auto-gouvernance au Kalaallit Nunaat s'est construite à travers le processus de construction d'une identité nationale à travers l'identité autochtone et les idéaux politiques (Graugaard,

2009; Loukacheva, 2007a; Rytter, 2008). Kalaallit Nunaat est une communauté imaginée (Anderson, 1983) dans un contexte colonial, où le groupe se forme dans un rapport antagoniste avec l'Autre (White, 2009).

Les revendications d'auto-gouvernance contemporaine (post-2009) sont ancrées dans les pouvoirs transférés au Gouvernement du Kalaallit Nunaat : les enjeux environnements, climatiques et de gestion de la pêche s'inscrivent dans un contexte de crise climatique. La décision du nouveau parti au pouvoir, Inuit Ataatigiit, en juin 2021 d'interdire toute future exploitation pétrolière et d'uranium sur son territoire terrestre et marin donne le ton de ce nouveau gouvernement quant à sa politique d'auto-gouvernance environnementale, ancrée dans l'Accord de 2009. Le principe de territorialité s'applique ici dans un contexte propice. . Tout comme les stratégies politiques des Inuit du Nunavut, les acteurs clés Kalaallit se sont servi du langage du droit international afin de rendre lisible leurs revendications auprès du gouvernement danois et des institutions internationales. Cette navigation des contextes normatifs et juridiques tant domestique au Groenland et au Danemark à travers l'instrumentalisation de la volonté quasi-existentielle du Danemark de conserver sa réputation de 'bon colonisateur', que régionaux à propos des enjeux sécuritaires des nations environnantes, qu'international à travers l'instauration d'un régime institutionnel de droit international, laisse transparaître le savoir stratégique d'une élite Kalaallit éduquée au sein du système occidental colonial (Loukacheva, 2007b, 2007a). L'Accord d'Auto-Gouvernance a permis au Naalakkersuisut (gouvernement groenlandais) de prendre le contrôle de la gestion des ressources naturelles, incluant la pêche. Pensant au contexte économique décevant de l'après des réformes de la modernisation des années 1950 et 1960, cette prise de contrôle s'exerce dans l'espérance d'une autonomie économique complète de Kalaallit Nunaat à l'égard du Danemark. Le territoire est vu dans une perspective d'autodétermination nationale : la communauté, pour exister, doit pouvoir survivre et prospérer sous ses propres termes. La rupture du nouveau gouvernement avec l'interdiction de forages pétroliers et d'exploitation d'uranium démontre une certaine perspective ontologique et épistémologique de comment être en relation avec son environnement : il ne s'agit justement plus d'environnement mais d'écosystème, où l'indépendance économique

se doit d'être pensée de façon écologique avec le futur. Le gouvernement ne renonce pas aux exploitations minières, mais celles-ci répondent à des normes environnementales qui jouent sur un autre terrain ontologique que celui purement exploiteur. La souveraineté par le territoire et pour le territoire.

Tensions derrière le principe d'identité: entre discours libéral et décolonisation

Nunavut : Indépendance fédérale

« La « personnalité » des lois (ou du droit) signifie que le droit applicable à un individu, donc son assujettissement à un ordre juridique, est déterminé non pas exclusivement en fonction de son rattachement territorial mais sur la base de son appartenance personnelle à une communauté ou à un groupe national donné. » (Otis, 2005, p.786) Le principe de personnalité est référé dans cet article comme un principe d'identité (collective) afin d'établir une distinction avec l'Anglais *personhood* et avec le concept de personnalité juridique. La volonté initiale d'un un territoire inuit dans le Nord du Canada s'est heurtée non seulement à la culture politique fédérale, pour qui l'établissement d'un critère ethnique dans l'instauration de structures de pouvoirs ne correspondait pas à la politique multi-ethnique fédérale, mais aussi à la réalité de ce qu'est aujourd'hui le Nunavut, où habitait et continue d'habiter des communautés différentes (Loukacheva, 2007a; White, 2009). Lors du partage des Territoires du Nord-Ouest, la question du territoire inuit dépassait les Territoires et se pensait en relation avec les autres communautés au Nunavik (Québec), au Labrador, au Yukon, et dans les Territoires du Nord-Ouest, qui eux composaient déjà avec leurs propres accords territoriaux (Hendersen & Bell, 2019; Loukacheva, 2007b). Le point amené par Jose Kusuguk est important pour ce qui touche au principe d'identité: la création du Nunavut allait, pour la première fois depuis la création du Manitoba par le peuple Métis, reconfigurer le territoire canadien dans le but de reconnaitre et d'accorder du pouvoir à un groupe autochtone particulier (Kusuguk, 2000). Le Nunavut, par sa configuration ethnique, allait devenir de facto Inuit, sans toutefois tomber dans une logique de séparatisme

ethnique où tout habitant du Nunavut peut participer à la vie politique locale.

Le contexte politique dans lequel s'inscrivaient les négociations a été un point majeur dans la volonté fédérale de trouver un terrain d'entente afin de conserver la paix sociale : la crise d'Oka de 1990, les élections fédérales de 1993, ainsi les accords dans la vallée Mackenzie de 1998 ont créés un contexte politique et social propice à la négociation avec les autorités fédérales, à travers lequel les partis inuit ont réussi à amener leurs intérêts sur la table de discussion (Kusuguk, 2000). L'essai (et l'échec) d'établir une parité dans la représentation électorale, à travers un système de double-représentation des circonscriptions (une femme, un homme), venait dans un souci de faire correspondre le système législatif du Nunavut à la Charte des droits et libertés (Kusuguk, 2000). L'appartenance des Inuit et de leur système politique à un système fédéral canadien libéral, défendant une vision tant d'appartenance collective à une nation qu'une prise en compte individualiste des responsabilités et droits, complexifie la notion de spécificité inuit à travers les revendications territoriales. Jose Kusuguk met l'accent sur la volonté d'inscrire le projet Nunavut dans une lignée politico-juridique fédérale afin de rendre lisible, potable, et possible la réalisation de ce projet. Ainsi, l'insertion de concepts juridiques occidentaux comme le droit des femmes, bien que ne correspondant pas aux pratiques et dynamiques sociales inuit, dans les lignes directives des décideurs Inuit était une stratégie de lisibilité du projet dans un cadre normatif libéral. Sans une conciliation avec les pouvoirs fédéraux, sans reconnaître et connaître les dynamiques tant de pouvoir que de savoir, les négociations n'auraient pas pu aboutir. *Scientia potentia est*, particulièrement lors de négociations dans un contexte colonial.

Cette connaissance de la part des négociateurs inuit des partis fédéraux afin de mener à bien le projet a ainsi permis une prise en compte des spécificités culturelles des communautés inuit dans les affaires sociales. L'Accord du Nunavut garantissait la séparation constitutionnelle du gouvernement du Territoire du Nunavut des pouvoirs décisionnaires fédéraux, garantissant une marge de manœuvre décisionnaire de la part des pouvoirs gouvernementaux territoriaux. Cette marge de manœuvre décisionnaire a pu œuvrer pour la restauration et le maintien de pratiques socio-culturelles

inuit : l'adoption coutumière, l'assistance social axée sur la chasse et les arts, le renforcement de l'utilisation de l'Inuktitut, les comités de justice (Kusuguk, 2000). L'importance d'avoir l'autorité sur ces questions de droit de la famille, de service social, et d'organisation de la justice vient en réponse aux abus subis par le passé : la séparation forcée des familles, les enfants séparés de leur famille de façon abusive, les pensionnats, l'interdiction fédérale des pratiques autochtones… La dévolution des pouvoirs de gestion sociale est vu comme un acte de réparation et de justice, particulièrement pour un gouvernement fédéral anxieux d'établir de meilleures relations avec sa population autochtone afin de redorer son blason. Les services sociaux et de santé, ainsi que l'éducation des enfants, à travers l'Inuit Qaujimajatunqangit comme fondation philosophique depuis 2007 (McGregor, 2013; Ministère de l'Éducation, 2007), deviendront des enjeux de société majeurs: 31,2% des enfants vivent sous le seuil de pauvreté, 70% de la population vivent dans l'insécurité alimentaire, les jeunes hommes Inuit sont 40 fois plus à risque de mourir d'un suicide que les jeunes du Sud du Canada (Affleck et al., 2020; Table ronde pour la réduction de la pauvreté au Nunavut, 2017; The Government of Nunavut et al., 2010, 2017; Tranter, 2020). Dans ce contexte, la capacité de gestion de la crise de santé mentale et de la grande pauvreté, en ajout à la crise de logement, est quintessentielle à la capacité du nouveau gouvernement de pouvoir gouverner et assurer sa légitimité comme détenteur de ce pouvoir décisionnaire à travers les accords de dévolution. Cette dévolution des pouvoir du fédéral au gouvernement du Nunavut répond au besoin criant pour la population Inuit d'obtenir des solutions culturellement adaptées pour répondre à cette crise sociale. La mise en œuvre du curriculum des écoles en lien avec l'IQ répond à l'inadéquation entre les apprentissages proposés à l'école et la culture inuit : d'après le recensement national de 2016, 47,8% de la population a obtenu son diplôme d'éducation secondaire, et le taux de fréquentation scolaire pré-pandémie était de 76,5% (tombé à 64,8% pendant la pandémie) (Nunavut News, 2021). La mise en place de plans d'action et de plans de prévention du suicide par les autorités gouvernementales, le Département de la Santé, et par NTI, depuis 2010, découlent de cette dévolution des pouvoirs vers une capacité d'action et de prise en charge culturellement et socialement adaptée. L'appartenance à la communauté inuit à travers sa spécificité culturelle, linguistique et sociale a servi de point d'ancrage

des revendications de dévolution de ces droits : pouvoir décider pour sa propre communauté en rapport à sa propre identité distincte et spécifique.

Le projet de loi C-91 de mars 2019, concernant les langues autochtones, a été fortement décrié par les autorités du Nunavut et par NTI et ITK à cause de l'absence de mention de l'Inuktitut et du maintien de l'obligation du français ou de l'anglais pour avoir accès aux services fédéraux, ceux-ci n'ayant aucune obligation de proposer leurs services en Inuktitut, renforçant ainsi non seulement l'inégalité d'accès à ces services pour ceux qui n'ont pas une bonne compréhension de ces deux langues, mais renforçant aussi la domination de ces langues coloniales sur les langues autochtones (Flaubert Takam, 2013; Nunatsiaq News, 2019). L'appel de NTI à un gouvernement autonome vient en conséquence de cet acte ainsi que du constat de la difficile avancée en matière de développement économique, de sécurité et santé publique (Mikijuk, 2021). Le vocabulaire utilisé par NTI dans sa critique de la politique du gouvernement du Nunavut fait écho au juridique, faisant référence directement aux Accords du Territoire du Nunavut de 1993 (idem). L'utilisation du vocabulaire juridique demeure une stratégie de défense des intérêts inuit tout en rejetant le colonialisme canadien. Un difficile équilibre est ici fait par NTI, entre un cadre de négociations dans un système colonial occidental imposant l'utilisation de termes juridico-politiques afin de pouvoir même avancer la possibilité de négociations, et maintenir le discours de spécificité Inuit dans une perspective décoloniale. L'accent mis sur l'identité inuit de la gouvernance régionale, en critiquant la position du gouvernement de 'focus on the non-Inuit minority' (Mikijuk, 2021), axe leur appel à l'autonomie sur un argument ethnique et identitaire. Une stratégie politique opposée à celle décrite par Jose Kusuguk lors des négociations des années 1980-2000 (Kusuguk, 2000).

Groenland : Inuit jusqu-au-boutiste ?

Les Actes groenlandais de 1979 et de 2009 : inspiration pour les Inuit du Nunavut ? Le *Self-Government Act* de 2009 détaille les responsabilités qui doivent être transférées aux autorités groenlandaises. Il comporte deux listes : la liste 1 concerne les responsabilités pouvant être transférées de manière unilatérale, et la

liste 2, les responsabilités pouvant être transférées après négociations avec les autorités danoises (Self-Government Act, 2009). Dans cette liste 2, plusieurs domaines sont mentionnés dont le droit de la famille, dont l'obtention de sa gestion par les autorités du Nunavut avait été un point central des négociations de dévolution, mais qui est toujours sous le chapeau des autorités danoises au Groenland. Le principe d'identité dans le cas du Groenland est intéressant au regard du commentaire fait par l'ancien ministre des Affaires Étrangères Pele Brogerb à propos d'une potentielle exclusion des citoyens non-Kalaallit d'un référendum sur l'indépendance du Groenland, propos contredit par le Premier Ministre Mute Egebe (Reuters, 2021). Plusieurs principes sont ici remis en question : l'égalité devant la loi, la citoyenneté, et l'identité nationale groenlandaise. Qui sont les Groenlandais ? Qui peut voter ? Pourquoi établir une différence de droit entre les Groenlandais Kalaallit et les Groenlandais non-Kalaallit ? Une 'ethnicisation' (Otis, 2005) potentielle du droit remet en avant la question de l'identité nationale groenlandaise : l'indépendance du Groenland est recherchée à cause des exactions coloniales du Danemark, dont des enlèvements d'enfants, l'interdiction des pratiques autochtones, et des relocalisations et sédentarisations forcées, et à cause de son inhabilité à répondre aux demandes économiques, sociales et politiques des populations locales du Groenland (Loukacheva, 2007a). Mais quid des Danois s'étant installés au Groenland depuis plusieurs générations, ou présents sur l'île depuis des décennies ? Sont-ils Groenlandais ou Danois ? Être Groenlandais, est-ce une question ethnique ou géographique (Cambou, 2020; Graugaard, 2009; Rytter, 2008)? La réponse du Premier Ministre « tous les citoyens au Groenland ont les même droits » rattache l'identité nationale à l'appartenance au territoire plutôt qu'à un groupe ethnique (Reuters, 2021). Mais l'identité nationale n'est pas aussi dichotomique que cela. Environ 85% de la population est Kalaallit et l'accent mis sur l'utilisation du Groenlandais comme langue nationale démontre de facto un certain cadre culturel autochtone inuit. Toutefois, l'histoire liant les Kalaallit au Danemark fait que beaucoup de Kalaallit et de Danois au Groenland comptent des Kalaallit et des Danois parmi leurs ancêtres.

La question du territoire et de l'ethnicité de la population est donc complexe et non manichéenne, les Inuit d'un côté et les Danois de l'autre, justifiant la réponse du Premier Ministre. Le droit ne prend pas en compte l'ethnie dans son application. Toutefois, le droit de la famille étant toujours sous l'autorité danoise, une dévolution de ce pouvoir pourrait poser la question du régime d'adoption en cas de dévolution : un retour à un régime traditionnel inuit, ou y aurait-il la possibilité d'un choix de régime (Otis, 2014) ? En cas d'indépendance, comment concilier l'identité nationale mixte avec un potentiel régime traditionnel inuit ? La position Kalaallit-jusqu'au-boutiste n'est pas tenue par le Premier Ministre, mais certains groupes et personnalités politiques, dont l'ancien ministre des Affaires Étrangères, semblent tenir une conception ethno-nationaliste de ce à quoi devrait ressembler l'application du droit et le droit lui-même. Établir différents régimes de droit en fonction de l'identité ethnique n'est pas unique : au-delà du continent américain, le cas français et sa spécificité de certains droits, comme l'obligation pour les communes et mairies de mettre à disposition des terrains pour les itinérants roms, donne un autre exemple de l'extension du principe d'identité vers une certaine 'ethnicisation' de ce droit. Sur le même territoire français, différents groupes communautaires sont régis par des règles leur étant propres. La réservation du droit de vote au seul citoyens Kalaallit tomberai cependant dans une forme d'ethno-nationalisme, voire d'ethno-fascisme, où l'étendue des droits découlant de la citoyenneté dépendrait de l'appartenance ou non à un groupe socio-culturel et ethnique. L'égalité devant la loi, socle fondamental, n'existerait plus et ainsi, parler de démocratie pour le Groenland serait sujet à débat. C'est justement tout l'inverse que le gouvernement groenlandais cherche : le Groenland cherche à s'insérer sur la scène internationale à travers une ouverture de son économie. Une position ethno-nationaliste rendrait une ouverture difficile afin d'attirer des travailleurs et compagnies à s'installer sur le territoire sur le long-terme. La position politique du gouvernement, sur un échiquier démocratique, est une position stratégique d'alignement tant avec le Danemark qu'avec ses alliés régionaux comme les États-Unis et le Canada. Bien que la Chine représente un partenaire commercial de plus en plus important pour le Groenland, les héritages coloniaux et historiques de l'implantation danoise et américaine sur le territoire, et la position géographique de l'île, rendent logique l'alignement de valeurs vers une démocratie libérale

conservant toutefois une perspective Kalaallit unique, dont les traditions politiques s'éloignent elles-aussi de pratiques autoritaires.

Les choix stratégiques politiques du Nunavut et du Groenland se ressemblent ainsi sur plusieurs points : ancrés dans une volonté de se rendre lisible aux yeux des puissances coloniales respectives à travers le droit, les deux territoires opèrent un exercice d'équilibre entre conserver leurs pratiques et cultures autochtones respectives tout en conservant l'objectif principal d'autonomie tant financière que politique. Une décolonisation du droit supposerait alors un éloignement de ces logiques de souveraineté et d'indépendance économique dictées par un monde capitaliste et westphalien. Est-ce possible ? L'indépendance du Groenland, de son territoire, de sa population, et de ses eaux, tient au droit international qui lui garantit des droits de souveraineté, sans quoi, le territoire, se trouvant au milieu d'un champ de *Big Power Politics*, aurait peu de marge de manœuvre en matière d'auto-gouvernance. Ce même droit international et ces mêmes principes de démocratie libérale, bien que coloniale, garantissent au Groenland la possibilité de recouvrir une indépendance pleine. Dans ce sens, l'Arctique n'est pas un Far Ouest sans foi ni loi, ouvert à l'exploitation du premier venu, mais est régi par des institutions et des régimes juridiques encadrant les relations économiques et diplomatiques dans la région. L'établissement d'institutions comme le Conseil de l'Arctique a ainsi garanti une prise en compte réelle des intérêts, tant individuels que collectifs, des populations autochtones du cercle circumpolaire. Bien que l'inclusion de ces intérêts ne signifie pas la décolonisation, c'est cette inclusion qui permet d'établir une fondation dans laquelle un dialogue peut se créer entre grandes puissances (étatiques ou privées) et communautés et gouvernements autochtones.

Discussion – Constitution du groupe : à la croisée des mondes

L'articulation des principes de territorialité et d'identité, tant au Nunavut qu'au Kalaallit Nunaat, est considérée dans une perspective de lisibilité vis-à-vis de la puissance étatique coloniale dans un cadre institutionnel international. La déclaration des Nations Unies sur les Droits des Peuples Autochtones de 2007, n'ayant reçu la sanction royale qu'en 2021 au Canada (Loi Sur La Déclaration Des Nations Unies Sur Les Droits Des Peuples Autochtones, 2021), a mis en

place un cadre de valeurs et de perspectives des droits des communautés et des personnes autochtones vers une volonté de réconciliation décoloniale. Le fait que le Canada n'ait fait de la déclaration de 2007 une loi fédérale qu'en 2021, en réaction aux découvertes d'environ 7000 cadavres d'enfants autochtones dans d'anciennes écoles résidentielles (Deer, 2021), en réaction à l'enquête nationale sur les femmes et filles autochtones disparues et assassinées de 2019 (*Réclamer Notre Pouvoir et Notre Place: Rapport Final de l'Enquête Nationale Sur Les Femmes et Les Filles Autochtones Disparues et Assassinées*, 2019), en réaction aux recommandations de Comité des Droits Humains des Nations Unies contre les pratiques racistes envers les peuples autochtones (Gorelick, n.d.), démontre la résistance du fédéral à non seulement reconnaître des exactions discriminantes systémiques, mais démontre aussi une reconnaissance non-dite des fondations canadiennes : le Canada est une colonie fondée sur le génocide envers les peuples autochtones, voter en faveur de la Déclaration revenait à contredire l'identité et l'histoire nationale canadienne comme vivant en harmonie avec les peuples autochtones. Le choix du Danemark d'ouvrir les négociations d'autonomie du Groenland ne rentre pas dans un même contexte social et géographique : le Danemark tient au Groenland pour sa position géostratégique et pour son potentiel économique d'exploitation minière. Le Danemark n'a pas été construit sur le Groenland alors que tout le Canada est une colonie établie sur des terres autochtones dont les conditions historiques de cession sont douteuses (Motard, 2019). Cette différence géographique explique aussi les différences politiques entre les deux pays, mais l'essence coloniale des deux pays explique les stratégies de négociations entre les Inuit et les gouvernements centraux. L'utilisation et l'instrumentalisation des registres politico-légaux par les partis inuit s'explique par la volonté de se rendre lisible par un système colonial. L'entrée dans un terrain linguistique colonial est la condition pré-requise afin d'entamer des possibilités de négociations. Comprendre le fédéral ou le gouvernement central, utiliser leur vocabulaire et leurs logiques était la manière la plus efficace pour atteindre un objectif d'auto-gouvernance ou d'autonomie relative. Jose Kusuguk était très clair : Nunavut n'était pas un projet de séparatisme, de remise en question de la souveraineté canadienne, mais un projet de réajustement des relations de pouvoir entre le fédéral et les communautés Inuit

(Kusuguk, 2000). Mute Egebe, en rappelant l'égalité des droits de tous les citoyens, s'inscrit aussi dans un registre de coexistence avec le Danemark, une position évitant ainsi toute confrontation antagoniste ethnique d'une position identitaire (Reuters, 2021).

L'indépendance n'est pas à n'importe quel prix (Last, 2021). Bien que les principes de territorialité et d'identité aient été instrumentaux dans la mobilisation politique collective des Inuit tant au Nunavut qu'au Groenland, ces principes n'ont pas abouti à des politiques séparatistes ethniques, composant avec le climat politico-légal respectif à chaque territoire. L'indépendance du Groenland tient aussi à sa capacité de recomposer ses sources de revenus afin de ne plus être dépendant des reversements danois : l'industrie minière est considérée comme un élément clé (idem). Mais à quel prix ? Si, par principe de territorialité, un des tenants de l'identité nationale Kalaallit, socle politique et social des revendications d'indépendance, tient à son attachement à la terre et au territoire dans une conception cosmologique Inuit, peut-on concilier exploitation minière avec ce projet de construction d'identité nationale en vue de l'indépendance ? C'est cet équilibre entre durabilité écologique et indépendance économique qui forme les principales lignes de désaccord politiques entre les partis : quand et comment devenir indépendant ? Cette tension entre indépendance économique et durabilité est aussi centrale dans les trajectoires de développement au Nunavut. Le moratoire sur l'interdiction d'exploration et d'exploitation pétrolière imposé par le Premier Ministre Canadien en 2016, bien que dans un souci écologique, a aussi restreint les possibilités de revenus et de diversification économique du territoire. L'appel du 16 novembre 2021 à la gouvernance autonome de NTI se focalise sur la défense de la culture et des intérêts Inuit, comme la langue, mais ne fait pas mention de la nécessité de trouver un modèle de développement débouchant à l'autonomie économique vis-à-vis du fédéral. Les fondations socio-politiques des revendications d'autonomie et d'indépendance, en s'ancrant dans un cadre international économique particulier, se doivent de prendre en compte les modes de gouvernances appropriées à ce cadre économique capitaliste. Ceci en tous cas est une perspective de conception du développement et de l'indépendance, ironiquement, dépendante de s'insérer dans ce système économique mondial par essence colonial et extractiviste. Ces fondations philosophiques de l'identité nationale

se heurtent à la complexité économique : une identité nationale forte et cohérente suffit-elle pour se déclarer indépendant ? La population de Kalaallit Nunaat serait en désaccord, NTI pourrait approuver. Dans une perspective identitaire ethnique de l'appel de NTI, quid de l'hétérogénéité tant intragroupe que régionale du Nunavut ?

Conclusion

Le droit est tant un outil pratique qu'un régime ontologique et épistémologique. Le droit est tant un cadre d'action restrictif qu'un cadre d'action permettant le changement. Cette dualité du droit, tant comme outil colonial que comme outil décolonial, est le cœur de l'argumentaire développé dans cet article. L'instrumentalisation des principes d'identité et de territorialité par les partis Inuit au Nunavut et au Groenland démontre cette ambivalence du droit dans leurs revendications d'autonomie et d'indépendance face à des puissances coloniales. Le droit : un outil et un régime permettant un réajustement des rapports de pouvoir entre colonisés et colonisateurs. Les revendications d'autonomie et d'indépendance des peuples Inuit du Nord-Est Canadien et du Groenland se sont fondés dans univers politico-légal occidental. Leur capacité de négocier dans ce contexte sous-entend une capacité de composer avec le vocabulaire politico-juridique colonial : propriété du territoire, droits des habitants du territoire, relation avec les pouvoirs étatiques et fédéraux. L'utilisation des principes d'identité et de territorialité sont ainsi à comprendre au sein de cette stratégie politique d'établissement d'un terrain fertile aux négociations, une stratégie de lisibilité, évitant soigneusement les arguments séparatistes au Nunavut et d'ethno-nationalisme dans les deux territoires. Cet article analyse les stratégies de mobilisation des principes d'identité et de territorialité par les partis Inuit au Nunavut et au Groenland dans leur projet d'indépendance ou d'autonomie. Un aspect de cette question occultée, ou brièvement mentionnée ici, est l'instrumentalisation de ces mêmes principes par les autorités coloniales en vue d'approuver ou de rejeter les revendications Inuit. En effet, pour le Canada, se revendiquant comme nation multiculturelle et multiethnique, des revendications territoriales autochtones critiquant les politiques fédérales coloniales, et donc non-respectueuses de leurs droits, jettent une pierre dans l'édifice de verre de l'identité nationale de la

communauté imaginée canadienne. Pour le Danemark, les revendications Groenlandaises et la mise au jour des pratiques paternalistes et coloniales violentes danoises jettent aussi une pierre dans l'édifice de verre de cette société danoise supposée pacifiste et 'bonne colonisatrice'. Les revendications d'indépendance Kalaallit déconstruisent tout l'imaginaire collectif danois quant à son passé et présent colonial. Les réactions du Canada et du Danemark dans ce processus d'autonomie et d'indépendance n'ont pas été analysées ici mais simplement illustrées, l'article présent se focalisant sur les instrumentations Inuit des deux principes de territorialité et d'identité du droit.

Références

Affleck, W., Chachamovich, E., Chawky, N., Beauchamp, G., Turecki, G., & Séguin, M. (2020). Suicide amongst the Inuit of Nunavut: An Exploration of Life Trajectories. *International Journal of Environmental Research and Public Health*, *17*(6), 1812. https://doi.org/10.3390/ijerph17061812

Anderson, B. (1983). *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. Verso.

Buttler, M. (2021, July 16). *Greenland Bans All Future Oil Exploration Citing Climate Concerns*. Time. https://time.com/6080933/greenland-bans-oil-exploration/

Cambou, D. C. (2020). Disentangling the conundrum of self-determination and its implications in Greenland. *Polar Record*, *56*, e3. https://doi.org/10.1017/S0032247420000169

Chartier, D. (2020). Renversements décoloniaux de la cartographie de l'Arctique. *Captures*, *5*(1), 21.

Coulthard, G. S. (2018). Chapitre 1: La politique de la reconnaissance en contexte colonial. In *Peau rouge, masques blancs: Contre la politique coloniale de reconnaissance* (p. 368). Lux éditeur.

Dahl, J., Hicks, J., & Jull, P. (Eds.). (2000). *Nunavut: Inuit Regain Control of Their Lands and Their Lives*. IWGIA.

Deer, K. (2021, September 29). Why it's difficult to put a number on how many children died at residential schools. *CBC News*. https://www.cbc.ca/news/indigenous/residential-school-children-deaths-numbers-1.6182456

Enquête nationale sur les femmes et filles autochtones disparues et assassinées (Ed.). (2019). *Réclamer Notre Pouvoir et Notre Place: Rapport Final de l'Enquête Nationale sur les Femmes et les Filles Autochtones Disparues et Assassinées*.

Flaubert Takam, A. (2013). Territorialisation comme stratégie de survie des langues autochtones au Canada. *The Canadian Journal of Native Studies*, *33*(1), 27–47.

Gorelick, M. (n.d.). *Discrimination of Aboriginals on Native Lands in Canada*. UN Chronicle. https://www.un.org/en/chronicle/article/discrimination-aboriginals-native-lands-canada

Graugaard, N. D. (2009). *National Identity in Greenland in the Age of Self-Government*. Centre for the Critical Study of Global Power and Politics.

Hendersen, W. B., & Bell, C. (2019). Rights of Indigenous Peoples in Canada. In *L'Encyclopédie Canadienne*.

Herolf, G., Åkermark, S. S., Suksi, M., Stephan, S., Ackrén, M., Malloy, T. H., Lyck, L., & Rógvi, K. á. (2015). *The Nordic Self-Governing Areas in a Peace Perspective*. Nordic Council of Ministers. https://doi.org/10.6027/ANP2015-732

Hicks, J., & White, G. (2015). *Made in Nunavut: An Experiment in Decentralized Government*. UBC Press.

Huebert, R. (1999). Canadian Arctic security issues: Transformation in the post-cold war era. *International Journal*, 203–229.

Kulchyski, P., & Tester, F. J. (2007). *Kiumajut (Talking Back): Game Management and Inuit Rights, 1900-70*. UBC Press.

Kusuguk, J. (2000). Chapter 1: The Tide Has Shifted: Nunavut Works For US, and It Offers a Lesson to the Broader Global Community. In J. Dahl, J. Hicks, & P. Jull (Eds.), *Nunavut: Inuit Regain Control of Their Lands and Their Lives* (pp. 20–29). IWGIA.

Last, J. (2021, April 2). Mining—And independence—At the heart of Greenland's election. *CBC News*. https://www.cbc.ca/news/canada/north/greenland-election-2021-1.5973836

Légaré, A. (2002). The Construction of Nunavut and Its Impact on Collective Identity in the Canadian Eastern Arctic. *Revue d'études Constitutionnelles*, *7*(1), 55–78.

Loukacheva, N. (2007a). Chapter 1: The Inuit of Greenland and Nunavut: From Subjugation to Self-Government? In *The Arctic Promise: Legal and Political Autonomy of Nunavut and Greenland* (pp. 17–32). University of Toronto Press.

Loukacheva, N. (2007b). Chapter 2: The Constitutional Dimensions of the Governance of Nunavut and Greenland. In *The Arctic Promise: Legal and Political Autonomy of Nunavut and Greenland* (pp. 33–52). University of Toronto Press.

Loukacheva, N. (2007c). Introduction. In *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut* (pp. 3–16). University of Toronto Press.

Lov om Grønlands hjemmestyre, Pub. L. No. 577 (1978).

Madwar, S. (2018). Délocalisation d'Inuits dans l'Extrême-Arctique au Canada. In *L'Encyclopédie Canadienne*. https://www.thecanadianencyclopedia.ca/fr/article/delocalisation-du-haut-arctique-au-canada

Lov om Grønlands Selvstyre, Pub. L. No. 473 (2009). https://naalakkersuisut.gl//~/media/Nanoq/Files/Attached%20Files/Engelske-tekster/Act%20on%20Greenland.pdf

McGregor, H. E. (2013). Curriculum Change in Nunavut: Towards Inuit Qaujimajatuqangit. *McGill Journal of Education*, *47*(3), 285–302. https://doi.org/10.7202/1014860ar

Mikijuk, M. (2021, November 16). Inuit Self-Governement in Nunavut. *Nunavut Tunngavik Incorporated*. https://www.tunngavik.com/news/inuit-self-government-in-nunavut/

Ministère de l'Éducation. (2007). *Education Framework: Inuit Qaujimajatuqangit for Nunavut Curriculum*. Gouvernement du Nunavut.
https://www.gov.nu.ca/sites/default/files/files/Inuit%20Qaujimajatuqangit%20ENG.pdf

Motard, G. (2019). Les dimensions collectives des ententes sur les répercussions et les avantages: Bémol sur le discours du contrat privé. *Les Cahiers de droit*, *60*(2), 395. https://doi.org/10.7202/1060982ar

Nunatsiaq News. (2019, June 26). Inuit org slams recently passed federal Indigenous languages bill. *Nunatsiaq News*.

https://nunatsiaq.com/stories/article/inuit-org-slams-recently-passed-federal-indigenous-languages-bill/

Nunavut Act, 28 SC (1993). https://laws-lois.justice.gc.ca/eng/acts/N-28.6/page-1.html

Nunavut Land Claims Agreement Act, 29 SC (1993).

Nunavut News. (2021, August 21). Low school attendance rate in Nunavut harming children's futures. *Nunavut News*. https://www.nunavutnews.com/editorial/nunavut-news-editorial-low-school-attendance-rate-in-nunavut-harming-childrens-futures/

Otis, G. (2005). Territorialité, personnalité et gouvernance autochtone. *Les Cahiers de droit*, *47*(4), 781–814. https://doi.org/10.7202/043911ar

Otis, G. (2014). L'autonomie gouvernementale autochtone et l'option de loi en matière de statut personnel. *Les Cahiers de droit*, *55*(3), 583–618. https://doi.org/10.7202/1026744ar

Reuters. (2021, September 27). Greenland foreign minister demoted after independence comments. *Reuters*. https://www.reuters.com/world/americas/greenland-foreign-minister-demoted-after-independence-comments-2021-09-27/

Rytter, J. E. (2008). Self-Determination of Colonial Peoples—The Case of Greenland Revisited. *Nordic Journal of International Law*, *77*(4), 365–400.

Sibbald, A. (2010). *Ishigaq: The Quest For Home*. Lunatic Publishing.

Table ronde pour la réduction de la pauvreté au Nunavut. (2017). *The Makimaniq PLan: A Shared Approach To Poverty Reduction 2017-2022* (p. 40). https://www.gov.nu.ca/sites/default/files/makimaniq_2_final.pdf

Tassinari, P. (Director). (1995). *Broken Promises—The High Arctic Relocation*. https://www.onf.ca/film/broken-promises-the-high-arctic-relocation-fr/

Tester, F., & Kulchyski, P. (2011). *Tammarniit (mistakes): Inuit relocation in the Eastern Arctic, 1939-63*. UBC press.

Loi sur la Déclaration des Nations Unies sur les droits des peuples autochtones, 14 SC (2021).

The Government of Canada, The Government of Nunavut, & Nunavut Tunngavik Incorporated. (2008). *Land and Resources Devolution Negotiation Protocol*. https://www.gov.nu.ca/sites/default/files/files/Devolution%20Protocol_eng.pdf

The Government of Canada, The Government of Nunavut, & Nunavut Tunngavik Incorporated. (2019). *Entente de principe sur le transfert des responsabilités liées aux teres et aux ressources du Nunavut*. https://www.rcaanc-cirnac.gc.ca/fra/1565186303207/1565186324673

The Government of Nunavut, Nunavut Tunngavik Incorporated, Embrace Life Council, & Royal Canadian Mounted Police. (2010). *Nunavut Suicide Prevention Strategy* (p. 27). https://www.gov.nu.ca/sites/default/files/files/NSPS_final_English_Oct%202010(1).pdf

The Government of Nunavut, Nunavut Tunngavik Incorporated, Royal Canadian Mounted Police, & Embrace Life Council. (2017). *Inuusivut Anninaqtuq, a five-year Nunavut Suicide Prevention Strategy Action Plan*. https://www.tunngavik.com/files/2017/06/2017-06-NR-NSPS-Inuusivut-Anninaqtuq-Action-Plan-ENG.pdf

Tranter, E. (2020, January 30). Nunavut children experience the highest poverty rate in Canada: Report. *Nunatsiaq News*. https://nunatsiaq.com/stories/article/nunavut-children-experience-the-highest-poverty-rate-in-canada-report/

White, G. (2009). Cultures in Collision: Traditional Knowledge and Euro-Canadian Governance Processes in Northern Land-Claim Boards. *ARCTIC*, *59*(4), 401–414. https://doi.org/10.14430/arctic289

On the Merits of Heritage Informed Coastal Wellbeing (HICW): Assessing our Common Maritime Heritage as a Governance Model

Benjamin McTaggart[*]*, University of Ottawa*

Abstract

Heritage Informed Coastal Wellbeing (HICW) is a novel model proposed here as utilizing maritime cultural heritage, both tangible and intangible, to illustrate the temporal, geographical and cultural links humans have with coastal environments. To that end, it can not only inform how societies govern and utilize their ocean spaces, but through heritage regulatory frameworks, guide responses to climate change. Through an analysis of broad maritime law, maritime cultural heritage itself, environmental assessments and finally on how people generate wellbeing from proximity to the sea, this article explores the

[*] Biography: Ben McTaggart is a UOttawa graduate student in the International Development and Globalization program, focusing on Environmental Sustainability. Having previously studied archaeology and worked at sea, he is interested to focus his research and studies on the intersection of cultural heritage management and ocean health. Additionally, having worked for Crown-Indigenous Relations and Northern Affairs Canada, he is curious about how to his work can work in support of First Nations, Metis and Inuit traditional knowledge. How Canadian and international policy factors in Arctic and northern voices and place-based knowledge is central to that learning.

Biographie : Ben McTaggart est un étudiant diplômé du programme de développement international et de mondialisation de l'Université d'Ottawa, qui se concentre sur la durabilité de l'environnement. Ayant déjà étudié l'archéologie et travaillé en mer, il souhaite axer ses recherches et ses études sur l'intersection de la gestion du patrimoine culturel et de la santé des océans. En outre, ayant travaillé pour le ministère des Relations avec les Autochtones et des Affaires du Nord, il est curieux de savoir comment son travail peut contribuer à soutenir les connaissances traditionnelles des Premières nations, des Métis et des Inuits. La façon dont les politiques canadiennes et internationales prennent en compte les voix de l'Arctique et du Nord ainsi que les savoirs locaux est au cœur de cet apprentissage.

legitimacy of HICW as a governance model. Through case studies, the model's legitimacy and limitations in the Canadian Arctic and the South China Sea (SCS) are addressed. I concentrate on two specific research questions: 1) how maritime heritage can inform coastal wellbeing and 2) if such heritage regulation can be used to generate cooperative ocean governance in areas of authoritative, legal, or governance dispute, will guide discussion on how a HICW model can function as a marine, environmental, and regional governance framework.

Keywords: Heritage, Governance, Wellbeing, Arctic, South China Sea

Résumé

Le bien-être côtier éclairé par le patrimoine (Heritage Informed Coastal Wellbeing, HICW) est un nouveau modèle proposé ici, qui utilise le patrimoine culturel maritime, à la fois matériel et immatériel, pour illustrer les liens temporels, géographiques et culturels que les êtres humains entretiennent avec les environnements côtiers. À cette fin, il peut non seulement informer sur la manière dont les sociétés gouvernent et utilisent leurs espaces océaniques, mais aussi, par le biais de cadres réglementaires patrimoniaux, guider les réponses au changement climatique. En analysant le droit maritime au sens large, le patrimoine culturel maritime lui-même, les évaluations environnementales et, enfin, la manière dont les gens tirent leur bien-être de la proximité de la mer, cet article explore la légitimité de l'approche intégrée de l'écosystème côtier en tant que modèle de gouvernance. À travers des études de cas, la légitimité et les limites du modèle dans l'Arctique canadien et la mer de Chine méridionale (SCS) sont abordées. Je me concentre sur deux questions de recherche spécifiques : 1) comment le patrimoine maritime peut informer le bien-être côtier et 2) si une telle réglementation du patrimoine peut être utilisée pour générer une gouvernance coopérative des océans dans les zones de litige autoritaire, juridique ou de gouvernance, guidera la discussion sur la façon dont un modèle HICW peut fonctionner comme un cadre de gouvernance marine, environnementale et régionale.

Mots-clés: Patrimoine, gouvernance, bien-être, Arctique, mer de Chine méridionale

Heritage, as a lens through which to guide how we humans govern our interactions with both land and sea, is an often-unexplored phenomenon. Jurisdictions around the world already have laws and regulations that encode heritage site preservation both tangible and intangible, integrating environmental considerations for areas frequented by community members like parks, beaches, and national monument sites. However, it is often underexplored how this heritage governance generates greater ecosystem services for human wellbeing (Blythe et al 2020). As such, the concept of Heritage Informed Coastal Wellbeing (HICW) is proposed here as a model that looks to manage coastal and marine tangible and intangible heritage to better steward such environments. Implicit in this is HICW's capacity to increase place-based wellbeing for surrounding communities.

Central to HICW is the knowledge that, as discussed further in Henderson (2019), the concept of a marine coastal landscape encapsulates the multitude of ways humans interact with the ocean: geographical, temporally, and culturally to name the most pertinent dimensions. By incorporating a "common heritage of mankind" (associated with seabed law in Schofield et al (2013)) into how humans interact with the ocean, more sustainable and border-crossing solutions to cooperative (co-) governance exist. As such, I explore the legitimacy of HICW's ability to mobilize that common heritage to inform regional co-governance. Today, critical marine coastal zones and their associated biodiversity are under threat from a warming world, made worse by many nations, including Canada's, collective inability to respond accordingly (CBC News, 2023). I propose that HICW can utilize our common heritage to help us respond and operate within that warming world. To do so, I use two regional contexts to provide evidence for HICW's legitimacy: the circumpolar Arctic from an Inuit and Canadian standpoint, and the South China Sea (SCS) in a Vietnamese context, specifically on the island of Quan Lạn in Hạ Long Bay. Both regions are informed by coastal benefits and access to resources defined by a status quo where built and intangible heritage is impacted by a changing geopolitical and environmental climate. I have worked within and in support of both of these regions and bring contexts to light throughout this article to highlight the utility of HICW as a dynamic model able to address different global contexts.

Ultimately, the utility of taking a HICW approach to governance is illuminating multidimensional (temporal, spatial, multispecies, multicultural) aspects to human interaction with the oceans. Too often, ecosystem preservation is pursued in isolation from heritage preservation, and vice versa (Henderson, 2019). A HICW approach means using cultural heritage as the starting point for the creation of laws and regulations governing coastal areas increasingly impacted by a changing climate. The approach posits that ecosystem and natural resource governance is stronger when connected to the protection of cultural heritage (Blythe et al, 2020; Jing and Li, 2019). In short, ecosystem services, defined as how people benefit from the environment, and social wellbeing, indicators determining how we thrive in life, are at the center of HICW (Blythe et al, 2020).
To generate an effective discussion around the concept of HICW, I draw on concepts and themes found in four areas of research: cultural resource and heritage management, environmental and ecosystem management, maritime law, and general discussions around coastal wellbeing. Through their relevance to marine and environmental management, political governance, and human wellbeing/flourishing discussions, these areas serve as the epistemological backbone of HICW. I explore these by presenting the four areas of research and discussing their interconnections, taking a siloed approach. I discuss an overview of these areas of research in relation to heritage management before outlining how I intend to utilize them for a discussion on the HICW concept.

Research Framework and Literature Review

Maritime Law and Jurisdiction

To start as broad as possible, the maritime law and jurisdiction literature provides the backdrop for the relevance of HICW. When looking at both Arctic and SCS cultural and natural resource management topics, most research focuses on some form of fishing and sub-sea resource use like gas and oil (Vu, 2013; Zhang, 2018; Ca, 2019; Tanaka 2020; Guilan and Weiwei, 2021; Daly, Knott, Keogh, and Singh, 2021). Additional discussion also focused on the role of mitigating and adapting to climate change in the region (Arruda and Krutkowski, 2017; Scott, 2020; Zou and Zhang, 2020) and the role of co-governance (Dela Cruz, 2019; Ca, 2019; Crawford

2021). The role of heritage informing law itself is either within the domain of marine and maritime cultural heritage discussions or how it may be relevant to existing law under specific articles in the United Nations Convention on the Law of the Sea (UNCLOS) and the UNESCO Convention on the Protection of Underwater Cultural Heritage (UCHC) (Vu, 2013; Jing and Li 2019). Establishing a broad discussion on law and looking at its current and previous precedents indicates that heritage, while at the basis of conventions and agreements like UNCLOS and UCHC, are disaggregated and subject to the whims of signatory states (Zou and Zhang, 2020, p. 218). In both the SCS and Arctic, understanding how heritage informs both regions is central to understanding the various states inherent conflict of interests.

A cursory investigation into the basis of the SCS dispute reveals an understanding of Chinese intentions in the region. One source of this dispute is rooted in historic claims to use and livelihood within a region known as the nine-dash line that currently overlaps the existing exclusive economic zones (EEZ's) of Vietnam, Taiwan, the Philippines, Malaysia, Indonesia, and Brunei. Yet, central to this review, is the role of heritage in coastal wellbeing at a local level, so how do regional governance disputes factor in? Guilan and Weiwei (2021), in their discussion on synergistic management on maritime cultural heritage from a Chinese standpoint outline its major role in ancient Maritime Silk Road and place within SCS maritime history. The central question is one of if this history is to be used benevolently or just as a means of hegemony and jurisdiction acquisition. With Guilan and Weiwei noting expansive sunken cultural heritage all over the SCS region, they note how:

> A shipwreck's hull, fragments, and other objects inside are representative of a nation's maritime heritage, the shipyards and waterfronts that promote the development of shipbuilding and fishing and facilitated trade are also a significant part of the maritime cultural landscape, exemplifying the interaction between sea and land (2020, p. 1)

But this is not specific to China, as Vietnam, among other SCS nations have significant claim to cultural material both inside and outside of their EEZ. Observing difficulties, Guilan and Weiwei note

how a lack “bridges across domains” “highly limit” the ability to interpret and work with marine cultural heritage as “issues of public social utilization” due to the outsized economic importance of development and fishing considerations (p. 2). Bridging across domains can be read as the siloed nature of sector management in sea governance, a factor that both Grip and Blomqvist (2021, p. 3) and Scott (2020) highlights in a discussion around integrated ocean management (IOM). Defining IOM as “an approach to oceans governance that aims to integrate the management of marine-based activities across sectors, space and time under a unified, overarching vision,” this potentially useful tool can harmonize economic and heritage informed use of coastal zones, among other considerations (Scott, 2020, p. 297). Yet, as discussed in Blythe et al. (2020) and Avieli (2015), applying management to regions with diverse culture and heritage meets up against a SCS region with multiple national claims of place and space.

From an Arctic perspective, the calculus of co-management is less so a question of one state dominance over a shared sea, but traditional voices long marginalized having a stake in international consideration. The Canadian Arctic, like other Arctic nations, represents a region requiring consistent planning and change management as the world warms and the climate changes. Many Inuit and Indigenous governments have proposed their own plans and governance regimes for their coastal and marine zones that highlight the connections in human-environment relations (ITK, 2018; Qikiqtani Inuit Association, 2019; Inuvialuit Regional Corporation 2020). Moreover, on a macro, international, and geopolitical level, Crawford (2021) describes the region as an “exception” in that conflict and violence are absent. Crawford argues that the region is “ruled by networks of overlapping local regimes and states engaged in environmental co-management, economic development, scientific and security cooperation, and more,” while agreeing that “these networks alone cannot stop ice from melting” (para 3). This also ignores the very real injustices facing Indigenous populations, past and present. As a result, discussing the Arctic as a region to be managed simply within a context of climate change represents a “narrow framework” as highlighted by Arruda and Krutkowski (2017). Instead, by focusing on place-based avenues to expand awareness of life in the arctic, aspects like media and technology can help

"Indigenous people to alter this dominant approach and expand the concept of "change" with a discussion of cultural, social, political, economic, and technological issues affecting the everyday life of Arctic communities" (Arruda and Krutkowski, 2017, p.519). Further, they note how, by advancing what is already present in Arctic communities, cultural and natural awareness, knowledge of the environment, and how to rely on sustainable livelihoods, amplification of Arctic Indigenous voices creates an environment through which "Indigenous people can pursue community-focused goals" (p. 519). Here, HICW has a role to play in listening to and promoting the traditional heritage of Inuit populations, be they through tourism, ecosystem services, or other place-based or digital dimensions. However, moving forward, Canada also has a role to play in walking the line between co-managing, governing and, ultimately, devolving authority over Arctic ocean governance to a Inuit community level. This is made harder as the Arctic warms, natural resources become easily accessible, and competition and conflict with other states increases (Paikin, Kemp, Fitz-Gerald & Blais 2023). Doing so in a way that keeps Canada's northern residents safe increases the imperative for effective co-governance.

In addressing these vastly different contexts, I propose that HICW management regimes, which take a common heritage approach, can address diverse governance questions. In this way, the concepts of co-governance based on heritage between states in both the Arctic and SCS require unique, agreed upon frameworks if heritage informed coastal wellbeing is to be a legitimate model. Schofield et al (2013) highlights the precedent for seeing the seas and, by extension, the seabed as a "common heritage of mankind," viewed as such by 1970 UN General Assembly resolution 2749, called "A Declaration of Principles Governing the Sea-bed and Ocean Floor Beyond the Limits of National Jurisdiction" (p. 36). As such, HICW, by its very nature and landscape in question, is not without precedent. The question of governance is based inextricably on a shared heritage, to the extent that states are signatories to the resolution. As such, while it may be engrained at a global governance level, in practice in places like the SCS with overlapping claims, the extent to which a "common heritage" can inform human use and governance is subject to which actor has the power to enforce "whose heritage" and "whose governance" takes

precedence. This provides rationale for research around the claims of use in the region, along with a systematic historical review of heritage.

Maritime Cultural Heritage

HICW intentions derive their major inspiration from the literature on maritime cultural heritage and resource management. I explored research relevance to heritage, in general, and maritime heritage, specifically (Avieli, 2015; Khakzad, Pieters, and Van Balen, 2015; Sarid, 2018;Jin and Li, 2019; Henderson, 2019; You and Hardwick, 2020; Weber, Dawson, and Carter, 2021). All authors cover the broad themes of historical/cultural interpretation and stewardship. I link wellbeing and ecosystem service discussions expressed in Blythe et al (2020)[8] throughout this literature review. Focusing on the value of maritime cultural heritage to the previous overview of law, Jing and Li (2019) look at maritime cultural heritage as a lens through which stewardship and governance can be effectively implemented within the SCS. As highlighted in the above discussion on law, they too see heritage as a less researched and little recognized avenue towards claim of ownership and governance compared to resources like oil, gas, and fisheries. Jing and LI (along with Sarid 2020) see the significance of UNCLOS and UCHC as pivotal to governing maritime cultural heritage. They note that Vietnam's political views on the subject see that "cultural heritage is divided into intangible and tangible elements, comprising intellectual and material products with historical, cultural and scientific value that are passed on from generation to generation" (p. 110). With maritime cultural heritage being inherently political in Vietnam due to the dispute in the region with China, Jing and Li, linking with Dela Cruz (2019), promote the

[8] Blythe et al defines ecosystem services as "the flows of benefits that people derive from nature through provisioning, regulating, supporting and cultural functions". Additionally, they define social well being as "an approach to understand three related dimensions of a life well-lived: 1) a material dimension; 2) a relational dimension; and 3) a subjective dimension." From "Frontiers in coastal well-being and ecosystem services research: A systematic review," by J. Blythe et al, 2020, *Ocean & Coastal Management,* 185, p. 2.

idea of a regional seas convention for the SCS based on a shared heritage.

The relevance of HICW through a legal lens informed by Jing and Li's focus on heritage stewardship gives weight to the model's ability to promote regional co-governance. However, a deeper discussion of the criticality of maritime heritage is required. Henderson (2019) is a seminal text, looking at how including maritime cultural heritage in governance frameworks is considered essential for humans interacting with the oceans, regional seas, and bodies of water in all economic, leisure and cultural capacities. Specifically, Henderson discusses how maritime cultural heritage can integrate with UN Decade of Ocean Science for Sustainable Development Initiative (2021-2030). Henderson also highlights that current climate-based ocean science is suffering from a dearth of knowledge surrounding human cultural dimensions in the social sciences (p. 2). In discussing how practices of cultural heritage preservation are considered by many governments to be a "further financial burden they can ill afford" (p. 2), Henderson identifies the "potentially calamitous" gap of the minimally "effective sustainable development without a consideration of maritime cultural heritage, potentially [undermining] the identities and wellbeing of coastal communities" (p. 2). In further laying out the issues associated with the disaggregating of law surrounding land and sea management, Henderson illuminates how a marine cultural landscape, designed to integrate all manner of human-sea interactions, can situate wellbeing models (p. 3). Henderson's work serves as a nexus around which the literature examined here and the research question of the validity of HICW will be set.

Henderson's points link with the prior work of Khakzad, Pieters and Van Balen (2015), highlighting the missing opportunities of integrating 'coastal cultural heritage' into ways of knowing, stewarding, and operating in and around coastal regions. In defining cultural heritage as "that part of the past which we select in the present for contemporary purposes, be they economic, cultural, political, or social", Khakzad, Pieters and Van Balen situate maritime cultural heritage as the basis through which humans, governance structures and management decisions should steward the relationship between humanity, land, and sea (p. 110). Here we see

the merit of Guilan and Weiwei's (2021) "bridg[ing] across domains" in making maritime cultural heritage a policy consideration in the face of diverse and siloed governance regimes (p. 2).

By this point in the literature review, macro-concepts have been discussed with little consideration to everyday human use and interaction considerations of HICW. Here, Khakzad, Pieters and Van Balen (2015) provide further insight. Their methodology utilizes "integrated complexity theory" (ICT) or the ways people interact with, reconcile, and understand multiple dimensions informing a given space or concept (p. 112). The authours highlight the complexity of "the integrated planning and management of coastal resources and environments […,] defined as an approach based on the physical, socioeconomic and political issues inherent in a dynamic coastal system" (p. 112). While outside the scope of this article, ICT links with Metabolic Rift theory, highlighted by Ul-Durar et al (2023) as the capitalist informed rift between humanity and nature that effective ecological management can address. Looking at water conflict between India and Pakistan, Ul-Durar (2023) sees complexity as yielding to a needs-based approach (p. 2) ICT, informed by an ecological needs-based approach, can look at the differentiation of these dynamic coastal systems, how they are siloed, and then considers how they are integrated once more, or how people consider them related. In analyzing ICT's relevance to the HICW model, how people engage with a coastal landscape is made more informed and culturally significant through an awareness of the marine cultural landscape (as understood by Henderson 2019). Furthermore, this installation and multilateral awareness of a marine cultural landscape can serve to generate cooperation, representing an innovative way to bring both government, community, and marginalized groups to the governance table (Henderson, 2019; Rudolph, 2020; Dela Cruz, 2019; Vu, 2013). Taking the point further, HICW is not only for observable heritage, like a wreck or sunken use site. Rather, the intangible aspects of maritime cultural heritage discussed by Jing and Li (2019) represent what You and Hardwick see as "complex networks of concepts with political and historical stakes" (p. 4). Here again, it is seen how maritime heritage is inherently political: it involves a deeply human connection with the sea, culture, and the environment in which people live. How heritage is informed by memory, who is remembering and how groups

collectively remember within the bounds of 'Memory Politics'[9] as outlined by Lewis et al (2022) is critical for governing maritime heritage. Henderson's discussion of landscapes highlights how people can render dynamic complexity within an understandable policy or implemented use, as will be discussed in the section that follows.

Maritime cultural heritage also has value to coastal wellbeing through an analysis of economic development. While beyond the scope of this literature review, taking the concept of HICW to its ultimate conclusions, land, and sea use planning, along with stewardship and interpretation of maritime heritage sites would potential generate and promote tourism. Weber, Dawson, and Carter (2021) discuss this concept through recommendations made from interviewing residents of Gjoa Haven in Nunavut, focusing on the economic and tourism benefits that can come through interpretation of the Franklin wreck sites of the *Erebus* and *Terror.*[10] In finding a desire for increased economic opportunities in a remote and hard to reach environment, an awareness of Henderson's marine cultural landscape promotion

[9] "Even when under-stood spatially, "regions of memory" are of course not intended as large areas in which everyone shares the same memories—analogously to national memory-scapes, which are likewise never monolithic. There are diverse historical events remembered with varied significance across the geographical space; and the same events are often given different or conflicting meanings. However, their memories are in one or other way discursively connected to the place in which they happened. They might form supra- or transnational constellations of representations of the past within or referring to the particular regional space. They may share specific regional carriers, forms, agents, sites, or nodes of memory" (p.5). From " Regions of memory : transnational formations," by Lewis, S, Olick, J. K, Wawrzyniak, J, & Pakier, M, 2022, Palgrave Macmillan. https://doi.org/10.1007/978-3-030-93705-8

[10] The *HMS Erebus* and *Terror* left from Britain in 1845 to find the Northwest Passage in what is today northern Canada. Finding their wreck sites in 2014 and 2016 respectively, their relocation has generated significant attention from the Canadian government, historians, archaeologists and tourists. Parks Canada. (2021). Wrecks of HMS Erebus and HMS Terror National Historic Site. In *Parks Canada National Historic Sites*. Retrieved from https://www.pc.gc.ca/en/lhn-nhs/nu/epaveswrecks

can assist interpretation. Value is still found in heritage interpretation, even as the wrecks themselves are not dive-able due to Canadian government restriction (p. 10). Yet interest in the Arctic and Canadian heritage remains strong (p. 4). Arctic heritage and its regional governance are obviously distinct from the SCS region, yet still represents an interesting parallel worth exploring in future research.

Environment and Ecosystem Considerations

As a natural extension of how HICW can be utilized to better realize climate change governance, we must examine the implementation of Marine Protected Areas (MPA) in, around, or encompassing the Arctic and SCS. Specifically, MPA can represent Henderson's intended use of marine cultural landscapes by instilling ecological and biological protections, stimulating co-governance of areas in dispute. Many sources that looked at law and governance in the SCS region focused on combating human induced climate change to develop regional cooperation (Vu, 2013; Bai and Hu, 2016; Zhang, 2018; Dela Cruz, 2019; Ca, 2019; Zou and Zhang, 2020; Scott, 2020; Tanaka, 2020). Corresponding to the previous discussions of the Arctic example, Bai and Hu (2016) see the actions taken by the Arctic Council[11] as example for what the SCS region could develop

[11] The Arctic Council is an intergovernmental panel, founded in 1996, consisting of Arctic states (states who border the region) that deal with regional environmental, economic and sovereignty concerns. Arctic Council. (2021). The History of the Arctic Council. In *Arctic Council.* Retrieved from https://arctic-council.org/about/timeline/

[11] These skills are investigative in nature, designed for field digging, analysis and artifact identification. There is also a lab component and outreach and education opportunities designed to advertise and promote Vietnamese maritime cultural heritage. From "Choice, Values and Building Capability: A Case Study from Vietnam," by P. O'Toole, & M. Staniforth, 2019, *Journal of Maritime Archaeology*, 14(3), 355–68.

[11] Yuan Dynasty invasions of the lands of the Dai Viet in the 13th century form the basis of this national history. Wooden invasion ships were snared and scuttled off the coast of Quan Lan. Without knowing the exact location, taking on the guise of intangible cultural heritage, the ships represent a source of regional and national pride against historical Chinese aggression. From "Naval Battlefield Archaeology of the Lost Kublai Khan Fleets," by J. Kimura

through environmental based co-governance. Bai and Hu also highlight the complicated nature of co-governance, with Zhang (2018) focusing on the little action undertaken to mitigate the complexity of the issue in the SCS region. Subsequently, both Ca (2019) and Dela Cruz (2019) highlight the need in the SCS sea region for a "regional ocean governance framework" (p. 198), and a "regional seas convention" (p. 7), respectively. The literature surrounding environmental governance thus indicates a need but fails to streamline or advocate for a singular solution, highlighting the complexity.

Perhaps the most illustrative way environmental and ecosystem service considerations can result from HICW is through the Sustainable Development Goal initiatives. While SDG 14 (Life Below Water) focuses on interactions and stewardship of the ocean specifically, SDG 11 as noted by Carpenter, Skinner, and Johansson (2021), intersects more specifically with Henderson's marine cultural landscape. While its doesn't mention landscape ideas specifically, it notes how SDG 11, making cities more sustainable, safe, resilient, and inclusive, looks at the importance of cultural and natural heritage in places where people live, work and recreate. The "maritime domain", as they call it, is key when looking at how large or intensified populations of people use the coastal and ocean areas for their wellbeing (p. 490). Governance and management consideration are key however, and as Holon et al. (2015) highlight, global or regional analyses of marine biodiversity protections do not always mesh at a local governance level (p. 1). As such, it can be seen how a bottom-up approach that prizes and centres human use could lead a path forward. A HICW model could be based on recreation and use sites that stewards environmental protection and input from the local community. This point links with Carpenter, Skinner, and Johansson (2021)'s belief that SDG 11 can generate sustainable development through incorporating environmental (and possibly maritime) considerations.

---

et al ,2014, *The International Journal of Nautical Archaeology, 43(1*), 76–86. Retrieved from https://doi.org/10.1111/1095-9270.12033

From a Canadian Arctic perspective, these outcomes articulate more clearly. Canada is currently committed to protecting 25% of its ocean and coastal waters by 2025, and 30% by 2030. To do so, it is looking to co-create and manage Marine Protected Area's (MPA), support the creation of Indigenous Protected Area's (IPA) (combined I/MPA) and Other Effective Area-Based Conservation Measure's (OECM's). Central in their implementation is the prohibition of misuse and economic activity like unregulated fishing and fossil fuel extraction. Here, the main conflict between government intention and Indigenous/Inuit demands for livable northern livelihoods appears, as access to economic development through fossil fuels is removed. While this research stands in support of MPA/OECMs, as noted by Daly, Knott, Keogh, and Singh (2021) "although MPAs can improve both human well-being and conservation, negative impacts can co-occur with benefits" (p. 8). These negative impacts can be seen not only as limits on traditional activities due to conservation measures, but the removal of access to resources that has improved the economies of the western and southern developed world, potentially curtailing wellbeing for northern residents. Further, the question of preservation over use represents issues prevalent in the Arctic and SCS, as noted by Barkley et al 1997: "while there may be strong urban pressure to "preserve", there is a strong pressure from economically-depressed rural communities to utilize" (p. 726). While "economically-depressed" may be invariably inaccurate across both the Canadian north and SCS region, the divide between preservation and utilization needs to be bridged. Specifically, if moratoriums and resource extraction bans in the Arctic ocean which limit coastal Inuit communities are to remain law, it is critical to find ways to generate meaningful livelihoods and well-being through I/MPAs, both traditional and wage-based.

It remains to be seen if a HICW model could represent a basis for environmental co-governance through the establishment of livelihood focused MPAs in the Arctic and SCS based around shared heritage or what Schofield et al (2013) highlights as "common heritage". Guilan and Weiwei, previously alluding to the breadth of China's heritage claim, dubious though they may be, illuminate how heritage is used to stake territorial claim. This is something that can potential help bolster the position of SCS border nations like Vietnam under threat from Chinese territorial expansion AND guide Canada's desire

to strengthen Indigenous voices in the Arctic while righting its previous policy wrongs. But heritage, as will be analyzed in Blythe (2020) and Avieli (2015), is highly specific and regional. Local context is key to informing HICW.

Wellbeing

HICW is proposed here to be based on how communities and groups interact with and facilitate an awareness of maritime heritage into the use of their coastal regions. Blythe et al (2020) is central to HICW, as the proposed model's legitimacy is based around the definitions of ecosystem service and social wellbeing. According to Blythe et al (2020), ecosystem services relate to how humans benefit through their interactions with nature. Critically, social wellbeing serves as an indicator of material, relational and subjective dimensions in life that move beyond basic needs and reflects "the importance of social, psychological and cultural needs required to thrive" (p. 2) Local context then, informs how and when heritage could ever be used to govern a landscape, discuss interactions, or generate wellbeing. Noting Henderson (2019)'s promotion of a lack of heritage contexts in sustainable development, Rudolph (2020) provides a window into how HICW could serve to fill this void as "innovative leadership and niche-level experimentation" (p. 3). Demanding such leadership and experimentation in ocean stewardship, Rudolph provides the ownness to explore a niche concept within a context specific geographic location where society lives close to and in relative dependence on the sea. Of note, Wegscheidl (2016)'s work serves as an interesting environmental parallel for a marine cultural landscape as described by Henderson. Wegscheidl describes coastal seascapes as existing within a "range of services that contribute to human well-being" noting provisional, regulation-based, cultural and biodiversity services within said range (p. 4). This shows how Henderson's ideas around all human interactions with the sea from a cultural standpoint can also have an environmental one. HICW can inherently operate as environmental management, powered as it is by perceived human well-being and valuation of the marine landscape.

This opens the door for future research on why such close relationships exist between people and the sea, be it cultural or

purely for economic gain, and if focusing on a temporal dimension that explores past use, understandings of and cultural significance with these coastal regions is of use. Quimby and Levine (2021) bring further credence to the relevance of this framework on climate change governance, citing the need for local ecological and social memory being key to adaptive co-management (p. 2). Adding to Blythe et al (2020)'s highlighting that ecosystem services are "context-dependent" (p. 2), Quimby and Levine note that "community self-organization, participation in management actions, and decision-making are all cited as important principles for successful co-management" (p. 10). Relevantly, O'Toole and Staniforth (2019) explore the adaptive capacity building of the Vietnamese Maritime Archaeology Project for its ability to generate maritime cultural heritage skills of both the Vietnamese government and the local community where maritime heritage is situated. In this way, building the capacity of government and local knowledge around interacting with maritime cultural heritage represent a case study rooted in both the Arctic and/or SCS to test Rudolph's (2020), Quimby and Levine's (2021) and Blythe et al.'s (2020) notion of contextual and culturally specific relevance of ecological wellbeing. By exploring the ways in which HICW can benefit the local populace through co-management on a local level to build capacity, the relevance and legitimacy of HICW can be further assessed for its regional ocean governance potential.

Discussion

HICW is an experimental concept based on gaps identified predominantly in Henderson (2019) and Khakzad, Pieters, and Van Balen (2015). These gaps have been contextualized by the dependent implementation in the analysis of Blythe et al (2020), Rudolph (2020), and Quimby and Levine (2021). Specifically, for future assessment, I call on ethnographic research in both regions explored in this paper. Additionally, I recommend the secondary questions used to guide this review of HICW (the utility of heritage as management and such management used for regional governance) be used to inform and develop such research. With the legitimacy of HICW in Vietnam based on the idea of heritage informing regional co-governance of the South China Sea (SCS) region for example,

regional contexts need to be considered and approved ahead of any research.

In determining the legitimacy of HICW, I have assessed the four themes in a siloed manner through Arctic and SCS lens for contextual clarity. Moving forward, analysis through ethnographic accounts of how people interact with maritime culture can better inform the utility of HICW. One example of how this may look is from a Canadian Arctic perspective is the work of Weber, Dawson. and Carter (2021), highlighting how Indigenous input (through local interviews in Gjoa Haven) are critical for heritage tourism leading to economic gain in the region. Such work can inform HICW's utility on Quan Lạn Island in Hạ Long Bay, Vietnam. The island is thought to be home to the historic port of Van Don, where the Mongolian controlled fleet of China's Yuan Dynasty attempted to invade Vietnam in 1288. The site of a decisive victory for the Vietnamese forces and current nationalist pride serves a source of intangible cultural heritage. Ethnographic accounts of how people interact with this heritage, intangible as it is, can yield information on how people organize themselves around heritage as a form of governance. Structured interviews can look at how this heritage informs land and coastal use, the benefits it yields through tourism, and how heritage labels under the likes of the United Nations Educational, Scientific and Cultural Organization (UNESCO) can generate awareness of place-based use. Of note, in Avieli (2015)'s ethnographic account of Hội An's heritage implementation, the lack of local community input prior to and during UNESCO's world heritage implementation procedures obscures what world heritage designations intend to do through preserving culture in the first place (p. 39). An ethnographic account which generates an awareness of what maritime heritage means to the residents of Quan Lạn and how it can inform coastal use more broadly, not simply advocating protection for protections sake as evidenced in Avieli's accounts, would provide a crucial contribution to literature. In this way, ethnographic accounts from residents can, reflexively, help illuminate the validity of HICW as a process able to assist and generate co-governance in disputed regions. Validity will also be of central concern to HICW, given the experimental nature of the concept.

There are drawbacks to taking an ethnographic approach. Observing and discussing everyday interactions may miss the minute details associated with teasing out an illusive understanding of HICW. Indeed, interacting with people whose main concerns are their livelihoods may not yield answers that directly relate to heritage as a means through which people engage with their coasts. Additionally, and from experience, the Vietnamese government is highly structured and may not tolerate planned research on heritage deemed vital or sensitive to the national interest of Vietnam. Recent arrests of local climate NGO researchers by the Vietnamese government highlight the political and national security sensitivities inherent to such research (New York Times, 2023). Ethnography, while seemingly simply a process of observing and interpreting, may be both too broad and too intrusive a tool. Yet, it represents a relevant method for understanding what maritime heritage and landscape use means to people within a given context.
Secondly, looking at the relevance of HICW for informing governance from an Arctic context, existing Inuit management plans for coastal use need to be taken into consideration for future assessment of HICW's legitimacy. Blythe et al. (2020) look at the combined role of ecosystem services, or the benefits people gain from nature "through provisioning, regulating, supporting and cultural functions", and wellbeing as defining a life well-lived as incorporating material, relational and subjective dimensions (p. 2). How ecosystem services and human well-being combine is of relevance to creating strong livelihoods from protected and conserved areas:

> well-being and ecosystem service concepts can offer linked social-ecological insights on how best to craft and implement management interventions and processes (e.g., resource rights allocations, zoning for protection and use, flexible institutions) appropriate in rapidly changing coastal systems (Blythe et al, 2020, p. 2).

These social-ecological management interventions can perhaps best be represented as Integrated Ocean Management (IOM) and Marine Spatial Planning (MSP) schemes. IOM is defined by Scott 2020 as "an approach to oceans governance that aims to integrate the management of marine-based activities across sectors, space and time under a unified, overarching vision" (p. 297). In relation, Grip and Blomqvist (2021) discuss that MSP is a process of "analyzing

and allocating the spatial and temporal distribution of human activities in marine areas and space to achieve ecological, economic and social objectives" (p. 1). The social objectives, further discussed in Potts (2015) to integrate all manner of human uses of marine and coastal zones in stewarding the environment highlight how existing laws, statutes and tools like IOM and MSP employ can be repurposed to use Schofield's (2013) "common heritage of mankind" ideal (p.36).

Individual plans and agreements from Indigenous regional governments, representing an opportunity for heritage and environmental to guide conservation-based highlight overarching visions of livelihoods. Such examples within the Inuvialuit's *Proactive Vessel Management initiative* (2020) the Qikiqtani Inuit Association's *Evaluating the role of Marine-Based Harvesting in Food Security in The Eastern Arctic (2019)*, as well as the Inuit Tapiriit Kanatami's *National Inuit Climate Change Strategy (2018)*. Combined, these documents highlight how heritage, environment, and human management planning, in many ways, act as one and the same. These varied management and policy plans share a common theme: cultural heritage and the natural environment are intimately linked, and these links need to be preserved in decision making. It is proposed here that the combination of these two can not only make the push to conserve marine spaces more economically viable for northern populations but can do so in a way that centers preservation of the natural environment through a common heritage governance model based on wellbeing.

Conclusion

The aim of this article has been to justify the rationale for exploring the validity of HICW and explore its legitimacy as a governance model. This was done through a method that tests its ability to measure human-environment interactions in coastal environments with heritage significance, in this case, the South China Sea and Canadian Arctic. Future studies and tests on the model, based on measurable wellbeing and ecological benefit for the communities in question, will ideally be able to highlight attitudes based on regional co-governance around a shared understanding of common heritage. The gap that exists in protecting tangible and intangible heritage risks

erasing our common heritage. Through HICW, such common heritage is not just a tool for governance, but central to its inception and implementation. To pursue that intention, I presented the concept of HICW through a limited analysis of the existing literatures in maritime law, cultural resource management, environmental stewardship, and human wellbeing. I propose that HICW should be thought of as these four separate fields interacting on a spectrum between less governance and more governance. Finally, I identified the validity of HICW as a framework designed to manage our shared and conflicted marine spaces in order to promote united significance in service of a human and natural heritage, focused climate change governance regime.

References

Avieli, N. (2015). The Rise and Fall (?) Of Hội An, a UNESCO World Heritage Site in Vietnam. Sojourn, 30(1), 35–71. https://doi.org/10.1355/sj30-1b

Arruda, G.M., and Krutkowski, S. (2017). Arctic governance, indigenous knowledge, science and technology in times of climate change: Self-realization, recognition, representativeness. Journal of Enterprising Communities. 11(4): 514-528. https://www.emerald.com/insight/content/doi/10.1108/JEC-08-2015-0041/full/html

Bai., & Hu, H. (2016). Transcending Divisions and Harmonizing Interests: How the Arctic Council Experience Can Inform Regional Cooperation on Environmental Protection in the South China Sea. Chinese Journal of International Law, 15(4), 935–945. https://doi.org/10.1093/chinesejil/jmw039

Barkley, B., Patry, M., Story, P., & Virc, S. (1997) The Eastern Ontario Model Forest: Acting Locally, Connecting Globally. Forestry Chronicle. 723-726. https://pubs.cif-ifc.org/doi/abs/10.5558/tfc73723-6

Betcherman, G, & Marschke, M. (2016). Coastal Livelihoods in Transition: How Are Vietnamese Households Responding to Changes in the Fisheries and in the Economy? Journal of Rural Studies. 24–33. https://doi.org/10.1016/j.jrurstud.2016.02.012

Blythe, J., Armitage, D., Alonso, G., Campbell, D., Esteves Dias, A. C., Epstein, G., Marschke, M., & Nayak, P. (2020). Frontiers in coastal well-being and ecosystem services research: A systematic review. Ocean & Coastal Management. 185, 105028–. https://doi.org/10.1016/j.ocecoaman.2019.105028

Ca, V. T. (2019). A regional ocean governance framework for the integrated management of the environment and biological resources in the South China Sea. In T. T. Tran, J. Welfield, & T. T. Le. (Eds.) Building a Normative Order in the South China Sea (pp. 196–210).

Edward Elgar Publishing.
https://doi.org/10.4337/9781786437532.00019

Carpenter A., Skinner J.A., & Johansson T.M. (2021) Conclusions: Connecting Sustainable Development Goals to the Maritime Domain. In Carpenter. A., Johansson T.M., Skinner J.A. (Eds.) Sustainability in the Maritime Domain: towards ocean governance and beyond (pp. 489-507). Springer Cham. https://doi-org.proxy.bib.uottawa.ca/10.1007/978-3-030-69325-1_22

Crawford, B.K. (2021). Explaining Arctic peace: a human heritage perspective. International Relations. 35(3). https://www.sciencegate.app/document/10.1177/00471178211036782#:~:text=Looking%20below%20the%20radar%20of%20IR%20theory%20and,steered%20by%20indigenous%20knowledge%20holders%20in%20Arctic%20governance.

Daly, J., Knott, C., Keogh, P., Singh, GG. (2021). Changing climates in a blue economy: Assessing the climate-responsiveness of Canadian fisheries and oceans policy. Marine Policy, Elsevier. https://www.sciencedirect.com/science/article/abs/pii/S0308597X21002347

Dela Cruz, A. I. P. (2019). A South China Sea Regional Seas Convention: Transcending Soft Law and State Goodwill in Marine Environmental Governance? Journal of Territorial and Maritime Studies 6(1), 5–29. https://www.jstor.org/stable/26664177

Grip, K., & Blomqvist, S. (2021). Marine spatial planning: Coordinating divergent marine interests. Ambio, 50(6), 1172–1183. https://doi.org/10.1007/s13280-020-01471-0

Guilan, L, and Weiwei, D. (2021). Synergetic Management Strategy for Maritime Cultural Heritage Protection and Marine Development in China. Marine Policy, 125, 1-8. https://doi.org/10.1016/j.marpol.2020.104383

Henderson, J. (2019). Oceans without History? Marine Cultural Heritage and the Sustainable Development Agenda. Sustainability, 11(18), 1-22. https://doi.org/10.3390/su11185080

Holon, M. N., Boissery, P., Bouchoucha, M., Delaruelle, G., Tribot, A.-S., & Deter, J. (2015). Fine-Scale Cartography of Human Impacts along French Mediterranean Coasts: A Relevant Map for the Management of Marine Ecosystems. PloS One, 10(8), 1-20. https://doi.org/10.1371/journal.pone.0135473

Inuit Tapiriit Kanatami. (2019). National Inuit Climate Change Strategy. ITK Publications. https://www.itk.ca/wp-content/uploads/2019/07/ITK_Climate-Change-Strategy_English.pdf
Inuvialuit Regional Corporation. (2020). Proactive Vessel Management in the Inuvialuit Settlement Region. IRC Research. https://irc.inuvialuit.com/sites/default/files/2021-02/PVM%20Booklet_final2021.pdf

Jing, Y., & Li, J. (2019). Who Owns Underwater Cultural Heritage in the South China Sea. Coastal Management, 47(1), 107–26. https://doi.org/10.1080/08920753.2019.1540908

Khakzad, S., Pieters, M., and Balen, K. V. (2015). Coastal Cultural Heritage: A Resource to Be Included in Integrated Coastal Zone Management. Ocean & Coastal Management, 118, 110–28. https://doi.org/10.1016/j.ocecoaman.2015.07.032

Lewis, S., Olick, J. K., Wawrzyniak, J., & Pakier, M. (2022). Regions of memory : transnational formations. Palgrave Macmillan. https://doi.org/10.1007/978-3-030-93705-8
Nunatsiavut Government. (2020). Immappivut (Nunatsiavut Marine Plan). About page. https://imappivut.com/about/.

O'Toole, P., & Staniforth, M. (2019). Choice, Values and Building Capability: A Case Study from Vietnam. Journal of Maritime Archaeology, 14(3), 355–68. https://doi.org/10.1007/s11457-019-09249-6

Paikin, Z., Kemp, W., Fitz-Gerald, A., & Blais, L. (2023) True North: A Canadian Foreign Policy That Puts the National Interest First. The

Institute for Peace & Diplomacy. https://peacediplomacy.org/wp-content/uploads/2023/11/True-North-%E2%80%94-A-Canadian-Foreign-Policy-That-Puts-the-National-Interest-First.pdf

Potts, T. (2015) Marine spatial planning and various uses and interests relating to the marine environment. In Hassan, D., Kuokkanen, T., Soininen, N, (Eds.) Transboundary Marine Spatial Planning and International Law (pp. 42-59). Routledge. https://doi-org.proxy.bib.uottawa.ca/10.4324/9781315816425

Qikitani Inuit Association. (2018). Evaluating the role of Marine Harvesting in Food Security in the Eastern Arctic. Publications. https://www.nirb.ca/publications/strategic%20environmental%20assessment/190125-17SN034-QIA%20Report%20Re%20Marine%20Based%20Harvesting-IEDE.pdf

Quimby, B., & Levine, A. (2021). Adaptive Capacity of Marine Comanagement: A Comparative Analysis of the Influence of Colonial Legacies and Integrated Traditional Governance on Outcomes in the Pacific. Regional Environmental Change, 21(1), 1-14. https://doi.org/10.1007/s10113-020-01730-6

Rudolph, T., Ruckelshaus, M., Swilling, M., Allison, E.H., Österblom, H., Gelcich, S., Mbatha, P. (2020). A Transition to Sustainable Ocean Governance. Nature Communications 11(1): 3600. https://www.nature.com/articles/s41467-020-17410-2

Schofield, C. H., Yi, S., & Kwon, M.S. (2013). A jurisprudence of pragmatic altruism. In Schofield, C. H., Lee, S., & Kwon, M. (Eds.) The Limits of Maritime Jurisdiction (pp. 21-48). Brill. http://brill.com/view/title/22799

Scott, K. N. (2020). Integrated oceans management and climate change. In Scotee, K. N. (Eds.) Research Handbook on Climate Change, Oceans and Coasts (pp. 295–312). Edward Elgar Publishing. https://doi.org/10.4337/9781788112239.00023

Sarid, E. (2018). International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges. Berkeley Journal

of International Law, 35(2), 219–261. https://www.academia.edu/38735525/International_Underwater_Cultural_Heritage_Governance_Past_Doubts_and_Current_Challenges#:~:text=International%20Underwater%20Cultural%20Heritage%20Governance%3A%20Past%20Doubts%20and,Unauthorized%20salvage%20and%20looting%20are%20a%20continuing%20threat.

Tanaka, Y. (2020). Reflections on the Implications of Environmental Norms for Fishing: The Link between the Regulation of Fishing and the Protection of Marine Biological Diversity. International Community Law Review 22, 22(3–4), 389–409. https://doi.org/10.1163/18719732-12341437

Ul-Durar, S., Shah, M., De Sisto, M., & Arshed, N. (2023). Metabolic rift theory and the complexities of water conflict between India and Pakistan: A pathway to effective environmental management. Journal of Environmental Management, 347, 119164–119164. https://doi.org/10.1016/j.jenvman.2023.119164

Vu, H. D. (2013). A Bilateral Network of Marine Protected Areas Between Vietnam and China: An Alternative to the Chinese Unilateral Fishing Ban in the South China Sea? Ocean Development & International Law, 44(2), 145-169, https://doi.org/10.1080/00908320.2013.750984

Weber, M., Dawson, J., and Carter, N. A. (2021). Tourism Development in Gjoa Haven, Nunavut and Around the Wrecks of the HMS Erebus and HMS Terror National Historic Site. (Available through uOttawa Research Portal) http://dx.doi.org/10.20381/15nv-4658

Wee, S. (2023, November 28). Vietnam Relied on Environmentalists to Secure Billions. Then It Jailed Them. The New York Times. https://www.nytimes.com/2023/11/28/world/asia/vietnam-cop28-environment.html (Accessed on December 1, 2023).

Wegscheidl, C J., Sheaves, M., McLeod, I. M., Hedge, P. T., Gillies, C. L., & Creighton, C. (2016). Sustainable management of Australia's coastal seascapes: a case for collecting and communicating quantitative evidence to inform decision-making. Wetlands Ecology

and Management, 25(1), 3–22. https://doi.org/10.1007/s11273-016-9515-x

You, Z., & Hardwick, P. A. (2020). Guest Editors' Introduction: Intangible Cultural Heritage in Asia Traditions in Transition. Asian Ethnology, 79(1), 3–19. https://www.jstor.org/stable/26929482

Zhang, H. (2018). Fisheries cooperation in the South China Sea: Evaluating the options. Marine Policy, 89, 67–76. https://doi.org/10.1016/j.marpol.2017.12.014

Zimonjic, P. (2023, November 7). Liberal government set to miss 2030 emissions targets, says environment commissioner audit. CBC News. https://www.cbc.ca/news/politics/environment-comissioner-audit-emissions-charging-stations-1.7020689#:~:text=The%20federal%20government%20is%20set%20to%20miss%20its,audit%20from%20the%20commissioner%20of%20the%20environment%27s%20office. (Accessed on November 22, 2023).

Zou, K, and Zhang L. (2020). Handling climate change for the East and South China Seas. In McDonald, J., McGee, J., Barnes, B, (Eds.) Research Handbook on Climate Change, Oceans and Coasts (pp. 210–223). Edward Elgar Publishing. https://doi.org/10.4337/9781788112239.00018

Canada's Customary Obligation to Prevent Transboundary Harm and the Reduction of Emissions

Tyler Hammond[*]*, Western Law School*

Abstract

This paper argues that the duty of prevention is a customary international law. Customary international law is a norm accepted broadly by states, and the parameters of this norm are explored in this paper. The central question is whether the customary duty of prevention obliges Canada to reduce greenhouse gas emissions and whether Canada is abiding by this duty. Under the duty, states are required to make a due diligent effort to reduce activities causing harm in other states. This effort does not necessitate an actual cessation of a particular activity. Accordingly, this paper argues that the duty of prevention can be applied in the context of reducing greenhouse gas emissions; hence, Canada must take necessary steps to prevent the harms from such emissions, namely climate

[*]Biography: Tyler Hammond is a recent graduate with a Master of Laws from Western Law, complemented by a Juris Doctor and a Bachelor of Arts with a major in Political Science. His thesis focuses on Canada's compliance with the Paris Agreement, and the constitutionality of Canada's Greenhouse Gas Pollution Pricing Act. It explores the recent Supreme Court of Canada decision that declared the Act constitutional. His research focuses on the intersection of international environmental law with Canadian domestic law, and topics related to international relations. Currently, Tyler works in the field of immigration law, specializing in appeals to the Federal Court of Canada.

Biographie : Tyler Hammond est récemment diplômé d'un Master of Laws de Western Law, complété par un Juris Doctor et un Bachelor of Arts avec une spécialisation en sciences politiques. Sa thèse porte sur la conformité du Canada à l'Accord de Paris et sur la constitutionnalité de la loi canadienne sur la tarification de la pollution par les gaz à effet de serre. Elle explore la récente décision de la Cour suprême du Canada qui a déclaré la loi constitutionnelle. Ses recherches portent sur l'intersection entre le droit international de l'environnement et le droit national canadien, ainsi que sur des sujets liés aux relations internationales. Tyler travaille actuellement dans le domaine du droit de l'immigration, se spécialisant dans les appels devant la Cour fédérale du Canada.

change. This paper contends that Canada is fulfilling its duty of prevention by enacting a carbon pricing scheme, as evidenced by its adoption of the Greenhouse Gas Pollution Pricing Act.

Keywords: Duty of prevention, customary international law, state practice, opinio juris

Résumé

Ce document affirme que le devoir de prévention relève du droit international coutumier. Le droit international coutumier est une norme largement acceptée par les États, et les paramètres de cette norme sont explorés dans ce document. La question centrale est de savoir si le devoir coutumier de prévention oblige le Canada à réduire les émissions de gaz à effet de serre et si le Canada respecte ce devoir. En vertu de cette obligation, les États sont tenus de faire un effort diligent pour réduire les activités causant des dommages dans d'autres États. Cet effort ne nécessite pas la cessation effective d'une activité particulière. En conséquence, ce document soutient que l'obligation de prévention peut être appliquée dans le contexte de la réduction des émissions de gaz à effet de serre; le Canada doit donc prendre les mesures nécessaires pour prévenir les dommages causés par ces émissions, à savoir le changement climatique. Cet article soutient que le Canada s'acquitte de son obligation de prévention en adoptant un système de tarification du carbone, comme en témoigne l'adoption de la Loi sur la tarification de la pollution par les gaz à effet de serre.

Mots-clés: Obligation de prévention, droit international coutumier, pratique des États, opinio juris

State's actions or inactions are frequently based on a perceived legal obligation, regardless of whether these obligations exist within treaties. This is evident in various instances, such as the immunity granted to foreign heads of state, the principle of non-refoulement, and the norms prohibiting slavery, torture, or genocide. Sovereign states generally adhere to these norms, even if they have not explicitly consented to them. Nevertheless, many legal norms eventually become formalized through consent-based treaties (Follesdal, 2022, p.106). The Paris Agreement (2016; subsequently referred to as "the Agreement") is the leading international treaty on the global commitment to combat climate change. Canada ratified the treaty in 2016 while voicing its commitment to implementing climate change policies at all levels of government (Grassie, 2019, p. 237). The goal of the Agreement is to hold global temperature rise to 2°C while pursuing efforts to limit this increase to 1.5°C (Paris Agreement 2016, Article 2(a)). Article 4 establishes a binding commitment on all Parties to maintain a Nationally Determined Contribution (NDC), and to undertake domestic measures to achieve these aims by reducing emissions (Paris Agreement 2016, Article 4). How these measures are achieved is left to the individual country. The Agreement is silent on quantifiable binding commitments.

The purpose of this paper is to comprehend an international legal principle, specifically the customary duty of prevention, and the case study of Canada is used to understand how domestic states abide by international obligations, whether these obligations have been codified in a treaty. In this paper, I ask whether there is an additional obligation – beyond the Paris Agreement - under international law requiring states to reduce emissions. I argue that the answer is yes: there is a customary international law (CIL) in which states must prevent transboundary harm, and therefore, minimize engagement in activities causing significant cross-border damage. I trace the development of the CIL duty of prevention to understand whether it applies to climate change, and what states must do to fulfill their customary obligation. This is an understudied facet of international law, as there is limited scholarly work examining how domestic environmental law in Canada intertwines with CIL, and whether Canada is abiding by CIL in its approach to reducing emissions. This is a significant topic, considering that states around the world are

increasingly striving to mitigate emissions and adapt to climate change.

This paper makes a novel contribution to the established literature concerning CIL by meticulously delineating the historical advancement of the duty of prevention through treaties and various case law from international tribunals. The existing literature on the historical evolution of the duty within international case law and treaties is lacking. Additionally, I adopt a unique perspective through applying international case law to the realm of domestic Canadian law to determine whether Canada is abiding by its obligations under the duty of prevention. While recent academic works have contended that the duty of prevention constitutes a facet of CIL, the discourse surrounding whether an individual domestic state, in this case Canada, abides by the duty remains deficient.

I advocate for the adoption of a carbon-pricing scheme. Despite not reducing emissions all at once, a carbon pricing scheme is arguably one of the most effective measures available for individual states to curtail its emissions. I argue that a pricing scheme is compatible with and fits within the contours of the CIL duty of prevention, and by adopting a nation-wide carbon pricing mechanism, Canada is abiding by its commitments under CIL. The intention of this paper is not to establish the implementation of the scheme in Canada as a response to the CIL duty of prevention. Rather, its objective is to argue that Canada is indeed adhering to this duty. Notably, some, but not all Canadian provinces have already embraced a pricing scheme well in advance of the Paris Agreement, underscoring a psychological belief to prevent the harms stemming from climate change, otherwise known as opinio juris (Good, 2018, p. 3). By delving into Canada's carbon pricing scheme, this research offers valuable insights for states striving to navigate the path of reducing emissions.

The duty of prevention compels states to prevent persons or industries within its jurisdiction from carrying out harmful cross-border activities (Simlinger & Mayer, 2019, p. 187). While this CIL is referred to in various terms – such as the no-harm principle and the obligation to prevent transfrontier pollution – I refer to the norm as the duty to prevent transboundary harm or the duty of prevention. Under the duty of prevention, states are obligated to minimize greenhouse gas

(GHG) emissions from flowing cross-boundary and causing harm in other countries. As this paper will demonstrate, states have frequently received damages from various international tribunals after suffering cross-boundary harm. In the context of climate change, loss and damages has now been codified under Article 8 of the Paris Agreement (Paris Agreement, 2016, Article 8).

To comprehend the rationale behind the widespread commitment of states to reducing emissions, it is imperative to delve into the evolution of CIL and unravel the driving forces compelling states to address transboundary harm emanating from emissions. Proof of a CIL finds its origins across various avenues, including international tribunals, treaties, and the scholarship of international legal experts. I navigate the history of the duty of prevention, commencing with the Trail Smelter case, and through a series of cases within the International Court of Justice (ICJ). While no formal hierarchy is established among international tribunals, the ICJ remains the primary judicial organ of the United Nations (Nucup, 2019, p. 146). Hence, ICJ decisions matter by contributing to framing the development of international law, although the Court will rarely, if ever, solely shape a particular branch of law. Furthermore, this research will analyze several treaties and declarations, which individually may not conclusively constitute CIL, yet collectively epitomize state practice and opinio juris. The historical landscape of international case law and the array of treaties pertaining to the duty of prevention contributes to bolstering the credibility of establishing this norm as a CIL.

This paper is organized into five parts. In the first part, I define the components of CIL: state practice and opinio juris. When these two thresholds are met, a customary duty becomes binding on all states. In the second part, I identify the duty of prevention as a CIL, which was first defined in the Trail Smelter (1941) case. Since Trail Smelter, several cases brought before the ICJ have examined the duty of prevention. The ICJ even explicitly identified the duty as a CIL. Along with decisions from the ICJ, this paper will examine the numerous international treaties pertaining to the duty of prevention.

The third section includes my evaluation of the contours of the duty to understand the appropriate standard of care. The arguments are

compared to the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities (2001) (hereinafter ILC Prevention Articles), a United Nation's report from leading jurists, professors, and diplomats. A state must make a due diligent effort to prevent the harm from occurring. Or simply, a state must exert its "best efforts". I advocate that for a state's action or inaction to reach the duty of prevention, the harm must reach the threshold of being considered beyond a de minimus risk, meaning the risk must be greater than a minimum risk. The fourth part argues that the duty of prevention applies in the context of climate change. Climate change clearly is a significant risk and states, while not required to cease an activity altogether, must actively seek to reduce emissions.

Finally, this paper identifies whether Canada is obligated to reduce emissions under CIL. Canada follows a modified monist approach to CIL, meaning that unless domestic legislation displaces the CIL, it must be respected. Canada has a clear duty under international law to prevent transboundary harm by reducing its emissions, and therefore, this duty flows directly into Canadian domestic law. There is no domestic legislation displacing this CIL; rather, the recently enacted Greenhouse Gas Pollution Pricing Act (GGPPA) (2018) entrenches a federal carbon pricing scheme, which has been upheld as constitutional by the Supreme Court of Canada (SCC). This carbon pricing scheme affirms Canada's adherence to the CIL duty of prevention. Essentially, the Canadian example functions as a case study illustrating how a state adheres to the duty of prevention.

Customary International Law

CIL is a norm binding on all countries which cannot be altered by any single state (Brownlie 2008, 6). It can be unwritten or encoded. To become a custom, an international rule or principle must meet a two-part test. The first part of the test requires state practice; the second requires acceptance of this practice as law, or opinio juris (UN ILC 2018, pp. 122-123). This test has been widely accepted by states, judicial decisions, international institutions, and scholars (Peterson 2017, 357; Wood 2014, p. 22). CIL is reflected in Article 38(1) of the Statute of the International Court of Justice (1946), which provides that "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply … (b) international custom, as evidence of a general practice accepted

by law" (Art 38(1)). Therefore, the ICJ frequently analyzes specific customs, making it an appropriate means of determining a CIL. However, difficulties arise when discerning both general practice and acceptance of law, since states often do not practice a particular usage because they feel legally compelled to do so.[12]

State practice

State practice refers to states practicing a particular rule or principle. It has three elements: duration, generality, and uniformity. Duration is simple: while an exact duration is not required, the continued practice of a usage over time contributes to evidence of a custom (Wood, 2014, p. 43). Even so, in the North Sea Continental Shelf Case (1969), the ICJ held that the passage of a considerable period was unnecessary to form a custom (p. 43). This implies discretion when evaluating whether a particular principle becomes a CIL.

Generality refers to the widespread nature of the practice: the principle must be recognized by most, but not all nations (LeBel J., 2014, p. 5). To determine generality, courts examine the number, or distribution, of states following the relevant practice. The practice of states whose interests are specifically affected are given more weight (Wood, 2014, p. 37). The International Law Association (ILA, 2000) indicates that if "participation is sufficiently representative, it is not normally necessary for even a majority of states to have engaged in the practice, provided that there is no significant dissent" (p. 25). The problem in determining generality is detecting the value of abstention by a substantial number of states concerning a practice that other states follow. If a state is silent on the issue, it may denote a tactical agreement or a simple lack of interest on the issue (Brownlie, 2008, p. 7). When deciding if a practice has become a CIL, a tribunal must discern whether silence is because states are practicing the custom, whether it is a strategical decision, or if there is simply a lack of care.

[12]It should be noted that the terms "custom" and "usage" are often used interchangeably; however, these terms have different meanings. A usage is a general practice that does not reflect a legal obligation, while in contrast, a legal obligation is essential for a custom. Therefore, to become a custom, a belief that a particular practice is law must be demonstrated (Brownlie 2008, 7).

The third requirement, uniformity, is that relevant practice must be consistent amongst states. While complete uniformity is not required, substantial uniformity is (ILA, 2000, p. 42). A subtle but important difference. When states are specifically affected: the practice of the most affected states should be extensive (North Sea Continental Shelf 1969, p. 53). However, some inconsistency is not fatal (ILA, 2000, p. 42). Hence, complete uniformity is unnecessary. To illustrate how some inconsistent practice is not detrimental to a custom, the ICJ in Fisheries Jurisdiction (1951) stressed that "too much importance need not be attached to the few uncertainties or contradictions" (para. 136). Thus, an individual state failing to follow or acknowledge a particular usage in all instances is not detrimental to that usage reaching customary status.

In sum: 1) no particular duration is required, although the passage of time is evidence of generality; 2) the practice must be generally recognized by most, but not necessarily all nations; and 3) state practice must be found consistently (particularly among the most affected states), yet it need not be absolute. These three elements - duration, generality, and uniformity - are the essential ingredients of state practice. This paper argues that state practice is consistent with the duty of prevention by following the principles of duration, generality, and uniformity. But first, I discuss opinio juris - an essential element to a CIL.

Opinio juris

CIL depends not only on state practice (that is, on observable regularities of behaviour), but also on acceptance of these regularities as law by states. This is called opinio juris, which is the psychological or subjective element of a CIL (Slama, 1990, 606-607; Bodansky, 1995, 109). The ICJ defined opinio juris in the North Sea Continental Shelf (1969) case: "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to constitute evidence of a belief by the state parties that a practice is rendered obligatory by the existence of a rule of law requiring it" (44). States must act from a sense of legal obligation, instead of being motivated by courtesy, fairness, or morality (Brownlie, 2008, 8). In other words, a state must feel compelled to follow the practice stemming from a legal obligation, rather than undertaking the practice out of habit. In reality, since a

comprehensive survey of state practice can be difficult, the opinio juris element of a custom is generally given priority because it can be more easily assessed (Anne & Duvic, 2018, 91-92). The concept of opinio juris may seem similar to the generality concept of state practice, but note the focus is on the psychological belief itself, not the actions of a state.

According to Brownlie (2008), the ICJ has adopted two different approaches in determining whether an opinio juris exists. In the first approach, the ICJ assumes the existence of opinio juris based on evidence of general practice, a consensus in the literature, or in the previous determinations of the ICJ or other international tribunals. For the second approach, a more rigorous methodology calls for additional positive evidence of state action recognizing the validity of the rules in question (Brownlie, 2008, p. 8). A non-exhaustive list of examples of such evidence includes public statements made on behalf of states, official publications, government legal opinions, decisions by national courts, and conduct in connection with resolutions or treaties (Wood 2014, pp. 45-70). The second approach depends on the discretion of the court and the nature of the issue. As I elaborate on later, the ICJ has primarily adopted the first approach concerning the duty of prevention. The fact the ICJ is using the less rigorous approach in determining the opinio juris of the duty of prevention suggests that the psychological belief is firmly entrenched, since the rigorous approach is used more often when opinio juris is difficult to discern.

Similar to state practice, and the concept of generality, there is no need to demonstrate an opinio juris in each individual state for a particular usage to form a legal obligation (Slama, 1990, p. 654). In the Paramilitary Activities Case (1986), the Court indicated that opinio juris can be determined through general opinion or general recognition. The Court claimed that the word “general” here means “the aggregate of many individual opinions” (p. 98). The Court used the subjective element to find a legal obligation of a specific group of states that were parties to a multi-party convention to establish a CIL (Paramilitary Activities Case, 1986, p. 117). This essentially means that opinio juris can be formed regionally. This is important in the context of reducing emissions since wealthy industrialized states’ behaviour differs from those of developing or industrializing states.

What matters is that states are following a usage because of a legal obligation. With opinio juris and state practice clearly defined, this paper conveys that the duty of prevention largely stems from international courts and treaties. Thus, what contribution can these two devices have in determining a CIL?

Can international courts and treaties determine CIL?
Can an international court's decision determine a CIL? What about an international treaty? Can international courts, such as the ICJ, use treaties to decide whether certain usages amount to a CIL? According to Dupuy (2008), when writing on international environmental law, scholars often cite the largest number of possible opinions, treaties, and recommendations when finding a particular rule compulsory (p. 453). This number counting tactic is often problematic when demonstrating the compulsory character of a norm; in other words, to prove that the norm has been integrated into the 'corpus juris' of general international law. Other conditions must be met; a mere reiteration of different international documents does not actually consider what a particular state believes is binding. However, the ICJ may satisfy the existence of opinio juris if the belief is confirmed in state practice, and in return, the combination of state practice and opinio juris may lead to the declaration of a CIL (Dupuy, 2008, p. 453). Essentially, what is needed is concrete evidence of state practice.

The question becomes how much credibility does the ICJ, or other international courts, have in stating a particular rule or principle is a CIL? The Wood (2014) report, which dissects the ILC Prevention Articles, claims: "[w]hile the decisions of international courts and tribunals as to the existence of rules of customary international law and their formulation are not 'practice', such decisions serve an important role and subsidiary means for determination of rules of law" (p. 34). The report also asserts that the pronouncements of the ICJ may carry great weight (Wood, 2014, p. 34). However, states rarely seek recourse at the ICJ for environmental disputes, and when there is a dispute, the Court rarely decides to pronounce itself on the specific legal status of the norm in question. Furthermore, the ICJ is restricted to the specific facts of the case and the specific formulation of the legal question by the disputing parties (Dupuy, 2008, p. 453).

While ICJ decisions are not state practice, the ICJ can examine state practice (uniformity, duration, generality), and whether a particular state appears to have an internalized psychological belief in a particular usage. After the examination, the ICJ may then declare that a usage is a CIL. Hence, an ICJ declaration carries a normative force through its in-depth analysis of the customary nature of a usage. For this paper, the various ICJ decisions discussed provides a contextual analysis proving the duty of prevention as a CIL.

Regarding treaties, the ICJ has indicated that treaties may signify the existence of a CIL. In the Paramilitary Activities Case (1986), the ICJ considered the relationship between treaties and custom, finding that multilateral conventions "may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them" (p. 98). Further, the ICJ recognized that customary rules may emerge which are identical to those of treaty law, and which exist simultaneously with treaty obligations (Paramilitary Activities Case 1986, p. 98). In the North Sea Continental Case (1969), the ICJ found that state practice, including signing and ratifying a particular convention, could create a CIL (p. 73). The ICJ identified the conditions to be fulfilled for a new rule to become a CIL resulting from a treaty:

It would in the first place be necessary that the provision concerned should, at all events, potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule […] with respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of states whose interests were specifically affected. (North Sea Continental Shelf Case 1969, p. 41-42).

It is important to note the use of the term "fundamentally norm-creating character". In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996), the Court claimed that some non-binding resolutions "may sometimes have normative value" (p. 226), adding

they can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character. Thus, it should not be assumed that the mere fact a large number of states being a Party to a treaty establishes a customary norm for all. (Legality of the Threat or Use of Nuclear Weapons, 1996, p. 245)

Thus, essential to whether a treaty develops into a CIL is whether there is a "normative character" or a "fundamentally norm-creating character".

Establishing a CIL necessitates the finding of state practice and opinio juris. But the ICJ can determine both and declare that a particular usage is a custom. Although not determinative of a CIL, the ICJ making this declaration carries great weight. A treaty having a "normative character" may also contribute to the formation of a CIL. As this essay will demonstrate, the duty of prevention has consistently been brought to the ICJ, and in one case, declared a custom. In addition, there are several international treaties explicitly mentioning that states have a duty to prevent specific transboundary harms. The ICJ decisions, combined with treaties, ought to firmly establish the duty of prevention as a CIL.

The Duty to Prevent Transboundary Harm

This section examines whether the duty to prevent transboundary harm has reached CIL status. It argues that the answer is yes, especially since the ICJ has formally claimed that the duty is a CIL. Regarding state practice, the three necessary elements – duration, generality, uniformity – have all been met. Further, in finding state practice, the ICJ has cited prior decisions and treaties to determine that the duty of prevention has reached customary status. To emphasize, two approaches to opinio juris have been identified. The first approach involves the ICJ assuming the existence of opinio juris based on various factors, including general state practice and determinations made by international courts and tribunals. On the other hand, the second approach requires additional positive evidence beyond what is considered in the first approach, such as public statements, decisions by national courts, or government legal

opinions. Examining the two perspectives on opinio juris, the ICJ typically embraces the more flexible criterion – the first approach – when addressing the duty of prevention. This implies that the duty holds the status of a well-established CIL.

Trail Smelter and *Corfu Channel*

Trail Smelter is the most significant case related to the duty of prevention, and perhaps within international environmental law. Prior to this case, there was a dearth of evidence regarding environmental policies or legal disputes addressing the issue of pollutants crossing international boundaries. Since Trail Smelter, numerous treaties and cases have identified the duty to prevent transboundary harm as international law, some even as a CIL. The question before the Court was what level of continuing relief a polluting state owes to an affected state. This was framed as a question of law to be ascertained by looking at the nature of the duty of relief. To accomplish this task, the Court examined the content of the international "rule", which was assumed to be always a general principle applicable to transboundary pollution (Merrill, 1997, p. 948). In Trail Smelter (1941), Canada was held liable for the damages caused by pollutants discharged into the atmosphere by a smelter in British Columbia, which then blew towards the U.S. state of Washington (1910). In Washington, a group of rural farmers claimed damages from the waste emitted by the smelter, since this caused injury to plant life, soil, and crop yields. Notably, this was not an ICJ decision. The case was brought forward by the United States and was referred to the International Joint Commission, a bilateral Canada-U.S. tribunal tasked with overseeing transborder issues between two countries. Ultimately, Canada was held liable for $350,000 in damages (Trailer Smelter, p. 1941, 1910-1960). The Commission made an important assertion, one which forms the basis of the duty of prevention: "[u]nder the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury to properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence," (1960). In other words, a country has a duty to protect other states against injurious acts caused from within its jurisdiction.

Since 1941, numerous international cases, declarations, and resolutions have supported the ratio in Trail Smelter.

Following Trail Smelter, the ICJ in Corfu Channel (1949) held Albania responsible for damaging British warships in the North Corfu Strait (p. 4). The warships had sailed through part of Albanian territorial waters, and two of the ships struck water mines, causing explosions killing 44 people. The dispute was whether Albania was responsible for the explosions and resulting damage and loss of human life (Corfu Channel, 1949, p.15, 22). The Court claimed that every state is under "an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (p. 21). Much like in Trail Smelter, the Court referred to "certain general and well-recognized principles" that existed independent of treaty law (Corfu Channel, 1949,p. 22). Thus, the ICJ recognized the existence of general principles of law prohibiting states from violating the rights of, or inflicting damage on, other states. Ultimately, the ICJ determined that Albania was liable for damages of £843,947 to be paid to the United Kingdom (Corfu Channel Assessment, 1949, p. 10). Following both Corfu Channel and Trail Smelter, the ICJ was silent for a considerable period on the duty to prevent transboundary harm. However, international treaties and declarations emerged furthering the development of the duty within CIL.

Principle 21 and Principle 2 and treaty law

As mentioned earlier, for a treaty to form a CIL, it needs to have a "fundamentally norm-creating character" or "normative character". The duty has been articulated in two important declarations: the 1972 Stockholm Declaration and the 1992 Rio Declaration. Under Principle 21 from Stockholm:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. (Stockholm Declaration, 1972, Principle 21).

Principle 21 was reproduced almost verbatim in Principle 2 of the Rio Declaration (1992). Together, both declarations have exercised considerable influence on the development of international environmental law and have since been duplicated in multiple treaties (Kiss & Shelton, 2007, p. 284). This repetition provides an example of treaties contributing to developing the "normative character" of a CIL. While Rio and Stockholm received significant international attention, there are many other less notable treaties clearly establishing a belief that the duty of prevention results in a legal obligation.

Although there are over 200 international agreements dealing with environmental matters, only a handful deal specifically with transboundary pollution (Merrill 1997, 933). Article 192 of the UN Convention on the Law of the Sea (1992) expresses the general requirement of prevention by affirming that "[s]tates have the obligation to protect and preserve the marine environment" (Art. 192). The marine environment is a resource that is commonly used by many states. Damaging the marine environment can potentially undermine another state's enjoyment of this resource. Article 7 of the UN Convention on the Non-Navigational Uses of International Watercourses (1997) affirms the same duty in international freshwater (Art. 7). Furthermore, the preamble and Article 1 of the Convention on Biological Diversity (1993) lists various measures ensuring the conservation and sustainable use of biological resources within state parties, implying that neighbouring states are impacted if these resources are depleted (Art. 1). Other multilateral environmental agreements have dealt with transboundary pollution directly: the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (1997), the Convention on the Protection and Use of Transboundary Watercourse and International Lakes (1996), the Convention on Long-Range Transboundary Air Pollution (1983), the Montreal Protocol on Substances that Deplete the Ozone Layer (1989), the United Nations Framework Convention on Climate Change (1994), and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2003). Importantly, Article 8 of the Paris Agreement (2016) states that "Parties recognize the importance of averting, minimizing and addressing loss and damage associated with adverse effects of climate change" (Art. 8). At the 2022 Conference of Parties in Cairo, several developed states

pledged funds for the loss and damage caused by excessive emitting, albeit only marginal amounts (Gelles, 2022). While Article 8 does not form a binding requirement, it recognizes that states are aiming to reduce damages in other states stemming from climate change, which resembles the duty of prevention.

Since determining the formation of a CIL is not a quantitative analysis, the volume of treaties does not determine a custom. Thus, the relatively small number of environmental treaties addressing transboundary pollution and the duty of prevention is not determinative of a CIL. Still, a limited number of treaties implementing the duty of prevention contributes to establishing a CIL, especially when these treaties are consistent with state practice and opinio juris. As the next section highlights, several decisions of states causing environmental damage in other states' boundaries has been brought to the ICJ.

ICJ case law

The ICJ has issued five important decisions dealing specifically with the duty to prevent transboundary harm. In the ICJ's first decision since Principle 21 of the Stockholm Declaration was adopted, a dispute arose between New Zealand and Australia against France concerning atmospheric nuclear tests conducted in the South Pacific by the French Government. These cases are referred to as the Nuclear Test Cases I (1974). The main issue was whether the radioactive fallout from the testing was inconsistent with rules of international law. The Court found that since France intended to cease testing in the South Pacific, the objectives of the applications had been accomplished and the issue no longer existed. However, in both cases, Principle 21 was addressed (Australia v. France, 1974, para. 59). For example, Australia argued that Principle 21 was at "the very center of the problem in the present case" and suggested it is a rule of CIL that prohibits atmospheric nuclear tests (New Zealand v. France, 1974, para. 11). It was further argued in both cases that "the traditional standards of state freedom to pursue activities which may affect them must undergo some restriction" (Australia v. France, 1974, para. 28; New Zealand v. France, 1974, para. 11). Regardless of the rulings being against the harmed state, the cases featured additional judicial opinions demonstrating the divide between judges on their views regarding the legal status of the duty of prevention.

The separate dissents of Petrén J. and Castro J. in Australia v. France (1974) arrived at different conclusion on the customary status of the duty of prevention. Judge Petrén claimed that the argument brought forth by Australia and New Zealand depended on a CIL that prohibited states from conducting atmospheric tests on nuclear weapons giving rise to cross-border radioactive fall-out (Australia v. France, 1974, 305). Yet, Judge Petrén concluded there was no such rule of CIL due to a lack of state practice, as not enough states manufacturing nuclear weapons were refraining from carrying out atmospheric tests because of a belief that it was prohibited under international law (Australia v. France, 1974, 306). More simply, state practice was lacking in generality and uniformity.

In comparison, Judge Castro found generality and uniformity by taking a different approach in his dissenting opinion. He noted that Australia's complaint against France was "based on a legal interest which has been well known since the time of Roman law," namely the sic utere principle (Australia v. France, 1974, 388). He claimed it is a feature of modern law that property owners are liable for smoke and smells that overstep the physical limits of their property by referring to Trail Smelter and Corfu Channel (Australia v. France, 1974, 388-389). Therefore, Castro J. believed that France should cease the deposit of the radioactive fall-out upon other territories. These contrasting opinions illustrate Brownlie's (2008) judicial approaches to interpreting CIL. Judge Petrén adopted a strict interpretation when finding opinio juris; there was simply a lack of evidence of consistent state practice. On the other hand, Castro J. took a more liberal interpretation, stating that the principle was applied in prior (but limited) case law and stems from a general principle of property law (sic utere).

Nuclear Tests II (1995) was submitted to the ICJ when France decided to carry out a series of underground nuclear tests in the South Pacific. In response, New Zealand attempted to reactivate the proceedings from 1974. The question before the ICJ was whether the new tests violated New Zealand's rights under international law, and whether it was unlawful for France to undertake tests without conducting an environmental impact assessment. The Court concluded that since France was now dealing with underground

tests, while the 1974 case concerned atmospheric tests, the Court would not reactivate the case despite the new arguments from New Zealand (Nuclear Tests II, 1995, paras. 6, 63). However, in obiter dictum, the Court stated the present order was "without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment," (Nuclear Tests II, 1995, para. 64). The "obligations of States" indicates the Court recognized states' commitment to reduce environmental harms from flowing cross-boundary.

The Nuclear Tests II (1995) decision was not without dissent. In the case, New Zealand argued that the duty to prevent transboundary harm was a "well established principle of customary international law" and France recognized that a general obligation to protect the environment existed (Nuclear Tests II, 1995, Oral Proceedings, p. 11). There were three dissenting judges: Judge Weeramantry, Judge Kormoa, and Judge Palmer. Judge Weeramantry provided the most emphatic statement that "no nation is entitled by its own activities to cause damage to the environment of any other nation" and that this was a rule of CIL (Nuclear Tests II, 1995, p. 347). Judge Kormoa claimed: "under contemporary international law, there is probably a duty not to cause gross or serious damage which can reasonably be avoided, together with a duty not to permit the escape of dangerous substances" (Nuclear Tests II, 1995, p. 378). Judge Palmer did not address the principle's legal status, but recognized that the "obvious and overwhelming trend of these developments from Stockholm and Rio has been to establish a comprehensive set of norms to protect the global environment" (Nuclear Tests II, 1995, p. 409). While the three dissenting judges did not officially establish the duty to prevent transboundary harm as a CIL, they nonetheless contributed to its development.

In the Legality of the Threat or Use of Nuclear Weapons (1996), which was an Advisory Opinion, the ICJ dealt with nuclear weapons environmental impact, asking whether "the threat or use of nuclear weapons in any circumstance is permitted under international law" (para. 1). The Court recognized that the environment "is under daily threat and that the use of nuclear weapons could constitute a catastrophe" (para. 29). Furthermore, the environment "is not an

abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (Use of Nuclear Weapons, 1996, para. 29). The Court further claimed: "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (Use of Nuclear Weapons, 1996, para. 32). Moreover, Principle 21 of the Stockholm Declaration was invoked. Although the Court found that the use of nuclear weapons was not specifically prohibited by existing international law, it emphasized that international law indicates "important environmental factors that are properly taken into account" during armed conflict (Use of Nuclear Weapons, 1996, para. 32). The importance of this decision is that the duty of prevention was recognized as being part of the corpus of international law relating to the environment.

Gabčíkovo-Nagymaros (1997) provides additional support for the duty of prevention forming CIL. This case involved the construction of a barrage system on the Danube River effecting Hungary and Czechoslovakian. Hungary eventually abandoned a section of the project due to concerns for its natural environment. Czechoslovakia began looking for alternative solutions. Among them was Variant C, a proposal to unilaterally divert the river. In 1993, Slovakia, which was now an independent state, proceeded to dam the river, and the dispute was submitted to the ICJ (Gabčíkovo-Nagymaros, 1997, para. 22-23). The Court emphasized "the great significance that it attaches to respect for the environment" (Gabčíkovo-Nagymaros, 1997, para. 53). The Court recited the Advisory Opinion on the Legality of Nuclear Weapons, discussing the general obligation on states to ensure activities respect the environment of areas beyond national control as being part of "the corpus of international law relating to the environment" (Gabčíkovo-Nagymaros, 1997, para. 53). This indicates that the Court considered the general obligations referred to in the Legality of Nuclear Weapons to have a customary status.

Further cementing the duty of prevention's CIL status is Pulp Mills (2010). A dispute arose when Uruguay began constructing two pulp mills along the banks of the Uruguay River, which borders Argentina.

In 1975, both countries entered an agreement requiring a party that is undertaking potentially damaging activities on the River to notify the other; importantly, this party could proceed only if the notified country had no objections (Pulp Mills, 2010, para 80). In 2006, Argentina filed an application to the ICJ instituting proceedings. It expressed concerns that the mills posed "major risks of pollution of the river, deterioration in biodiversity, harmful effects on health and damage to fish stocks" (Application Instituting Proceedings, 2006, para. 15). The ICJ repeated a statement from Corfu Channel that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (Pulp Mills, 2010, para. 101). It was also said that the "duty of prevention, as a customary rule, has its origin in the due diligence that is required of a State in its territory," (Pulp Mills, 2010, para. 101). Due diligence is an important phrase, which will be demonstrated later in this essay is paramount to the standard of care for the duty of prevention. The Court further pointed to the Advisory Opinion on the Legality of Nuclear Weapons to claim that the "corpus of international environmental law" obligates states to use all means at its disposal to avoid environmentally damaging activities from causing harm in other states (Pulp Mills, 2010, para. 101). Therefore, the Pulp Mills decision further solidified the duty of prevention as a CIL.

By analyzing the statements made in the above-mentioned cases, it appears the ICJ is willing to infer an opinio juris from the general practice of protecting the environment. The Court has also grounded its arguments within international treaties. As indicated earlier in this essay, decisions by the ICJ are highly influential in determining the customary status of a usage. There is a clear line of international case law dealing with the duty of prevention and several international treaties and declarations. This long line of agreement at the international level indicates that the duty of prevention has become a CIL. Still, another issue arises: prior case law has not dealt with GHG emissions specifically. This must be addressed to determine whether the duty of prevention applies within the context of climate change. To do so, we must examine what is required of a state, or the contours of the duty of prevention.

The Operation of the Duty

To determine whether the duty to prevent transboundary harm applies to emissions, the contours of the duty must be understood. The question is what steps a state must take to prevent transboundary harm. The main issue relates to the standard of care applicable to the obligation of states to ensure activities within their jurisdiction do not cause cross-boundary damages (Wood, 2014, 34; Mayer, 2022, 96). This essay argues the standard of care is that states must make a due diligence effort when preventing significant transboundary damage. Note the importance of the word significant. This essay analyzes the ILC Prevention Articles (2001) to determine what level of risk is needed before a state is required to act. Ultimately, it concludes the risk must be beyond a de minimus range.

Due diligence

The most coherent interpretation of the standard of care for the duty of prevention is a due diligence obligation. The due diligence obligation is stated directly in the ILC's Prevention Articles (2001). Regarding transboundary harm from hazardous activities, the ILC claims that "the obligation of the State of origin to take preventive or minimization measures is one of due diligence" (ILC's Prevention Articles, 2001, Art. 3). This conclusion is supported by the wording of the duty of prevention in Principle 21 and Principle 2 as an obligation "to ensure" – a phrase that has often been used to suggest due diligence rather than strict liability (ILC's Prevention Articles, 2001, Art. 3). There need not be an intention to injure from the originating state; instead, states must take all measures to control and restrain likely harmful activity that can reasonably be excepted (Beyerlin & Marauhm, 2000, p. 284). The duty does not impose an absolute duty to prevent harm, but rather requires each state to prohibit those activities known to cause significant harm to the environment, such as mitigating harm from lawful activities that may deteriorate the environment (Kiss & Shelton, 2007, p. 91; Mayer, 2022, p. 103). The obligation is thus one of due diligence, not of absolute cessation.

The due diligence standard needs further clarification to understand what level of effort is expected from a state in the context of climate change. The ILC Prevention Articles requires states to "take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof," (ILC's Prevention Articles,

2001, Art 3). It follows that "due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeability to contemplated procedure and to take appropriate measures, in timely fashion, to address them" (ILC's Prevention Articles, 2001, Art 3(7)). In the same sense, the ICJ in the Pulp Mills (2010) case, which explicitly mentions due diligence, considered that a state must "use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" (para. 101). Furthermore, in Certain Activities (2015), Judge Donoghue expanded the scope by stating a failure to exercise due diligence of preventing transboundary harm may engage state responsibility "even in the absence of material damage to potentially affected States" (Certain Activities, 2015, para 50). Therefore, it appears the state is required to use all "reasonable efforts" or "means at its disposal" to reduce the risk.

The criterion of "reasonableness" entails a considerable degree of uncertainty. It must be discerned what "reasonableness" requires in the context of preventing transboundary harm. "Reasonableness" means states must do the "best they can" with the relevant technical standards, such as the "best available technology" and "best environmental practices" (Handle, 2008, 540; De Sadeleer, 2020, p. 128). Or more simply, the state of origin must exert its "best possible efforts" to avert or minimize the risk. In Trail Smelter (1941), it was accepted that a due diligence standard was applied, having regard to the capacity of Canada, via improving emissions control technologies to limit transboundary damage (Stephens, 2009, p. 158). Trial Smelter (1941) and the ILC Prevention Articles (2001) suggest that due diligence obligations may be imposed according to a state's "capabilities", which considers differences in their economic and technological development stages (Takano 2018, p. 40). When a state makes a reasonable due diligence effort to prevent significant transboundary harm, it cannot be made responsible for harm that occurs nonetheless, but the state still must act to prevent further damages (Simlinger & Mayer, 2019, p. 187). This interpretation - that states must do the best they can within their capabilities - is consistent with the reasonableness criteria. It cannot be expected that a state will go above and beyond its "best possible efforts" to prevent the transboundary harm.

The degree of risk

A state must make a due diligence effort to reduce risk; however, a different issue arises when applying a state's effort to the degree of risk. Not all transboundary harms are equal. Some carry a far greater risk than others. A nuclear fallout is catastrophic, but an individual car exhaust is marginal. In this regard, the extent of the required diligence increases in proportion with the severity of the risk, meaning a higher standard of care applies to activities which may be considered more hazardous than average (De Sadeleer, 2020, p. 96). The ILC Prevention Articles (2001) indicates "the standard of due diligence is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance," (Art. 3(11)). In other words, the regulation that must be implemented varies, with a higher level of due diligence required as the risk increases.

There are three different interpretations when evaluating the level of risk that compels a state's due diligence effort. Two of these interpretations are done by the ILC. Under the ILC Prevention Articles (2001), "the State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof" (Art. 3). According to Handl (2008), the ILC divides situations into events involving "significant transboundary harm", where states are required to "prevent", and those where states must "minimize the risk thereof" (540). Therefore, the two threshold factors are "significant transboundary harm" and "risk thereof". The third interpretation is the de minimis threshold (Beyerlin and Marauhm, 2000, p. 294; De Sadeleer, 2020, p. 94). This paper argues in favour of adopting the de minimis threshold because it necessitates a lower criterion for compelling states to prevent transboundary harm.

The "significant transboundary risk" threshold, while sounding simple, is actually far more convoluted than the de minimis approach. Article 2(a) of the ILC Prevention Articles (2001) clarifies the threshold of "significant transboundary harm" as including risk both of a "high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm" (Art. 2(a)). When determining the scope of the obligation to prevent the

occurrence of “significant transboundary harm”, it is necessary to account for the combined effect, the likelihood of occurrence, and the magnitude of the injurious impact (ILC Prevention Articles, 2001, Art. 2(2)). Therefore, the “significant transboundary harm” threshold appears capable of incorporating climate change, since it considers the combined effect of all the potential consequences. Yet, it is not exactly clear when this threshold is crossed. Uncertainty remains as to what is a “significant transboundary harm”, and what is a “low probability of causing disastrous transboundary harm”. As will be shown, the de minimis approach provides greater clarity as to when a state is required to act.

For the ILC Prevention Article’s (2001) second approach, the ILC does not provide an explanation as to what a “risk thereof” entails. Alternatively, Handl (2008) claims a “risk thereof” means a “mere risk of significant transboundary harm,” (p. 540). Under this interpretation, a state is obligated to minimize the transboundary harm. However, confusion remains as to what actions a state must take to minimize the “risk thereof”. According to Handl (2008), the ILC’s approach is problematic because it differentiates between certain harm (to be prevented) and less than certain harm (to be minimized). This differentiation is based on the probability of the harm alone, rather than the composite of probabilities and consequences of the future event. Under this normative scheme, a ‘mere’ risk of significant transboundary harm does not attract an obligation of prevention, rather it is simply of minimization (Handl, 2008, p. 540). Therefore, uncertain future harm, no matter how potentially catastrophic its nature and scope, does not eo ipso attract a legal obligation to regulate the risk bearing activity. Consequently, the ILC’s interpretation of the duty of prevention under “risk thereof” does not compel state action, clearly contradicting established case law and international treaties.

A different approach to analyzing whether a “significant transboundary risk” occurs is by requiring a lower threshold. Beyerlin & Marauhm (2000) argue that a de minimis burden of proof is the most appropriate; meaning that if the harm is not minor, the threshold is crossed (294). This approach can be read consistently with the ILC Prevention Articles (2001), as the commentaries define “significant” as something more than “detectable”, which need not reach the level

of “serious” or “substantial” (Art 2(4)). In other words, the harm must entail real detrimental effects in areas such as human health, industry, poverty, environment, etc. But the de minimus approach is far simpler. By simply stating the harm must be beyond only a minimum risk, it avoids the potential debate over the ILC Prevention Articles (2001) approach of interpretating the “low probability of causing disastrous transboundary harm” (Art 2(a)). It also avoids any diplomatic squabbling over when the duty to prevent arises. Afterall, some may argue that GHG emissions will not cause disastrous harm, especially since “disastrous” harm is not defined in the ILC Prevention Articles (2001). Emphasizing a de minimis approach will lead to fewer problems in finding that the harm caused by GHG emissions crosses the burden of proof. This will compel states to act in the form of mitigating the damage much quicker.

Climate change is potentially catastrophic, and the cross-border flow of emissions is clearly more than minor. Of course, this raises the question, if every state is producing emissions, is there a duty to prevent the harmful effects? Not every state produces an equal number of emissions, some produce only a negligible amount. Still, states cannot claim that just because every state is producing emissions, the duty to prevent harm is an unnecessary CIL.

The Duty in The Context of Climate Change

The case law from the ICJ demonstrates that the duty of prevention is a recognized CIL. However, these cases, for the most part, dealt with singular instances of harm. For example, Trail Smelter (1941) concerned a single factory in Canada. In Corfu Channel (1949), Albania was held responsible for specific damages to British warships and the deaths of 44 people in the North Corfu Strait. Additionally, Pulp Mills (2010) and Gabčíkovo-Nagymaros (1997) deal with specific, identifiable instances of harm caused by damage to waterways. The facts of these cases are different from the harms caused by GHG emissions, which occur many years later, especially considering that emissions are produced by virtually every aspect of the economy. While the Nuclear Tests Cases dealt with the accumulation of atmospheric pollution, ultimately the victim state was unsuccessful in its claim.

If these cases deal only with specific harms, can the duty of prevention be applied in the context of climate change? This paper argues that it can. The Legality of Nuclear Weapons (1996) provides a useful analogy to GHG emissions. What is relevant is not the quantity of emissions by a state in a single year, but its emission over decades because of inadequate policy decisions by national governments over time (Mayer 2018, 266). Measuring emissions over time is essential to assessing the risk.

Many scholars arguing against the duty of prevention being applied to climate change misunderstand the functionality of the actual duty. The observation of widespread transboundary harm indicates that the duty of prevention does not support a specific result. Yet, states are consistently making significant efforts to avoid or reduce transboundary harm. Therefore, the duty of prevention relates to the conduct of states, as opposed to the outcome (Mayer, 2022, pp. 108-109). In other words, its purpose is not to eliminate all harmful GHG emissions, but to balance the duty to prevent transboundary harm with the state's right to develop its economy (Dupuy, 1991, p. 64; Gupta & Schmeier, 2020, p. 733). When seen through this perspective, clearly the duty is not all-or-nothing. Since it is impossible to eliminate emissions immediately, states must be granted the right to continue emitting harmful substances to develop their economies. Instead, the duty to prevent transboundary harm obliges states to slowly eliminate its emissions.

Climate Change and the Legality of Nuclear Weapons Case

Before analyzing whether the duty of prevention applies in the context of GHG emissions, this paper will summarize the consequences of climate change. Although the "[g]lobal economic impacts from climate change are difficult to estimate," the International Panel on Climate Change suggests that an increase of the global average temperature by 2°C would cause global annual economic losses at a minimum between 0.2 and 2.0% of global incomes (Christopher B Field et al., 2014, pp. 4-7). Stemming from the increase in frequency and intensity of extreme weather events, climate change adversely impacts food security, affects terrestrial ecosystems, and contributes to desertification and land degradation

(Almut Arneth et al., 2020, p. 9). As the majority in the SCC noted in the landmark GPPAA Reference:

Canada is also expected to continue to be affected by extreme weather events like floods and forest fires, changes in precipitation levels, degradation of soil and water resources, increased frequency and severity of heat waves, sea level rise, and the spread of potentially life-threatening vector-borne diseases like Lyme disease and West Nile virus. (GGPPA Reference 2021, para 10).

The impacts of climate change are already having a massive toll on human life. The World Health Organization estimates that climate change is currently causing the deaths of 150,000 people worldwide each year, and this is expected to increase by 250,000-300,000 between 2030 and 2050 (WHO). Emitting GHG emissions is incredibly destructive; it does not matter where the emissions originate, because emissions collectively impact the entire world.

Simlinger and Mayer (2019) argue that climate change differs from the previously mentioned ICJ cases in at least three pivotal ways. First, damages from climate change result not from a single act of a state but from states longstanding reliance on fossil fuels. Second, damages from climate change occur because of the concomitant conduct of multiple states, with the resulting harm not confined to a single state but affecting virtually all states. Finally, the harm results not from one activity, but from an accumulation of many activities over decades (Simlinger and Mayer, 2019, p. 187). These three reasons create difficulties when applying the duty to prevent transboundary harm to climate change.

The Legality of the Threat of Nuclear Weapons (1996) represents an important analogy in the context of climate change. As Simlinger and Mayer (2019) highlight, some states in their submissions (Mexico, Egypt, and Ecuador) argued that the possibility of repeated use of nuclear weapons could cause a nuclear winter leading to a cataclysmic upheaval of the climate system, destroying most of earth's life (Simlinger and Mayer 2019, p. 187). When mentioning that the damages caused by nuclear weapons could not "be contained in either space or time" and had "the potential to destroy all civilization and the entire ecosystem of the planet", the ICJ made no

distinction between immediate damage and damage cumulatively caused (Legality of the Threat of Nuclear Weapons, 1996, para. 35). In doing so, the Court implied that duty of prevention applied equally to both.

These facts are analogous to GHG emissions. If two states launch nuclear weapons at each other in a short period, the consequences are the devastation of our planet's environment. States which have no part in the conflict still suffer significantly over time. Similarly, if multiple large emitting states continuously emit GHGs over a long period, the result has the potential to be comparatively devastating. Furthermore, small developing countries, where emissions are negligible, will be innocent bystanders. The differences in the immediacy between a nuclear war and the slower nature of climate change should not be a deciding factor since the ultimate consequences are both potentially catastrophic. Consistent with the ILC Prevention Articles (2001), the focus ought to be on the significance of the risk. The duration of how the risk unfolds is irrelevant to a state's duty to prevent transboundary harm. But unlike the claims in the ILC Prevention Articles (2001), if the risk meets the de minimus threshold, a state's obligation is engaged.

GHG emissions are not explicitly mentioned as an example in the ILC Prevention Articles (2001). But this does not mean that GHGs are excluded from the duty of prevention. The ILC Prevention Articles (2001) simply summarizes the multilateral treaties in which the duty to prevent transboundary harm has already been agreed, including treaties addressing nuclear accidents, space objects, international watercourses, management of hazardous wastes and the prevention of marine pollution (Art. 5). It should be noted that the Articles were written in 2001, before states agreed under Article 8 of the Paris Agreement (2016) to "recognize the importance of averting, minimizing and addressing loss and damage associated with adverse effects of climate change" (Art. 8). As Mayer (2016) indicates, those arguing that emissions are inapplicable to the duty of prevention are operating under a misunderstanding. This misunderstanding is the belief that the duty to prevent transboundary harm requires a state to eliminate the harmful activity all together (Mayer, 2016, p. 92). The exclusion of references to GHG emissions in the ILC Prevention

Articles does not undermine the applicability of the duty of prevention to climate change.

It is often assumed that including GHG emissions in the duty of preventing transboundary harm would create unrealistic objectives, such as industrialized states forced to eliminate a given activity (Mayer 2016, 92). However, Trail Smelter (1941) reads:

It would not be to the advantage of the two countries concerned that industrial effort should be prevented by exaggerating the interests of the agricultural community. Equally, it would not be to the advantage of the two counties that the agricultural community should be oppressed to advance the interest of industry. (Trail Smelter, 1939)

The duty of prevention does not create an absolute duty of cessation, which would have been impossible to fulfill, or at least impossible to impose on the parties in Trail Smelter (1941). Rather, it is about the balancing of interests in a sustainable manner, including the right to emit with minimizing the consequences of such emissions. Under this balancing act, and as this essay will demonstrate next, the principle of sovereignty remains important to a state's right to develop.
Sovereignty

The principle of state sovereignty over natural resources is applicable to the duty to prevent harm by allowing for states to conduct activities that utilize the natural resources within their territories, even when these activities adversely impact the environment. This is rooted in the principle of permanent sovereignty over natural resources formulated in various UN resolutions since 1952 (Sands, 2003, p. 236; Mayer, 2022, p. 97). For example, the UN General Assembly in 1962 adopted a landmark resolution that the "rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development of the well-being of the state concerned" (Res. 1803). This right is also reflected in several environmental treaties. For example, the 1992 Climate Change Convention (1994) reaffirmed "the principle of sovereignty of states in international co-operation to address climate change" (Preamble). Additionally, the 1992 Convention on Biological Diversity (1993) acknowledged that states have "sovereign rights … over their natural resources" and that "the

authority to determine access to genetic resources rests with national governments and is subject to national legislation" (Art. 15(1)). The Paris Agreement (2016) adds that the framework will be "respectful of state sovereignty" (Art 13(3)). This obligation results from the requirement of peaceful co-existence between states' interests, but neither the principle of sovereignty nor the principle to prevent transboundary harm is absolute (De Sadeleer, 2020, p. 86).

While states have a duty to prevent transboundary harm, they are still free to extract resources within their borders. This includes activities that release emissions. Yet, the duty implies a compromise between the territorial sovereignty of the state of origin and the territorial integrity of the state likely to be affected. Since the contemporary international legal system is based on states being equal sovereigns, states could not be equal if one state was permitted to seriously interfere with the internal affairs of another. For example, one state could not be an equal sovereign with another if it was permitted to render the territory of another uninhabitable through causing environmental harms that cross international borders (Beyerlin & Marauhm, 2000, p. 40). States then have exclusive rights to permanent sovereignty over its natural resources and non-exclusive rights to the protection of global commons (Mayer, 2022, p. 100). The duty of prevention, when applied to sovereignty, means states are not obligated to eliminate every source of harmful activity, just a due diligent effort to minimize risk beyond the de minimus threshold.

The transboundary outlook of the duty of prevention and its concern for territorial integrity are still very much present in the principle of prevention. Under certain circumstances, states have moved beyond the sovereignty paradigm to protect the environment irrespective of the location of harm (Anne & Duvic, 2018, p. 234). With this balancing act between the sovereign right to develop resources and the duty of prevention, states are allowed to continue their emitting activities while taking the necessary steps to prevent or minimize the future harms of climate change. Since the ICJ clearly labelled the duty of prevention as a CIL, and the duty applies in the context of climate change, the question then becomes whether Canada is abiding by its obligations. As this essay will demonstrate, Canada is abiding by the duty of prevention through the implementation of a

carbon pricing scheme, which enables economic development while mitigating the risks of climate change.

Customary Law and the Duty of Prevention in Canada

Canada, as a wealthy industrialized country, has long contributed to climate change by emitting more compared with other states. In fact, Canada ranks tenth in the world in emissions (Government of Canada, 2022, p. 7). Therefore, Canada has considerable responsibility to prevent transboundary harm through reducing its emissions. How is Canada meeting this responsibility? This essay argues that a carbon pricing system, which Canada has adopted under the GGPPA, exemplifies that Canada is complying the duty of prevention. In addition, Canada's actions of taking steps to reduce emissions further demonstrates an opinio juris. But first, it must be established how CIL applies to Canada.

Canada's adoption of CIL

International law is incorporated into domestic law in two ways: (1) the dualist approach and (2) the monist approach. Canada takes a dualist approach to treaties, but a modified monist approach to CIL norms unless domestic legislation overrides it. The dualist method requires an international law to be expressly received (or transformed) by some executive and/or legislative action. Thus, the only way treaties become binding in Canada as a matter of domestic law is when they are transformed through domestic legislation. In contrast, under the monist approach, international law is directly incorporated into domestic law and is immediately effective without additional legislative or executive action (Judge LeBel, 2014, p. 4).

When it comes to CIL, Canada adopts a modified monist approach. In Canada, CIL is directly integrated into the common law and takes effect immediately. Unlike treaties, CIL does not require additional legislative or executive action for its incorporation. This integration is referred to as the doctrine of incorporation or adoption. Nevertheless, this incorporation is subject to modification if there is any legislation that contradicts the CIL. In such cases, the legislation takes precedence and displaces the application of CIL within the Canadian legal system (Van Ert, 2008, p. 184). In general, Canada

takes a monist approach to CIL unless domestic legislation overrides it.

The landmark Nevsun (2020) case is the judicial authority on the matter of CIL in Canada. The case involved three individuals who were conscripted to work in an Eritrean mine that was majority owned by the Canadian company Nevsun. The conditions in the mine were horrific, and claims were brought forth involving forced labour, slavery, cruel and inhumane treatment, and crimes against humanity, which were said to be peremptory norms (jus cogens) from which no derogation is permitted (Nevsun, 2020, para 7). Abella J's. majority affirmed that CIL is automatically part of Canadian common law, and a Canadian company breaching a CIL can theoretically be remedied. The SCC ruled that the "automatic incorporation" of norms of CIL "is justified on the basis that international custom, as the law of nations, is also the law of Canada," (Nevsun, 2020, para 93). Therefore, if the twin requirements of CIL (state practice and opinio juris) are met, CIL becomes fully integrated into Canadian domestic law. As indicated in the decision, consistent with the modified monist approach, legislatures are of course free to change or override CIL; but like all common law, no legislative action is required to give CIL effect in Canada (Nevsun, 2020, para 94). Since the duty of prevention is a CIL, the duty automatically applies to Canadian domestic law. This is consistent with the doctrine of incorporation and legislation in Canada has only reaffirmed the preventative duty.

The Greenhouse Gas Pollution Pricing Act

The GGPPA (2018) came into force in 2018. The key purpose is to incentive the behavioural changes necessary to reduce GHG emissions. To achieve this purpose, carbon pricing policies are applied throughout the provinces. The Act has two key parts. Part 1 of the legislation is the fuel charge, which is the price per tonne of the various GHGs emitted, while Part 2 is the Output Based Pricing Mechanisms, or a cap-and-trade. For Part 1, the price per tonne was set at $20 for 2019, rose to $50 per tonne in 2022, with a loose goal of achieving carbon neutrality by 2050 (GGPPA, 2018, Schedule 4). Yet, this charge is revenue neutral, and 90 percent of the proceeds are returned to individuals within a jurisdiction in the form of a Climate Action Incentive Payment, while the remaining 10 percent is

given to small businesses and institutions to reduce emissions through the Climate Action Incentive Fund (GGPPA Reference 2021, para 31). Part 2 of the GGPPA (2018) allows large emitters covered by the Output-Based Pricing System (OBPS) to provide compensation for the portion of emitted GHGs that exceed their applicable emissions limit based on sector specific percentages (section 168). Industries that emit below their cap receive a credit, while facilities that exceed their limit must pay a charge to the federal government.

By implementing a carbon price, Canada is meeting its due diligence obligations under the duty of prevention. As previously discussed, states have an obligation to make a due diligent "best effort" to prevent foreseeable damage, or at least minimize the risk of harm. Experts frequently argue that carbon pricing is the most effective tool for reducing emissions; hence, a carbon price could represent a state's "best efforts". For example, the Federal-Provincial-Territorial Working Group on Carbon Pricing Mechanisms, which was created by the federal government to determine the effectiveness of carbon pricing, claimed "[m]any experts regard carbon pricing as a necessary policy tool for efficiently reducing GHG emissions," (Factum of Attorney General of Ontario, para 24). Furthermore, the High Level Commission on Carbon, comprised of economists and climate change scientists from around the world, reported that a well-designed carbon price is an indispensable part of a strategy for reducing emissions in an efficient way (World Bank Group, 2017, p. 8). Stiglitz (2019), an American Nobel Prize winning economist, advocates for a detailed carbon price to apply to all sectors of the economy, albeit not with a "single price" applied uniformly. Not applying the price uniformly abides by the principles of state practice disused earlier. This is consistent with how the Canadian carbon price was designed, as certain exemptions are carved out for large emitters that may opt out of the carbon price and enter the OBPS (GGPPA Reference, 2021, para 34). Therefore, by implementing carbon-pricing, Canada is doing its "best effort" to reduce emissions. It should be noted that while a carbon price is one way for a particular state to meet its CIL, there are several other ways (such as command and control regulation), to abide by the duty of prevention. To compare, carbon pricing relies on markets to achieve emission

reduction, while command and control relies on regulation, such as performance and technology mandates (Pomerleau & Dolan, 2021).

Around the globe, numerous industrialized wealthy countries have begun implementing carbon pricing strategies. For example, in Europe, eighteen countries have implemented a carbon tax. The price ranges from less than €1 per metric ton of carbon emissions in Poland and Ukraine to more than €100 in Sweden (Asen, 2021). In July 2021, the EU proposed a new legislation that would impose a carbon price on imported goods. While this policy has yet to be implemented, it would be the first of its kind, and aims to protect domestic industries that are abiding by EU's emission reduction policies (Plumer, 2021). Approximately 40 countries around the world have implemented a carbon pricing mechanism (World Bank). With a few exceptions, these carbon prices have all been implemented in wealthy industrialized countries. Wealthy industrialized states, which have contributed more to the problem, have a heightened ability to implement more stringent policies to prevent transboundary harm. This heightened ability may come in the form of a carbon price.

Considering a large portion of countries have not implemented a carbon price, how can a carbon price represent compliance with the CIL duty to prevent the transboundary harm stemming from GHG emissions? In other words, there is a lack of generality and uniformity. As mentioned earlier, a CIL can still be found amongst a group of states. It is unnecessary for all states to take similar measures against foreseen consequences because due diligence obligations may be imposed according to a state's "capabilities" (Takano, 2018, p. 39). This due diligence approach is consistent with the "common but differentiated capabilities" (CBDR) principle, which recognizes that developed countries acknowledge their historic responsibility and may have an additional responsibility based on their enhanced abilities (Rio Declaration 1992, Principle 7). Notably, CBDR has not reached customary status, but it still provides some "steering" effect on state behaviour. CBDR considers states' socio-economic differences when goals and benchmarks are applied to global development agendas (Beyerlin, 2008, p. 442). Hence, when analyzing the level of due diligence involved, it is important to consider a state's capacity. Canada has not only contributed more to the problem of climate change, but it has more resources than

developing states to reduce its emissions (Stone, 2004, p. 292). As a wealthy industrialized economy, Canada has a heightened ability to prevent transboundary pollution, while simultaneously allowing for its sovereign right to develop. It should be stressed that for Canada a greater emphasis is placed on its duty of prevention compared to a developing state. Under this approach, Canada has a more burdensome "best effort" to prevent transboundary harm. In light of the GGPPA and the subsequent Reference decision, carbon pricing is a sufficient means to abide by its customary duty of prevention.

The Greenhouse Gas Pricing Pollution Act Reference

In March 2021, the SCC delivered a landmark decision known as the Re Greenhouse Gas Pricing Pollution (2021). The case primarily dealt with the constitutionality of the GGPPA. Wagner C.J, writing for the majority, recognized that the presence of the Paris Agreement was a factor influencing the decision to uphold the GGPPA. Even though Canada's obligations under the Paris Agreement was not a decisive factor, Wagner C.J. recognized that "[a]ddressing climate change requires collective national and international action. This is because the harmful effects of GHGs are by their very nature not confined within borders" (para 12). While the SCC did not consider CIL, this statement reflects the need for Canada to prevent transboundary harm. In upholding the GGPPA, Wagner C.J recognized that collective action is needed by Canada and acknowledged that harm crossing borders ought to be prevented. Taking the inverse approach, if the GGPPA was held unconstitutional, and the nation-wide carbon pricing scheme was abolished, would Canada be abiding by the CIL duty of prevention? Since Canada is a federalist state, the provinces have a great deal of discretion in establishing their own climate policies. Before the GGPPA became law, only British Columbia, Alberta, and Ontario had carbon pricing mechanisms. Also, Canada was seriously behind in meeting its emission reduction targets under the Paris Agreement: Canada's overall emissions had decreased by 3.8 percent from 2005 to 2016, far short of the Paris Agreement goals of a 30 percent reduction by 2030 (GGPPA Reference, 2021, paras 23-24). This trajectory virtually guaranteed that Canada would not meet its Paris Agreement commitment and fail in fulfilling the customary duty to prevent transboundary harm.

Besides the GGPPA, there is no other federal legislation tackling climate change, with one exception: the Canadian Net-Zero Emissions Accountability Act (2021). This legislation enshrines Canada's commitment to set national targets for the reduction of GHG emissions with the objective of attaining net-zero by 2050 (Net Zero Act, 2021, Preamble). The Net-Zero Act (2021) sets the 2030 emission reduction target as more ambitious than what Canada has committed to under the Paris Agreement, which is between 40 and 45 percent below 2005 levels, compared with the 30 percent reduction under the Paris Agreement (Net-Zero Act, 2021, section 7). The Net-Zero Act demonstrates that Canada is committed to reducing its emissions; but unlike the GGPPA, there is nothing setting out how to fulfill the commitment. It is more of a commitment to commit, meaning Canada is creating a law to reduce its emissions, but how this will be done is handled through other legislation, such as the GGPPA. Without the GGPPA, Canada cannot abide by the CIL duty to prevent transboundary harm with the Net-Zero Act alone.

Conclusion

The duty to prevent transboundary harm is a CIL. It was established in Trail Smelter and has been consistently repeated in treaties after the 1972 Stockholm Declaration. The ICJ has explicitly stated it is a CIL, thereby recognizing the combination of state practice and opinio juris. As a result, all states are bound by the obligation to make a due diligence effort to reduce transboundary harms. This due diligence effort is based on a state's capabilities. In other words, this due diligence effort must be reasonable.

The fact that states continue to pollute does not negate the duty's CIL status. The discussion in the ICJ case law illustrates that states accept and feel bound by the duty to prevent transboundary harm, even if the duty is violated. Climate change represent a form of harm that is covered under the CIL duty to prevent transboundary harm.

Canada follows a modified monist approach to a CIL: Canada is bound by any CIL that is not displaced by legislation. To date, legislation has not displaced the prevention duty. In fact, the GGPPA reiterates this duty. The nation-wide carbon pricing scheme established by the GGPPA is consistent with the implementation of

the CIL duty to prevent transboundary harm. The adoption of the GGPPA demonstrates that Canada is taking legislative action to implement a CIL, using its due diligent "best efforts" to reduce emissions through a carbon price. The GGPPA does not require an absolute cessation of emissions. Some industries – particularly those involved in creating emissions - will feel its impact more than others, but this fact does not negate Canada's overarching obligation to prevent transboundary harm.

Canada has made clear international commitments to reduce emissions under the Paris Agreement. Canada has an additional, simultaneous, duty under CIL to do so. While the Paris Agreement quantifies the actual reduction target Canada must meet under international law, the prevention duty places a concomitant commitment on Canada to prevent the harm from occurring. The GGPPA helps to address both treaty and CIL obligations. The expectations are that the prices associated with the per tonne of GHGs emitted will lead to reductions that exceed Canada's commitments and will therefore assist Canada in meeting the due diligence standard of preventing transboundary harm.

References

Anne, L. & Duvic, P. (2018) The Prevention Principle in International Environmental Law. Cambridge University Press.

Application Instituting Proceedings Pulp Mills on The River Uruguay (2006), ICJ filed on 4 May 2006.

Arneth, A, et al. (2020). Climate Change and Land: An IPCC Special Report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems. Intergovernmental Panel on Climate Change. https://www.ipcc.ch/srccl/.

Asen, E. (2021). Carbon Taxes in Europe. Tax Foundation. https://taxfoundation.org/carbon-taxes-in-europe-2021/.

Beyerlin, U. (2008). Different Types of Norms in International Environmental Law Policies, Principles, and Rules. In Daniel Bodansky, Jutta Brunée & Ellen Hey (Eds.), The Oxford Handbook of International Environmental Law (425-448). Oxford Handbooks in Aw. https://doi.org/10.1093/oxfordhb/9780199552153.013.0018.

Beyerlin, U, & Marauhm, T. (2000). International Environmental Law. Oxford: Hart Publishing Ltd.
Bodansky, D. (1995). Customary (And Not So Customary) International Environmental Law. Indiana Journal of Global Legal Studies. 3(1): 105-119. https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1060&context=ijgls.

Brownlie, I. (2008). Principles of Public International Law. Oxford University Press 6th Edition.
Declaration of the United Nations Conference on the Human Environment, June 16, 1972. http://www.un-documents.net/unchedec.htm.
Draft articles on Prevention of Transboundary Harm from Hazardous Activities. International Law Commission, fifty third session, A/56/10 148, 2001.

https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf.

Canadian Net-Zero Emissions Accountability Act, SC 2021 C 12. (2021). https://laws-lois.justice.gc.ca/eng/acts/c-19.3/fulltext.html.

Carbon Pricing Leadership Coalition, (2019). Report of the High-Level Commission on Carbon Prices and Competitiveness. World Bank Group. https://elibrary.worldbank.org/doi/abs/10.1596/32419.

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, No. 30619, September 11, 2003. https://www.cbd.int/doc/legal/cartagena-protocol-en.pdf.

Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica), Judgment on Merit (16 December 2015), [2015] ICJ Rep 665.

Convention on Biological Diversity, No. 30619, December 29, 1993, https://www.cbd.int/convention/text/.

Convention on Long-Range Transboundary Air Pollution, No. 21623, March 16, 1983. https://unece.org/convention-and-its-achievements.

Convention on the Protection and Use of Transboundary Watercourse and International Lakes, No. 33207, October 6, 1996. https://unece.org/convention-and-its-achievements.

Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) [1949] ICJ Rep 4.

De Sadeleer, N. (2020) Environmental Principles: From Political Slogans to Legal Rules. Oxford Scholarship, 2nd edition.

Dupuy, P.M. (2008). Formation of Customary International Law General Principles. In Daniel Bodansky, Jutta Brunée & Ellen Hey (Eds.), The Oxford Handbook of International Environmental Law. Oxford Handbooks in Aw. https://doi.org/10.1093/oxfordhb/9780199552153.013.0019.

Dupuy, P.M. (1991). Overview of the Existing Customary Legal Regime Regarding International Pollution. In Daniel Barstow Magraw (Ed.), International Law and Pollution (61-89). University of Pennsylvania Press. https://doi.org/10.9783/9781512804003-005.

Field, C.B. et al. (2014). Climate Change 2014: Impacts, Adaptation, and Vulnerability: Volume 1, Global and Sectoral Aspects (Working Group II Contribution to the IPCC Fifth Assessment Report). Intergovernmental Panel on Climate Change. https://www.ipcc.ch/report/ar5/wg2/.

Fisheries Jurisdiction (United Kingdom vs Norway), "Judgment" (18 December 1951) ICJ Reports No 116.

Follesdal, A. (2022). The Significance of State Consent for the Legitimate Authority of Customary International Law. In Panos Merkouris, Jörg Kammerhofer, & Noora Arajärvi (Eds.) The Theory, Practice, and Interpretation of Customary International Law (105-136). Cambridge University Press. https://doi.org/10.1017/9781009025416.007.

Gelles, D. (2022, November 08). After Decades of Resistance, Rich Countries Offer Direct Climate Aid. The New York Times. https://www.nytimes.com/2022/11/08/climate/loss-and-damage-cop27-climate.html.

Good, J. 2018. Carbon Pricing in Canada. Library of Parliament. https://bdp.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/InBriefs/PDF/2018-07-e.pdf

Government of Canada. (2022) Global Greenhouse Gas Emissions. https://www.canada.ca/content/dam/eccc/documents/pdf/cesindicators/global-ghg-emissions/2022/global-greehouse-gas-emissions-en.pdf.

Grassie, S. (2019). Canada and the Global Pact for the Environment: A Strategic Analysis. Journal of Environmental Law & Practice. 32(2): 237-280. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369251.

Greenhouse Gas Pollution Pricing Act, SC 2018 C 12. (2018). https://laws-lois.justice.gc.ca/eng/acts/g-11.55/.

Gupta J., & Schmeier S. (2020). Future Proofing the Principle of No Significant Harm. International Environmental Agreements Politics, Law and Economics. 20: 731-742. https://link.springer.com/article/10.1007/s10784-020-09515-2.

Handl, G (2008). Transboundary Impacts. In Daniel Bodansky, Jutta Brunée & Ellen Hey, (Eds.) The Oxford Handbook of International Environmental Law (532-549). Oxford Handbooks in Law.

Factum of the Attorney General of Ontario. In the Matter of the Greenhouse Gas Pollution Pricing Act, Bill C-74 Part 5 and in the Matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal for Saskatchewan Under the Constitution Questions Act, 2012, C c-29.01. https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38781/FM010_Appellant_Attorney-General-of-Ontario.pdf.

International Law Association. (2000) Committee on Formation of Customary (General) International Law. London Conference. https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf.

Kiss, A., & Shelton, D. (2007). Guide to International Law. Kininklijke Brill NV.

LeBel, L., Justice. (2014) A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law. University of New Brunswick Law Journal. 65(3): 2-20. https://journals.lib.unb.ca/index.php/unblj/article/view/29103/18825242287.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep 226.

Mayer, B. (2018). The Place of Customary Norms in Climate Law: A Reply to Zahar. Climate Law. 8(3-4): 261-274.

https://benoitmayer.com/wp-content/uploads/2018/11/Reply-to-Zahar.pdf.

Mayer, B. (2016) The Relevance of the No-Harm Principle to Climate Change Law and Politics. Asia-Pacific Journal of Environmental Law. 19: 79-104. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2914121.

Mayer, B. (2022) International Law Obligations on Climate Change Mitigation. Oxford University Press.

Merrill, T.W. (1997). Golden Rules for Transboundary Pollution. Duke Law Journal. 46: 931-1019. https://doi.org/10.2307/1372915.

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), [1986] ICJ Rep 14.
Montreal Protocol on Substances that Deplete the Ozone Layer, No. 26369, January 1, 1989. https://web.archive.org/web/20130420100237/http://ozone.unep.org/new_site/en/Treaties/treaties_decisions-hb.php?sec_id=5.

Nevsun Resources Ltd. v Araya, 2020 SCC 5.

North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) “Reports of Judgment, Advisory Opinions and Orders” [20 February 1969] ICJ Rep 327.

Nuclear Tests Case (Australia v. France), [1974] ICJ Rep 253.

Nuclear Tests Case (New Zealand v. France), [1974] ICJ Rep 457.

Nucup, N.B. (2019). Infallible or Final?: Revisiting the Legitimacy of the International Court of Justice as the “Invisible” International Supreme Court. The Law and Practice of International Courts and Tribunals 18: 145-162. https://brill.com/view/journals/lape/18/2/article-p145_1.xml?language=en.

Paris Agreement, No. 54113, November 4, 2016. https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

Peterson, N. (2017). The International Court of Justice and the Judicial Politics of Identifying Customary International Law. European Journal of International Law. 28(2): 357-385. https://doi.org/10.1093/ejil/chx024.

Plumer, B. (2021, July 14). Europe is proposing a Border Carbon Tax. What Is It and How Will It Work? The New York Times. https://www.nytimes.com/2021/07/14/climate/carbon-border-tax.html.

Pomerleau, A., & Dolan, E. (2021), Carbon Pricing and Regulations Compared: An Economic Explainer. Niskanen Center. https://www.niskanencenter.org/carbon-pricing-and-regulations-compared-an-economic-explainer/#:~:text=The%20two%20leading%20options%20for,performance%20standards%20and%20technology%20mandates.

Reference Greenhouse Gas Pollution Pricing Act, 2021 SCC 11.
Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case, (New Zealand v. France), [1995] ICJ Rep 288.
Rio Declaration on Environment and Development, A/Conf.151/26 (Vol.1), June 16, 1992. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

Sands, P. (2003) Principles of International Environmental Law. Cambridge University Press.

Simlinger F. & Mayer, B. (2019). Legal Responses to Climate Change Induced Loss and Damage. In Reinhard Mehcler, Laurens M. Bouwer, Thomas Schinko, Swenja Surminski & JoAnne Linnerooth-Bayer (Eds.), Loss and Damage from Climate Change: Concepts, Methods and Policy Options (179-203). Springer Nature Switzerland AG.

Slama, J.L. (1990). Opinio Juris in Customary International Law. Oklahoma City University Law Review. 15(2): 603.

Statute of The International Court of Justice, April 18, 1946. https://www.icj-cij.org/en/statute.

Stephens T. (2009) International Courts and Environmental Protection. Cambridge University Press.

Stiglitz, J.E. (2019). Addressing Climate Change Through Price and Non-Price Interventions European Economic Review. 119: 594-612. https://doi.org/10.1016/j.euroecorev.2019.05.007.

Stone, C.D. (2004). Common but Differentiated Responsibilities in International Law. American Journal of International Law. 98: 276-301. doi:10.2307/3176729.

Takano, A. (2018). Due Diligence Obligations and Transboundary Environmental Harm: Cybersecurity Applications. Laws. 7(4): 36-48. https://doi.org/10.3390/laws7040036.

The Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), [2010] ICJ Rep 14.

The Corfu Channel Case (Assessment Of The Amount of Compensation Due From The People's Republic of Albania To The United Kingdom Of Great Britain And Northern Ireland) [1949] ICJ Rep 4.

The Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), [1997] ICJ Rep 7.

Trail Smelter Case (United States, Canada), [1941] IJC (International Joint Commission).

United Nations Convention on the Law of the Sea, No. 31363, December 10 1982. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

United Nations Convention on the Non-Navigational Uses of International Watercourses, No 52106, May 21, 1997.

https://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf.

United Nations Framework Convention on Climate Convention, No. 30822, March 21, 1994. https://unfccc.int/.

UN ILC, Draft conclusion in identification of customary international law, with commentaries, seventieth session, A/73/10, (2018). https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.

Van Ert, G. (2008). Using International Law in Canadian Courts, 2nd ed. Irwin Law.

Wood, M. (2014) Second report on identification of customary international law, sixty-sixth session. International Law Commission A/CN.4. https://legal.un.org/ilc/documentation/english/a_cn4_672.pdf.

World Bank. Pricing Carbon. World Bank. https://www.worldbank.org/en/programs/pricing-carbon.

World Health Organization. Climate Change, World Health Organization. https://www.who.int/health-topics/climate-change#tab=tab_1.

1991 Convention on Environmental Impact Assessment in a Transboundary Context, No. 34028, September 10, 1997. https://unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf.

Hydro-hegemony and transboundary conflict resolution: the case of Kyrgyzstan and Uzbekistan

Nodir Ataev[*], Queen's University

Abstract

Uzbekistan, which has been traditionally viewed as the hydro-hegemon in the Amu Darya and Syr Darya river basins, has been historically opposed to the construction of dams by its neighbors Kyrgyzstan and Tajikistan on these rivers. Following the death of President Islam Karimov in 2016, Uzbekistan's policy changed, and the country started to redesign its policy framework with Kyrgyzstan, signing a historic border demarcation deal and an agreement on the joint construction of the Kambar-Ata 1 Hydroelectric Power Plant.

---

[*]Biography: Nodir Ataev is a PhD student in the Global Development Studies program at Queen's University. He received a Specialist Diploma (2011) from the Alatoo International University in Bishkek, Kyrgyzstan, and a Master of Arts (2013) degree from Central European University in Budapest, Hungary. He has ten years' experience in the development aid sector, having worked for the Organization for Security and Co-operation in Europe (OSCE), ACTED, and Family Health International 360 (FHI 360). Ataev's research focuses on examining transboundary water relations from a political-economy perspective in the Fergana Valley, a densely populated region divided between the modern states of Kyrgyzstan, Tajikistan, and Uzbekistan. He fluently speaks five languages and is currently learning French, his sixth language.

Biographie: Nodir Ataev est doctorant dans le programme d'études sur le développement mondial à l'université Queen's. Il a obtenu un diplôme de spécialiste (2011) à l'université internationale Alatoo de Bichkek, au Kirghizistan, et un master en arts (2013) à l'université d'Europe centrale de Budapest, en Hongrie. Il a dix ans d'expérience dans le secteur de l'aide au développement, ayant travaillé pour l'Organisation pour la sécurité et la coopération en Europe (OSCE), ACTED, et Family Health International 360 (FHI 360). Les recherches d'Ataev se concentrent sur l'examen des relations transfrontalières en matière d'eau d'un point de vue politico-économique dans la vallée de Fergana, une région densément peuplée divisée entre les États modernes du Kirghizistan, du Tadjikistan et de l'Ouzbékistan. Il parle couramment cinq langues et apprend actuellement le français, sa sixième langue.

Several developments, including internal challenges and changes in Uzbekistan's bargaining power against Kyrgyzstan, pushed the former to redefine its hydro-hegemony. Based on an analysis of bilateral accords, official press releases, commentary by officials coupled with quantitative data collected from secondary sources, I attempt to demonstrate that hydro-hegemony can effectively explain transboundary relations between the two countries both before and after 2016. More broadly, I argue that as the power asymmetry changes, hydro-hegemons are forced to revise their discourses.

Keywords: Hydro-hegemony; transboundary water governance; Syr Darya; Kyrgyzstan; Uzbekistan

Résumé

L'Ouzbékistan, traditionnellement considéré comme l'hydro-hégémon des bassins des fleuves Amu Darya et Syr Darya, s'est toujours opposé à la construction de barrages par ses voisins, le Kirghizistan et le Tadjikistan, sur ces fleuves. Après la mort du président Islam Karimov en 2016, la politique de l'Ouzbékistan a changé et le pays a commencé à redéfinir son cadre politique avec le Kirghizistan, signant un accord historique sur la démarcation de la frontière et un accord sur la construction conjointe de la centrale hydroélectrique de Kambar-Ata 1. Plusieurs événements, notamment des défis internes et des changements dans le pouvoir de négociation de l'Ouzbékistan face au Kirghizstan, ont poussé l'Ouzbékistan à redéfinir son hégémonie sur l'hydroélectricité. Sur la base d'une analyse des accords bilatéraux, des communiqués de presse officiels, des commentaires des fonctionnaires et des données quantitatives recueillies auprès de sources secondaires, je tente de démontrer que l'hydro-hégémonie peut expliquer efficacement les relations transfrontalières entre les deux pays avant et après 2016. Plus généralement, je soutiens qu'à mesure que l'asymétrie de pouvoir change, les hydro-hégémons sont contraints de réviser leurs discours.

Mots-clés: Hydro-hégémonie ; gouvernance de l'eau transfrontalière ; Syr Darya ; Kirghizistan ; Ouzbékistan

Uzbekistan vehemently opposed the construction of dams on transboundary rivers in upstream Kyrgyzstan and Tajikistan for over quarter of a century. Then, after the death of independent Uzbekistan's first President, Islam Karimov, in 2016, the country started to negotiate a new framework with its neighbors on managing transboundary rivers. Not only did Uzbekistan stop criticizing its neighbors' plans to build large dams, but in January 2023 signed a roadmap agreement with Kyrgyzstan to finance the construction of the Kambar-Ata 1 Dam and Hydroelectric Power Station on the Naryn River.

In this paper, I attempt to explain Uzbekistan's redefinition of its policy towards upstream Kyrgyzstan through the lens of hydro-hegemony. Employing Zeitoun and Warner's (2006) framework of hydro-hegemony and Roseberry's (1994) conceptualization of hegemony as a problematic and fragile process, I analyze Uzbekistan's water policy towards Kyrgyzstan along the Syr Darya River since 2016. I have chosen 2016 as a break point because following the death of President Karimov, Uzbekistan almost immediately started to redefine its foreign policy, including its policy regarding managing transboundary rivers. What drove Uzbekistan to sign a border deal and agree to the construction of a mega dam upstream in Kyrgyzstan after years of dispute? How can an analytical approach based on hydro-hegemony and power asymmetry help explain Uzbekistan's reworked water policy framework? These are the main questions I examine in this article.

There is a rich body of literature on the hegemonic and counter-hegemonic strategies in transboundary river basins. The Nile River basin is one of the most studied hydro-hegemonic configurations. In the Nile basin, Egypt is usually viewed as the hegemon, with Ethiopia depicted as a weaker riparian or a "counter-hegemon". Rather like Uzbekistan, Egypt was forced to reconsider its hegemony after it faced a "fact on the ground" challenge, namely the construction of the Grand Ethiopian Renaissance Dam (GERD) (İlkbahar & Mercan, 2023). While Egypt initially reacted to the project aggressively, even threatening to bomb it, once the GERD became a *fait accompli* the country revised its position and acknowledged Ethiopia's right to use the waters of the Nile and eventually signed the Declaration of Principles with Ethiopia and Sudan (Tekuya, 2020). As in the case of

Egypt, Uzbekistan was forced to revise its hydro-hegemony because of changes in power asymmetries, albeit the two cases differ in many respects. While in both cases the dominant hydro-hegemony was challenged and had to be revised due to the realities on the ground, a hydro-hegemon changing its policy radically as in the case of Uzbekistan is an exception rather than the rule. Therefore, Uzbekistan presents a unique case.

The primary research method for this study has been a review of the limited extant literature coupled with political discourse analysis. I have employed political discourse analysis using a qualitative approach, paying close attention to the speeches of Kyrgyz and Uzbek high-level government figures, bilateral accords, official press releases, and news articles published before and after 2016. I have primarily focused on the speeches and press releases by high-level government officials such as presidents, prime ministers, as well as ministers and their direct subordinates. For the media coverage, I focused on articles that appeared in state media and independent publications with established readership such as Radio Free Europe/Radio Liberty and Eurasianet. I have also used quantitative data collected from secondary sources.[13]

I argue that a hydro-hegemony approach can help explain Uzbekistan's reworked water framework, and that hydro-hegemons revise their stance as their bargaining power changes, meaning hydro-hegemonic processes are continually contested. Through this finding, I aim to contribute to the field of transboundary water management by demonstrating how the concepts of hydro-hegemony and power imbalance can be employed to better analyze transboundary water relations.

The Syr Darya River Basin

[13] An important caveat should be pointed out here: when analyzing transboundary issues, official sources should be treated with a pinch of salt (Zeitoun & Allan, 2008). In addition, data are not always available or are only partially available on many issues that have a bearing on an analysis of transboundary relations in Central Asia.

Tensions over water have remained high in Central Asia, especially in the Fergana Valley, a densely populated region divided between the modern states of Uzbekistan, Kyrgyzstan, and Tajikistan (Figure 1). Water is a vital resource in the region, as agriculture is the backbone of the economy of the Fergana Valley (Mosello, 2008). The valley serves as a major source of food for Central Asia and many families living in the region depend on agriculture both as a source of income and sustenance.

Figure 1

The Fergana Valley

Source: prepared by the author based on a German map. Wikimedia Commons. Nataev, CC BY-SA 4.0

The Syr Darya and the Amu Darya lie at the heart of most water disputes in Central Asia. In this article, I focus on transboundary water relations in the Syr Darya river basin, which generally flows west from Kyrgyzstan through Uzbekistan, Tajikistan, and

Kazakhstan into the Aral Sea.[14] The Syr Darya is formed by the confluence of the Naryn and Kara Darya rivers, both of which start in Kyrgyzstan.

Following the dissolution of the USSR, centralized water, energy, and land management relations broke down, leaving the Central Asian states to agree on how to distribute resources around the new national borders. Even before the break-up of the Soviet Union there were disputes over water resources between the Central Asian republics, as there had been strong intra-republic tensions over shared resources even during the Soviet period (Roberts, 2022). However, they were not openly discussed, and Russia played the role of mediator and, rather literally, Big Brother.[15] Still, transboundary conflicts have become more frequent and more violent in the years following independence. Though some efforts have been undertaken, the countries have so far failed to set up an effective framework for water allocation and prevention of conflict (Bernauer & Siegfried, 2012; Menga, 2017).

Water has often been singled out as a major driver of conflict in the region (Mosello, 2008; Smith, 1995). Indeed, Kyrgyzstan, Tajikistan, Uzbekistan, and Kazakhstan have experienced years of dispute over water allocation. Most recently, in late April 2021 a dispute over irrigation water triggered a military confrontation between Kyrgyzstan and Tajikistan, resulting in the death of 55 people. During a dramatic escalation of the conflict in September 2022, over 130 people were killed (Bifolchi & Boltuc, 2023). This is not to say that the clashes between Kyrgyzstan and Uzbekistan can be categorized as a “water war”. While it is beyond the scope of this research, it is important to note that other factors such as disputed borders, rising nationalism, and politics have played a far more important role in intra-state tensions in the region.

[14] In one of the worst anthropogenic global environmental disasters, the Aral Sea has largely dried up, further complicating water relations in the region. The sea, which once was the world’s fourth largest body of inland water, started to shrink in the 1960s as the Soviets diverted the waters of the Syr Darya and the Amu Darya for irrigation purposes.

[15] The first line of the anthem of the Uzbek SSR read “Peace be upon you, Russian people, our great brother”.

In Central Asia, the competing demands for irrigation and hydropower are a further source of conflict. Kyrgyzstan and Tajikistan, which are upstream countries, have sought to construct dams and other hydroelectric power projects to meet their growing energy needs and generate income by selling excess electricity (Menga, 2017). Uzbekistan, along with Kazakhstan, is a downstream country and relies heavily on the water from these rivers for agriculture and other industries (Figure 2).[16] Kyrgyzstan and Tajikistan prefer to utilize the waters of the Amu Darya and Syr Darya when demand for hydropower production is highest, particularly in the winter to spring season. Kazakhstan and Uzbekistan, on the other hand, are interested in getting enough water for irrigation during the growing season, which lasts from April to September (Bernauer & Siegfried, 2012). Both Uzbekistan and Kazakhstan have argued – albeit the latter less vigorously than the former – that dams constructed upstream can significantly impact the water flow and quality downstream, having serious consequences for agriculture and water safety in downstream countries. In this paper, I focus on Kyrgyzstan and Uzbekistan and to some extent Tajikistan, but not on Kazakhstan. This is because compared to Uzbekistan, Kazakhstan is less reliant on agriculture and thus is less sensitive to water variability.

[16] It should be noted here that because of the way the Central Asian borders were drawn up by the Soviets, Uzbekistan is both upstream and downstream of Tajikistan with respect to the Syr Darya.

Figure 2

Aral Sea Watershed

Source: Wikimedia Commons. Shannon1, CC BY-SA 4.0

Until 2016, Uzbekistan's prevailing strategy against the dam projects was based on several discourses, including concerns over water scarcity, environmental degradation, and the potential for conflict between upstream and downstream countries (Menga, 2017). For years the country advocated for cooperation and the equitable sharing of water resources in the region, as well as the use of alternative sources of energy that do not depend on the construction of dams. Uzbekistan often resorted to drastic measures, including cutting gas supplies to Kyrgyzstan, and launching a long-standing campaign against the construction of dams upstream (ibid.). Uzbekistan's calls for sharing water equitably and using alternative sources of energy are rather hypocritical, especially given the

extremely wasteful nature of cotton irrigation in the country (see, for example, Mollinga & Veldwisch, 2016).

Against this backdrop, in 2022, Kyrgyzstan and Uzbekistan signed agreements on delimitating disputed parts of the Kyrgyz-Uzbek border and on the joint management of a water reservoir located on the border. As part of the border demarcation settlement, Kyrgyzstan agreed to transfer the land under the Andijan Water Reservoir[17] to Uzbekistan in exchange for land elsewhere (Rickleton, 2023b). The reservoir, which has an area of about 56 square kilometers, is on the Kara Darya River, one of the source rivers of the Syr Darya. The reservoir was completed in 1983 and had been disputed by Kyrgyzstan and Uzbekistan since the two countries gained independence in 1991. The two countries also disputed the ownership of the much smaller Kasan-Sai Water Reservoir,[18] which is also in the Fergana Valley (Shustov, 2016). The reservoir was built on Kyrgyz SSR territory with Uzbek SSR money on the Kasan-Sai River, another tributary of the Syr Darya. Since its construction, the reservoir has been de facto controlled by Uzbekistan. In fact, Uzbekistan had troops stationed there until 2016 (Joldoshev, 2017). While in authoritarian Uzbekistan there was hardly any public discussion of the 2022 border deal, in neighboring Kyrgyzstan, the issue became a flashpoint for domestic opposition. Kyrgyz authorities pushed the accord through parliament without disclosing the particulars of the agreement to the public, which outraged many citizens and sparked demonstrations in the capital and the region where the Andijan Reservoir is located. Over 20 people who opposed the agreement were jailed on dubious charges and independent media came under unprecedented pressure (Rickleton, 2023b). Kyrgyzstanis who have opposed the border deal have maintained that not only does it deprive Kyrgyz farmers of water, but it also significantly weakens Kyrgyzstan's bargaining power against Uzbekistan (Mamatzhanova, 2021).

These developments since 2016, including the border deal between Kyrgyzstan and Uzbekistan and the latter's agreement to jointly build the Kambar-Ata 1 Dam in the territory of the former, have not yet

[17] In Kyrgyzstan, the reservoir is called Kempir-Abad.
[18] Formerly called the Orto-Tokoy Water Reservoir.

been closely studied. Moreover, water-related conflicts in the Fergana Valley are often analyzed under resource scarcity and "water wars" frameworks (Sievers, 2001). Such approaches have been criticized for being misguided and unsupported by the available evidence (Barnett, 2000; Selby et al., 2022; Toset et al., 2000). For one thing, they disregard power relations as well as cultural and political drivers of conflict (Burgess et al., 2016). For instance, scarcity-based analysis often fails to account for power asymmetry lying at the core of conflicts over water. It has been argued that in transboundary river basins power and hegemony are more important than international water law, water sharing ethics, or the geographical location of competing riparian states (Zeitoun & Allan, 2008).

Only a few scholars have used alternative frameworks such as power relations and hegemony when analyzing transboundary water interactions in Central Asia (Menga & Mirumachi, 2016; Zhupankhan et al., 2017; Wegerich, 2008; Zinzani & Menga, 2017). Filippo Menga's 2017 book *Power and Water in Central Asia* is a notable exception, as it offers a comprehensive analysis of overt and covert power shaping transboundary relations in the region. However, much has changed in the region since the book's publication in 2017.

Conceptual Framework

Power and Hegemony

Alternatives to scarcity-based and conflict-based analyses of transboundary water relations put power and hegemony at the center of analysis. The notions of power and hegemony are closely interrelated. Power, despite being an increasingly important issue in the social sciences, is a contested concept, and there is no universally accepted definition of it (Rein, 2017). For the purposes of this paper, I use the conceptualization of power offered by Menga (2016) as "the ability or capacity of an actor to get a desired outcome through coercive, bargaining, and ideational means" (p. 405). Menga's conceptualization of power is based on the work of Cascão and Zeitoun (2010), who applied Steven Luke's original work on the three faces of power to water politics. Cascão and Zeitoun distinguish between four forms of power, namely, geographical,

material, bargaining, and ideational/discursive power (Rein, 2017). Geographical power refers to the geographical position of a riparian state; material power includes a riparian country's military strength, geographic position, size, population, and economy; bargaining power refers to the ability of a riparian to define political agendas; finally, ideational or discursive power has to do with a riparian country's ability to impose an advantageous discourse or ideology. A related concept to power is hegemony, which is variously defined, but is basically used to denote some sort of dominance or leadership of one group over another. The term has been used in its modern sense since at least the 19th century (Rosamond, 2020). It was the Italian, Marxist thinker Antonio Gramsci who popularized the concept by using it to explore the way in which dominant groups maintain their power over subordinate groups through the exercise of cultural and ideological influence as well as economic and political power (Femia, 1987).

Hegemony should not be confused with domination. Coercion plays a considerably less important role than the active consent of subordinate groups in a hegemonic setting (Wright, 2010). Zeitoun and Warner (2006) differentiate between hegemony, which is "leadership buttressed by authority", and dominance, which they define as "leadership buttressed by coercion" (p. 438). Hegemony is often viewed as "a problematic, contested, political process of domination and struggle" (Roseberry, 1994, p. 358). As Roseberry argues, for Gramsci hegemony was indeed a fragile process. Gramsci demonstrated how the interactions between governing and subaltern groups are characterized by contention, struggle, and argument. This idea is similar to the idea of a fragile state, or the fact that "the illusion of cohesion and unitariness created by states is always contested and fragile" (Sharma & Gupta, 2006, p. 11). The case of Uzbekistan's hydro-hegemony yields support to Roseberry's interpretation of Gramsci's conceptualization of hegemony, as will be demonstrated below.

According to Menga (2016), power is a means to an end, with the end being "the achievement and retention of hegemony" (p. 409). Applying the concepts of power and hegemony, scholars have developed the framework of hydro-hegemony, to which I turn now.

Hydro-Hegemony

Hydro-hegemony is largely based on the concept of hegemony, as developed by Gramsci. Just as there are many different notions of hegemony, there are different conceptualizations of hydro-hegemony. Zeitoun and Warner, who offer one of the most comprehensive conceptualizations of the framework of hydro-hegemony, originally defined it as "hegemony at the river basin level, achieved through water resource control strategies such as resource capture, integration and containment" (Zeitoun & Warner, 2006, p. 435). Later, they added that hegemony depends on "the skilful use of hard and soft forms of power, between formally equal parties such as nation states" (Zeitoun & Allan, 2008, p. 3). Menga defines hydro-hegemony as "the success of a basin riparian in imposing a discourse, preserving its interests and impeding changes to a convenient status quo" (Menga, 2017, p. 39). Just as for Gramsci hegemony was not simply based on force or coercion but more on the ability of a dominant group to shape ideology and consciousness, hydro-hegemony also focuses on ideology and knowledge construction rather than coercion or domination.

A parallel can be drawn between imposing a discourse and the general paradigm of state regulation as outlined by Corrigan and Sayer (1985): states support some discourses, while at same time supressing and undermining others. Moreover, disputing parties usually present their discourse in contradistinction to that of the opposing side and use moralistic language (Hanke & Gray, 2006). Indeed, both Kyrgyzstan and Uzbekistan have been "encouraging" and "suppressing" conflicting discourses on managing the transboundary rivers that flow through their territories. Until 2016 Uzbekistan actively used several tactics to promote its own discourse on transboundary water management, including by organizing conferences, seeking the international community's support (including at the UN General Assembly), and supporting research into potential undesirable consequences of its neighbors' water ambitions. Kyrgyzstan, on the other hand, has supported a discourse on the unjust status quo that Uzbekistan has maintained since Soviet times and has tried to portray the Kambar Ata-1 Dam project as an important national project (Menga, 2017). Such discourses can be termed "hegemonic projects" (Jessop, 2016).

Exploring transboundary water relations as hegemonic projects is useful for two main reasons. First, in practice hydro-hegemons rarely resort to force and violence, even when competing parties are not equal (Zeitoun & Warner, 2006). Second, hydro-hegemony can help explain how and why riparian countries continually change their hegemonic projects and create new frameworks. The second argument is closely aligned with Roseberry's (1994) interpretation of hegemony, which calls for viewing it as a contested and continual process of domination and struggle.

Uzbekistan's Hydro-Hegemony

Uzbekistan has traditionally been considered the hegemon in both the Amu Darya and Syr Darya river basins, partly due to its stronger military, large population, large irrigated area, and its preservation of advantageous water allocation schemes established in Soviet times (Bernauer & Siegfried, 2012; Menga, 2016). In addition, Uzbekistan has been a hydro-hegemon because of its stronger bargaining power stemming from its natural gas reserves, which the upstream countries of Kyrgyzstan and Tajikistan lack.[19] However, there is some dispute as to whether Uzbekistan is actually a hydro-hegemon in the region (Wegerich, 2008).

In any case, referring back to Menga's definition of hydro-hegemony, Uzbekistan has 1) imposed certain discourses or hegemonic projects (for instance, by highlighting how dams could lead to water scarcity, environmental degradation, and conflict and by calling on its neighbors to explore alternative sources of energy); 2) strived to protect its interests (by demanding water for its irrigation during the harvest season, defending its territory, seeking to keep or obtain control of key water objects); and 3) fought against changes to the status quo (namely, water sharing arrangements developed in Soviet times). I discuss each in more detail below.

Imposing a Discourse

[19] In Kyrgyzstan, domestic natural gas production accounts for only two percent of the country's natural gas needs (Kalybekova, 2013).

Uzbek politicians have been historically critical of the Rogun Dam being built on the Amu Darya by Tajikistan and have used their bargaining power to influence other countries such as Russia interested in financing the project. On several occasions, Uzbekistan blocked the transportation of construction materials meant for the Rogun Dam through its territory (Shustov, 2016). Uzbekistan has also opposed the construction of the Kambar-Ata 1 Dam on the Naryn River being built by Kyrgyzstan, albeit somewhat less vocally. Menga (2017) argues that this is primarily because Kyrgyzstan already has a cascade of dams on the Naryn, meaning the river is already regulated and that Kyrgyzstan already possesses some bargaining power. Indeed, about 90 percent of the mean annual flow of the Syr Darya is regulated by dams (Bernauer & Siegfried, 2012). Nevertheless, Uzbekistan has taken several measures to hinder the completion of the project, such as pressuring Kyrgyzstan to abandon the project by cutting gas supplies to the country.

Protecting Own Interests

Uzbekistan has forcefully defended its national interests, including by exercising what has been termed material power in hydropolitics. Tashkent frequently demonstrated its military might to its neighbors. Just before the death of long-time President Karimov in September 2016, Kyrgyzstan accused Uzbekistan of deploying its troops to the Kyrgyz-Uzbek border, close to the disputed Kasan-Sai Water Reservoir (Rickleton, 2023). The country has also used its bargaining and ideational power to secure enough water for its farmers. Thus, it is no surprise that Uzbekistan has strived to preserve the Soviet water division schemes, which allocated most of the waters of the Syr Darya to the country.

Maintaining the Status Quo

Water sharing arrangements in Central Asia were centrally managed by Russia during Soviet times. The Soviets allocated respectively 0.4 percent and 0.5 percent of the waters of the Amu Darya and Syr Darya rivers to Kyrgyzstan, while earmarking 29.6 percent of the Amu Darya and 10.4 percent of the Syr Darya waters for Uzbekistan (Kalybekova, 2013). Following the disassembly of the USSR, Uzbekistan has largely retained the status quo on using the waters of

the two rivers. This has meant that the country still receives a large share of water from the two rivers to irrigate its cotton fields and other crops, as well as to supply drinking water to cities and towns.

Reworked Hegemony

Uzbekistan's foreign policy has undergone significant changes since Karimov's death in 2016. His successor, President Shavkat Mirziyoyev, has implemented a range of reforms aimed at opening up the country and engaging more with the international community. Under Karimov's leadership, Uzbekistan had a highly isolationist foreign policy, which resulted in strained relations with its neighboring countries. Karimov is said to have been personally responsible for the country's aggressive campaign against the construction of large dams in upstream Kyrgyzstan and Tajikistan.

I argue that Karimov's death is not the only or even the primary reason that led Uzbekistan to rework its hydro-hegemony. As will be shown below, two other developments since 2013, namely severe energy crises in Uzbekistan and the weaking of the country's gas leverage over its neighbors have weakened Uzbekistan's bargaining power as a hydro-hegemon. However, these developments do not mean that Uzbekistan is no longer a hegemon. Rather, the country has simply redefined its hegemonic project (Table 1).

Table 1

Uzbekistan's Hydro-Hegemony Before and After 2016

	Pre-2016	**Post-2016**
Imposing a discourse	• Dams lead to water scarcity, environmental degradation, and conflict • Neighbors need to explore	• We need to build dams jointly to ensure energy security

	alternative sources of energy	
Preserving its intrests	• Water for irrigation (when needed) • Land • Control over key objects (reservoirs, canals, rivers)	• Water for irrigation (when needed) • Land • Control over key objects (reservoirs, canals, rivers) • Electricity and gas for citizens
Maintaining the status quo	• Soviet water division	• Soviet water division with some unavoidable compromises

Before Shavkat Mirziyoyev became president in 2016, Uzbek officials had opposed the construction of the Kamabar-Ata 1 Dam on the Naryn River by Kyrgyzstan. Uzbekistan demanded that an external examination be conducted into the project and its possible impact on the region. In 2012, Deputy Prime Minister Rustam Azimov, who was directly supervised by the then Prime Minister Mirziyoyev, stated the following about the Kambar-Ata 1 and Rogun dams:

> Projects for investment cooperation in the construction of large hydropower structures on rivers flowing through the territories of several countries should undergo an authoritative and independent international examination. [Such an examination] should contain an assessment of the impact [of the projects] on the state of regional ecology, the careful use of natural resources, and the dangers of a technogenic nature (Beishenbek kyzy, 2012).

Once Mirziyoyev became president in 2016, Uzbekistan changed its discourse (Shustov, 2016). In September 2017, Mirziyoyev publicly stated that Uzbekistan was ready to support the construction of the Kamabar-Ata 1 Dam. During a visit to the Kyrgyz capital Bishkek, Mirziyoyev said both Kyrgyzstan and Uzbekistan "needed" the Kambar-Ata 1 Hydroelectric Power Plant:

> We have reached a clear agreement. [President] Almazbek Sharshenovich [Atambayev] said that no power station will be built without the participation of Uzbekistan. I completely agree, and we will take active participation [in them], both financially and resource-wise, committing to whatever participation as needed. We will jointly build the Kambar-Ata Station. … We must proceed carefully so that it is beneficial for the two sides (Elkeeva, 2017).

Following Karimov's death, Uzbekistan also pulled back its forces from the Kyrgyz-Uzbek border. In October 2017, the two countries signed an agreement on the joint use of the disputed Kasan-Sai Reservoir. According to the agreement, Kyrgyzstan is now the undisputed owner, but the two counties will jointly use it, with maintenance costs shared between the two according to water usage: Uzbekistan will use 90 percent of the reservoir's water and thus cover most of the maintenance costs (Joldoshev, 2017). Before 2017, not only had Uzbekistan used the reservoir and guarded it with its armed forces but had also laid claim to its ownership.

While it is true that Karimov was personally opposed to Kyrgyzstan's and Tajikistan's hydro projects, his death does not fully explain Uzbekistan's change of direction. For one thing, current President Mirziyoyev, who served as Prime Minister from 2003 until Karimov's death, was also highly critical of neighboring countries' hydro projects. In fact, from 2007 until Karimov's death in 2016 Mirziyoyev engaged in a bitter epistolary debate with his Tajik counterpart about the merits and dangers of the Rogun Dam (Menga, 2017; Shustov, 2016). In a 2016 letter to Tajik Prime Minister Kokhir Rasulzoda, Mirziyoyev warned that the Rogun Dam posed a threat to the entire Central Asian region. Interestingly, Mirziyoyev's letter, which was originally published on the website of the Ministry of Foreign Affairs of Uzbekistan, has since been deleted (Podrobdno, 2016). A major development that can help explain Uzbekistan's changing discourse

has to do with an internal challenge the country is facing, namely severe energy shortages.

Energy Crises

For the past few years Uzbekistan has experienced gas and electricity shortages, especially in winter months. This is largely due to decades of neglect, mismanagement, and large-scale corruption (RFE/RL, 2023). The 2022–2023 winter season was particularly challenging, with entire cities across the country left with no electricity, heating, or gas for several weeks. Even those living in the capital city of Tashkent, who had been spared during similar crises in the past, experienced gas and electricity cuts. In January 2023, the country decided to import Russian gas for the first time since gaining independence.

Considering these challenges, one could argue that the government of Uzbekistan decided it could benefit from additional electricity that the Kambar-Ata 1 Hydroelectric Power Plant could produce if completed. Some local experts have indeed argued that Uzbekistan stands to benefit from additional electricity generated by Kambar-Ata 1 (Elkeeva, 2017). The plant, once completed, is expected to generate 1,900 MW, allowing Kyrgyzstan to export electricity (Menga, 2017).[20] More broadly, Jalilov et al. (2013) have argued that if there is political will, both upstream and downstream countries can benefit from additional hydroelectricity produced in the region. Uzbekistan has not only stopped criticizing Kambar-Ata 1 but has even offered to co-finance the construction of the project. Before 2017, the idea of Uzbekistan agreeing to jointly build the dam “would have seemed unimaginable” (Rickleton, 2023a). As Menga argued in 2017, Kyrgyzstan’s efforts to counter Uzbekistan’s hegemony had been largely ineffective until then. Uzbekistan has also changed its discourse on the Rogun Dam, signing a memorandum of understanding with Tajikistan in June 2022 and committing to buy electricity once the power plant becomes operational (Eurasianet, 2022). A year earlier, Uzbekistan had agreed to jointly build two hydropower plants on the Zarafshon River, a former tributary of the

[20] For comparison, the Toktogul Power Plant, Kyrgyzstan’s biggest hydro power plant in operation, has a capacity of 1,200 MW.

Amu Darya that now ends in the desert (Hashimova, 2021). Neither Kyrgyzstan nor Tajikistan upped its counter-hegemonic discourse after 2016, offering further support to the proposition that Uzbekistan's revised hegemony was most likely caused by energy shortages in the latter and other factors. One of these factors – particularly with respect to Kyrgyzstan – is the loss of an important leverage: natural gas.

Weakening Gas Power

Another important development that likely influenced Uzbekistan's policy towards Kyrgyzstan has to do with Uzbekistan's reliance on natural gas imports from Kyrgystan. Kyrgyzstan, like Tajikistan, has been historically dependent on imports of natural gas from Uzbekistan. Especially during the rule of Karimov, Uzbekistan frequently resorted to cutting gas supplies to its neighbor to flex its muscles, which caused serious energy shortages in Kyrgyzstan (Menga, 2017).

However, the situation started to change in 2013, when Kyrgyzstan sold its natural gas network to Gazprom of Russia for the symbolic amount of 1 (one) US dollar (Kalybekova, 2013). In return, Gazprom pledged to invest millions of dollars to upgrade Kyrgyzstan's ailing gas infrastructure. Since 2013, the country has been importing increasingly more gas from Russia. While before 2013 Kazakhstan and Uzbekistan were Kyrgyzstan's major gas suppliers, currently the country imports most of its natural gas from Russia. In fact, available data show that Russian exports of natural gas to Kyrgyzstan have been steadily increasing since 2017.[21]
In light of Uzbekistan's actions, government officials, experts and ordinary citizens argued for ending Kyrgyzstan's reliance on Uzbek gas. For instance, in 2011, Azamat Arapbaev, Chairman of the Committee on Fuel and Energy Complex and Subsoil Use of the Supreme Council of Kyrgyzstan at the time, stated that Tashkent was using gas exports as leverage:

> Uzbekistan, being a gas supplier, uses it as leverage to put pressure on Kyrgyzstan. And even though Kyrgyzstan has

[21] Exports increased from 249 million cubic meters (mcm) in 2017 to 335.3 million cubic meters (mcm) in 2021. Sourced from https://www.stat.kg/

> electricity, its switch is in Uzbekistan. Unfortunately, during the reign of [Prime Minister Daniar] Usonov, gas prices for Kyrgyzstan were linked to global [oil] prices, so they are constantly changing for us (Kasymbekov, 2011).

The calls culminated in Kyrgyzstan signing the agreement with Gazprom and eventually resulted in Russia supplanting Uzbekistan as the main gas supplier. As a result, Uzbekistan has been deprived of an important leverage, further reducing its bargaining power. It is ironic that it was Uzbekistan's own actions such as frequent gas cuts that partly led Kyrgyzstan to diversify its gas supply sources. This is an example of the process of domination influencing the hegemonic process itself (Roseberry, 1994), a topic that warrants further research.

Conclusion

The case of Kyrgyzstan and Uzbekistan demonstrates that a hydro-hegemonic framework can effectively explain Uzbekistan's revised policy framework. The case also supports Roseberry's argument that hegemonic relationships are not static but, rather, they are constantly revised and redefined. In the case of Uzbekistan, the country's bargaining power changed due to several major developments, including, internal challenges in the country and the neutralization of its gas leverage over its neighbors, which caused the country to come up with a new hegemonic project that was diametrically opposed to its previous discourse.

The case of Uzbekistan clearly demonstrates that when the power asymmetry in the management of water resources changes, hydro-hegemons are forced to revise their discourses. The stronger the changes in power asymmetry, the more radically a hydro-hegemons reworks its dominant discourse. However, a hydro-hegemon making a complete volte face in its discourse, as in the case of Uzbekistan, is an exception rather than the rule. Still, my argument that the hydro-hegemony framework is effective at explaining transboundary relations and changing discourses of riparian countries still holds. Uzbekistan's redefined discourse on transboundary water management is silent on the potential negative consequences of the Kambar-Ata 1 Dam. Instead, the new rhetoric is focused on cooperation, and, more importantly, meeting the region's energy

needs. Despite the revised discourse, Uzbekistan's reliance on agricultural water has not ended and the country's revised framework is simply a new hegemonic project. In the coming years, Kyrgyzstan, Tajikistan, and Uzbekistan will have to continually revisit their dominant discourses as they try to balance the conflicting demands of irrigation and hydropower as well as the challenges posed by national interests, climate change, and increasing demand for water. Kyrgyzstan and Tajikistan face the added challenge of mobilizing foreign investment to complete their dam projects. Given the narrow scope of this paper and relatively limited data availability, I suggest that the implications of my findings need to be tested through further research, both in Central Asia and in other contexts of hydro-hegemony. While it is beyond the scope of this paper to examine in detail this issue, it is worth noting that over the past decades Kyrgyzstan has signed several deals with Russia to fund the construction of the Kambar Ata 1 Dam, although most of these agreements were later cancelled. Russia has also had several rounds of negotiations with Tajikistan on funding and constructing the Rogun Dam but has so far refrained from getting fully involved in the project.

Following Russia's invasion of Ukraine, the Central Asian countries seem to be trying to hedge their reliance on Russia. China and the European Union see this as a chance to expand their influence in the region. The EU has already expressed interest in financing the Rogun Dam in Tajikistan (Guarascio & Pirnazarov, 2022). To date China has tended to invest primarily in downstream Uzbekistan and Kazakhstan, but it might well get involved in the hydro projects of Kyrgyzstan and Tajikistan. In the summer of 2023, it was reported that Kyrgyzstan had signed a memorandum of understanding and an investment agreement with a group of Chinese companies to fund the Kazarman project, another ambitious endeavor of the Kyrgyz government to build four more hydropower plants on the Naryn River (Shambetov, 2023). However, if the history of Central Asia's dam projects is any indication, implementation, which is what ultimately matters, will be anything but easy.

In recent years, another country has entered the hydropolitics of Central Asia: Afghanistan. In 2022, the Taliban-run government started digging the Qosh Tepa Canal in the north of the country to divert the waters of the Amu Darya River. The war-torn country is not

party to any regional or international treaty on using transboundary river waters, and the ambitious project has understandably raised concern in Uzbekistan. As Uzbekistan works on its strategy to deal with this new challenge, a familiar and expected discourse is taking shape. In September 2023, President Mirziyoyev stated the following when speaking about the canal: “Its commissioning could radically change the water regime and balance in Central Asia” (Mirziyoyev, 2023). It very well could, meaning we can expect Uzbekistan to once again rework its hydro-hegemony.

References

Barnett, J. (2000). Destabilizing the environment—Conflict thesis. *Review of International Studies*, *26*(2), 271–288. https://doi.org/10.1017/S0260210500002710

Beishenbek kyzy, E. (2012, December 18). Tashkent nastaivayet na ekspertize «Kambaraty-1». *Radio Free Europe/Radio Liberty*. https://rus.azattyk.org/a/kyrgyzstan_uzbekistan_hydropower/24801880.html

Bernauer, T., & Siegfried, T. (2012). Climate change and international water conflict in Central Asia. *Journal of Peace Research*, *49*(1), 227–239. https://doi.org/10.1177/0022343311425843

Bifolchi, G., & Boltuc, S. (2023, March 15). Kyrgyzstan-Tajikistan border dispute: Might CSTO guarantee regional security? *SpecialEurasia*.

Burgess, J. P., Owen, T., & Sinha, U. K. (2016). Human securitization of water? A case study of the Indus Waters Basin. *Cambridge Review of International Affairs*, *29*(2), 382–407. https://doi.org/10.1080/09557571.2013.799739

Cascão, A. E., & Zeitoun, M. (2010). Power, Hegemony and Critical Hydropolitics. In *Transboundary Water Management*.

Elkeeva, K. (2017, September 7). Kak Bishkek i Tashkent budut stroit' GES? *Radio Free Europe/Radio Liberty*. https://rus.azattyk.org/a/28721985.html

Eurasianet. (2022, June 3). Uzbekistan commits to buying power from Tajikistan's Roghun plant. *Eurasianet*. https://eurasianet.org/uzbekistan-commits-to-buying-power-from-tajikistans-roghun-plant

Femia, J. V. (1987). *Gramsci's Political Thought: Hegemony, Consciousness, and the Revolutionary Process*. Clarendon Press.

Guarascio, F., & Pirnazarov, N. (2022, July 6). EU plans investment in world's tallest dam to dent Russia's energy clout. *Reuters*. https://www.reuters.com/business/energy/eu-plans-investment-worlds-tallest-dam-dent-russias-energy-clout-2022-07-06/

Hanke, R. C., & Gray, B. (2006). Big Water Tales and Small Town Stories: Power and Identity Narratives in Protracted

Environmental Disputes. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.913740

Hashimova, U. (2021, June 21). Uzbekistan and Tajikistan talk dams, not Rogun. *The Diplomat*. https://thediplomat.com/2021/06/uzbekistan-and-tajikistan-talk-dams-not-rogun/

İlkbahar, H., & Mercan, M. H. (2023). Hydro-Hegemony, Counter-Hegemony and Neoclassical Realism on the Nile Basin: An Analysis of Egypt's Response to the Grand Ethiopian Renaissance Dam (GERD). *Journal of Asian and African Studies*, 00219096231188953. https://doi.org/10.1177/00219096231188953

Jalilov, S.-M., Amer, S. A., & Ward, F. A. (2013). Reducing conflict in development and allocation of transboundary rivers. *Eurasian Geography and Economics*, *54*(1), 78–109. https://doi.org/10.1080/15387216.2013.788873

Jessop, B. (2016). *The state: Past, present, future*. Polity Press.

Joldoshev, K. (2017, October 6). Orto-Tokoyskoye vodokhranilishche pereshlo pod kontrol' Kyrgyzstana. *Radio Free*

Europe/Radio Liberty.
https://rus.azattyk.org/a/28778133.html

Kalybekova, A. (2013, July 31). Kyrgyzstan: Is Gazprom deal a blessing or curse for Bishkek? *Eurasianet*. https://eurasianet.org/kyrgyzstan-is-gazprom-deal-a-blessing-or-curse-for-bishkek

Kasymbekov, K. (2011, September 9). Tashkent povyshayet tseny na gaz. *Radio Free Europe/Radio Liberty*. https://rus.azattyk.org/a/kyrgyzstan_gas/24323019.html

Mamatzhanova, Z. (2021, April 7). «Ne uchityvali nashe mneniye». Zhiteli Kara-Suu vystupili protiv peredachi Uzbekistanu 50 ga zemli vozle Kempir-Abadskogo vodokhranilishcha. *Kloop*. https://kloop.kg/blog/2021/04/07/ne-uchityvali-nashe-mnenie-zhiteli-kara-suu-vystupili-protiv-peredachi-uzbekistanu-50-ga-zemli-vozle-kempir-abadskogo-vodohranilishha/

Menga, F. (2016). Reconceptualizing hegemony: The circle of hydro-hegemony. *Water Policy*, *18*(2), 401–418. https://doi.org/10.2166/wp.2015.063

Menga, F. (2017). *Power and Water in Central Asia*. Taylor & Francis.

Menga, F., & Mirumachi, N. (2016). Fostering Tajik hydraulic development: Examining the role of soft power in the case of the Rogun Dam. *Water Alternatives*, *9*(2), 373–388.

Mirziyoyev, S. (2023). *Address by the President of the Republic of Uzbekistan Shavkat Mirziyoyev at a meeting of the Council of Heads of the Founder States of the International Fund for Saving the Aral Sea*. President of the Republic of Uzbekistan. https://president.uz/en/lists/view/6662

Mollinga, P. P., & Veldwisch, G. Y. (2016). Ruling by canal: Governance and system-level design characteristics of large-scale irrigation infrastructure in India and Uzbekistan. *Water Alternatives*, *9*(2).

Mosello, B. (2008). Water in Central Asia: A prospect of conflict or cooperation? *Journal of Public & International Affairs*, *19*, 151–174.

Podrobdno. (2016, July 19). Mirziyoev predupredil svoyego tadzhikskogo kollegu o posledstviyakh stroitel'stva Rogunskoy GES. *Podrobno*.

https://podrobno.uz/cat/politic/mirziyeev-predupredil-svoego-tadzhikskogo-kollegu-o-posledstviyakh-stroitelstva-rogunskoy-ges/

Rein, M. (2017). Power Asymmetry in the Mekong River Basin: The Impact of Hydro-Hegemony on Sharing Transboundary Water. *Vienna Journal of East Asian Studies*, *8*(1), 127–162. https://doi.org/10.2478/vjeas-2016-0005

RFE/RL. (2023). *Special investigation: How Russia and political insiders cash in on Uzbekistan's lucrative gas sector*. RFE/RL. https://www.rferl.org/a/uzbekistan-investigation-insiders-energy-projects/32262127.html

Rickleton, C. (2023a). Now with neighbors' support, is Kyrgyzstan's mega-dam dream viable? *RFE/RL*. https://www.rferl.org/a/kyrgyzstan-naryn-river-hydropower-plant-uzbekistan-kazakhstan/32218985.html

Rickleton, C. (2023b, January 31). For Kyrgyzstan and Uzbekistan, 'no other path' but deeper cooperation. *Radio Free Europe/Radio Liberty*. https://www.rferl.org/a/kyrgyzstan-uzbekistan-cooperation-ties/32248114.html

Roberts, F. J. (2022). Rival Eco-Anxieties: Legacy of Soviet Water Management in the Syr Darya Basin. *Security and Human Rights*, *32*(1–4), 41–52. https://doi.org/10.1163/18750230-bja10011

Rosamond, B. (2020). Hegemony. In *Encyclopedia Britannica*. https://www.britannica.com/topic/hegemony

Roseberry, W. (1994). Hegemony and the Language of Contention. In *Everyday Forms of State Formation: Revolution and the Negotiation of Rule in Modern Mexico*. Duke University Press.

Selby, J., Daoust, G., & Hoffmann, C. (2022). *Divided Environments: An International Political Ecology of Climate Change, Water and Security* (1st ed.). Cambridge University Press. https://doi.org/10.1017/9781009106801

Shambetov, T. (2023, August 1). Kyrgyzstan turns to Chinese companies for major hydropower project. *RFE/RL*. https://www.rferl.org/a/kyrgyzstan-hydropower-megaproject-china/32529949.html

Sharma, A., & Gupta, A. (2006). Introduction: Rethinking Theories of the State in an Age of Globalization. In *The Anthropology of the State: A Reader*. Blackwell Publishing.

Shustov, A. (2016, October 12). Uzbekistan otkazyvayetsya ot vodnykh voyn. *Yevraziya Ekspert*. https://eurasia.expert/uzbekistan-otkazyvaetsya-ot-vodnykh-voyn/

Sievers, E. W. (2001). Water, conflict, and regional security in Central Asia. *Environmental Law Journal*, *10*(1), 356–402.

Smith, D. R. (1995). Environmental Security and Shared Water Resources in Post-Soviet Central Asia. *Post-Soviet Geography*, *36*(6), 351–370. https://doi.org/10.1080/10605851.1995.10640997

Tekuya, M. (2020). The Egyptian Hydro-Hegemony in the Nile Basin: The Quest for Changing the Status Quo. *The Journal of Water Law*, *26*(2). Tekuya, Mahemud, The Egyptian Hydro-Hegemony in the Nile Basin: The Quest for Changing the Status Quo (August 25, 2018). THE JOURNAL OF WATER LAW, Volume 26, 2, 2020, Available at SSRN: https://ssrn.com/abstract=3680312

Toset, H. P. W., Gleditsch, N. P., & Hegre, H. (2000). Shared rivers and interstate conflict. *Political Geography*, *19*(8), 971–996. https://doi.org/10.1016/S0962-6298(00)00038-X

Wegerich, K. (2008). Hydro-hegemony in the Amu Darya Basin. *Water Policy*, *10*(S2), 71–88. https://doi.org/10.2166/wp.2008.208

Wright, E. O. (2010). *Envisioning Real Utopias*. Verso.

Zeitoun, M., & Allan, J. A. (2008). Applying hegemony and power theory to transboundary water analysis. *Water Policy*, *10*(S2), 3–12. https://doi.org/10.2166/wp.2008.203

Zeitoun, M., & Warner, J. (2006). Hydro-hegemony – a framework for analysis of trans-boundary water conflicts. *Water Policy*, *8*(5), 435–460. https://doi.org/10.2166/wp.2006.054

Zhupankhan, A., Tussupova, K., & Berndtsson, R. (2017). Could changing power relationships lead to better water sharing in Central Asia? *Water*, *9*(2), 139. https://doi.org/10.3390/w9020139

Zinzani, A., & Menga, F. (2017). The Circle of Hydro-Hegemony between riparian states, development policies and borderlands: Evidence from the Talas waterscape

(Kyrgyzstan-Kazakhstan). *Geoforum*, *85*, 112–121.

https://doi.org/10.1016/j.geoforum.2017.07.019

Awarded Citizenships and Fragile National Identities: A Study into Foreign Born Football Players Belonging and Identity

Mark Pompilii[*], Balsillie School of International Affairs (BSIA)

[*]Biography: Mark Pompilii is a student of political science. He graduated with an Honors Bachelor of Arts from Kings University College at Western University, Specializing in Political Science (2021). From there, he completed a Master of Arts in Political Science at Western University, Specializing in Canadian Politics (2022). During his Master of Arts, Mark completed a Major Research Paper exploring the extent that foreign policy affects the votes of ethnocultural communities in Canadian federal elections. Encouraged by this project, Mark completed a Master's in International Public Policy from the Balsillie School of International Affairs at Wilfrid Laurier University, Specializing in Global Migration and International Economic Relations (2023).

Biographie : Mark Pompilii est étudiant en sciences politiques. Il a obtenu un baccalauréat ès arts avec mention au Kings University College de la Western University, avec spécialisation en sciences politiques (2021). Il a ensuite obtenu une maîtrise en sciences politiques à l'Université Western, avec spécialisation en politique canadienne (2022). Au cours de sa maîtrise, Mark a rédigé un mémoire de recherche majeur explorant la mesure dans laquelle la politique étrangère influe sur le vote des communautés ethnoculturelles lors des élections fédérales canadiennes. Encouragé par ce projet, Mark a obtenu une maîtrise en politique publique internationale à la Balsillie School of International Affairs de l'Université Wilfrid Laurier, avec une spécialisation en migration mondiale et en relations économiques internationales (2023).

Abstract

Football is often described to be a global game. This narrative is embodied through the Fédération Internationale de Football Association's (FIFA) World Cup tournament which consists of 32 national teams competing against each other for international glory. With FIFA being an international body, problems of global governance often spill over into its operations. The citizenship and identity of many players – often football royalty – has been a subject of many international tournaments, The problem this paper investigates is the fragile nature of national identity experienced by migrants focusing on the relationship of foreign-born or minority football players in the Men's game and their host national teams. This study's question considers how citizenship and national identity are structured and change towards certain migrants. This paper will make two central arguments: First, citizenship is likely to be granted to foreign-born football players and is motivated by nationalism. Second, the national belonging of the migrant football player in the broader public depends on the team's success. Two recent examples of final losses in the case of England and France show how nationality and belonging of minority players is attacked upon defeat.

Key Words: Citizenship, National Belonging, National, Nationalism, FIFA

Le football est souvent décrit comme un jeu mondial. Ce discours est incarné par le tournoi de la Coupe du monde de la Fédération internationale de football association (FIFA), qui voit s'affronter 32 équipes nationales pour la gloire internationale. La FIFA étant un organisme international, les problèmes de gouvernance mondiale se répercutent souvent sur ses activités. La citoyenneté et l'identité de nombreux joueurs - souvent des rois du football - ont fait l'objet de nombreux tournois internationaux. Le problème étudié dans ce document est la nature fragile de l'identité nationale vécue par les migrants, en se concentrant sur la relation entre les joueurs de football masculins nés à l'étranger ou appartenant à une minorité et leur équipe nationale d'accueil. La question de cette étude porte sur

la manière dont la citoyenneté et l'identité nationale sont structurées et évoluent à l'égard de certains migrants. Le présent document s'articule autour de deux arguments principaux : Premièrement, la citoyenneté est susceptible d'être accordée aux joueurs de football nés à l'étranger et est motivée par le nationalisme. Deuxièmement, l'appartenance nationale du joueur de football migrant dans le grand public dépend du succès de l'équipe. Deux exemples récents de défaites en finale dans le cas de l'Angleterre et de la France montrent comment la nationalité et l'appartenance des joueurs minoritaires sont attaquées en cas de défaite.

Mots clés : Citoyenneté, appartenance nationale, national, nationalisme, FIFA

Football is often described to be a global game. This narrative is embodied through the Fédération Internationale de Football Association's (FIFA) World Cup tournament which consists of 32 national teams competing against each other for international glory. With FIFA being an international body, problems of global governance often spill over into its operations. Particularly in relations to migration, with the most recent World Cup in Qatar having their preparations put under the microscope due to (mis)treatment of migrant workers. However, in addition to this, the citizenship and identity of many players – often football royalty – has been a subject of many international tournaments. FIFA maintains the authority to determine who, when, and under what conditions football players are eligible to play for a national team; However, FIFA has no control over who can acquire citizenship within a state (van Campenhout et al., 2018). That authority remains with the state. Nevertheless, international tournaments are increasingly seeing the countries competing being represented by players with "vague" connections to the badge on their chest (van Campenhout et al., 2019). This has raised debates about the representativeness of national teams and belonging to the nation of foreign-born players (van Campenhout et al., 2019). From this, van Campenhout et al. (2019) conclude that the World Cup has become more migratory with foreign-born players representing other countries being a common feature since the tournament's inception in the 1930s, additionally foreign-born players are increasingly representing national teams other than the one of their births, and countries of origin for foreign-born players has diversified overtime.

Despite this, reports of racial abuse and xenophobia are commonly placed towards minority players in international tournaments with players feeling as though they are nationals when victorious and foreigners in defeat. In this paper, I explore the puzzle that is the fragile nature of national identity experienced by migrants by focusing the relationship of foreign-born football players and their host national teams in the men's game. The question guiding this study considers how citizenship and national identity are structured and impact migrants. I make two central arguments: First, citizenship is likely to be granted to foreign-born football players and is motivated by nationalism. Second, the national belonging of foreign born or minority football players in the broader public is dependent on the

success of the team. I structure this article as follows: first, literature will investigate the discriminatory nature of citizenship and national identity with respect to unequal nation-states. Next, I review the migratory processes of international football stars and how these campaigns follow nationalistic tendencies. From this, I present examples of France and England to showcase how the national identity of foreign-born football players is dependent on success.

Hierarchical Citizenship within Migratory Movements:

To uncover the first claim of this paper that citizenship with respect to foreign-born football players is motivated by nationalism requires reviewing the structured nature of citizenship within the world of nation-states. Citizenship is a discriminatory institution in that as a citizen – or national – one enjoys privileges that are not available to non-citizens or non-nationals (Lui, 2004). Therefore, I suggest that the privilege of citizenship is subscribed to foreign-born footballers as they are symbols of national pride on the world stage.

Citizenship within modern democratic states has taken on a double meaning in that it denotes inclusion within a self-governing political community as well as signifies belonging within a specific national community (Castles, 2005). As a result, the citizen is also a national (Castles, 2005). While political citizenship is universal and inclusive, national belonging is often culturally specific and exclusive (Castles, 2005). This is attributed to the institutional structure of nation-states having most people being legally defined as citizens (Castles, 2005). Castles (2005) discusses the changing character of the nation-state and citizenship, focusing on how citizenship has been reshaped by new forms of international migration and how the meaning of citizenship has shifted away from universalism and equality to signify a position of unequal hierarchical order. For example, ethnic minorities and Indigenous peoples may have formal citizen rights, but are often excluded from the political and social fabric (Castles, 2005). This contradictory or hierarchical denotation of citizenship has been sharpened by globalization with unprecedented levels of cultural integration (Castles, 2005). Globalization has additionally transformed the kinds of migration in both sending and receiving countries – for example, technological advances allow migrants to maintain close links with their place of origin which has led to the

emergence of transnational communities (Castles, 2005). To this end, the post-Cold-War global order has led to the rise of a *hierarchical nation-state system* that is based on a singular superpower at its core (Castles, 2005), Similarly, this power of states is reflected by a hierarchy of rights and freedoms of each state's peoples—what Castles refers to as "hierarchical citizenship" (2005). Hierarchical citizenship puts forth that the possession of civil, social, and political rights of citizens is masked by a steep hierarchy. For example, a United States citizen enjoys a high set of formal rights, but there are exceptions to this rule with minorities facing discrimination and exclusion (Castles, 2005).

The obvious concern with the application of differentiated rights in societies is how it has led to perpetuating ethnic group differences and increased group inequalities rather than leading to equality for previously disadvantaged groups (Krasniqi, 2015). Gëzim Krasniqi investigates differentiated and hierarchical citizenship, particularly within the context of Kosovo. Krasniqi (2015) points out that despite the claim that liberalism provides universal citizenship and that the state is blind towards differences, various disadvantaged groups have been able to challenge the ethnic or cultural "neutrality" of liberal citizenship. Krasniqi additionally proposes of group-differentiated citizenship as a complement to the universal citizenship of liberal states. Differentiated citizenship advocates for the incorporation of members not as individuals, but as groups as an advancement for equality within liberal democracy (Krasniqi, 2015). There are cases whereby group-differentiated and multicultural policies have evened equality, however, they may also promote ethnic conflict, exacerbate division, and establish vested interest in group distinctions (Krasniqi, 2015). Otherwise put, the result may be an internally divided societies and states, where various groups enjoying a degree of rights and privileges within a pluralized differentiated citizenship (Krasniqi, 2015) – much like the status quo today.

I suggest that this division can occur between migrant groups as well. Similar to Castles' (2005) power of states reflecting hierarchy of rights and freedoms of each state's peoples, Wallerstein's (2004) world system theory contains a three-level-hierarchy of states: core, periphery, semi-periphery (Krasniqi, 2015). This suggests that some

groups form the core of the political system, while others are in the periphery or semi-periphery. Within the current nation-sate system, this distinction in relation to migration would group foreign-born football players in the core vs migrant labourers in the periphery or semi-periphery. Krasniqi (2015) finds that the mixing of group-differentiation within the liberal state ideal in post-war Kosovo resulted in a hierarchical citizenship regime. This instance of group-differentiation can deepen group differences and divisions, ultimately establishing uneven citizenship (Krasniqi, 2015). Despite the legally enshrined principle of equality some communities in Kosovo occupy the core of the polity and society, while others are pushed to the periphery or semi-periphery (Krasniqi, 2015). To this end, citizenship is an ongoing process that is constructed historically with institutions primarily focusing on group belonging (Ng'weno & Aloo, 2019). I suggest that this has extended into international migration with groups of migrants – such as football players – experiencing different rights and privileges.

National Identity

The previous section identifies citizenship as a crucial marker of membership in a world of fluid boundaries (Cadler et al., 2010). This suggests that the institution of citizenship distinguishes between people based on members and outsiders by establishing a boundary around the community (Cadler et al., 2010). The access of this membership – or citizenship – can be acquired in two distinct ways: birth and migration. Citizenship by birth is either *jus soli* being born within state territory or *jus sanguinis* born to a parent who is already a citizen (Cadler et al., 2010). Citizenship by migration is often determined through relationship with a citizen (marriage) or by length of stay (Cadler et al., 2010). However, the migratory process of citizenship still requires crossing several complex spaces before coming a citizen – one of which is access to national identity (Cadler et al., 2010).

The boundary of national identity concerns the extent to which migrants become integrated into the nation (Cadler et al., 2010). Citizenship, in theory, is founded on the idea of a shared national identity that stabilizes its members, promotes social cohesion, stimulates democratic participation, and motivates citizens to

sacrifice for social justice demands (Cadler et al., 2010). The political reality is that migration has created a variety of sources of identity, making mutual recognition complex and problematic (Cadler et al., 2010). Otherwise put, the boundary of national identity can be either formally blocked by the state or informally by the hostility of resident populations (Cadler et al., 2010). I argue that the formal acceptance of national identity is placed on foreign-born footballers by the state for nationalistic purposes – World Cup success – additionally, the informal placement of national identity from resident nationals is dependent on the success of the squad.

FIFA, Citizenship, and Migration:

The 2018 FIFA Men's World Cup in Russia saw 84 football players compete for national teams outside of their country of origin (van Campenhout et al., 2019). This was the second highest World Cup with foreign-born footballers representing their host nations after the 2014 competition in Brazil (van Campenhout et al., 2019). In 2022, the World Cup in Qatar saw about 10% of players representing nations as foreign-born (Santamaria & Fusco, 2022).

Citizenship within FIFA

Historically, citizenship refers to the legal entitlement of membership to a country based on either *jus soli* (right of soil) or *jus sanguinis* (right of blood) (van Campenhout et al., 2019). In addition to this, citizenship can be acquired later in life through naturalization such as by marriage (*jus matrimanii)* or residence in a country (*jus domicilii)* (van Campenhout et al., 2019). In response to this, FIFA attempted to ensure national teams were symbols of nationalism and in 1962 introduced the following eligibility restrictions: "any person holding permanent nationality that is not dependent on residence in a certain country is eligible to play for the representative teams of the association of their country" (van Campenhout et al., 2019). However, in 2004, a growing number of players reported dual nationality, which forced FIFA to adjust this restriction. The new eligibility policy that followed was based on a "clear connection between footballers and the country they represent" (van Campenhout et al., 2019).

Nonetheless, despite these ruling football players connections with squads seem to be increasingly based in ((great) grand-) parental heritage, loyalty to clubs in domestic league (residence), or by way of marriage, rather than by birth (van Campenhout et al., 2019). Further, this points to the marketization of citizenship because of national governments involvement in fast-tracking citizenship to notable athletes – footballers among them (van Campenhout et al., 2019). Therefore, since FIFA has no eligibility in national citizenship procedures the migration histories and national citizenship policies of states has influence on the volume and diversity of foreign-born players that make up national squads in international tournaments (van Campenhout et al., 2019).

Wider Context of Football Migration

The commercialization of the footballer phenomena has led to a growing inflow of foreign-born players into domestic competition, particularly across Europe's top five leagues: English Premier League, Spanish La Liga, Italian Serie A, German Bundesliga, and French Ligue 1 (van Campenhout et al., 2018). This presence was initially restricted by national governments; however, it is now a norm that footballers move internationally for work – a form of labour migration (van Campenhout et al., 2018). This trend has transitioned from domestic to national club competition as players become eligible for citizenship abroad and represent the best nation during events such as the World Cup (van Campenhout et al., 2018).

The context of international football is different and more controversial than migration to compete in domestic leagues, as players can choose and, in some cases, do opt to switch their nationality and represent national teams around the world. One of the most controversial examples came in 2014 when Brazilian-born striker Diego Costa represented the Spanish National team after being eligible for Spanish citizenship through naturalization based on residency from playing in the Spanish domestic league – primarily for Atlético Madrid (van Campenhout et al., 2018). The controversial nature of this option is that the national teams is a symbolic representation of states (van Campenhout et al., 2018). Players, inevitably become associated with this national identity through representation.

Further, there appears imbalance between FIFA's eligibility regulations and countries national policies, leading to inequalities between a national team's pool of eligible players (van Campenhout et al., 2018). In other words, national policies on migration and citizenship control the influence of foreign-born players in national teams. For example, Japan and South Korea are stricter in providing citizenship to migrants, whereas countries like Canada and Australia are more open (van Campenhout et al., 2018). These national policies reflect the number of migrant footballers' national teams can pull from (van Campenhout et al., 2018). However, the complex nature of citizenship acquisition within FIFA's guidelines suggest analysis must go beyond birth destinations.

Migratory data might become adjusted for historical changes in boundaries, bloodline connections, and colonial relations (van Campenhout et al., 2018). In other words, global migration patterns and colonial/post-colonial identities help contextualize debates on citizenship and national identity in relation to migrant footballers (Oonk, 2020).

First, global migration patterns consider diaspora networks. Diasporic national football teams involve "the mother country" being active in recruiting attractive football players born in a foreign country with a connection to this motherland (Oonk, 2020). Two examples emerge as prominent: Italy in 1934 and Morocco in 2018. In both cases the motherland played an active role in recruiting players from its diaspora. In 1934, the Italian National team was victorious, and this success involved five players from the diaspora, not born in Italy, but in Argentina and Brazil (Oonk, 2020). Their recruitment was heavily influenced by the Prime Minister and National Fascist Party leader Benito Mussolini who encouraged the players to honour the Italian nation (Oonk, 2020). Referred to as "oriundi" – imported Italians – they reflected the Italian diaspora by speaking Italian and having two grand-parents born in Italy (Oonk, 2020). The Moroccan Football Federation actively recruited from their European diaspora, helping them qualify for the 2018 World Cup with 17 of 23 players being foreign-born (Oonk, 2020). Eight were from France, five from the Netherlands, two born in Spain, and the final two from both Canada and Belgium (Oonk, 2020). In total 20 of the 23 had dual citizenship

and could have played elsewhere (Oonk, 2020) suggesting that the efforts of the federation were key in convincing the players to play for Morocco.

Another distinction refers to how colonial and post-colonial realities reflect representation and suggests that colonial activities have exploited football talents. Talented players of the colonial periphery strived to play at the centre of the empire to improve their chance of playing in World Cup competition (Oonk, 2020). Portugal and France become clear examples of this. Portugal, by way of incorporating colonial players to national teams, and France, through colonial migrants (children of) emerging into the national team and French identity (Oonk, 2020).

In the 1950s, the Portuguese dictator Antonio de Oliveira Salazar wanted to show that the civilization missions in the colonies were a success. In an attempt to do so, he introduced colonial football talents into the national team (Oonk, 2020). At that time, Portugal lost 5-1 to arch-rival Spain and 9-1 to Austria and in Salazar's eyes, drastic changes were necessary, and incorporating colonial talent into the national team was a successful formula for him to bind the nation and increasing the chances of winning (Oonk, 2020). Eusébio da Silva Ferreria – one of the star colonial projects – would later declare that he was the de facto slave of Salazar, being completely dependent on him for his passport and travels, revealing another exceptional perspective on the relation among state, citizenship, and nationality (Oonk, 2020). Additionally, France took advantage of former colonial relations particularly with the World Champion squads of 1998 and 2018 being considered the most diverse teams to play in the World Cup (Oonk, 2020). From this, ideals of migration, diversity, and national identity became the heart of the public debate in France, as exemplified in the documentary 'Les Blues' (in 2010); 'Black, blanc, beur' ('black, white, Arab') was a major theme in the film and later became a slogan for the national team, which was not just 'diverse' but, particularly postcolonial (Oonk, 2020). In relation to the post-colonial reality of the 2018 squad, fresh off World Cup victory, popular South African comedian on American television, Trevor Noah, suggested that the World Champion French team was made up of African born players and he congratulated the African team on

winning the world championship, cheering in the studio, “Africa has won, Africa is world champion.” Oonk explains:

> [Noah exclaimed “]I know that France has won, but I also recognize my African brother in the French team[“]. He explained that the African background of the players on the French national team made it possible for many African fans to identify with France. His performance was strongly criticized by the French ambassador to the United States, Gerard Araud. According to Araud, Noah had deprived the French team of French identity by referring to their African descent (Oonk, 2020).

This together calls in the idea of nation building and origins of the nation-state. Ernest Gellner and Benedict Anderson developed two contrasting theories to understand the emerging “nation states” in the nineteenth and twentieth centuries. According to Gellner, nationalism is a necessary consequence of Europe’s transformation from an agrarian economy to an industrial capitalist society (Oonk, 2020). Alternatively, Benedict Anderson identifies the invention of print, the demise of religion, and the weakening of dynastic power as the key social and historical causes that explain the emergence of larger nation states (Oonk, 2020). This established the possibility for states to introduce a unifying language through their legal and educational systems establishing larger ‘imagined communities’ (Oonk, 2020). The idea of shared nationhood, according to Anderson, became an alternative justification of political power (Oonk, 2020). Elites and the media negotiate the terms of belonging and identity and consider common concepts within this discourse including “the imagined community,” “banal nationality” and “invented traditions” (Oonk, 2020). However, “no matter how ‘banal’ or ‘invented’ that identity may be, it is at the same time so powerful and real that some opinion leaders have argued that international football matches sometimes involve a war minus the shooting” – suggesting that nationalism gives shape to soccer loyalties (Oonk, 2020, p. 1050).

To this end, taken together these sections show how citizenship and national identity are structured along nationalistic narratives in relation to foreign-born soccer players. States are prone to use their institutional structure of citizenship and grant status for foreign-born

players to represent the nation on the world's stage. Further, this granting of citizenship is not only nationalistic, but also hierarchical, as foreign-born footballers are associated with the national identity of the state by representing the national team within international tournaments. This in turn makes foreign-born footballers not only citizens, but nationals as well. However, the next section will go on to showcase how this national identity is often only accepted in the public when players and teams are successful.

Fragile Identities in Defeat

I now turn my focus on how the national identity of the migrant or minority footballer is subject to change. I argue that the national belonging of the migrant or minority football player in the broader public is dependent on the success of the national team. This has been displayed in the finals of the last two international tournaments (Euro 2020 and World Cup 2022). The minority players of the losing team (England and France) have faced racist and xenophobic comments from the public.

England: Euro 2020

In July of 2021 – after being delayed for a year due to COVID-19 – Italy and England faced off in the Euro 2020 final. The game was decided on penalties, with Italy winning 3-2 after three English players missed crucial penalties. Jaden Sancho, Marcus Rashford, and Bukayo Saka were the players that missed and, in the days that followed, experienced waves of racist abuse online (Hassan & Adam, 2021). The three players all were born in England with migrant parents from Trinidad and Tobago (Sancho), St. Kitts and Nevis (Rashford), and Nigeria (Saka). The aftermath of the abuse these players received saw actors such as Prime Minister at the time Boris Johnson and Prince William – President of England's football Association – condemn the hateful comments towards the players (Hassan & Adam, 2021). Additionally, England Manager Gareth Southgate suggested that the abuse was "unforgivable" especially as the team has "been a beacon of light in bringing people together, in people being able to relate to the national team, and the national team stands for everybody" (Hassan & Adam, 2021).

This culture amongst English football fans been a common occurrence with other players such as Raheem Sterling – who was born in Jamacia – having faced racial abuse from the crowd and media (Hassan & Adam, 2021). This has left some who follow the team suggesting that English fans are "relying on Black English footballers to bring them glory as if they were their servants, then turning on them as soon as they fell short of their dreams" (Hassan & Adam, 2021). This example and quote show how racial abuse undermines the identity of English nationals when minority players miss crucial chances on the international stage.

France: World Cup 2022

In December of 2022, France lost to Argentina 4-2 on penalties. This similarity to the Euro 2020 final goes beyond the match and into the aftermath, as three French players were targeted with racial abuse (Hill, 2022). Kingsley Coman, Aurélin Tchouméni, and Randel Kolo Muani were subject to racial abuse following the loss (Hill, 2022). Coman was born in Paris, France to parents from Guadalupe, Tchouméni was born in Rouen, France and is of Cameroonian descent, Kolo Muani was born in Bondy, France and is of Congolese descent. This example additionally shows a case where a domestically born player's identity and value within the nation or community becomes questioned and attacked after a loss.

These abuses are far too common in the sport labelled "the beautiful game" with questions of nationality towards players in defeat disproportionally targeting minority players. This is not a new occurrence, but rather, a decades long issue. However, with increased online presence these abuses are more present within the public eye. Further, the two examples in this section together showcased how in defeat the placement of national identity from resident populations is often stripped.

Conclusion

As the attractiveness of football continues to stretch across the globe and the sport maintains its title as the global game, problems of global governance continue to be associated with its structure. Particularly in relation to migration with citizenship and national

identity having been subjects of international tournaments for decades. As a result, I considered how citizenship and national identity are structured and change towards certain players by focusing on foreign born and minority football players in the men's game.

The two central arguments of this paper are that: first, citizenship is likely to be granted to foreign-born football players and is motivated by nationalism. Second, the national belonging of the migrant football player in the broader public is dependent on the success of the team. These arguments are reflected in the literature by displaying the hierarchical nature of citizenship as an institution. States are prone to use their institutional structure of citizenship and grant status for foreign-born players to represent the nation on the world's stage.

Further, this granting of citizenship is not only nationalistic, but also hierarchical, as foreign-born footballers are associated with the national identity of the state by representing the national team within international tournaments. However, the second portion suggests that this national identity or belonging for the player by the public is dependent on success as the informal placement of national identity comes from resident nationals. Two recent examples of final losses in the case of England and France demonstrate how the nationality and belonging of minority players is attacked upon defeat with racist and xenophobic comments being directed to players with migrant roots. To this end, with dual citizenship being a commonality for many footballers world-wide and with many minority players on top teams experiencing racism and xenophobia, it raises the question as to whether more players will turn to play for their country of origin in future tournaments.

References:

Bandyopadhyay, K. (2011). Peter Alegi. African Soccerscapes: How a Continent Changed the World's Game. (Africa in World History.) Athens, Ohio: Ohio University Center for International Studies. Athens, Ohio: Ohio University Press. The American Historical Review, 116(3), 915–916. https://doi.org/10.1086/ahr.116.3.915.

Calder, G., Cole, P., & Seglow, J. (2010). Citizenship acquisition and national belonging : migration, membership and the liberal democratic state. Palgrave Macmillan.

Castles, S. (2005). Hierarchical Citizenship in a World of Unequal Nation-States. PS, Political Science & Politics, 38(4), 689–692. https://doi.org/10.1017/S1049096505050353.

Fusco, C. S. P., Santamaria, C., & Fusco, P. (2022, December 2). The graphic truth: The World Cup of Immigration. GZERO Media. Retrieved April 21, 2023, from https://www.gzeromedia.com/the-graphic-truth-the-world-cup-of-immigration

Gëzim Krasniqi. (2015). Equal Citizens, Uneven Communities: Differentiated and Hierarchical Citizenship in Kosovo, Ethnopolitics, 14:2, 197-217, DOI:10.1080/17449057.2014.991152.

Hassan, J., & Adam, K. (2021, July 12). Boris Johnson, prince william condemn racist abuse of England's black players. The Washington Post. Retrieved April 21, 2023, from https://www.washingtonpost.com/world/2021/07/12/england-players-racism-euros-defeat/.

Hill, G. A. (2022, December 21). *Three French players face racist online abuse after World Cup loss*. The Washington Post. Retrieved April 21, 2023, from

https://www.washingtonpost.com/sports/2022/12/20/french-players-racism-world-cup/

Ng'weno, B., & Aloo, L. O. (2019). Irony of Citizenship: Descent, National Belonging, and Constitutions in the Postcolonial African State: Irony of Citizenship. Law & Society Review, 53(1), 141–172. https://doi.org/10.1111/lasr.12395.

R. Lui. (2004). "The International Government of Refugees" in Global Governmentality (W. Larner and W. Walters, eds.), Chapter 6, pp. 116-135.

Oonk, G. (2021). Who May Represent the Country? Football, Citizenship, Migration, and National Identity at the FIFA World Cup. International Journal of the History of Sport, 37(11), 1046–1065. https://doi.org/10.1080/09523367.2020.1844188.

Peltier, E. (2018). "Racial Abuse, Then a Beating, on a French Soccer Field." New York Times. https://www.nytimes.com/2018/10/15/sports/soccer/france-soccer-racism.html.

van Campenhout, G., van Sterkenburg, J., & Oonk, G. (2018). Who Counts as a Migrant Footballer? A Critical Reflection and Alternative Approach to Migrant Football Players on National Teams at the World Cup, 1930–2018. The International Journal of the History of Sport, 35(11), 1071–1090. https://doi.org/10.1080/09523367.2019.1581769.

van Campenhout, G., van Sterkenburg, J., & Oonk, G. (2019). Has the World Cup become more migratory? A comparative history of foreign-born players in national football teams, c. 1930-2018. Comparative Migration Studies, 7(1). https://link-gale-com.libproxy.wlu.ca/apps/doc/A585825224/AONE?u=wate18005&sid=bookmark-AONE&xid=6bee6116.

Do Civil Liberties Matter for State Capture? Evidence from Latin America 1996-2017

James Korman[*]*, University of Delaware*

Abstract

This study explores the impact of civil liberties on state capture. It employs a mixed effects regression model using a novel dataset for the years 1996-2017 where time serves as the level 1 units and countries as the level 2 units. The study tests two main hypotheses: 1) As civil liberties increase in a country, state capture will correspondingly decrease; 2) Latin American countries in the mid-range of civil liberties will experience the highest levels of state capture overall relative to countries with either low and or high levels of civil liberties. The results demonstrate that as civil liberties increase, we may not see a corresponding decrease in state capture

[*]Biography: James Korman is a PhD candidate at the University of Delaware in Political Science & International Relations with a concentration in Comparative Politics & Quantitative Methodologies. Within Comparative Politics, his research focuses on issues surrounding corruption, development, Latin American politics, political economy, & state capture. Methodologically, he uses & conducts research in applied statistics & computational social science w/ a focus on multilevel modeling & panel data analysis. His work has been published in the Emory International Law Review, European Review of Latin American & Caribbean Studies, International Journal of Development Issues, amongst other scholarly outlets.

Biographie : James Korman est candidat au doctorat en sciences politiques et relations internationales à l'université du Delaware, avec une spécialisation en politique comparée et méthodologies quantitatives. Dans le cadre de la politique comparée, ses recherches se concentrent sur les questions relatives à la corruption, au développement, à la politique latino-américaine, à l'économie politique et à la capture de l'État. Sur le plan méthodologique, il utilise et mène des recherches en statistiques appliquées et en sciences sociales computationnelles, en mettant l'accent sur la modélisation multiniveaux et l'analyse des données de panel. Ses travaux ont été publiés dans l'Emory International Law Review, l'European Review of Latin American & Caribbean Studies, l'International Journal of Development Issues, entre autres.

which is contrary to the prevailing literature on the importance of a strong civil society and civil liberties for inhibiting corruption and state capture. However, this study has definitively shown that countries in the mid-range of civil liberties relative to countries with low and or high levels of civil liberties, will experience greater amounts of state capture. Overall, the findings of this study present a significant contribution to the field and help us to generalize the true impact of civil liberties on state capture to other regions of the world.

Keywords: Civil Liberties; Civil Society; Corruption; Latin America; State Capture

Résumé

Cette étude explore l'impact des libertés civiles sur la capture de l'État. Elle utilise un modèle de régression à effets mixtes à l'aide d'un nouvel ensemble de données pour les années 1996-2017, où le temps sert d'unité de niveau 1 et les pays d'unités de niveau 2. L'étude teste deux hypothèses principales : 1) Plus les libertés civiles augmentent dans un pays, plus la capture de l'État diminue ; 2) Les pays d'Amérique latine se situant dans la moyenne des libertés civiles connaîtront les niveaux les plus élevés de capture de l'État dans l'ensemble par rapport aux pays ayant des niveaux de libertés civiles faibles ou élevés. Les résultats démontrent qu'à mesure que les libertés civiles augmentent, il se peut que la capture de l'État ne diminue pas en conséquence, ce qui est contraire à la littérature dominante sur l'importance d'une société civile forte et des libertés civiles pour inhiber la corruption et la capture de l'État. Cependant, cette étude a définitivement montré que les pays se situant dans la moyenne des libertés civiles par rapport aux pays ayant des niveaux faibles ou élevés de libertés civiles, connaîtront une plus grande capture de l'État. Dans l'ensemble, les résultats de cette étude apportent une contribution significative au domaine et nous aident à généraliser l'impact réel des libertés civiles sur la capture de l'État dans d'autres régions du monde.

Mots-clés : Libertés civiles ; Société civile ; Corruption ; Amérique latine ; Capture de l'État

State capture, defined as the systematic shaping of the rules of the game by private sector actors through illicit and non-transparent payments to public officials, represents a grand form of corruption (Hellman et al., 2000, p. 2). Distinguished from petty corruption, such as bribes to evade minor offenses or rent-seeking behavior by public sector bureaucrats (Hellman, Jones, & Kaufmann, 2000), state capture has thrived in the post-Cold War era with the globalization of markets and economies (Ouzounov, 2003; Ackerman & Palifka, 2016).

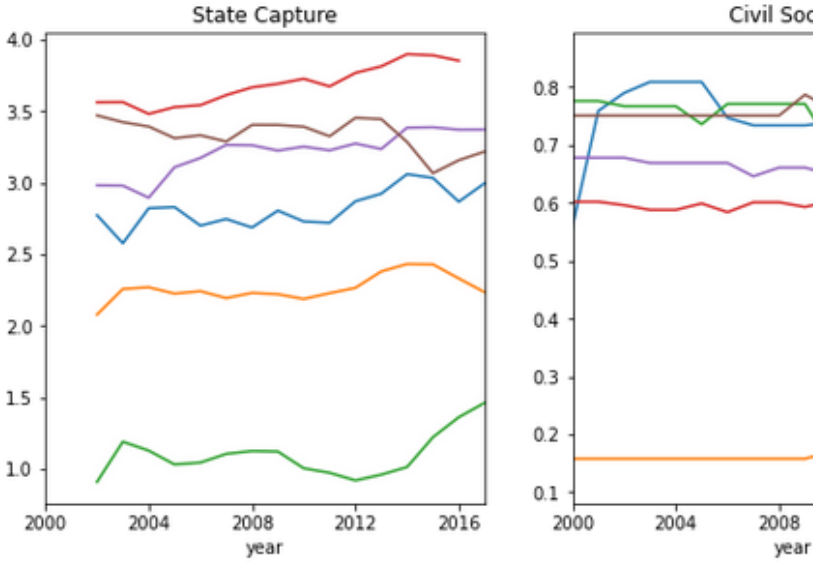
In Latin America, the fall of mixed economies and the transition from authoritarian rule in the 1980s raised hopes for democratic consolidation and improved governance in the region. Democracy and democratic institutions are often associated with higher growth and lower corruption compared to countries with deficient democratic systems (Aidt, Dutta, and Sena, 2008). However, the reality did not align with these expectations, particularly regarding corruption. Scholars like Weyland (1998) and Morris (2006) observed a growing perception that corruption was on the rise in Latin America, prompting a renewed focus on combating political corruption by various stakeholders, including voters, politicians, social institutions, and international organizations. This shift underscored the recognition of corruption as a direct threat to democracy in the region. The persistence of corruption despite the process of democratization raises a crucial question: why haven't the institutional configurations of democracy effectively reduced corruption and state capture in Latin America? This inquiry highlights the need for a deeper understanding of the factors contributing to corruption dynamics in the region (Lederman and Loayza, 2005).

To understand the drivers of pervasive corruption and state capture in Latin America, it is crucial to examine the factors that go beyond the influence of democracy alone. One factor that has garnered attention in addressing corruption and state capture is the role of a strong and robust civil society, which safeguards civil liberties. The impact of civil liberties on inhibiting state capture has gained prominence, although the evidence on its specific impact remains incomplete. There is substantial variation in the strength of civil society and the corresponding levels of civil liberties and state capture across Latin American countries. Figure 1 illustrates this

variation, depicting a 2-panel plot showcasing state capture over time in the left panel derived from the Control of Corruption index from the World Bank and civil society strength derived from the Varieties of Democracy Dataset (used as a proxy for civil liberties) over time in the right panel for a random sample of six Latin American countries with distinct regime types. Notably, the left-panel plot reveals a dilemma in which Cuba, an authoritarian state, exhibits lower levels of state capture on a 0-5 scale (least to highest) compared to Peru and Honduras, both democracies albeit weak ones. This paradox warrants scrutiny to better understand the complex relationship between civil liberties, state capture, and the influence of different regime types.

Figure 1

State Capture and Civil Society over Time



Continuing with the focus on Figure 1, we turn to the right panel that illustrates the plot of civil society strength over time on a scale from 0 to 1 (low to high). Here, another dilemma becomes apparent. When comparing Cuba to Honduras and Peru, Cuba consistently exhibits a significantly lower level of civil society strength, which aligns with its authoritarian regime, while both Honduras and Peru, as democracies, generally have stronger civil societies. However, it is puzzling that despite its weaker civil society, Cuba experiences lower levels of state capture compared to the other two countries. One would expect that countries with stronger civil societies and resultant civil liberties would have lower levels of state capture and corruption over time, as they offer greater transparency, accountability, and the ability to express dissent. Figure 1 challenges this assumption. Moreover, the plot indicates that countries in the mid-range of civil society strength, such as Venezuela and Nicaragua, with values between 0.3 and 0.7 on the scale, exhibit the highest levels of state capture, as depicted in the left panel of Figure 1. Hence, it becomes

evident that civil society strength and the resulting civil liberties make a difference in state capture dynamics. However, a deeper analysis is necessary to fully understand their impact. The existing literature also presents conflicting views. Crabtree (2020) argues that in Peru, business actors have gained power at the expense of a politically active civil society, suggesting that a weak civil society enables mechanisms of state capture. Conversely, Hellman et al. (2000) propose that the impact of civil society strength on state capture is most pronounced in the mid-level range, where civil liberties are in a state of flux. Thus, it is imperative to thoroughly investigate the true effects of civil liberties on state capture, which is the objective of this paper.

This study makes several significant contributions to our understanding of *state capture* in Latin America. For one, by highlighting the crucial role of the mid-range of *civil liberties* where civil liberties are neither necessarily weak nor strong, the findings demonstrate that countries experiencing a mid-range level of *civil liberties* are particularly vulnerable to higher levels of *state capture* compared to countries with either high or low levels of *civil liberties*. This supports and extends the findings of Hellman et al. (2000) in the Eastern European region to Latin America.

Finally, this paper also makes a methodological contribution by employing a mixed effects regression model with a random intercept. This approach allows for the inclusion of country-level variation by assigning each country its own intercept, capturing unobserved heterogeneity that may influence *state capture* dynamics. By utilizing this model, the study provides a robust framework to analyze the relationship between *civil liberties* and *state capture* in Latin America, while also offering the ability to generalize the findings across the region. This methodological advancement is particularly significant considering the limited availability of quantitative research on *state capture* in Latin America to date.

The remainder of the paper is structured as follows: First, I provide a background on the relationship between civil society, civil liberties, and state capture in Latin America from the 1990s to the present. The subsequent section presents a comprehensive literature review on the determinants of corruption and state capture. I then focus on

the independent variable, civil liberties, and its significance in relation to state capture, including the derivation of hypotheses. Following that, I describe the data and methods employed to test my argument. The empirical analysis and results are presented in the subsequent section, followed by a discussion of robustness checks. Finally, I offer concluding remarks on the impact of civil liberties on state capture and provide suggestions for future research.

Background: Civil Society Strength, Civil Liberties, and State Capture in Latin America

Latin America, comprising diverse countries with unique historical and socio-political contexts, has witnessed varying degrees of success in promoting and protecting civil liberties. For instance, countries like Uruguay and Costa Rica have established robust democratic systems that prioritize civil liberties and human rights, while others have grappled with authoritarian regimes, social inequalities, and systemic corruption. It is within this complex landscape that the relationship between civil liberties and state capture in Latin America emerges.

Several studies have explored the positive correlation between the strength of civil society and the protection of civil liberties in the region (Durand 2019; Crabtree 2020). A vibrant and autonomous civil society acts as a crucial check on state power, advocating for the rights of citizens and holding governments accountable for their actions. It fosters an environment where individuals and organizations can freely express their opinions, mobilize for collective action, and participate in shaping public policies (Crabtree, 2020).

However, the prevalence of state capture poses significant challenges to the protection and exercise of civil liberties in Latin America. State capture undermines democratic governance by co-opting state institutions, eroding the separation of powers, and subverting the rule of law (Durand, 2019). It enables a small elite to manipulate political processes, control public resources, and undermine the functioning of civil society. As a result, civil liberties are threatened, as dissent is suppressed, freedom of expression is curtailed, and the ability of civil society to advocate for human rights, social, and economic justice is weakened (Hellman et al., 2000).

To further understand the relationship between civil liberties and state capture in Latin America, it is crucial to examine the contextual factors that have shaped the region's political landscape. The 1990s marked a period of significant political transitions and economic reforms, as many Latin American countries embraced market-oriented policies and embarked on democratic transitions. These changes brought hopes for greater respect for civil liberties and human rights, but they also created new challenges, such as increasing inequalities, weak institutional frameworks, and the persistence of systemic corruption (Schneider and Soskice, 2009; Fukayama 2008).

Moreover, the present day is characterized by a growing awareness and demand for greater transparency, accountability, and inclusive governance across the region. Civil society organizations and grassroots movements have played pivotal roles in exposing corruption scandals, advocating for reforms, and mobilizing citizens to actively participate in democratic processes (Smulovitz and Peruzzotti, 2000). However, the struggle against state capture and the protection of civil liberties remains ongoing, as new challenges emerge and authoritarian tendencies resurface in some countries (Hunter and Power 2019; Meléndez-Sánchez 2021).

By delving into the contextual dimensions of the relationship between civil liberties and state capture in Latin America, this study aims to shed light on the intricate dynamics that have influenced the region's democratic development. The findings will contribute to a deeper understanding of the role of civil society and resultant civil liberties on state capture, and the challenges posed by state capture in Latin America.

Literature Review

State capture

Scholars, such as David-Barrett (2021, 2023), have made significant strides in understanding state capture and its mechanisms. A formative contribution by Hellman et al. (2000) sheds light on how state capture operates. They argue that in capture economies, formidable barriers to entry persist, favoring incumbent domestic firms. In this context, captor firms resort to illicit practices, including

bribery, to gain market access (Hellman, Jones, and Schankerman, 1999). Consequently, they effectively purchase private property protection from the state, perpetuating an environment of uncertain property rights and fluctuating rules. Certain businesses enjoy privileged treatment, such as preferential government contracts and licenses, while others struggle to operate legitimately, free from corruption and state capture. This captor environment hinders economic development and exacerbates inequalities, granting disproportionate power and wealth to the few at the expense of the majority. Silencing the voices of the majority, it perpetuates skewed policies that serve entrenched interests. Recognizing the urgency of addressing this issue, we must continuously explore novel variables and employ innovative methodologies to uncover the causal mechanisms of state capture. By doing so, we can empower citizens living under captor economies and provide policymakers with valuable insights to prevent state capture and foster inclusive economic livelihoods.

One such variable is civil liberties which serves as a crucial variable in inhibiting acts of corruption and state capture. The impact of civil liberties on state capture exhibits variation over time and space. Civil liberties, in this study, specifically refer to the extent of freedoms and rights enjoyed by individuals within a country. Strong civil liberties are only achievable when accompanied by a robust civil society that safeguards and promotes these liberties. Therefore, civil liberties are operationalized as the variable used in this study to test the argument.

Civil Society, Civil Liberties, and State Capture

Civil liberties play a crucial role in challenging the entrenched privileges of groups, such as the landed elites, that have historically held power over Latin American political economies. During transitions to democracy in the region, scholars like O'Donnell and Schmitter (1986) emphasize the importance of a vibrant civil society to counteract autocratic interests, a view shared by Acemoglu and Robinson (2006). Bratton and Walle (1992) and Bunce, McFaul, and Stoner-Weiss (2010) support this notion, highlighting the significance of a strong and independent civil society for opposition leaders to pose a credible threat to entrenched elites. However, caution is necessary, as autocratic and populist actors, like Rafael Correa in

Ecuador, have been adept at dismantling civil society and curtailing civil liberties to consolidate their power (Bermeo, 2016; De la Torre, 2018). Therefore, it is vital for society to remain vigilant and protect the rights of all individuals against attempts to undermine them.

The salience of a contentious political environment, as stated by Burmeo (1997), highlights the role of civil society in challenging entrenched interests and fostering democratization. However, a weak civil society, constrained private sector, and impoverished civil liberties contribute to the perpetuation of autocratic governments and the interests they serve. Cameron (2020) underscores how a feeble civil society enables powerful economic elites to corrupt public institutions in their favor. Conversely, Levitsky et al. (2010) and Hellman et al. (2000) argue that strengthening civil society raises the costs of repression and state capture, aligning with Burmeo's contention. On the contrary, March (2017) posits that without a strong civil society and robust civil liberties, democratization efforts often falter, leaving entrenched interests in privileged positions. Levitsky and Way (2010) find that authoritarianism prevails when civil society is weak and state institutions lack robustness. Fortunately, a strong civil society can overcome these barriers (Rivero, 2018; Bunce & Wolchik, 2011). However, in Nicaragua, the absence of a strong civil society severely hindered equitable economic growth and development, with corruption thriving under President Daniel Ortega. Diamond (2020) attributes Ortega's ability to dismantle civil society and suppress civil liberties to his ability to keep the business community and investors satisfied, allowing business to continue unaffected. In Mexico, Guerrero (2010) also observes similar instances of state capture facilitated by strong, organized economic actors in the presence of a weak civil society.

Durand (2019) emphasizes the exponential growth of corporate power in Latin America, leading to significant power imbalances and questioning the foundations of democracy. The lack of a robust civil society has allowed unchecked collusion between economic and political elites, resulting in the re-entrenchment of interests favoring economic elites at the expense of other societal groups. Durand (2019) argues that economic elites are capturing the state, reinforcing oligarchy and preventing radical change. Riggirozzi (2015) and Chodor (2021) suggest that civil society in Latin America

often lacks significant impact, with invited actors participating through consultations and lobby mechanisms rather than having effective decision-making power. Visser and Kalb (2010) caution that civil society can become captured by specific interests. Moreover, Latin American social groups face the challenge of overcoming deep-rooted issues such as patrimonialism, patronage, corruption, and abuse of power. To ensure state capture is prevented, it is crucial to neutralize corporate influence and strengthen civil society and its corresponding civil liberties. Durand (2019) notes that corporate state capture is most prominent in countries where political and economic liberalism are at their peaks, weakening the state and civil society while sustaining a fragile democracy. Overcoming state capture requires the collective efforts of corporate players, government actors, and civil society (Ouzounov, 2003). In summary, civil society plays a vital role in preventing state capture by safeguarding strong civil liberties.

Thus, the undermining of civil society in Latin America is contributing to the rise of state capture by corporate actors (Durand, 2019). A weakened civil society, lacking resources and cohesion, hampers the ability of people to voice their concerns and participate in shaping economic policies. Understanding state capture requires examining the state of civil society and its implications for elite actions. Activated civil society has the potential to challenge the power asymmetry imposed by elites, allowing citizens to exercise their civil liberties, express discontent, and resist oppressive dynamics. Over time, civil society organizations can effectively oppose and demand accountability from both economic and political elites (Durand, 2019). However, the opacity and pervasive elite power in Latin American countries present significant challenges for civil society in dismantling the unchecked influence of corporate actors.

With all of this said, the importance of civil society strength for state capture becomes evident when considering the extent of civil liberties, as highlighted by Hellman, Jones, and Kaufmann (2000). According to their findings, countries with low levels of civil liberties have limited state capture due to strong state control over the economy. Conversely, countries with robust civil liberties and an active civil society exhibit minimal state capture as civil society acts as a safeguard. However, state capture thrives in environments of

partial political and economic liberalization, characterized by moderate levels of civil liberties. While Hellman et al. (2000) focused on Eastern European countries, their insights can be extended to the Latin American region. Based on the descriptive analysis conducted in the introduction, the background provided clarifying the causal links between civil liberties and state capture, and the literature review, Latin American countries with higher levels of civil liberties experience less state capture compared to those with lower levels. However, countries in the mid-range of civil liberties in Latin America are likely to experience the highest levels of state capture. I test two core hypotheses derived from these observations.

H1: The greater the level of civil liberties in a given country in Latin America – the less state capture there will be overall.
H2: Countries in Latin America that have a mid-level range of civil liberties experience greater state capture overall relative to countries that have an extremely weak level of civil liberties and or a strong/robust level of civil liberties.

Methodology

Variables

Civil Liberties

The measurement of civil liberties in this study relies on the widely recognized and reputable assessment provided by Freedom House, an independent organization dedicated to the promotion and protection of democracy and human rights worldwide (Freedom House, 2023). Freedom House employs a systematic methodology to evaluate civil liberties which includes various indicators and qualitative assessments to assign a numerical score to each country.

Freedom House's methodology for measuring civil liberties involves assessing the extent to which individuals can exercise their political and civil rights in each country (Freedom House, 2023). This includes evaluating factors such as freedom of expression, assembly, and association, as well as the independence and effectiveness of the judiciary, respect for the rule of law, and the presence of restrictions or infringements on individual liberties. The assessment process involves gathering information from diverse sources, including local and international experts, human rights organizations, media reports, and legal documents.

To provide a standardized measure, Freedom House assigns scores ranging from 1 to 7 for civil liberties, with 1 representing the most severe restrictions and 7 signifying the highest level of protection and respect for civil liberties (Freedom House, 2023). In this study, for interpretability purposes, the values of the variable were reversed so that 1 corresponds to extremely weak/non-existent civil liberties and 7 corresponds to very strong civil liberties.

The utilization of Freedom House's measurement of civil liberties ensures the consistency and comparability of the data across different countries and time periods. It also benefits from the expertise and extensive research conducted by Freedom House in assessing the state of civil liberties globally. This approach provides a reliable and comprehensive measure of civil liberties, allowing for a more nuanced understanding of the relationship between civil liberties and state capture in Latin America.

Mid-Range Civil Liberties

In addition to the variable measuring the overall level of civil liberties, I created a new variable called "mid-range civil liberties" for the purpose of testing hypothesis 2 in this study. This variable focuses specifically on country-year observations where the civil liberties score falls in the middle range, represented by a value of 4. By isolating this subset of observations, I examine the relationship between mid-range civil liberties and the extent of state capture in Latin American countries.

To create the mid-range civil liberties variable, I coded all country-year observations with a civil liberties score of 4 as 1, indicating the presence of mid-range civil liberties out of the original measure (a 1 to 7 scale). All other observations received a code of 0, signifying the absence of mid-range civil liberties. This coding strategy allows for a targeted analysis of countries situated in the middle range of civil liberties and their potential association with extreme levels of state capture.

This variable is used to test hypothesis 2, which suggests that countries in Latin America with mid-range civil liberties are more

likely to experience higher levels of state capture. By focusing on this specific subset, I aim to identify patterns or relationships that may exist between the middle range of civil liberties and the prevalence of state capture, shedding light on the dynamics at play within these countries.

Overall, the inclusion of the mid-range civil liberties variable provides a valuable lens through which to examine the hypothesis regarding the relationship between civil liberties and state capture in Latin America. By isolating the observations within the middle range of civil liberties, I seek to uncover potential nuances and variations in the impact of civil liberties on state capture, contributing to a more comprehensive understanding of this relationship.

State Capture

The dependent variable in this study is *state capture,* which is derived from the Control of Corruption index provided by the World Bank. The Control of Corruption index measures the extent to which state institutions are prone to corruption and capture by powerful individuals or interest groups. Originally, the variable was scaled on a range from -2.5 to 2.5, with -2.5 representing the highest levels of state capture and 2.5 signifying the absence of state capture (WGI, 2022). To ensure the interpretability of results, I inverted the state capture variable, so that higher values on the index indicate higher levels of state capture. Subsequently, I transformed the variable to produce a scaled measure ranging from 0 to 5, where 0 represents low levels of state capture and 5 signifies high levels of state capture. I performed this transformation by adding 2.5 to every observation, converting the variable into positive integers for ease of analysis.

The Control of Corruption index formulated by the World Bank is a composite measure that combines various indicators and qualitative assessments to evaluate the presence and extent of corruption and state capture within a country. The index draws upon multiple data sources, including surveys, expert assessments, and other quantitative data related to corruption and governance. It accounts for factors such as bribery, embezzlement, favoritism, and the effectiveness of anti-corruption measures implemented by governments (WGI, 2022). The World Bank's methodology for

formulating the Control of Corruption index ensures a comprehensive assessment of state capture and corruption risks. The use of this widely recognized index for assessing state capture enhances the reliability and validity of the state capture variable used in my analysis (Aidt and Dutta, 2008; Aidt et al., 2008; Bagashka, 2014; Blake and Morris, 2009; Innes, 2014; Kaufmann, 2016; Meon and Weill, 2010).

Control Variables

I use an extensive range of control variables, as suggested by the literature, to account for various political, economic, institutional, and social factors that are known to significantly influence state capture.

Time. To capture the temporal scope of the study from 1996 to 2017 and account for the observed increase in state capture and corruption in the Latin American region over time (Weyland, 1998; Durand, 2019), I include a time counter ranging from 1 to 22.

Democracy. Considering Latin America's historical challenges with weak democratization, the study recognizes that porous democratic systems create favorable conditions for state capture to thrive (Kupferschmidt, 2009). To account for the influence of democracy, I include the *v2x_polarchy* variable from the Varieties of Democracy dataset (Coppedge et al., 2022).

Urban Population %. I measure the level of urbanization in a country using the Urban Population % indicator, obtained from the World Development Indicators (World Bank, 2023). This indicator represents the percentage of a country's total population residing in urban areas and is expressed on a percentile scale from 0 to 100 (Korman, 2023).

Economic Freedom. The Economic Freedom Index, developed by the Heritage Foundation, is utilized to assess the level of economic freedom within countries (Heritage Foundation, 2023). This composite measure combines various indices that gauge factors such as business freedom and overall business friendliness. Prior research has shown a negative correlation between the openness of

an economy, as reflected in higher economic freedom scores, and the prevalence of corruption (Morris, 2004).

Log GDPPC. I employ *log GDPPC* (logarithm of Gross Domestic Product per capita) as an indicator of a country's economic prosperity. It measures the average economic output per person on a logarithmic scale. Previous research has indicated a negative relationship between the level of economic development, as captured by *log GDPPC*, and the occurrence of state capture. Higher levels of economic prosperity have been associated with lower levels of state capture, as countries with stronger economies tend to have more robust institutions, greater transparency, and reduced incentives for corruption (Korman, 2022).

Methodology

In this study, I examine the relationship between civil liberties and state capture in Latin American countries. The analysis includes a pooled time series cross-sectional dataset of 19 Latin American countries[22] from 1996 to 2017. The data for the dependent variable, *state capture*, is derived from the World Bank, while data for other explanatory variables (control variables) are obtained from the Heritage Foundation, Freedom House, and the Varieties of Democracy dataset. The study estimates a mixed effects model to account for temporal variation and handle missing values, providing a robust estimation technique (Hodges, 2013).

The main model focuses on the continuous and dummy variable form of civil liberties to estimate its effects on state capture and test Hypothesis 1 and 2 respectively. I chose to use a mixed effects model due to its suitability for analyzing continuous variables and

[22] The 19 Latin American countries analyzed are the following: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela

temporal variation in the dataset. A mixed effects model addresses the limitations of missing values and allows for robust estimation compared to pooled time series regressions (Snijders and Bosker, 2012). The model includes additional control variables known to influence state capture, encompassing both continuous and dummy variables.

To address autocorrelation, I incorporate an AR(1) term into the mixed effects model. Additionally, I include a robustness check by excluding Cuba from the sample due to its extreme outlier status regarding civil society strength and civil liberties. This step ensures the robustness of the main results. The robustness check analysis is presented in Appendix A, with the total number of observations reduced from 359 to 339 after excluding Cuba.

Table 1 below showcases the descriptive statistics for the main model and its variables. Following is a discussion of the results.

Table 1

Descriptive Statistics

	Mean	Median	Standard Deviation	Range	Minimum	Maximum
State Capture	2.77	2.92	0.69	2.99	0.90	3.89
Civil Liberties	4.99	5.0	1.29	6	1	7
Time	10.5	10.5	6.35	21	0	21
GDPPC	5274.78	4123.38	3808.16	18685.89	5	18690.89
Democracy	0.48	0.45	0.22	0.80	0.05	0.86
% Population Urban	70.88	72.58	13.59	51.79	43.44	95.24
Economic Freedom	60.10	61.8	10.78	52.3	26.7	79

Results

To estimate the effects of the independent variables on state capture, I utilize a mixed effects model, incorporating both fixed effects and random intercept. The equation can be expressed as:

$$State\ Capture\ =$$

$$B_0 + B_1 * Civil\ Liberties + B_2 * Mid - Level\ Civil\ Liberties + B_3 * Time + B_4 * log\ GDPPC + B_5 * Democracy + B_6 * \%\ Population\ Urban + B_7 * Economic\ Freedom + u + \varepsilon$$

Within this equation, "State Capture" represents the dependent variable. The β coefficients ($B_1, B_2, B_3, B_4, B_5, B_6, B_7$) denote the regression coefficients for each independent variable ($Civil\ Liberties$, $Mid - Level\ Civil\ Liberties$, $Time$, $log\ GDPPC$, $Democracy$, $* \%\ Population\ Urban$, $Economic\ Freedom$). The random intercept term, denoted as "u," captures the unobserved individual-specific effects, accounting for variations across different country-level groups in the dataset.

By including the random intercept, the mixed effects equation accommodates the presence of individual-specific heterogeneity, allowing for a more comprehensive analysis of the relationship between the independent variables and state capture (Snijders and Bosker, 2012). The ε term represents the error term, representing unexplained variability in the model. Together, the mixed effects equation provides a robust framework for examining the impacts of the independent variables on state capture, considering both fixed effects and individual-specific random effects, while accounting for temporal variation.

In Table 2, I present the results of the mixed effects regression for the full sample, providing estimations for the main model. The mid-range form represents countries with civil liberties score of 4, falling within the mid-range of our index, coded as 1, while other countries are coded as 0.

Table 2

Full model results

Fixed Effects	**Main Model**
Time	0.013***
	(-0.006)
Civil Liberties	-0.080***
	(0.024)
Civil Liberties Mid-Range	0.068***
	(-0.033)
Democracy	-0.471***
	(-0.178)
% Population Urban	-0.016***
	(-0.008)
Economic Freedom	-0.007***
	(-0.003)
Log GDPPC	-0.325***
	(-0.104)
Constant	5.819***
	(-0.625)
Random Effects	
Intercept	9.196
	(-1.82)
Residual	0.541
	(-0.06)
Correlation Structure (AR1)	0.979

Observations	358
Log Likelihood	247.349
AIC	-472.76
BIC	-430.07

Note: ∗p<0.1;∗∗p<0.05;∗∗∗p<0.01

Discussion

The main model represented in Table 2 demonstrates the effects of the independent variables, including *civil liberties*, on *state capture*. Controlling for other regressors in the model, *civil liberties* were found to be statistically significant at the p < .01 level with a negative coefficient estimate of 0.080. This leads me to reject the hypothesis (H1) that greater levels of *civil liberties* would lead to reduced *state capture* as this result shows that as *civil liberties* move from good to worse, *state capture* decreases. This finding could in part be explained by the fact that Latin American countries to begin with already have low levels of civil liberties and weak democracies to begin with resulting in a continual reduction in space and opportunity for private sector actors to shape the rules of the game in their favor as society becomes less and less free. However, these findings align with the argument put forth by Hellman et al. (2000) that a mid-range level of *civil liberties* may be more conducive to state capture.

To that end, the results indicate that in the Latin American region, an increase in mid-range *civil liberties* corresponds to an increase in *state capture*. This suggests that the conditions most favorable for state capture occur when *civil liberties* are in the mid-range. In this range, the state is not strong enough to severely repress *civil liberties*, nor is civil society robust enough to ensure the protection of strong *civil liberties*. These circumstances create an environment where *state capture* can flourish. The variable representing *mid-range civil liberties*, constructed to capture this concept, yields a positively signed coefficient estimate of 0.068, which is statistically

significant at the $p < .01$ level, even when accounting for other variables.

Therefore, for Latin American countries with *mid-range civil liberties*, *state capture* is expected to increase by approximately 0.068 units compared to countries with high or low levels of *civil liberties*. This evidence means that we fail to reject hypothesis H2. This result is congruent with Hellman et al. (2000) which found a positive relationship between mid-range civil liberties and state capture in Eastern Europe. Replicating this result in Latin America through my study contributes to a better understanding of *state capture*. Despite H1 not being confirmed and the results showing the reverse of the initial argument, the confirmation of H2 and the findings in Table 2 shed light on the true impact of *civil liberties* on *state capture*.

The inclusion of the AR(1) term in Table 2's model output revealed the presence of significant autocorrelation or "time dependence" within the model. By incorporating this term, we accounted for and addressed the observed autocorrelation. Overall, the findings from the main model in Table 2 demonstrated robustness.

However, the results for H1 were counter to the initial prediction for Latin America. Instead of observing an increase in *state capture* as *civil liberties* worsened, the analysis revealed an unexpected decrease in *state capture*. This discrepancy raised intriguing questions. On the other hand, the findings related to H2 provided valuable insights. By examining the varying levels of *civil liberties* in detail, the study uncovered that it is the mid-level range of *civil liberties* that truly impacts *state capture*. Countries situated in this mid-range category are more likely to experience higher levels of *state capture* overall.

In summary, while the findings for H1 were contrary to expectations, the analysis of mid-range levels of *civil liberties* supported H2, highlighting the significance of the mid-level range in driving *state capture* outcomes.

Among the control variables included in the study, *Democracy* exhibited a statistically significant negative coefficient of -0.471, indicating that higher levels of democracy were associated with lower

levels of *state capture*. This finding aligns with expectations and previous literature, suggesting that stronger democratic institutions and processes act as a deterrent to *state capture*.

Additionally, the variable *% Population Urban* showed a statistically significant negative coefficient of -0.016, implying that a higher proportion of the population residing in urban areas was associated with lower levels of *state capture*. This suggests that urbanization may play a role in fostering transparency, accountability, and a more competitive business environment, reducing opportunities for *state capture*.

Overall, in examining the relationship between *civil liberties* and *state capture* in Latin America, the findings revealed intriguing insights. Contrary to the initial hypothesis (H1), the analysis demonstrated that as *civil liberties* worsened, *state capture* actually decreased. However, the results aligned with the theoretical proposition of a mid-level range of *civil liberties* being critical for *state capture* (H2), with countries in this range experiencing higher levels of *state capture*. These findings expanded upon previous research and shed light on the nuanced dynamics within Latin American countries.

Furthermore, the control variables in the study provided significant insights. Higher levels of *democracy* were found to be associated with lower levels of *state capture*, emphasizing the importance of strong democratic institutions in preventing corruption. Additionally, the proportion of the population residing in urban areas showed a negative relationship with *state capture*, suggesting that urbanization contributes to transparent and accountable governance, thus reducing opportunities for state capture.

These findings contribute to a comprehensive understanding of the factors influencing *state capture* in Latin America, highlighting the complex interplay between civil liberties, democracy, urbanization, and state capture. The study underscores the importance of considering specific contexts and the mid-level range of *civil liberties* when assessing the impact of these factors on *state capture* dynamics.

Conclusion

This study examined the complex relationship between *civil liberties* and *state capture* in Latin America. While the findings revealed an unexpected negative correlation between worsening *civil liberties* and *state capture*, they confirmed a statistically significant, positive impact of the mid-range level of *civil liberties* on *state capture*. These results contribute to the existing literature and extend the understanding of *state capture* dynamics beyond the Eastern European region, as demonstrated by Hellman et al. (2000).

The implications of the study's findings are clear for state actors, civil society, and the private sector. Strengthening *civil liberties* beyond the mid-range level is crucial in combating *state capture*. Domestic political leaders, local business actors, and civil society play key roles in leading the fight against state capture (Hellman and Kauffmann, 2001; Rupert, 2016). Transparency mechanisms, such as in-depth surveys of citizens and firms, can empower civil society and drive reform. Public officials should disseminate survey results widely to mobilize support and foster accountability. Implementing "public hearings" for procurement and government contracts can further combat state capture. The importance of democracy, democratic institutions, and a robust civil society with watchdog groups and independent media cannot be underestimated in this context (Blake and Morris, 2009).

To address the challenge of weak civil society and civil liberties, policymakers can consider appealing to nationalism to mobilize the population against entrenched interests (Way 2005). Reigniting a sense of urgency among civil society groups and protecting the rule of law are vital steps in limiting corporate power and state capture (Kalaitzake, 2015; Weyland 2020). However, reversing state capture requires sustained efforts and overcoming the influence of powerful entities in Latin America. Notably, countries like Chile, Uruguay, and Costa Rica have shown leadership in anti-corruption initiatives, demonstrating that action across different spheres of society can make a positive impact (Rotberg, 2019).

In summary, this study highlights the importance of the mid-range level of *civil liberties* and its influence on *state capture* in Latin America. By strengthening *civil liberties* and promoting transparency,

mobilization, and accountability, Latin American countries can mitigate the detrimental effects of *state capture* and pave the way for a region characterized by reduced corruption and enhanced democratic governance.

References

Acemoglu, D., & Robinson, J. A. (2006). *Economic origins of dictatorship and democracy*. Cambridge University Press.

Aidt, T., Dutta, J., & Sena, V. (2008). Governance regimes, corruption and growth: Theory and evidence. *Journal of Comparative Economics*, *36*(2), 195-220.

Aidt, T.S. and Dutta, J. (2008), "Policy compromises: corruption and regulation in a democracy", Economics and Politics, Vol. 20 No. 3, pp. 335-360.

Bagashka, T. (2014), "Unpacking corruption: the effect of veto players on state capture and bureaucratic corruption", Political Research Quarterly, Vol. 67 No. 1, pp. 165-180.

Bermeo, N. (1997), "Myths of Moderation: Confrontation and Conflict during Democratic Transitions." Comparative Politics 29 (3): 305-322

Bermeo, N. (2016), "On Democratic Backsliding." Journal of Democracy 27 (1): 5-19.

Blake, C. H., & Morris, S. D. (Eds.). (2009). *Corruption & Democracy in Latin America*. University of Pittsburgh Press.

Bratton, M., and Van de Walle, N. (1992), "Popular Protest and Political Reform in Africa." Comparative Politics 24 (4): 419-442

Bunce, V., and Wolchik, S. Defeating Authoritarian Leaders in Postcommunist Countries. New York: Cambridge University Press, 2011.

Bunce, V., McFaul, M., and Stoner-Weiss, K., editors. Democracy and Authoritarianism in the Postcommunist World. New York: Cambridge University Press, 2010.

Cameron, M. A. (2020). The return of oligarchy? Threats to representative democracy in Latin America. *Third World Quarterly*, 1-18.

Chodor, T. (2021). The Changing Face of Mercosur: Legitimacy and the Politics of Scale in South American Regionalism. *JCMS: Journal of Common Market Studies*.

Coppedge, Michael, John Gerring, Carl Henrik Knutsen, Staffan I. Lindberg, Jan Teorell, David Altman, Michael Bernhard, Agnes Cornell, M. Steven Fish, Lisa Gastaldi, Haakon Gjerløw, Adam Glynn, Sandra Grahn, Allen Hicken, Katrin Kinzelbach, Kyle L. Marquardt, Kelly McMann, Valeriya

Mechkova, Pamela Paxton, Daniel Pemstein, Johannes von Römer, Brigitte Seim, Rachel Sigman, Svend-Erik Skaaning, Jeffrey Staton, Eitan Tzelgov, Luca Uberti, Yi-ting Wang, Tore Wig, and Daniel Ziblatt. 2022. "V-Dem Codebook v12" Varieties of Democracy (V-Dem) Project.

Crabtree, J. (2020). Democracy, elite power and civil society: Bolivia and Peru compared. *Revista CIDOB d'Afers Internacionals*, (126), 139-161.

Dávid-Barrett, E. (2023). State capture and development: a conceptual framework. *Journal of International Relations and Development*, 1-21.

David-Barrett, L. (2021). State Capture and Inequality.

De la Torre, C. (2018), "Ecuador After Correa." Journal of Democracy 29 (4): 77-88.

Diamond, L. (2020), "Breaking Out of the Democratic Slump." Journal of Democracy 31 (1): 36-50.

Dunne, T., Kurki, M., & Smith, S. (Eds.). (2021). Mark Rupert in *International relations theories: Discipline and diversity*. Oxford University Press, USA.

Durand, F. (2019). *La captura del Estado en América Latina: reflexiones teóricas*. Fondo Editorial de la PUCP, 1-206.

Freedom House. (2023). Freedom in the World Research Methodology. Retrieved from URL. https://freedomhouse.org/reports/freedom-world/freedom-world-research-methodology

Fukuyama, F. (2008). Poverty, inequality, and democracy: The Latin American experience. *Journal of Democracy*, *19*(4), 69-79.

Guerrero, M. A. (2010). Broadcasting and democracy in Mexico: From corporatist subordination to State capture. *Policy and Society*, *29*(1), 23-35.

Hellman, J. S., Jones, G., & Kaufmann, D. (2000). *Seize the state, seize the day: State capture, corruption, and influence in transition*. The World Bank.

Hellman, J. S., Jones, G., Schankerman, M., & Kaufmann, D. (1999). *Measuring governance, corruption, and state capture: How firms and bureaucrats shape the business environment in transit*. The World Bank.

Hellman, J., & Kaufmann, D. (2001). Confronting the challenge of state capture in transition economies. *Finance and Development*, *38*(3), 31-35.

Hellman, J., Jones, G., & Kaufmann, D. (2000). Beyond the 'grabbing hand' of government in transition: facing up to 'state capture' by the corporate sector. *Transition*, *11*(2), 8-11.

The Heritage Foundation. (2023). 2023 Index of Economic Freedom. Retrieved from https://www.heritage.org/index/pdf/2023/book/2023_IndexOfEconomicFreedom_FINAL.pdf

Hodges, J. S. (2013). An Opinionated Survey of Methods for Mixed Linear Models. Richly parameterized linear models: additive, time series, and spatial models using random effects, CRC Press.

Hunter, W., & Power, T. J. (2019). Bolsonaro and Brazil's illiberal backlash. *Journal of democracy*, *30*(1), 68-82.

Innes, A. (2014), "The political economy of state capture in Central Europe", JCMS: Journal of Common Market Studies, Vol. 52 No. 1, pp. 88-104.

Kalaitzake, M. (2015). Political capture by the financial industry. *TNI State of Power report*.

Kaufmann, D. (2016), "Governance, aid and corruption in transition: taking state capture seriously", Brookings,available at: www.brookings.edu/opinions/governance-aid-and-corruption-in-transition-taking-state-capture-seriously/amp/ (accessed 10 June 2022).

Korman, J. (2022). State capture and the role of political parties in Latin America. *Biden School J. Pub. Pol*, *13*, 46-65.

Korman, J. G. (2023). Assessing the impact of wealth inequality on state capture in Latin America. *International Journal of Development Issues*, *22*(2), 198-213.

Kupferschmidt, D. (2009),"Illicit political finance and state capture", International IDEA.

Lederman, D., Loayza, N. V., & Soares, R. R. (2005). Accountability and corruption: Political institutions matter. *Economics & politics*, *17*(1), 1-35.

Levitsky, S., and Way, L. Competitive Authoritarianism: Hybrid Regimes After the Cold War. Cambridge University Press, 2010.

March, L., Rovira Kaltwasser, C., Taggart, P., Ochoa Espejo, P., & Ostiguy, P. (2017). Populism in the post-soviet states. *The Oxford handbook of populism*, 214-231.

Meléndez-Sánchez, M. (2021). Latin America Erupts: Millennial Authoritarianism in El Salvador. *Journal of Democracy*, *32*(3), 19-32.

Meon, P.G. and Weill, L. (2010), "Is corruption an efficient grease?", World Development, Vol. 38 No. 3, pp. 244-259.

Morris, S. D. (2006). Corruption in Latin America. *The Latin Americanist*, *49*(2), 5-16.

Morris, S.D. (2004),"Corruption in Latin America: an empirical overview", Secolas Annals, Vol. 36, pp. 74-92.

O'Donnell, G., and Schmitter, P. Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies. Baltimore: The Johns Hopkins University Press, 1986.

Ouzounov, N. A. (2003). Facing the challenge: corruption, state capture and the role of multinational business. *J. Marshall L. Rev.*, *37*, 1181.

Riggirozzi, P. (2015). The Social Turn and Contentious Politics in Latin American Post-Neoliberal Regionalism. In *The Legitimacy of Regional Integration in Europe and the Americas* (pp. 229-248). Palgrave Macmillan, London.

Rivero, Á. (2018). Populism and democracy in Europe. *Routledge handbook of global populism*, 281-294.

Rose-Ackerman, S., & Palifka, B. J. (2016). *Corruption and government: Causes, consequences, and reform*. Cambridge university press.

Rotberg, R. I. (2019). The Corruption of Latin America. In *Corruption in Latin America* (pp. 1-25). Springer, Cham.

Schedler, A. Electoral Authoritarianism: The Dynamics of Unfree Competition. Boulder and London: Lynn Rienner, 2003.

Schneider, B. R., & Soskice, D. (2009). Inequality in developed countries and Latin America: coordinated, liberal and hierarchical systems. *Economy and society*, *38*(1), 17-52.

Smulovitz, C., & Peruzzotti, E. (2000). Societal Accountability in Latin America. *Journal of democracy*, *11*(4), 147-158.

Snijders, Tom A.B. and Bosker, R. 2012. Multilevel Analysis: An Introduction to Basic and Advanced Multilevel Modeling, 2nd Edition. Thousand Oaks, CA: Sage. Chapters 1-3.

Visser, O., & Kalb, D. (2010). Financialised capitalism Soviet style? Varieties of state capture and crisis. *Archives Européennes de Sociologie/European Journal of Sociology/Europäisches Archiv für Soziologie*, 171-194.

Way, L. (2005), "Authoritarian State Building and the Sources of Regime Competitiveness in the Fourth Wave: The Cases of Belarus, Moldova, Russia, and Ukraine." World Politics 57 (2): 231-261

Weyland, K. (2020). Populism's threat to democracy: Comparative lessons for the United States. *Perspectives on Politics*, *18*(2), 389-406.

Weyland, K. G. (1998). The politics of corruption in Latin America. *journal of Democracy*, *9*(2), 108-121.

WGI (2022), available at: http://info.worldbank.org/governance/wgi/ (accessed 2 October 2022).

The World Bank. (2023). World Development Indicators. Retrieved from https://databank.worldbank.org/source/world-development-indicators

Appendix A: Robustness Check

Table A below presents a robustness check of the main model in Table 2, with the exclusion of Cuba from the analysis. Cuba was intentionally omitted due to its extreme outlier status in terms of *civil liberties*, scoring zero or non-existent *civil liberties* across the board according to the scale employed by Freedom House. This omission ensures that the estimates are not unduly influenced by Cuba's unusual position.

Upon examining Table A, it is evident that the results remain highly robust and consistent with those of the main model in Table 2. The signs for the two key variables, *civil liberties* and *civil liberties mid-range*, remain the same and highly statistically significant. However, as with the main model, H1, which examines *civil liberties*, shows an opposite sign but remains statistically significant. Conversely, the results for H2, which examines *civil liberties* mid-range, continue to hold, confirming that countries within the mid-level range of civil liberties experience higher levels of *state capture* overall.

In summary, the robustness check in Table A demonstrates that the results remain consistent and reliable, supporting the findings of the main model. The exclusion of Cuba from the sample accounts for its unique level of *civil liberties*, ensuring the integrity of the analysis. This further underscores the significance of the mid-level range of *civil liberties* in understanding *state capture* dynamics in Latin America.

Table A

Robustness Results

Fixed Effects	**Main Model**
Time	0.013***
	(-0.006)
Civil Liberties	-0.077***
	(0.025)
Civil Liberties Mid-Range	0.063**
	(0.034)
Democracy	-0.515***
	(0.182)
% Population Urban	-0.015**
	(0.008)
Economic Freedom	-0.008**
	(0.003)
Log GDPPC	-0.331***
	(-0.106)
Constant	5.907***
	(-0.619)
Random Effects	
Intercept	5.31
	-1.86
Residual	0.525
	-0.08
Correlation Structure (AR1)	0.976

Observations	339
Log Likelihood	229.398
AIC	-436.796
BIC	-394.701

Note:∗p<0.1;∗*p<0.05;∗**p<0.01

Book Reviews | Recensions d'ouvrage

Cristina Beltrán. *Cruelty as Citizenship: How Migrant Suffering Sustains White Democracy* Minneapolis: University of Minnesota Press, 2020. 126pp., $10 USD paperback (ISBN: 978-1-5179-1192-8)

Piers Eaton[*]*, University of Ottawa*

In her book *Cruelty as Citizenship: How Migrant Suffering Sustains White Democracy*, Cristina Beltrán uses past practices of Herrenvolk democracy as a means for exploring the nativist treatment of noncitizen migrants in the contemporary United States. Herrenvolk democracy is a concept taken from the sociologist Van der Berghe (1967, 18) in which a regime is "democratic for the master race but tyrannical for the subordinate groups". This kind of regime simultaneously promises white citizens equality (between one another) and privilege (over non-whites), treating non-whites as "*anticitizens*", the Other who threatens and consolidates white citizenship, and who "[ensure] that no white ever need find himself or herself at the absolute bottom of the social and political barrel" (Beltrán 2020, 45. Emphasis in original; Olson 2004, 43, 29-30).

[*] Biography: Piers Eaton is a PhD student in the School of Political Studies at the University of Ottawa under the supervision of André Lecours. His research focuses on the role of communication systems in identity formation. His doctoral work is on the relationship between online communication and national identity, particularly within the modernist view of nationalism. His master's work was done at University of St. Andrews, on the role of friendship in Aristotle's ethics and on the moral implications of Hegel's concept of recognition. He also does research on the ideological foundations of assumptions in political economy.

* Biographie : Piers Eaton est doctorant à l'École d'études politiques de l'Université d'Ottawa sous la direction d'André Lecours. Ses recherches portent sur le rôle des systèmes de communication dans la formation de l'identité. Son travail de doctorat porte sur la relation entre la communication en ligne et l'identité nationale, en particulier dans le cadre de la vision moderniste du nationalisme. Andrews, sur le rôle de l'amitié dans l'éthique d'Aristote et sur les implications morales du concept de reconnaissance de Hegel. Il effectue également des recherches sur les fondements idéologiques des hypothèses en économie politique.

Beltrán examines historical Herrenvolk democratic practices during the American Frontier, the Mexican-American War, and the eras of slavery and Jim Crow. White men on the frontier were free to both create and enforce the law, allowing them to terrorize the people into whose territory they were expanding. Frontiersmen were permitted to both "practice 'vigilante justice'" and "pardon those they felt had been treated unjustly" while people of colour were subject to racial terrorism (Beltrán 2020, 54-57. Emphasis removed; Grandin 2020, 22). Throughout the book, Beltrán highlights how the ability to enforce extra-legal terror on racialized minorities while being immune from legal consequences is a practice that continued through public lynching in the 19th and 20th centuries and continues through border militias today. Beltrán adds that during the Mexican-American war, the violence against Mexicans was often witnessed by the broader public, whose sanction gave the violence a public character similar to anti-Black lynchings. Understanding the public nature of the violence of the lynchings is necessary to understanding the role of the violence in Herrenvolk democracy, because it explains how this violence reinforced the dominant and subordinated races positions, by demonstrating how the former is above the law and reminding the latter of their position below it.

As Beltrán (2020, 111; Olson 2004, 76) notes, "today's white advantage involves 'probabilities, not guarantees'". Despite persistent wealth gaps and continuing discrimination, Black Americans can no longer function as anticitizens, due to prominent examples of Black Americans (Barack Obama, Oprah Winfrey, LeBron James) who have achieved higher status than most whites. Noncitizen migrants, on the other hand, are not able to rise to prominence due to their precarity and can therefore serve as anticitizens in a Herrenvolk society, always remaining below the lowest whites. Noncitizens migrants are further made into anticitizens by demonizing them as a threatening Other through the 'great replacement', a racist theory which posits that "white people are being systematically 'replaced' by people of color through mass migration" (Beltrán 2020, 115). All of this creates a situation in which non-citizen migrants can be subjects of the extra-legal terror that defines Herrenvolk democracy.

Beltrán's work helps readers see contemporary nativist American immigration politics, not as an aberration, but as a continuation of Herrenvolk practices that have existed for centuries. This can help explain why America has border militias, despite Americans holding more positive opinions of immigrants than, for example, Italy, a country which also has high levels of disapproval in immigration and is experiencing an influx of refugees at their border. While the US has armed border militias, Italy uses government efforts and partnerships to attempt to slow migration (Gonzalez and Connor 2019). The book situates past violence, not as aberrations or as failures to live up to ideals, but as integral practices in the formation of American democracy. Therefore, it allows us to examine whether the same is true today: does America's mistreatment of migrants mean it is falling short of its self-image as a nation of immigrants, or is it part of its identity? Goals like building a border wall, practices like separating migrant children from their parents, and the existence border militias are evidence of the latter.

My principal criticism of the text is that it fails to acknowledge certain key differences between the historical periods Beltrán is covering and recent history. Lenard (2022) shares this criticism, highlighting how previous periods involved American expansion into non-American territory, whereas today's violent practices relate to non-Americans' movement into American territory. However, I would argue that the differences are more fundamental than Beltrán or Lenard posit.

Beltrán tries to use Trump's rallies as a stand in for the public violence of the past, which she compares to lynching, however, I argue there is a disjuncture in this comparison due to how the content of Trump rallies reveals a significant difference between past and present (Beltrán 2020, 105-107). Beltrán elucidates how Trump's speeches would "conjure images of 'deadly sanctuary cities' where 'dangerous, violent, criminal aliens' are continually 'hacking and raping and bludgeoning' American citizens", which Beltrán compares to "nineteenth century newspaper accounts that sought to satisfy white readers with the 'excruciating details' of lynchings" (Ibid). The nineteenth-century newspaper accounts reinforced Herrenvolk democracy because they reminded white readers of their dominant position. In this scenario, they are the citizens and the non-whites are the anti-citizens, and so the white citizens are reminded that no

matter how low their social standing, at least they are not subject to unpunished violence. The Trump rally inverts this relationship: non-citizen migrants are depicted as acting with impunity, protected by Democrats, and in Trump's telling, it is white citizens who are subject to unpunished violence at the hands of illegal immigrants - putting them closer to the position of anticitizens than dominant citizen.

This contradiction points to a recurring issue in Beltrán's argument: the racism she describes was based on superiority, whereas modern nativism activates a sense of threat. Beltrán (2020, 114) is correct when she describes the modern nativist as feeling a mixture of "envy, impotence, and rage" towards migrants, but she fails to see how that creates a fundamental disjuncture between the practitioners of Herrenvolk democracy and modern nativists. An approach which sufficiently contextualises the continuity *and* divergence between past and contemporary practices would be more theoretically impactful.

References

Betrán, C. (2020). *Cruelty as Citizenship: How Migrant Suffering Sustains White Democracy*. University of Minnesota Press.

Gonzalez-Barrera, A., & Connor, P. (2019, March 14). Around the World, More Say Immigrants Are a Strength Than a Burden. *Pew Research Center's Global Attitudes Project*. https://www.pewresearch.org/global/2019/03/14/around-the-world-more-say-immigrants-are-a-strength-than-a-burden/

Grandin, G. (2020) *The End of the Myth: From the Frontier to the Border Wall in the Mind of America*. Metropolitan Books.

Lenard, P. T. (2022). Cruelty as citizenship: How migrant suffering sustains white democracy. *Contemporary Political Theory*. https://doi.org/10.1057/s41296-022-00560-x

Olson, J. (2004). *The Abolition of White Democracy*. University of Minnesota Press.

Van der Berghe, P. L. (1967). *Race and Racism: A Comparative Perspective*. Wiley.

***Nonhuman Humanitarianism: Animal Interventions in Global Politics*. By Benjamin Meiches. Minneapolis (Minnesota): University of Minnesota Press, 2023. pp. 234. $100 (hardcover); $25 (paperback). ISBN 978-1-5179-1384-7 (hc); ISBN 978-1-5179-1385-4 (pb).**

Alexandra Boesel, University of California, Los Angeles (UCLA)

In *Nonhuman Humanitarianism*, Benjamin Meiches examines the roles of nonhuman actors in international humanitarian assemblages, identifying how multi-species interactions increase the functions of human aid work. Meiches's work addresses a critical gap in International Relations (IR), with the acknowledgment of the key ways in which animals remake global political projects (see also Meiches, 2019). The author deftly employs wide swathes of relevant theory to focus on how concepts of anthropocentric reason and anthropocentric feeling continue to marginalize nonhumans in humanitarian work: animals labor in the projects of keeping humans safe, healthy, and fed, while performing work that is explicit about its human exceptionalism. Recipients of humanitarianism are worth saving because they are human, a shifting political semiotic, which has leaned on racist, classist and gendered logics throughout history to legitimize itself. Despite the anthropocentrism that pervades and is the basis for such humanitarian work, Meiches argues that multi-species justice can arise in these more-than-human assemblages of aid. Interactions between human workers and the de-mining dogs, disease and bomb-sniffing rats, and food-producing goats and cattle, Meiches argues, necessitate metacommunication, producing modes of multi-species understanding within humanitarian work. This metacommunication, per Meiches, holds potential for multi-species justice. While the author's theoretical framework creates a strong foundation for this argument, the empirical evidence for such a claim leaves the reader wanting.

The introductory chapter lays out his theoretical framework and argument for how animal actors challenge and transform the human-centric work of humanitarianism. The second, third, and fourth chapters begin with vignettes of various species that work within humanitarianism: de-mining dogs, bomb and tuberculosis (TB)-

sniffing rats, and finally, milkable and consumable goats, cattle and poultry. After reading these chapters, the reader is left with only fragments of interactions with the creatures that are meant to be the focus of the book. Theory leads the way in considering how animals (probably) transform humanitarian work and empirical application appears to take a back seat. While lacking in empirical evidence, the book undoubtedly provides incredible more-than-human genealogy, stitching together the important multi-species work of philosophers, anthropologists, and ethologists, with important international studies conversations regarding humanitarianism. Such interdisciplinary theoretical framework is critical in considering nonhuman roles in current geopolitical projects, especially given the multiple socio-ecological crises which humanitarian aid is increasingly addressing (i.e. climate change, mass extinction, etc.). This book makes important strides in calling for increased awareness of multi-species participation and enrollment in global social, political, and economic projects.

The book's strengths lie in the author's careful critique of the inescapable anthropocentrism of humanitarianism. Providing thorough theoretical and historical context, Meiches argues that humanitarianism's anthropocentrism has not only marginalized nonhuman life, but also humans. Relying on a shifting semiotic of the 'human' has impacted "how humanitarianism addresses humans, because the fluidity of the concept of the human produces and sustains inequity within and between human and nonhuman communities" (p. 7). As such, Meiches critiques humanitarian efforts for its biopolitics: subjects of subsistence aid are "included in a global political order only insofar as they exist as mouths to feed, a model that frequently serves as a pretext for making lives fungible" (p. 138). In a world where human and nonhuman lives are increasingly made vulnerable by socioecological crises of climate change, mass extinction, and more, the stakes of humanitarianism projects considering the nonhuman are critical.

Meiches makes the provocative assertion that the path towards multi-species justice is interaction. This claim is argued through the introduction of ethology, in the fourth and final chapter. Here, the author argues that the key to justice is in attempting to understand nonhuman metacommunication, or communication beyond human

verbality. Per Meiches, metacommunication is critical to helping achieve nonhuman humanitarianism, or even a less anthropocentric perspective, that is open to the view that Earthly politics do not just encompass human political claims. Or, as Meiches more pithily writes, "the problem is less the anthropomorphism, since humans inevitably anthropomorphize just as birds avianmorphize, but the form anthropormorphism takes when it views politics as exclusively made up of human statements" (2023; p. 154).

Unfortunately, the lack of empirical evidence for the democratizing capacity of metacommuncation in multi-species humanitarian assemblages leaves the scholarly reader wanting. It seems more than possible that Meiches could—and perhaps did—gain evidence of such meta-communicative coalition-building. Meiches fourth and final chapter, which covers the vast field of ethology, could have offered such empirics, including observations or quotes from humanitarians who work alongside the dogs, rats, goats, or cows. Certainly, Meiches hints in his acknowledgments that such conversations were occurring, at least with the staff of APOPO, a global NGO which uses rats to sniff out bombs and TB, who cared for the bomb and TB sniffing rats. Why the author did not foreground a multi-species ethnographic approach that explicitly pulled upon ethology, as other scholars have (see Hartigan, 2020, 2021) is unclear. His theoretical assertions seem to necessitate such a multi-species methodology. Other multi-species approaches have also built on more local, situated, and decolonial knowledges to understand nonhumans (see Govindrajan, 2018; Parreñas, 2018); including such a methodological practice would have benefitted the text, prioritizing the subjectivities oft marginalized in humanist work. Particularly because Meiches work seeks to consider how nonhumans labor and give gifts, citing Indigenous ontologies that have long acknowledged more-than-human gifting and reciprocity would have been prudent (see Kimmerer, 2013; Nadasdy, 2007; Reo & Ogden, 2018).

Meiches makes an important contribution to the field of international studies, providing theoretical framework for considering how nonhumans transform global politics and calling for more attention to the need for multi-species justice. I look forward to the works to

follow that provide the empirical examples necessary to further his theoretical arguments.

References

Govindrajan, R. (2018). *Animal Intimacies: Interspecies Relatedness in India's Central Himalayans*. University of Chicago Press.

Hartigan, J. J. (2020). *Shaving the Beasts: Wild Horses and Ritual in Spain*. University of Minnesota Press.

Hartigan, J. J. (2021). Knowing Animals: Multispecies Ethnography and the Scope of Anthropology. *American Anthropologist*, *123*(1).

Kimmerer, R. (2013). *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge and the Teachings of Plants*. Milkweed Editions.

Meiches, B. (2019). Non-human humanitarians. *Review of International Studies*, *45*(1), 1–19. https://doi.org/10.1017/S0260210518000281

Nadasdy, P. (2007). The gift in the animal: The ontology of hunting and human-animal sociality. *American Ethnologist*, *34*(1), 25–43. https://doi.org/10.1525/ae.2007.34.1.25.American

Parreñas, J. S. (2018). *Decolonizing Extinction: The Work of Care in Orangutan Rehabilitation*. Duke University Press.

Reo, N. J., & Ogden, L. A. (2018). Anishnaabe Aki: an indigenous perspective on the global threat of invasive species. *Sustainability Science*, *13*(5), 1443–1452. https://doi.org/10.1007/s11625-018-0571-4

Policy Briefs | Notes de politique

Dual Threat to Democracy: Neoliberalism and Meritocracy

Muaz Jalil[*]*, University of Ottawa*

Abstract

Globally, there is a rise in populism and a growing threat to democracy, even among western liberal democracies. These are also market-based societies that have idealized the concept of meritocracy, which, coupled with neoliberal free market capitalism, has resulted in a rapid rise in income and wealth inequality. These factors have resulted in social dysfunction in the form of erosion of our social fabric and decreased political trust. In this essay, I showcase how the last four decades of neoliberal capitalism, the myth of meritocracy, and subsequent rising inequality has eroded our

[*]Biography: Muaz Jalil is a Ph.D. candidate at the School of International Development and Global Studies (SIDGS) at the University of Ottawa, Canada. His research focuses on assessing the effectiveness of employment programs to improve labor market outcomes for youth in the Least Developed Countries (LDCs) in Sub-Saharan Africa. Muaz has over 13 years of experience in International Development, particularly in the area of monitoring and evaluation and private sector development, working in various countries in South Asia, East Asia, Asia-Pacific, and East Africa. Muaz has an MA in Economics from UBC, Canada, and an MPhil in Development Studies from the University of Cambridge, UK. Contact information: mjali044@uottawa.ca

Biographie: Muaz Jalil est candidat au doctorat à l'École de développement international et d'études mondiales (SIDGS) de l'Université d'Ottawa, au Canada. Ses recherches portent sur l'évaluation de l'efficacité des programmes d'emploi visant à améliorer les résultats du marché du travail pour les jeunes dans les pays les moins avancés (PMA) d'Afrique subsaharienne. Muaz a plus de 13 ans d'expérience dans le développement international, en particulier dans le domaine du suivi et de l'évaluation et du développement du secteur privé. Il a travaillé dans différents pays d'Asie du Sud, d'Asie de l'Est, d'Asie-Pacifique et d'Afrique de l'Est. Muaz est titulaire d'une maîtrise en économie de l'UBC (Canada) et d'un doctorat en études du développement de l'université de Cambridge (Royaume-Uni). Coordonnées : mjali044@uottawa.ca

faith in democracy, particularly in US and UK, and given rise to populism in western countries.

Keywords: Neoliberalism, Meritocracy, free market, populism

Résumé

À l'échelle mondiale, on assiste à une montée du populisme et à une menace croissante pour la démocratie, même dans les démocraties libérales occidentales. Ces dernières sont également des sociétés fondées sur le marché qui ont idéalisé le concept de méritocratie, ce qui, associé au capitalisme néolibéral de libre marché, a entraîné une augmentation rapide des inégalités de revenus et de richesses. Ces facteurs ont entraîné des dysfonctionnements sociaux sous la forme d'une érosion de notre tissu social et d'une diminution de la confiance politique. Dans cet essai, je montre comment les quatre dernières décennies de capitalisme néolibéral, le mythe de la méritocratie et les inégalités croissantes qui en ont résulté ont érodé notre foi dans la démocratie, en particulier aux États-Unis et au Royaume-Uni, et ont donné naissance au populisme dans les pays occidentaux.

Mots-clés : Néolibéralisme, méritocratie, marché libre, populisme

Background

The global rise in populism and growing threat to democracy has impacted even the so-called "bastion of democracies"– western liberal democracies (Zmerli, & Van der Meer, 2017). Michael Sandel, the Harvard Philosopher, argued in his book "*What money can't buy: the moral limits of markets"* (Sandel, 2012) that over the last forty years, we have moved away from a society with a market economy to a market society. The implication is that initially, the market was a powerful tool for distributing goods and services, but it did not encompass the entire society. Instead, large parts of our lives, such as our sense of civic duty, community participation, and reciprocity, operated outside market principles. However, gradually we have become a market society where everything is 'valued.' Jean-Jacques Rousseau once said, "the politicians of the ancient world were always talking of morals and virtue; ours speak of nothing but commerce and money" (Rousseau, 1761). How true is this statement in today's world of technocratic capitalism and governance?

This market-based society has also fostered a false prophet of meritocracy (Sandel, 2020), coupled with neoliberal free market capitalism, resulting in a rapid rise in income and wealth inequality. This has resulted in social dysfunction in the form of erosion of our social fabric, increased job insecurity, and a proliferation of mental health issues. (Wilkinson & Pickett, 2009; Ho, 2009). It has also led to a justified "double movement" (Polanyi, 1944), a resentment among many citizens of the developed world, impacting the belief in democratic systems and lowering political trust (Dalton, 2017; Torcal, 2017).

In this policy brief, I showcase how neoliberal capitalism, the myth of meritocracy, and rising inequality have eroded our faith in democracy. The objective will be to demonstrate how these factors contributed to the deterioration of democracy in selected developed countries.

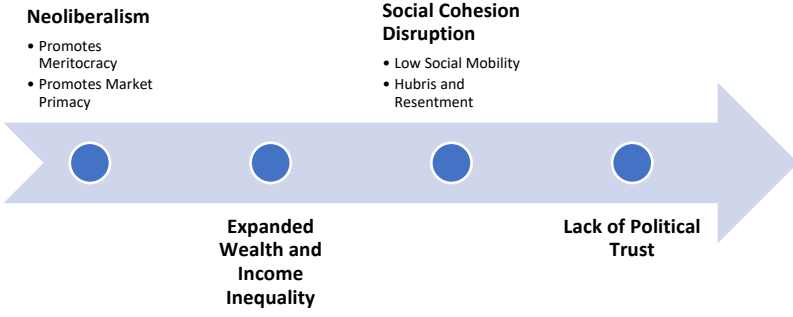
Methodology

I use a multi-case design with multiple embedded units (Yin, 2017, page 96). The two core cases are the US and UK, with embedded unit analysis on the financial sector. To analyze these two cases, I employ a comparative sequential research method, which calls for systematically comparing two or more historical sequences with

temporal and spatial contexts (Falleti & Mahoney, 2015). In this case, I compare countries in the Anglosphere and continental Europe regarding their application of neoliberal policies and their subsequent impact on inequality. The following causal graph (Rick and Liu, 2018) illustrates the critical causal process I am trying to capture (see Figure 1).

Figure 1

The Impact of Neoliberalism and Meritocracy on Political Trust



In Figure 1, I showcase how neoliberalism, which entails faith in meritocracy, results in inequality (wealth and income), disrupting social cohesion. This fractionalization and polarization ultimately lead to a lack of political trust in the democratic process and institution. There are limitations to this research design. This brief represents exploratory research using qualitative research methods. Furthermore, the paper primarily focuses on US and UK, particularly the neoliberal period, i.e., starting in the 1970s. The causal graphic (Figure 1) does not imply that this applies to other countries. There is evidence that political trust is in decline in many developed countries, and in some cases, it may be due to cultural diversity and immigration (Green, Janmaat, & Chang, 2011). My analysis in this brief does not preclude the prospect of such alternative pathways.

Instead, I wish to establish the plausible hypothesis outlined in Figure 1 for US and UK within the neoliberal period.
Neoliberalism is a political and economic concept that believes human well-being can be best achieved in an institutional structure characterized by free market/trade where liberated individuals with maximal freedom freely engage in transactions (Harvey, 2007). It is an "unholy alliance between neoclassical economics, which provided most of the analytical tools, and what may be called the Austrian-Libertarian tradition, which provided the underlying political and moral philosophy" (Chang, 2002). It is unholy because Hayek, a key figure in the Austrian-Libertarian tradition, strongly opposed the conclusion of neoliberalism and did not believe that the free market promoted merit (Chang, 2002; Sandel, 2020). However, meritocracy provides the moral legitimacy and foundation of neoliberal ethos (Littler, 2017).

Rise of Neoliberalism

The elections of Thatcher and Reagan after 1979 are considered the start of the neoliberal era (Harvey, 2007). During this period in the US and UK, in which the economy was impacted by the global oil shock and stagflation, the government introduced severe austerity programs with curtailment of social welfare, deregulation, privatization, and dismantling of the post-World War 2 welfare state (Chang, 2002; Harvey, 2007). An integral part of this neoliberal paradigm (both in the US and UK) is the faith in a meritocratic society, i.e., with individual dynamism and initiative, one can attain social mobility progress (Green et al., 2011). This contradicts the views of one of neoliberalism's intellectual fathers, Friedrich von Hayek. Hayek (1960) rightly points out:

> a society in which it was generally presumed that a high income as proof of merit and a low of the lack of it, in which it was universally believed that position and remuneration corresponded to merit…would be much unbearable to the unsuccessful ones than one in which it was frankly recognized that there was no necessary connection between merit and success. (p. 86)

Thus, we see even Hayek, who believed in market primacy, wanted to stress that market allocation was a function of demand and supply and did not showcase merit or moral desert. Otherwise, this leads to

resentments among the have-nots and hubris among the rich. The situation is further exacerbated when the economy's structure is such that it results in increased inequality, which is precisely what happened during the neoliberal era.

Rise in Inequality

Inequality rose in the aftermath of electoral defeats of political parties that espoused regulated or state-led capitalism, particularly in the English-speaking developed economies or Anglosphere, by conservative political parties who advocated a "neoliberal" approach (Steger, 2009). During the golden age of capitalism, i.e., post-World War 2, there was a decline in inequality, high growth rate, and social mobility in developed countries (Steger, 2009). However, after 1979, with the rise in conservative governments across English-speaking countries, mainly US/UK, we see a rapid rise in inequality. This has been validated by Piketty and Saez (2013) in their seminal research on inequality, where they tracked the top 1% share of total income over 100 years (1900-2010) across Anglophone countries: US, UK, Canada, Australia, New Zealand, Ireland, and non-Anglophone developed countries, such as France, Japan, Germany, etc. Their research indicates a clear difference between Anglophone and Non-Anglophone countries; till about 1980-85 there is a steady decline but after that trend between the two set of countries diverge: the anglophone show rising inequality while the non-Anglophone do not. Further research indicates that over the last 30 years, the wage differential between the 90^{th} and 10^{th} percentiles has increased mainly in the UK, US, and Australia, but Sweden, France, and Finland have had the lowest increases (Hills, 2010; Jalil, 2016). According to the Institute of Policy Studies, between March 18, 2020 and April 22, 2020 – the peak COVID crisis – the wealth of the top 1% of Americans increased by $308 billion, while 26 million American workers were left unemployed (Kelly 2020). Thus, this comparative historical trend shows that inequality has increased in the countries following neoliberal policies. As indicated before, rising inequality may lead to hubris among the rich and resentment among the disadvantaged. The following section discusses empirical research that supports this hypothesis.

Hubris and Resentment

Sandel (2020) argues that one of the significant downsides of meritocracy is that it generates hubris among the rich, who start having a negative opinion about the poor. This kind of mentality even extends to developing countries. Madeira et al. (2019) recently conducted a systematic review of 33 psychological evaluation studies around meritocracy. They define it as "a worldview, or ideology, that broadly embraces the idea that equal opportunities exist, allowing upward social mobility" (p. 2). The authors found that winners in a meritocratic society tend to have negative evaluations and stereotype low-status groups; the findings were statistically significant (Madeira et al. 2019). The meta-analysis confirms that the rich or successful have negative views or look down upon the less fortunate, which Sandel calls hubris. We see an example of this in Thomas Friedman, an American political commentator and Pulitzer Prize winner who is also a strong proponent of neoliberal globalization.
Friedman (2004) argued that anti-globalizers have no justification and are comparable to Luddites; their aim for autarky impossible. According to him, free market globalization is an unstoppable phenomenon, and there is no way to retreat. In the article mentioned above, he tries to show empathy towards those suffering to ride the tide of globalization but argues that it cannot be stopped, it will be challenging, and they must adapt. The 2016 elections in US and UK have proven that globalization is neither inevitable nor unstoppable. And it is precisely such elitist disregard for the "backlash group" or "the wounded gazelles," as the author calls them, that resulted in the seismic political shift in 2016 (UK and US). This is in line with Sandel's (2020) argument that because of the liberal faith in meritocracy, the elites have lost touch with the ordinary people suffering in this neoliberal and 'meritocratic' society.

This kind of hubris leads to resentment and polarization. In a micro-study by Newman, Johnston, and Lown (2015), the authors used the national representative attitudinal survey undertaken by the Pew Research Centre and county-level inequality measure (Gini) by American Community Survey to investigate faith in meritocracy and inequality. They studied whether belief in meritocracy varies between highly unequal local counties from those that are more equal. They found that in highly unequal counties, the gap between low-income

and high-income residents in their belief in meritocratic ethos statistically increases, i.e., leads to more polarization as opposed to more equal counties. Thus, this study confirms that even at the micro-community level, an increase in inequality results in divergent views on meritocracy and leads to polarization: the rich believe it because it provides them with the moral foundation for their position and, more importantly, absolves their responsibilities (beyond voluntary charity) towards the less fortunate. If our success were not only because of our merit but because of how society was structured, we would indeed have less hubris about our success and humility towards others.

Karen Ho, an American anthropologist and global finance and economics reporter for Quartz, undertook a penetrating ethnographic analysis of Wall Street. Her research indicates that in the bastion of capitalism, market, and meritocracy and that what is passed off as meritocracy is an "entanglement of elitism" and hubris (p. 62). A "pay for performance" culture with a "winner takes it all" mentality creates a culture divorced from ethical or social good (p. 253). The book also exemplifies that the Wall Street employees believe they deserve the fund/salary they get, even though computation of bonus seems abstract at best. Since Wall Street is supposedly hyper "meritocracy" and "market-oriented," Ho's rich ethnographic research generates two important findings. First, behind every meritocracy, there are non-merit-based advantages. Second, how such a culture of market and "winner takes it all" model undermines democratic ethos and the public good. She showcases that similar hubris is present in other financial markets, an argument supported by authors such as Taleb (2005). Snowdon (2014) argues that inequality breeds a lack of trust and creates shame and humiliation among the so-called "losers." Major and Machin (2019) find that US and UK have one of the worst social mobility in the developed western world. They argue it is because of opportunity hoarding by the rich and institutional structure that biases the "rules of the game" in favor of the rich that creates this decline. This reinforces that we are not living in a meritocratic society where there is a level playing field.

These findings have implications for political debate as it indicates that as neoliberal policies promote inequality, then concurrent promotion of meritocratic virtue will create more resentment and antagonism among those residing at the bottom and create hubris

among the rich. Sandel (2020) discusses the emergence of the 'rhetoric of rising' since the 1980s in the US and UK, followed by other countries. The argument goes that the free market broadly gives everyone equal opportunity to compete. Thus, market outcomes reward merits, and people can rise "as far as their talents will take them" (Sandel, 2020, p. 23). This is entirely against what Hayek argued above. Gladwell (2008) points out similarly that our conception that individual hard work results in success is deeply flawed; highly successful people have a lot of things working for them, including economic background, the act of kindness, supportive cohort, or mentor.

Political Trust

With rising inequality, most people are being left behind, and social mobility is coming to a halt. Furthermore, we have a moral philosophy that argues that those that are being left behind are devoid of merit. Thus, the market outcome is "just"; this is a damming indictment against the population. Therefore, it is not a surprise that the resentment gave rise to the elections of 2016 (Trump in the US and Brexit in the UK). Elites were shocked by the results, but given the above discussion, it is a surprise that it took so long for the resentment to boil over.

According to PEW research, in 1958, 73% of Americans had trust in Government; in 2020, the figure was close to 17% (Dimock, 2020). This is not only due to neoliberalism, but it is undoubtedly a contributing factor. We see a similar trend in the UK with a downward decline in trust in government and dissatisfaction. Drawing on the quantitative survey, such as Gallup Polls and British Election Study, and qualitative data from mass observation archives, Jennings et al. (2017) find that the current state of popular views of politics has taken an increasingly negative and cynical turn. There is a high degree of distrust of the political system (constitutional monarchy) and the politicians. The authors argue that people feel that the politicians are self-serving and represent the interest of the elites rather than the majority. Jennings et al. (2017) find that during the height of the neoliberal period, government disapproval went from below 40% in the late 1970s to close to 80% by the mid-1990s. They

also show a decline in trust in the government during the period, which has continued.

From the abovementioned findings, we can see that disapproval and trust in government have also diminished in Britain. Thus, we see that both in the UK and US, the rise of neoliberalism and meritocratic hubris has impacted social cohesion and thereby diminished public trust in the democratic process.

Bukodi and Goldthorpe undertook a quasi-experimental study using the case of Hungary (which was moving from state planning to a capitalistic market economy) to test the hypothesis that whether the market mechanism is aligned with meritocracy as functional imperative" (MFI) or "market versus meritocracy" (MVM). They argued that MFI predicts capitalism rewards merit; hence, both systems are aligned. MVM, on the other hand, drawing on Hayek (1960), states that the market is efficient in matching demand and supply but not merit, which is a normative concept. They conclude that the Hungarian data shows that capitalism is aligned with MVM and not MFI. The finding might explain the rise of hubris among the 'haves' and resentment among the "have-nots."

We have promoted a market economy or transformed our society into a market society (Sandel, 2012), but we have also promoted the ethos of meritocracy, i.e., MFI. Hence our market society has two values that contradict – capitalism objectively leading to MVM, while we propagate MFI. This tension and contradiction are bound to create antagonism and rhetoric of resentment instead of rising.

Conclusion

In this brief, I have laid out a case as to how neoliberal policies, with their embedded meritocratic myth, have not only resulted in increased inequality and diminished social mobility but, in turn, have also fractured our society. Using US and UK as illustrative case studies, as the bastion of neoliberal meritocratic ethos, I have shown how inequality has disproportionately increased in these societies. Further, I discussed how research indicates that the policies were embedded with a normative value system around meritocracy, which argued that the market gave an opportunity to everyone, and hence

everyone could go as far as their talent took them. The implication was that the rich "deserve" to be rich while the poor, because they lack "merit," deserve to be poor. This harsh indictment on the majority, as with growing inequality, the majority were the "have-nots," created a culture of resentment among most while creating hubris among the rich. This polarisation in belief systems is impacting the democratic process in US and UK.

There may be other reasons for the decline in trust in government. Green et al. (2011) find additional explanations for the decline in political trust among the various cohorts of democracies: liberal democracies (US/UK) are struggling with social cohesion because of the failures in their meritocratic ethos, but cultural identity and ethnic diversity are the fundamental cause for social disharmony among the Social Market societies (France/Germany). Only among the social democratic countries (Nordic) do they see a rise in political trust. The arguments used in this brief apply primarily to the US and UK, but they may also apply in varying degrees to other economies. Countries trying to bring about a structural transformation of their society to a market society may learn from the above case study on US and UK.

References

Bukodi, E., & Goldthorpe, J. H. (2010). Market versus meritocracy: Hungary as a critical case. *European Sociological Review*, *26*(6), 655-674.

Chang, H. J. (2002). Breaking the mould: an institutionalist political economy alternative to the neo-liberal theory of the market and the state. *Cambridge Journal of Economics*, *26*(5), 539-559.

Dalton, R. J. (2017). Political trust in North America. In *Handbook on political trust*. Edward Elgar Publishing.

Dimock, M. (19 Feb 2020). How Americans View Trust, Facts, and Democracy Today. *PEW Research*. Retrieved from: https://www.pewtrusts.org/en/trust/archive/winter-2020/how-americans-view-trust-facts-and-democracy-today

Falleti, T. G., & Mahoney, J. (2015). The comparative sequential method. In *Advances in Comparative-Historical Analysis (Strategies for Social Inquiry)* (pp. 211-239). Cambridge University Press.

Friedman, T. (2004). Backlash. In Mingst, K. A., & Snyder, J. L. (Eds.). (2004). *Essential readings in world politics*. WW Norton

Gladwell, M. (2008). *Outliers: The story of success*. Little, Brown.

Green, A., Janmaat, G., & Cheng, H. (2011). Social cohesion: converging and diverging trends. *National Institute Economic Review*, *215*(1), R6-R22.

Harvey, D. (2007). *A brief history of neoliberalism*. Oxford University Press, USA.

Hayek, F. A. (2020). *The constitution of liberty: The definitive edition*. Routledge. (Originally published in 1960)

Hills, J. (2010). An anatomy of economic inequality in the UK-report of the national equality panel. *LSE STICERD Research Paper No. CASEREPORT60*.

Ho, K. (2009). *Liquidated: an ethnography of Wall Street*. Duke University Press.

Jalil, M. M. (2015). Did globalisation stimulate increased inequality? A heterodox perspective. *Realworld economics review*, *70*, 92-106.

Jennings, W., Clarke, N., Moss, J., & Stoker, G. (2017). The decline in diffuse support for national politics: The long view on political discontent in Britain. *Public opinion quarterly*, *81*(3), 748-758.

Kelly, J (27 April, 2020). *Billionaires Are Getting Richer During The COVID-19 Pandemic While Most Americans Suffer*. Forbes.

Littler, J. (2017). *Against meritocracy: Culture, power and myths of mobility*. Taylor & Francis.

Major, L. E., & Machin, S. (2018). *Social mobility: And its enemies*. Penguin UK.

Madeira, F., Costa-Lopes, R., Dovidio, J. F., Freitas, G., & Mascarenhas, M. (2019). Primes and consequences: a systematic review of meritocracy in intergroup relations. *Frontiers in psychology*, *10*, 2007.

Newman, B. J., Johnston, C. D., & Lown, P. L. (2015). False consciousness or class awareness? Local income inequality, personal economic position, and belief in American meritocracy. *American Journal of Political Science*, *59*(2), 326-340.

Piketty, T., & Saez, E. (2013). Top incomes and the great recession: Recent evolutions and policy implications. *IMF economic review*, *61*(3), 456-478.

Polanyi, K (1944*). The Great Transformation*. Farrar & Rinehart.

Ricks, J. I., & Liu, A. H. (2018). Process-tracing research designs: a practical guide. *PS: Political Science & Politics*, *51*(4), 842-846.

Rousseau, J. (1761). The Social Contract and Discourses. J. M. Dent.

Sandel, M. J. (2012). *What money can't buy: the moral limits of markets*. Macmillan.

Sandel, M. J. (2020). *Tyranny of Merit*. FSG.

Snowdon, C. (2014). Selfishness, greed and capitalism: Debunking myths about the free market. *Selfishness, Greed and Capitalism: Debunking Myths About the Free Market, Institute of Economic Affairs Monographs, Hobart Paper*, *177*.

Steger, M. (2009). Globalisation and social imaginaries: the changing ideological landscape of the twenty-first century. *Journal of Critical Globalisation Studies*, *1*(1), 9-30.

Taleb, N. (2005). *Fooled by randomness: The hidden role of chance in life and in the markets* (Vol. 1). Random House Incorporated.

Torcal, M. (2017). Political trust in Western and Southern Europe. In *Handbook on Political Trust*. Edward Elgar Publishing.

Wilkinson, R. G., & Pickett, K. E. (2009). Income inequality and social dysfunction. *Annual review of sociology*, *35*, 493-511.

Yin, R. K. (2017). *Case study research and applications: Design and methods*. Sage publications.

Zmerli, S., & Van der Meer, T. W. (Eds.). (2017). *Handbook on political trust*. Edward Elgar Publishing.

Rôle de l'intégration régionale dans la lutte contre les changements climatiques en Afrique

Christ Arsène Ouinsou[*]*, University of Abomey-Calavi*

Résumé

[*]Biographie : Christ Arsène Ouinsou est Docteur en Science Economique de l'Université d'Abomey-Calavi (UAC) en République du Bénin. Il est membre du Laboratoire d'Economie Publique (LEP) de l'Université d'Abomey-Calavi où il a obtenu son Doctorat. Auteur et co auteur de près de six articles scientifiques, le champ de recherche de Christ Arsène OUINSOU est plus dans les innovations et ses implications dans le processus du développement économique et social. En effet depuis son Master l'auteur a travaillé sur comment les innovations peuvent affecter la compétitivité des entreprises manufacturières des pays de l'Afrique Subsaharienne. Dans le cadre de sa thèse de doctorat, Christ Arsène Ouinsou a travaillé sur innovations et transformation structurelle des pays de l'Afrique Subsaharienne. L'auteur est un jeune chercheur engagé dans la résolution des problèmes socioéconomiques du monde à travers la recherche scientifique. Ainsi, de plus en plus il travaille sur des questions relatives aux changements climatiques, l'instabilité politique et l'inclusion sociale. L'auteur a étudié au Cameroun où il obtient Master 2 en Economie Appliquée option Economie Industrielle et en Italie à l'Université de Sapienza dans le cadre de sa thèse de Doctorat.

Biography: Christ Arsène Ouinsou holds a PhD in Economics from the University of Abomey-Calavi (UAC) in the Republic of Benin. He is a member of the Laboratoire d'Economie Publique (LEP) at the Université d'Abomey-Calavi, where he obtained his doctorate. Author and co-author of nearly six scientific articles, Christ Arsène OUINSOU's field of research focuses on innovations and their implications for the economic and social development process. Since completing his Master's degree, the author has worked on how innovations can affect the competitiveness of manufacturing companies in Sub-Saharan African countries. For his doctoral thesis, Christ Arsène Ouinsou worked on innovations and structural transformation in Sub-Saharan African countries. The author is a young researcher committed to solving the world's socio-economic problems through scientific research. Increasingly, he is working on issues relating to climate change, political instability and social inclusion. The author studied in Cameroon, where he obtained a Master 2 in Applied Economics with a major in Industrial Economics, and in Italy at the University of Sapienza for his doctoral thesis.

L'objectif de cette réflexion est d'analyser le rôle de l'intégration régionale dans la lutte contre les changements climatiques dans les pays de l'Afrique. Le travail montre que l'intégration régionale peut être un instrument efficace pour l'harmonisation des mesures climatiques et la gestion des changements climatiques des zones frontalières, et un instrument de coordination et de mobilisation des financements verts. Ainsi, les communautés économiques régionales peuvent constituer des centres efficaces de décision des mesures de lutte contre les changements climatiques. Il est donc important que les unions régionales développent des projets ou programmes de lutte contre les changements climatiques d'envergure régionale.

Mots clés : Intégration régionale, Changement climatique, gestion climatique.

Abstract

The aim of this paper is to analyze the role of regional integration in the fight against climate change in African countries. The work shows that regional integration can be an effective instrument for harmonizing climate measures and managing climate change in border areas, and an instrument for coordinating and mobilizing green financing. In this way, regional economic communities can become effective decision-making centers for measures to combat climate change. It is therefore important for regional unions to develop projects or programs to combat climate change on a regional scale.

Keywords: Regional integration, climate change, climate management.

Introduction

La gouvernance climatique met aujourd'hui l'accent sur deux centres de décisions dans la lutte contre les changements climatiques à savoir; (i) le national où les États développent leurs propres stratégies, et (ii) au niveau international par la mise en place des conventions auxquelles les États adhèrent (CCNUCC, 1992; UNICEF, 2020; Luomi, 2020). Pourtant, les communautés économiques et régionales, qui sont des regroupements régionaux d'États (UA, 2022), peuvent aussi constituer un centre de décision efficace dans la lutte contre les changements climatiques dans les économies. En effet, la plupart des pays du monde appartiennent à des communautés économiques et régionales. En Afrique, il y a la Communauté Économique des États de l'Afrique de l'Ouest (CEDEAO, la Communauté Économique des États de l'Afrique centrale (CEEAC), le Marché Commun des Etats de l'Afrique du Sud-Est, (COMESA), Communauté des Etats de l'Afrique de l'Est (EAC), l'Autorité Intergouvernementale pour le Développement (IGAD), la Communauté de développement de l'Afrique australe (SADC) et l'Union du Maghreb Arabe (UMA). Ces différentes communautés qui affectent la performance économique des États en termes de croissance économique, de performance commerciale, de réduction du chômage et de résilience aux chocs (Pomerlyan & Belitski, 2023; Ndinga, 2022; Ejones, Agbola, & Mahmood, 2021) peuvent également jouer un rôle important dans la lutte contre les changements climatiques en Afrique.

Le choix de l'Afrique comme zone d'étude se justifie par le fait que ce continent subit plus les conséquences des changements climatiques dans le monde malgré sa faible contribution aux émissions mondiales de gaz à effet de serre. Ainsi, on assiste à un réchauffement à un rythme plus rapide que le réchauffement de +0,2 °C/décennie observé sur la période 1961-1990; l'aggravation de la sécheresse en Afrique de l'Est qui a coûté la vie à plus d'un demi-million de personnes et causé des pertes économiques supérieures à 70 milliards de dollars; l'élévation du niveau de mer le long des côtes africaines de façon plus rapide que le rythme moyen mondial; ainsi qu'à un stress hydrique marqué qui touche environ 250 millions de personnes sur le continent (WMO, 2021). Ces conséquences rendent la lutte contre les changements climatiques sur le continent

urgente. Dans cette lutte, les communautés économiques régionales peuvent jouer un rôle important. Pourtant, les travaux empiriques (Pomerlyan & Belitski, 2023; Ndinga, 2022; Ejones, Agbola, & Mahmood, 2021; Mignamissi, 2018) réalisés sur l'intégration régionale notamment en Afrique sont restés silencieux sur cet aspect. Or, le continent africain contient huit (08) communautés économiques régionales (UA, 2019) ce qui offre la possibilité d'analyser le rôle de ces communautés dans les politiques environnementales au niveau régional.

Comment l'intégration régionale peut-elle être un instrument pour la lutte contre les changements climatiques en Afrique ? L'objectif de cette réflexion est d'analyser le rôle de l'intégration régionale dans la lutte contre les changements climatiques dans les pays de l'Afrique afin de mieux faire face aux changements climatiques par la mise en place de mesures régionales.

Ce manuscrit est organisé comme suit. La section suivante présente le cadre conceptuel et les opportunités qu'offre l'intégration régionale dans la gestion des changements climatiques. La dernière section conclut. Le principal résultat de cette réflexion est que l'intégration régionale peut constituer un instrument de lutte contre les changements climatiques en Afrique par l'harmonisation des mesures climatiques, la gestion commune des changements climatiques des zones frontalières, ainsi que par la mobilisation et la coordination des financements verts.

Opportunités d'intégration régionale pour la gestion des changements climatiques

Suivant les travaux séminaux de Balassa (1961) et de Cooper et Massel (1965), on peut déduire quatres avantages de l'intégration régionale; *(i)* les gains en termes d'économie d'échelle et changements technologiques, *(ii*) l'impact positif sur la structure des marchés et de la concurrence, *(iii)* la réduction du risque et de l'incertitude dans les activités d'investissement et *(iv)* la croissance de la productivité. En plus de ces avantages qui sont majoritairement d'ordre économique, les communautés régionales exercent aussi des influences sur les plans socio-politiques des États membres de

telle sorte que plus les Etats sont intégrés, plus il leur est difficile de choisir une autre option que préconisée par la communauté régionale même si cette dernière procure un gain élevé (Mahoney, 2000). Ces influences des communautés régionales affectent les politiques environnementales des États (Panagariya & Suthiwart-Narueput, 1997) et peuvent aussi les aider à mieux faire face aux changements climatiques.

L'intégration régionale comme instrument efficace pour l'harmonisation des mesures climatiques et la gestion des changements climatiques des zones frontalières

Les pays membres des communautés économiques et régionales partagent souvent certaines réalités culturelles, historiques, linguistiques et géographiques qui, selon Granovetter (1973), les lient fortement. Ces similarités géographiques, même si la taille des territoires diffère, peuvent servir d'instrument pour harmoniser les stratégies d'adaptation aux changements climatiques. Les communautés économiques régionales peuvent être aussi des centres de décisions efficaces dans la définition et l'harmonisation des mesures fiscales et techniques relatives aux changements climatiques, et des lois de protection de l'environnement (Jain et al., 2021). L'intégration régionale peut ainsi être un instrument efficace pour la lutte contre les changements climatiques dans les zones frontalières.

Les zones frontalières présentent la particularité de partager, en plus des caractéristiques culturelles et linguistiques, des infrastructures économiques (OCDE, 2020). La lutte contre les changements climatiques dans ces zones nécessite des interventions coordonnées entre les États pour éviter les externalités négatives qu'auraient engendrées les actions d'aménagement de l'un des pays. Il serait alors plus coûteux pour les États de participer à tous les projets de lutte contre les changements climatiques de toutes leurs zones frontalières. En cela, des mesures régionales seraient plus efficaces et bénéfiques pour les pays qui sont intégrés de manière forte.

Intégration régionale instrument de coordination facile et de mobilisation des financements verts

Les conventions internationales en matière de changements climatiques ont facilité la mise en place de fonds qui peuvent appuyer les pays dans leur stratégie de lutte contre les changements climatiques. On peut citer à cet effet entres autres le Fond pour l'Environnement Mondial (FEM) servant à financer la croissance verte (Watson & Schalatek, 2021) ; le Fond Vert pour le Climat (FVC) de la Convention-Cadre des Nations Unies pour les Changements Climatiques (CCNUCC), ainsi que le Fond pour l'Adaptation (FA) désormais mandaté pour servir les Accords de Paris. Ces différents fonds sont destinés à appuyer les pays en développement dans leur stratégie de lutte contre les changements climatiques. Dès lors que ces fonds verts financent des projets et programmes régionaux, leur mise à disposition des communautés régionales pourrait être facilitée ainsi que leur suivi.

Les communautés régionales peuvent également constituer un outil de mobilisation des ressources financières pour la lutte contre les changements climatiques dans les économies. A cet effet, il serait plus facile pour les États-membres de communautés régionales de mettre en place des fonds verts partagés entre États-membres qui seront financés par des prélèvements sur les échanges intra régionaux.

Conclusion

L'objectif de cette réflexion est d'analyser le rôle de l'intégration régionale dans la gestion des changements climatiques en Afrique. Partant des avantages classiques de l'intégration régionale, l'étude présente les opportunités que constitue l'intégration régionale pour la gestion des changements climatiques en Afrique. Il ressort des différentes analyses que l'intégration régionale peut constituer un instrument de lutte contre les changements climatiques en Afrique principalement par l'harmonisation des mesures climatiques et la gestion commune des changements climatiques des zones frontalières. Il ressort aussi que l'intégration régionale peut faciliter la coordination des financements verts issus des conventions sur les changements climatiques, et peut également être un instrument dans la mobilisation du financement vert dans les pays de l'Afrique. Ainsi, les communautés économiques régionales peuvent constituer des centres efficaces de décision concernant les mesures de lutte contre

les changements climatiques. Il est donc important que les unions régionales développent des projets et programmes de lutte contre les changements climatiques d'envergure régionale.

Références

Balassa, B. (1961). The Theory of Economic Integration. *Richard D. Irwin, Homewood*, 304.

CCNUCC. (1992). Covention-Cadre des Nations Unies sur les Changements Climatiques *Document des Nations Unies*, 2.

Cooper, C. A., & Massell, B. F. (1965). Toward a general theory of customs union for developing countries. *The Journal of Political Economy, 73 (*5), 461-476.

Ejones, F., Agbola, F., & Mahmood, A. (2021). Regional Integration and Economic Growth: New Empirical Evidence from the East African Community. *The International Trade Journal*, 1-26. doi:10.1080/08853908.2021.1880990

Granovetter, M. (1973). The strength of weak ties. *American Journal of Sociology, 78*(6), 1360-1380.

Jain, P., Rakshit, B., Raina, B., & Bardhan, S. (2021). Regional integration and environmental sustainability during the COVID-19 pandemic: Evidence from South Asia. *International Social Science Journal*(Special Issue), 1-19. doi:10.1111/issj.12291

Luomi, M. (2020). La gouvernance mondiale des changements climatiques: En quête d'efficacité et d'universalité. *International Institute for Sustainable Development, Earth Negotiation Bulletin, 6*, 1-13.

Mahoney, J. (2000). Path dependence in historical sociology Theory and Society. *29*, 507–548.

Mignamissi, D. (2018). Monnaie unique et intégration par le marché en Afrique: le cas de la CEEAC et de la CEDEAO. *African Development Review, 30*(1), 71–85. doi:10.1111/1467-8268.12313

Ndinga, M. M. A. (2022). L'intégration régionale est-elle un instrument de résilience pour les pays de la CEMAC ? *Brief Policy, fondation pour les études et recherches sur le développement international (FERDI)* (237), 1-12.

OCDE. (2020). Villes frontalières & changement climatique. *Guide pratique sur les leviers juridiques et financiers*, 1-137.

Panagariya, A., & Suthiwart-Narueput, S. (1997). Regional integration and the environment. *Environment and*

Development Economics, 2(1), 5-18. doi:10.1017/S1355770X97000090

Pomerlyan, E., & Belitski, M. (2023). Regional integration and economic performance: evidence from the Eurasian Economic Union. *Eurasian Geography and Economics*, 1-30. doi:10.1080/15387216.2022.2163414

UA. (2019). Rapport sur l'état de l'intégration régionale en Afrique (pp. 1-13): Banque Africaine du Développement

UA. (2022). *Guide de l' Union Africaine 2022*. Dcoument de l'Union Africaine

UNICEF. (2020). Qu'est-ce que la gouvernance climatique ? *Document de UNICEF*. pp 1-132

Watson, C., & Schalatek, L. (2021). Architecture du financement climatique mondial *Rapport de Climate Funds Update*.

WMO. (2021). State of the Climate in Africa 2021 (pp. 1-52): World Meteorological Organization.