

Creating Higher Burdens: The Presumption of State Protection in Democratic Countries

JAMIE CHAI YUN LIEW

Abstract

The author examines the burden on refugee claimants at the Immigration and Refugee Board in Canada to provide evidence that their home state cannot protect them. In particular, the paper discusses the growing trend of adjudicators taking de facto judicial notice of the fact that a country is democratic to make the finding that there is state protection for claimants. The author argues that the practice of labelling countries as democratic and making state protection findings upon the finding is a biased and unhelpful practice when evaluating the issue of whether state protection exists. The paper discusses what “democracy” means and the problems associated with defining it. It will discuss how judicial notice of whether a state is democratic can affect an analysis of state protection in the example of claimants fleeing domestic abuse in Mexico.

Résumé

L'auteure examine la charge pesant sur les demandeurs d'asile à la Commission de l'immigration et du statut de réfugié du Canada de fournir la preuve que leur État d'origine ne peut pas les protéger. En particulier, le présent article examine la tendance croissante des juges de faire automatiquement le constat judiciaire du fait qu'un pays est démocratique pour arriver à la conclusion qu'il y a protection de l'État pour les demandeurs. L'auteure fait valoir que la pratique d'étiqueter des pays comme démocratiques et d'en tirer des conclusions quant à la protection de l'État est une pratique biaisée et inutile lorsqu'il s'agit d'évaluer la question à savoir si la protection de l'État existe. L'auteure aborde le sens de la « démocratie » et les problèmes liés à sa définition. Elle explique comment le constat judiciaire voulant qu'un État soit démocratique peut affecter une

analyse de protection de l'État dans l'exemple des demandeurs d'asile fuyant la violence domestique au Mexique.

Introduction

In April 2009, Canada's Minister of Citizenship and Immigration, Jason Kenney, stated that asylum seekers' applications from “liberal democracies” may be treated differently than those from totalitarian regimes.¹ Minister Kenney has now gone further than making public statements, and introduced a bill titled *Balanced Refugee Reform Act* in the House of Commons to amend the *Immigration and Refugee Protection Act (IRPA)*.² This “reform” has been pushed through the Canadian parliamentary system at breakneck speed, with first reading taking place on March 30, 2010, and receiving Royal Assent on June 29, 2010.³

Among the “balanced reforms” is clause 12 of Bill C-11, which creates a new section in *IRPA*. The new section 109.1(1) of *IRPA* “provides that the Minister may designate by order, nationals of a country, a part of a country, or a class of nationals of a country, if the Minister is of the opinion that they meet criteria established in the regulations.”⁴ This “designated countries of origin” clause essentially allows the government to create a list of countries from which they deem refugees could not possibly come. Citizenship and Immigration Canada framed the new provision as follows:

Most Canadians recognize that there are places in the world where it is less likely for a person to be persecuted compared to other areas. Yet many people from these places try to claim asylum in Canada, but are later found not to need protection.

This suggests that they may be using Canada's asylum system to jump the queue. Too much time and too many resources are spent reviewing these unfounded claims.

Designated countries of origin will include countries that do not normally produce refugees, that have a robust human rights record and offer strong state protection. States with strong *democratic*, judicial and accountability systems are likely to provide the necessary protection to their citizens.⁵

This amendment could open the door to allowing the government to diminish refugee claimants' rights whether an individual is a *bona fide* refugee simply because of the country they are from. It would essentially allow the government to use certain criteria, such as whether a country is democratic, to determine whether or not a state could provide protection to its nationals. The new section also gives licence to use a particular bias when evaluating claims from "designated countries."

The concept of the lack of state protection is central to defining who is a refugee. Indeed the impetus with creating protection for refugees is because a refugee is unable to seek protection from their home country. Hathaway states:

... the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population. As a holistic reading of the refugee definition demonstrates, the drafters were not concerned to respond to certain forms of harm per se, but were rather motivated to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection.

... persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. A well-founded fear of persecution exists when one reasonably anticipates that remaining in the country may result in a form of serious harm which government cannot or will not prevent, including either "specific hostile acts or ... an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear."

[...]

In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community.⁶

The question then becomes, how do we determine whether there is enough state protection afforded before the international duty of surrogate protection may be said to arise?

Hathaway notes that it is obvious that when a state is an agent of persecution, not only conducting the persecution,

but also condoning or supporting it, the state is not affording state protection.⁷ Similarly, Hathaway writes that state protection is clearly not available when a state is unwilling to defend its citizens from harm. He states: "Beyond these acts of commission carried out by entities with which the state is formally or implicitly linked, persecution may also consist of either the failure or inability of a government effectively to protect the basic human rights of its populace."⁸ Hathaway lists four situations where state protection not founded:

1. Persecution committed by the state concerned;
2. Persecution condoned by the state concerned;
3. Persecution tolerated by the state concerned;
4. Persecution not condoned or not tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection.⁹

The Supreme Court of Canada in *Ward* also grappled with the proper test for determining the existence of effective state protection:

The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided.¹⁰

Here, the Supreme Court of Canada created a presumption of state protection. Essentially, the Court imposed a burden upon a refugee claimant to rebut a presumption that a state is unwilling or unable to protect a refugee claimant. In presenting a refugee claim, the onus was placed upon a claimant to show "clear and convincing" proof to rebut a presumption that their home state can provide protection.

In conducting evaluations, Canadian Courts have grappled with what kinds of factors or tools they may use in making the assessment that a state has not or is unwilling or unable to provide state protection to an individual. One of the tools that Canadian Courts have increasingly relied upon is taking *de facto* judicial notice of whether the home country of a claimant is democratic or not. Courts have added a gloss to the presumption of state protection, by stating that the burden to rebut state protection is higher for those coming from democratic states. The Federal Court of Appeal in *Kadenko* brought the practice of recognizing whether a state is democratic or not, as an indicator to the level of state protection provided to claimants:

When the state in question is a democratic state, as in the case at bar, the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the course of action open to him or her.¹¹

In making this finding, the Federal Court of Appeal in *Kadenko* crafted a higher threshold that refugee claimants must meet in Canada since the *Ward* decision. No longer is the examination of whether there is state protection *de novo* or from a clean slate. The *Kadenko* decision gives the Immigration and Refugee Board (Board) and Federal Court judges licence to take judicial notice of the political structure of a country and to put the onus back on the claimant to prove that a state in question cannot protect them.

This paper aims to discuss whether the seminal decision in *Kadenko*, which links state protection to democracy, provides decision makers with an appropriate tool upon which to determine whether state protection is available for claimants. It is argued that this precedent pushes the limits to what Board members and judges can give judicial notice to, and gives a biased and unhelpful perspective as to the true nature of state protection in any given country.

The paper will first give a brief overview of how Board members and the Federal Court are using the presumption of state protection in democratic countries. I will then discuss what "democracy" means and the problems associated with defining it. Finally, the paper will provide recommendations that Board members and the Courts refrain from the knee-jerk reaction of relying on the categorization of whether a country is democratic to aid in their evaluation of whether a state can provide protection to a particular claimant.

Immigration and Refugee Board Propensity to Use Democracy Presumption

To give context to how the presumption of state protection in a democratic country is being applied by decision makers in refugee claims, this section will review recent cases of claimants from Mexico, with claims based on fear of domestic violence. The country of Mexico was chosen as there are a number of claims in Canada made by Mexican nationals, and because it has what is commonly described as a democratic political system. The case study of claimants who claim based on belonging to the social group of survivors of domestic violence is instructive because it is a vulnerable group whose claims not only vary from individual to

individual, but also can illustrate the problem with using a democracy presumption.

It is important to note that Canada and Mexico have cultivated a close relationship with each other. Mexico has been Canada's partner in the North American Free Trade Agreement (NAFTA) since 1994.¹² Since then, their relationship has strengthened significantly as Canada and Mexico are now among each other's largest trading partners. Canada has become one of Mexico's major foreign investors with Mexico identified as a "priority market" for Export Development Canada (EDC). Resident presence of EDC started in 2000.¹³ While Mexico is the largest recipient of Canadian tourists destined for Latin America, Canada receives not only significant numbers of Mexican tourists, but also thousands of temporary workers.¹⁴

In recent years, relations between Canada's Parliament and Mexico's Congress have deepened with interparliamentary meetings held in 2005 and 2006 to discuss a wide array of issues of common concern.¹⁵ In February 2009, the Canadian government also made a strategic shift in foreign policy by shifting foreign aid dollars towards the Americas. This move was touted as signalling a desire to be a bigger player in the hemisphere and an intention to make the Americas a foreign policy priority.¹⁶

Despite the close relations, and perhaps because of them, the government of Canada has recently signalled its perspective that refugees could not possibly come from Mexico.¹⁷ Indeed, Mexico has publicly defended its international reputation in Canada saying that they have control over the drug wars within their borders.¹⁸ In July 2009, the government imposed visa requirements on Mexicans travelling to Canada overnight where previously no such requirement was needed.¹⁹ The government cited the need to stop the surge of refugee claims from Mexico as the reason.²⁰

With the political context in mind, the following is an overview of recent published cases regarding Mexican claimants fearing domestic violence in which the Board has relied on the presumption of state protection in a democracy to find that there is sufficient state protection for the claimant.

In the case of *N.Q.C.*,²¹ the claimant had been living with her boyfriend who, she later discovered, was a drug dealer. The claimant had been beaten by her boyfriend, and also received threats against her life. In evaluating the availability of state protection, the board member stated that unless the state apparatus is in a complete breakdown, states are presumed to be capable of protecting their citizens and that the presumption cannot be reversed without "clear and convincing" evidence of the state's inability to provide protection.²² The Board followed the reasoning in *Kadenko* and reasoned that the burden of proof that rests on the claimant

is “directly proportional to the level of democracy in the state in question.”²³ In evaluating the claimant’s home country of Mexico, the Board stated:

With respect to state protection, Mexico is a democracy with a functioning police force. Even if the police or some of them were agents of persecution, there is no evidence of a pervasive undermining of democratic institutions. In addition, there is evidence of state-run aid and protection available through non-police organizations²⁴

The Board concluded that while “the situation in Mexico is not perfect,” they found no “clear and convincing” evidence that the Mexican government could not protect the claimant.²⁵

In *Cortes*,²⁶ the Board was evaluating a claim by a woman who was cohabiting with her boyfriend. Her boyfriend increasingly became violent and abusive, and also isolated her totally from her family and friends. When the claimant escaped and moved to her sister’s home outside of the city, the claimant received threatening phone calls. In determining whether state protection would be provided for her, the Board found that the claimant failed to rebut the presumption of state protection in Mexico with clear and convincing evidence or that the “government is in chaos or disarray.”²⁷ The Board provided in its reasons that “the claimant’s burden of proof is directly proportional to the level of democracy.”²⁸ In describing Mexico as a democracy, the Board stated:

Mexico is a Federal Republic composed of 31 states in a federal district with an elected president and a bicameral legislature. In July of 2000, the voters elected President Vicente Fox Quesada of the Appliance for Change Coalition historic elections that observers judged to be free and fair. No government is expected to be able to protect all of its citizens at all times, nor is it expected to provide perfect protection.²⁹

In *Z.Y.A.*³⁰ the claimant had a relationship with a man who was emotionally and physically abusive. She ended the relationship and met another man with whom she had a child. Because of the continuing presence of her ex-boyfriend, her child’s father ended the relationship with the claimant, and after persistent requests to reconcile, the claimant reconciled with her ex-boyfriend. The claimant claimed that her boyfriend resumed his abusive behaviour, and at the height of the abuse, raped her. The claimant fled to another city to live with family, but was located by her abuser, who threatened her with a gun to come back to him. In finding that the claimant did not rebut the presumption of state protection,

the Board relied on the democratic nature of the Mexican government:

Furthermore, *Kadenko* states that when the state in question is a democratic state, the claimant must do more than simply show that he or she went to see some member of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy of the state in question. The more democratic the state’s institutions, the more the claimant must have done to exhaust all courses of action open to him or her. The claimant has not rebutted the presumption of state protection with clear and convincing proof as she is required to do.³¹

In *Campos*,³² the Board was dealing with a claim from a gay man who survived abuse from his former partner who was also a police officer. After suffering abuse, the claimant had broken up with his partner and had begun a relationship with another man. The claimant’s former partner confronted him about the new relationship, took him to a secluded place, and raped him. He had frequent encounters with his former partner, which led to physical altercations that also included his current partner. In commenting about whether state protection was available, the Board stated, “the presumption of state protection applies” and noted that “in the documentary evidence, it is indicated that Mexico is a constitutional democracy with an independent judiciary.”³³

In *Sulvaran*,³⁴ the claimant was dating a police officer who harassed, raped, and physically abused her. In reviewing state protection, the Board relied upon *Kadenko* providing that the burden of proof to establish the absence of state protection is directly proportional to the level of democracy in the state in question.³⁵ As well, the Board reasoned that except in situations of complete breakdown of state apparatus, the state is assumed to be capable of providing protection for citizens. Citing *Ward*, the Board held that only clear and convincing evidence can rebut the presumption of state protection.³⁶

In *S.B.L.*,³⁷ the claimant was cohabiting with a man who not only liked to smoke and drink a lot, but also was possessive, controlling, and abusive. He abused the claimant sexually and physically, and threatened to kill her. The claimant tried to leave the relationship several times, but was always intimidated into returning. The police were called several times due to noise, but when they arrived, the claimant’s spouse would say things were fine. In fact, the claimant was almost killed by her spouse when he tried to shoot her. When discussing state protection, the Board held:

The panel finds that protection is adequate in the Federal District. She did not rebut, with clear and convincing proof, the

presumption that the democratically elected government in the Federal District is capable of providing protection for its citizens. There is no evidence that this government is dysfunctional or in disarray.³⁸

In *F.M.L.*,³⁹ the claimant had lived with her boyfriend but left him because of physical abuse. Aside from credibility concerns and efforts to seek state protection, the Board also found that the claimant failed to rebut with clear and convincing proof the presumption that the democratically elected government in Mexico is capable of providing protection for its citizens, and there was no evidence provided that the democracy is dysfunctional or that the government is in disarray.⁴⁰

In *F.C.F.*,⁴¹ the claimant was fourteen years old when she began to cohabit with a man. When the claimant became pregnant, her partner was displeased and became physically abusive. Two of the claimant's boyfriends were allegedly murdered by the man. In reviewing whether state protection is available, the Board provided almost identical reasoning as *S.B.L.* and *F.M.L.*, stating that the claimants failed to rebut with clear and convincing evidence the presumption that the democratically elected government in Mexico is capable of providing protection and that there was no evidence that the "democracy is dysfunctional or the government is in disarray."⁴²

Other cases have relied on similar reasoning, relying on the findings in *Kadenko* and making pronouncements that Mexico is a democracy and therefore can afford state protection.⁴³ These cases demonstrate how there is a growing trend amongst decision makers to truncate their analysis with regard to whether state protection is available in a particular claim. Instead, decision makers reason that if a claimant is from a democratic country, there is a higher burden for the claimant to meet to rebut the presumption of state protection, ending their analysis there.

Federal Court Acceptance of Kadenko Principle

Since the Federal Court of Appeal decision in *Kadenko*, it is not only the Board that has relied heavily upon the assumption that if a country can be described as democratic, the heavier the burden upon a refugee claimant to show that state protection is not available. Essentially decision makers have held that where a state has what can be described as having a democratic system, that in itself constitutes "clear and convincing" evidence that there is effective state protection.⁴⁴

The notion that the political makeup of a country can determine whether there is effective state protection has been upheld recently by the Federal Court of Appeal in *Hinzman*. The case of *Hinzman* involved an American

member of the military seeking refugee status in Canada after his application for conscientious objector status in the military was rejected. In appealing his judicial review of the Board's decision to deny him refugee status, one of the main issues was whether the United States could provide Mr. Hinzman with state protection. The Court of Appeal ruled against Mr. Hinzman with the following reasoning:

The United States is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantee of due process. The appellants therefore bear a heavy burden in attempting to rebut the presumption that the United States is capable of protecting them and would be required to prove that they exhausted all the domestic avenues available to them without success before claiming refugee status in Canada.⁴⁵

The Federal Court of Appeal recently not only supported *Hinzman* in *Flores Carillo* but also restated the principle from the *Kadenko* case, holding that a claimant from a democratic country will have a heavy burden when rebutting the presumption of state protection.⁴⁶

In returning to our case study of Mexican claimants who are survivors of domestic violence, the following section canvasses recent cases from the Federal Court.

In the case of *Carillo*⁴⁷ where the claimant was in an abusive relationship suffering severe beatings from her boyfriend, the Federal Court held: "The burden of proof that rests on the claimant is in a way directly proportional to the level of democracy in the state in question. The more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her."⁴⁸

In *Flores*,⁴⁹ Justice Mosley of the Federal Court was reviewing a Board decision regarding a family of claimants fearing the former common-law partner of the principle applicant. Here, Justice Mosley, in finding no reviewable error in the Board's reasoning on state protection, relied upon the presumption of state protection in democracies:

When that state is a democratic society, such as Mexico, albeit one facing significant challenges with corruption and other criminality, the quality of the evidence necessary to rebut the presumption will be higher. It is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation.⁵⁰

Justice Lagace of the Federal Court in *Gea*⁵¹ was reviewing a decision of the Board involving a woman fleeing her former common-law spouse when he relied on previous jurisprudence using the presumption of state protection in

democracies. He stated that “it must be remembered that there is a presumption of state protection, especially in a democratic state” and listed jurisprudence relying on this principle.⁵² Justice Lagace accepted that the applicant has the burden of rebutting the presumption of state protection and held that the Board in *Gea* had considered the effectiveness of state protection, and “on a general level, addressed the gaps or inconsistencies in Mexican state protection.”⁵³

Justice Lagace took the opportunity to reiterate this analysis verbatim in the decision of *Sanchez*,⁵⁴ another refugee case involving a woman who was in an abusive relationship with her former common-law partner.

The problem with this analysis is that it effectively withers away the intended protection the refugee regime was intended to provide. If the Courts are to review state protection on a “general level” only, then the particular circumstances of claimants are no longer important.

This point was made in the case of *Farias*, where the Federal Court held that the Board’s analysis of state protection was too general, relying on other jurisprudence to say that a lack of analysis of a claimant’s personal situation is a reviewable error in the Board’s decision.⁵⁵ *Farias* concerned a case of a woman who was in an abusive relationship with a senior government official in Mexico. In reviewing the decision to deny refugee status to the claimant, the Federal Court held that more than a finding that Mexico can provide protection is needed and a particularized analysis is warranted.⁵⁶ While the Court did not say so in this case, the principles enumerated suggest that decision makers cannot simply rely on the democratic nature of a country in determining whether state protection is available, but must examine the individual circumstances of the particular claimant to decide whether protection would be provided, regardless of which political system the country adheres to.

In *Bautista*,⁵⁷ Justice Beaudry of the Federal Court was reviewing a decision by the Board involving a claimant who was abused by her ex-partner for approximately three years. The court noted that the “Board relied on its findings that Mexico is a functioning democracy”⁵⁸ but held that the Board did not make a “complete analysis” of the evidence to determine whether Mexico is able or unable to protect its citizens.⁵⁹ The judicial review was allowed, in part, for this reason.

In the case of *Huerta*,⁶⁰ Justice Blanchard allowed the judicial review of a refugee decision wherein a claimant feared persecution at the hands of her common-law spouse. In summarizing the Board’s findings with respect to state protection, Justice Blanchard stated that the Board relied on documentary evidence to conclude that, “as a progressive democracy, Mexico can be said to be providing adequate though not necessarily perfect state protection

to its citizens.”⁶¹ As well, Justice Blanchard noted that the Board found that the Applicant did not reasonably exhaust any course of action available to her prior to seeking international protection, concluding that state protection is available to the Applicant in Mexico.⁶² The Court was dissatisfied with the analysis of the Board holding that the Board failed to deal with the evidence, especially evidence that directly contradicted its findings.⁶³

Similarly, in allowing the judicial review, in *Canto Rodriguez*,⁶⁴ another case regarding a Mexican claimant who was abused by her ex-boyfriend, Justice Russell noted that the “Board pointed out that Mexico is a democracy with functioning political and judicial systems. The burden on the Applicant to rebut the presumption of state protection was heavy.”⁶⁵ In his analysis, he held that the Board did not do enough to address evidence concerning the ineffectuality of police action in a context where the claimant was under daily threats from an influential perpetrator who, in addition to wanting to harm the claimant, showed no hesitation in threatening the police themselves.⁶⁶ Also, Justice Russell pointed out that there was contradictory evidence before the Board that women are not protected in Mexico by the police and the criminal justice system generally.⁶⁷

Justice Shore applied a similar line of reasoning in *Bravo Tamayo*,⁶⁸ when he allowed an application for judicial review of a Mexican claimant’s refugee decision that involved domestic abuse. Relying on the case of *Avila*,⁶⁹ Justice Shore held that “the Board must undertake a proper analysis of the situation in the country and the particular reasons” why the claimant is unable or unwilling to avail himself or herself of the protection in the country of nationality or habitual residence.⁷⁰ Further, in quoting *Avila*, the Court held that the Board must consider not only whether the state has the capacity to protect but also their willingness to act. In particular:

In this regard, the legislation and procedures which the applicant may use to obtain state protection may reflect the will of the state. However, they do not suffice in themselves to establish the reality of protection unless they are given effect in practice⁷¹

In a number of Federal Court decisions, the factors that the Court expects Board members to look at when determining whether there is state protection for women who have suffered domestic violence have nothing to do with how a country governs itself. Rather, the focus has been on police responses to complaints of domestic violence.⁷²

Indeed, as Justice Campbell of the Federal Court has stated in *Garcia*, “serious efforts” to protect women through “due diligence” in the form of commissions of inquiry investigating issues regarding violence against women, the

creation of ombudspersons to take complaints of police failure, or educational initiatives do not constitute evidence of “effective state protection.”⁷³ Justice Campbell also rationalized that the existence of non-governmental agencies such as women’s shelters are not signs of effective state protection, citing that the Board’s own “Gender Guidelines” agree.⁷⁴ The Court posited that there should not be a burden on the claimant to seek protection from these agencies.⁷⁵ “Serious efforts,” Justice Campbell states, “must be viewed at the *operational level* of the protection services offered by the state.”⁷⁶ Essentially, the ability of the state to protect must be seen not only through effective legislation and procedural framework, but also through the capacity and will to implement them.⁷⁷ Justice Campbell provides an illustration:

For example, when a woman calls the police at 3:00 am to say that her estranged husband is coming through the window, the question is, are the police ready, willing, and able to make serious efforts to arrive in time to protect her from being killed? While it is true that even the best trained, educated, and properly motivated police force might not arrive in time, the test for “serious efforts” will only be met where it is established that the force’s capability and expertise is developed well enough to make a credible, earnest attempt to do so, from both the perspective of the woman involved and the concerned community. The same test applies to the help that a woman might be expected to receive at the complaint counter at a local police station. That is, are the police capable of accepting and acting on her complaint in a credible and earnest manner? Indeed, in my opinion, this is the test that should not only be applied to a state’s “serious efforts” to protect women but should be accepted as the appropriate test with respect to all protection contexts.⁷⁸

Justice Campbell in this case asks for particular evidence of whether effective state protection will be available; he calls for an examination of whether a woman calling for help in a domestic violence situation would get the help she needed, at the operational level. There is no reason to examine whether the country is democratic or not. At the heart of the examination is whether, there is state protection in practice, not whether there is in theory. In order to come to a sound conclusion, the factor of democracy is not helpful. As in the case studies of looking at claimants claiming by reason of the fact that they cannot be protected by perpetrators of domestic violence, it is a personal analysis that not only needs to be done, but an analysis of the protection mechanisms in that country. The voting system of a country should not be a factor in a determination of whether a state can protect a particular individual whatsoever.

While many cases make the presumption that if a state is democratic, there is effective state protection,⁷⁹ other

jurisprudence, however, has begun to challenge the very notion of the character of an government system informing as to the effectiveness of state protection in a refugee context. Indeed in *Katwaru*, the Federal Court opined:

The Board also relied on *Kadenko* ... for the proposition that the burden for the claimant to prove an absence of state protection is directly proportional to the level of democracy of the state. *Democracy alone does not guarantee effective state protection*; it is merely an indicator of the likely effectiveness of a state institution. In the present case, the evidence indicates that the Guyana Police Force is a very weak institution that is having real difficulties responding to the high levels of violent crime that exist in the Country as a whole. The Board is required to do more than determine whether a country has a democratic political system and must assess the quality of the institutions that provide state protection.⁸⁰

Despite the efforts of the judiciary to rein in the use of the democracy factor in evaluating whether effective state protection exists, should asylum countries, such as Canada, be using this factor at all in its determination of whether one is deserving of refugee protection?

Judicial Notice of Democracy

While recognizing that the Board is an adjudicative body that is deemed to have specialized knowledge, and a body that does not apply rules of evidence as strictly as the courts, there is still an obligation for Board members to make findings upon a sound foundation.

The problem with recognizing democracy as a barometer of whether state protection is available is best illustrated by looking at how the democracy factor is applied in decision making. Whether as specialized knowledge or as judicial notice, the application of the assumption that a democratic nation can provide “clear and convincing” evidence that there is effective state protection, in general, does not adhere to legal norms of how judicial notice should be applied. Paciocco and Stuesser define judicial notice as follows:

Judicial notice is the acceptance by a court, without the requirement of proof, of any fact or matter that is so generally known and accepted by the community that it cannot be reasonably questioned, or any fact or matter that can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned.⁸¹

Judicial notice is given to facts that are already known and acknowledges the vast knowledge, understanding, and experience that adjudicators are expected to use; it basically dispenses with proof. Judicial notice is a mechanism that

constitutes an exception to the general rule that matters of fact are established by the introduction of evidence or by admission.⁸² Examples that Paciocco and Stuesser provide include:

We know that children can drown in lakes; we need no proof of that. We also know that alcohol can impair a person's faculties; we need no proof of that. Much is simply accepted as part of human experience, as a matter of common sense, for which no proof is needed and to which nothing is said. When the silence is broken and the acceptance of a matter of common knowledge is urged or disputed, the issue of judicial notice arises.⁸³

Essentially, judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts that are judicially noticed are not proven by evidence or tested, and therefore the threshold for judicial notice is strict. Courts will accept a fact without proof if (a) it is so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (b) it is capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.⁸⁴

Paciocco and Stuesser also distinguish between taking judicial notice of adjudicative facts, legislative facts, and social framework facts. They define "adjudicative facts" as those facts "to be determined in the litigation between the parties."⁸⁵ "Legislative facts" are those that "assist in determining questions of law and are not intended to assist in resolving questions of fact."⁸⁶ "Social framework facts" are defined as those that "provide a context for the judge to consider and apply the evidence in a given case."⁸⁷ They also describe social framework facts as "a hybrid of adjudicative and legislative facts" and "social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case."⁸⁸

Arguably, taking judicial notice of whether a country is a democracy would be a social framework fact. The warning that Paciocco and Stuesser provide with this kind of judicial notice is apt: "in the absence of evidence, reliance on such general propositions simply leads to inappropriate and unfair speculation" or "stereotyping."⁸⁹

Interestingly, Paciocco and Stuesser note that judicial notice and expert evidence are not compatible: "Judicial notice, as outlined, deals with matters of notorious common knowledge; on the other hand, expert evidence is called precisely because the expert has knowledge beyond the ken of the ordinary person."⁹⁰

Indeed, the Federal Court has recognized the above principles with regard to judicial notice and upheld the standards set out in *R. v. Find*.⁹¹ For example in *Kankanagme*:

... judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Because facts judicially noted are not taken under oath or subject to cross-examination, the threshold for the admission of facts by judicial notice is strict. To be admissible, the facts must be either "so notorious or generally accepted as to be not the subject of debate among reasonable persons; or ... capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy."

As an administrative tribunal, the Immigration and Refugee Board is not bound by the stringent evidentiary rules applicable in a criminal case. Nevertheless, I am not persuaded that the etiology of speech impediments is something of which the Board could properly take notice. In purporting to take notice of this 'fact,' the Board committed a further error.⁹²

Similarly, in the case of *Castro*, the Federal Court stated:

According to the Respondent, the Applicant is asking the Court to take judicial notice that there has been an increase in crimes in Mexico, therefore rendering it a dangerous place for anyone. Judicial notice may be taken of any fact of matter which is so generally known and accepted that it cannot reasonably be questioned, or any fact of matter which can readily be determined or verified by resort to sources whose accuracy cannot be reasonably questioned⁹³

Perhaps most pertinent to the discussion is the decision of *H.K.* wherein the Federal Court was reviewing a decision by a Pre-Removal Risk Assessment (PRRA) officer regarding an applicant from India. In rendering the decision, the Court held that the "situation in India, or in any other country" is a question of fact. The Court recognized that the PRRA officer is not subject to strict rules of evidence but provided that judicial notice should only be given to facts that "are so notorious as not to be subject of dispute among reasonable people" and facts that "everybody knows."⁹⁴ The Court held that the particular facts provided to the PRRA officer were not those deserving judicial notice, and also that the government had not recognized that India was in a horrific situation where a moratorium was issued.⁹⁵

The problem with the Board, in effect, taking judicial notice of a country as having a democratic political system to impute that state protection is available, is that in doing so, it is essentially engaging in what Paciocco and Stuesser warn against: unfair speculation and stereotyping. The

consequence of such a practice is that the finding of whether there is effective state protection becomes the same for all individuals, regardless of their particular circumstance.

It is the distinction between judicial notice and expert evidence that illustrates the problem with the use of the democracy factor in assessing effective state protection. The Supreme Court of Canada in *Ward* has made it clear that the burden of proof as to whether there is effective state protection is one where there must be “clear and convincing” evidence. Board members and judges alike have become accustomed to being presented with country documentation or expert evidence about a country’s response to a particular threat that an individual claimant describes, and the expectation should not be discouraged. The determination of whether the presumption that there is state protection should be rebutted is a question of mixed fact and law, and not one that should be easily dispensed with by judicial notice.

The Problem with Defining Democracy

The Oxford English Dictionary defines “democracy” as: government by all the people, direct or representative. It also notes that democracy derives from the Greek word *demos* which means people.

This definition demonstrates that, at its core, “democracy” is a noun that describes a form of government. By this definition alone, it seems illogical that adjudicators would rely upon the form of a government of a country to indicate whether it can effectively protect its citizens. However, political theory divulges more.

Ironically, when proponents of democracy were promoting the use of its form in ancient Greek times, others, like Plato, were skeptical of the benefits it could bring to society. Rule of the many was viewed as inefficient or it was thought that only a few were fit to rule. The notion of democracy has evolved since Plato’s time, and indeed many others have provided their philosophical perspectives as to whether it is an appropriate way for society to be governed. Today, it is widely held to be the preferred way to govern, and indeed is the form of government most promoted.

Today, there are many forms of democratic government, including representative, parliamentary, direct, and others. Indeed, not only the forms of democratic governments have evolved but theories surrounding the study of democracies have evolved as well. These studies inform the problems associated with how we define democracy.

Indeed, political scientists have tried to wrap their minds around the very characteristics that make up a democratic country. Robert Dahl asks:

Democracy means, literally, rule by the people. But what does it mean to say that the people rule, the people is sovereign, a people governs itself? In order to rule, the people must have some way of ruling, a *process* for ruling. What are the distinctive characteristics of a democratic process of government?⁹⁶

Wolfgang Merkel and Aurel Croissant examined their colleagues’ assessments and have found that there are many ways in which one can examine whether a state is democratic or not:

[Some scholars discussed democracy in its most simple construct: Schumpeter, Dahl and Przeworski] They reduced democracy to the question of free and general electoral competition, vertical accountability and the fact that the most powerful political and social actors played the political game according to democratically institutionalized rules. At least implicitly, democracy was conceived as an elitist electoral democracy. Neither the structural question of prerequisites for democracy nor the conditions for sustainable legitimacy played and could play a relevant role within this minimalist concept of the sustainability of democracy. But not only the external ‘embedding’ of democracy, but also the ‘internal’ embeddedness of the democratic electoral regime was neglected. Rule of law, civil rights and horizontal accountability were excluded from the concept of democracy. Guillermo O’Donnell (1993) was the first to criticize that conceptual flaw of the mainstream of transitology and consolidology. Thirty years after the beginning of the third wave of democratization empirical evidence revealed the theoretical shortcomings of the minimalist ‘electoralists.’ It became evident that it is misleading to subsume Denmark, Sweden or France under the same type of regime—an electoral democracy—as Russia, Thailand or Brazil. Political science ran the risk of even falling behind the analytical capacity of daily newspapers in differentiating between different types of democracy.⁹⁷

Much has been written about the rise of the number of democratic states since the fall of the Soviet Union in 1991, but only recently have the newly democratic states been given a second glance. Fareed Zakaria asserts that identifying as a democracy may not mean that a state espouses the characteristics one normally associates with a democracy. He writes:

The American diplomat Richard Holbrook pondered a problem on the eve of the September 1996 elections in Bosnia, which were meant to restore civil life to that ravaged country. “Suppose the election was declared free and fair,” he said, and those elected are “racists, fascists, separatists, who are publicly opposed to [peace and reintegration]. That is the dilemma.” Indeed it is, not just in the former Yugoslavia, but increasingly around the

world. Democratically elected regimes, often ones that have been reelected or reaffirmed through referenda, are routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms. From Peru to the Palestinian Authority, from Sierra Leone to Slovakia, from Pakistan to the Philippines, we see the rise of a disturbing phenomenon in international life—illiberal democracy.

It has been difficult to recognize this problem because for almost a century in the West, democracy has meant liberal democracy—a political system marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property. In fact, this latter bundle of freedoms—what might be termed constitutional liberalism—is theoretically different and historically distinct from democracy ... Today the two strands of liberal democracy, interwoven in the Western political fabric, are coming apart in the rest of the world. Democracy is flourishing, constitutional liberalism is not.

Constitutional liberalism has led to democracy, but democracy does not seem to bring constitutional liberalism. In contrast to the Western and East Asian paths, during the last two decades in Latin America, Africa, and parts of Asia, dictatorships with little background in constitutional liberalism have given way to democracy. The results are not encouraging.⁹⁸

Zakaria articulates the problem with adjudicators relying on the classification of “democratic” as a starting point in an analysis of the state’s ability to effectively protect its citizens. We can no longer rely on the fact that democracy means “liberal democracy.” These days, it may also mean “illiberal democracy.”

Beyond that, other political scientists are questioning whether democracy should have been promoted. Merkel and Croissant state:

It became clear that the majority of new democracies could not be labeled “liberal democracies.” General, competitive and free elections turned out to be insufficient in guaranteeing the rule of law, civil rights and horizontal accountability. Between elections, many of the electoral democracies were not government by, or for the people. It became obvious, again, that democratic elections need the support of complementary partial regimes, such as the rule of law, horizontal accountability and an open public sphere in order to become ‘meaningful’ elections.⁹⁹

Interestingly, Merkel and Croissant opine:

We argue that *defective democracies* are the most frequent type of democracy found among the almost 100 new democracies

which emerged during the third wave of democratization. We therefore need a clearer conceptual understanding of the character, sources of legitimacy, institutions and mode of reproduction of this regime type in order to analyse, explain and predict the emergence, durability and trajectory of defective democracies.¹⁰⁰

They describe defective democracies as having some common characteristics. The first characteristic is that these democracies carry out elections; the second is a deficient implementation of the rule of law and horizontal accountability; the third is the existence of powerful political groups that drive the agenda; and the fourth is low-intensity citizenship or “weak stateness.”¹⁰¹

Koelble and Lipuma also question the way that democracy is measured and how the label is given to countries—labels given by organizations such as Freedom House and others that the Board and refugee lawyers rely upon. Their research critically analyzes the ongoing projects designed to quantify and gauge the quality of democracy and the performance of national governance. They discuss the limitations of measurement and the methodologies used to arrive at the determination of whether one country is democratic and on what scale.¹⁰²

The authors state that current measurements are well-attuned to Euro-American realities and “fail to adequately capture the differences that are (and have been) shaping the character of postcolonial democracies.”¹⁰³ They posit that the means of measuring democracy is flawed because it fails to adequately grasp the way in which democracy as a concept and form of governance becomes reterritorialized in local/national contexts.¹⁰⁴ Interestingly, they make the finding that the real measure of democracy is the extent to which governance conforms to the visions of democracy worked out by the governed.

If we are to use this definition, arguably the act of refugees leaving their country would demonstrate that they are dissatisfied with the way their country is being governed—is that enough?

Carothers takes this further and questions whether democratization or “open national elections” is always a good idea. He provides that when tried in poor countries, democracy can and does result in bad outcomes such as illiberal leaders or extremists.¹⁰⁵ Like Carothers, there is a growing body of those who question whether promoting democracy really leads to good. Faundez states that positive developments brought by democratization are offset by the quality of governance and at the expense of other things:

One of the factors triggering political disaffection is, arguably, the failure of new democratic regimes to resolve pressing social and economic problems of vast sections of their population. Although

democracy aims mainly at guaranteeing political and civil equality, pervasive economic inequalities have a negative impact on the capacity of citizens to exercise their democratic rights. The danger posed by this situation is that populist leaders or sectarian groups could take advantage of democracy's freedom to undermine, discredit or overthrow its institutions.¹⁰⁶

Finally, scholars like William Robinson question the true aims of "democracy promotion":

When transnational elites talk about "democracy promotion" what they really mean is the promotion of polyarchy. I use the term to refer to a system in which a small group actually rules, and mass participation in decision making is confined to choosing leaders in elections that are carefully managed by competing elites.¹⁰⁷

Robinson goes further and provides that "democracy promotion" does not lead to the characteristics many think come with it, such as rule of law or greater access to rights for individuals. He states: "the trappings of democratic procedure in a polyarchic political system do not mean that the lives of ordinary people become filled with authentic or meaningful democratic content, much less that social justice or greater economic equality is achieved."¹⁰⁸ Rather, the "transitions to democracy" become a mechanism to facilitate the rise to power of groups of elites.¹⁰⁹ He also argues that rather than bring the expected benefits, democracy promotion leads to problems other scholars have noticed:

Transitions to polyarchy have been accompanied by a dramatic sharpening of inequalities and social polarization, as well as growth in poverty ... Added to the income polarization in the 1980s and 1990s was the dramatic deterioration in social conditions as a result of neoliberal policies that drastically reduced and privatized health, education and other social programs.¹¹⁰

Robinson, in particular, highlighted that the position of many Latin American countries, including Mexico, decreased on the United Nations Development Program's Human Development Index during the period of "democracy promotion" and that what really happened in Mexico and other Latin American countries was "intraelite conflict" rather than a true democratic reforms.¹¹¹

What is clear is that while many academics and researchers have debated (a) the best way to measure democracy and (b) the value of promoting democracy, two things have become clear for those working in the refugee legal system in Canada. First, calling a state democratic is not an easy exercise. Simply saying a country is democratic is not informative to whether there are structures in place,

or informative of the attitude or will of a state to provide effective state protection. The fact that it is difficult to discern what it means to be a democracy suggests that it would be wrong to assume that all Board members or adjudicators are using the same methods to determine whether a state is democratic, or, indeed, where that state may fit on a spectrum that has not been fully defined.

The danger here is applying the rules of judicial notice to a notion that is not fit to be judicially noticed. The above discussion that academics and researchers are having illustrates that the finding that a state is democratic is not "uncontroversial" or "beyond reasonable dispute." As well, there is no capability of "immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy," as the above dialogue demonstrates, to define democracy, let alone identify whether a country is democratic.

Second, beyond the problem of defining democracy, and defining which states belong in that definition, one needs to question whether this is a factor that helps in determining whether the presumption of state protection is rebutted in a particular case. Academics such as Zakaria have challenged the idyllic notion that democracy brings with it the rule of law and systemic protections. As well, academics such as Faundez and Robinson question whether democracies today provide of the protections of civil, social, and economic rights that are often assumed to be associated with democratic countries. The larger picture is that while we as advocates and adjudicators in the Canadian refugee system are seeking ways to get to a determination in an efficient and easy-to-use manner, the democracy factor does neither. Instead, it is distorting our notions of what is effective state protection, and deflecting attention from other factors that may be more appropriate. As noted by the Committee on Population and Refugees of the Council of Europe:

... the concept of persecution should be interpreted and applied liberally and also adapted to the changed circumstances which may differ considerably from those existing when the Convention was originally adopted [A]ccount should be taken of the relation between refugee status and the denial of human rights as laid down in different international instruments.¹¹²

While much of the jurisprudence has held that when a state is democratic, the evidence necessary to rebut the presumption of state protection will need to be higher, some judges have tried to provide a more nuanced approach in the hopes of preventing the pigeon-hole effect of assuming that every person from a certain country would not be a refugee. The result is that there is confusing jurisprudence pertaining to the same country and no distinguishable way to discern why.

This is aptly demonstrated in the case of *Flores Zepeda*¹¹³ in the Federal Court wherein Justice Tremblay-Lamer referred to a series of cases demonstrating the problem in using democracy as a barometer for state protection. Justice Tremblay-Lamer first points to a case relied upon by the respondent called *Velazquez*. The Court in *Velazquez* stated that “Mexico is a functioning democracy, and a member of the NAFTA, with democratic institutions.”¹¹⁴ From this, the Court in *Velazquez* reasoned that the presumption of state protection is “a strong one.”¹¹⁵

Justice Tremblay-Lamer then examines other jurisprudence that “focused on the problems that remain in Mexico’s democracy.”¹¹⁶ In *De Leon*, the Court indicated that Mexico was “a developing democracy with problems including corruption and drug trafficking involving state authorities.” This reasoning led the Court in *De Leon* to find that the presumption of state protection in Mexico “more easily overturned.”¹¹⁷

Justice Tremblay-Lamer then refers to *Capitaine*¹¹⁸ wherein the Court held that “Mexico is a democracy to which a presumption of state protection applies” but that “its place on the ‘democracy spectrum’ needs to be assessed” to determine what evidence will displace that presumption.¹¹⁹ The Court in *Capitaine* held that all countries on the “democracy spectrum” do not get the same treatment and that decision makers are not relieved of their obligation to “assess the evidence offered” to establish whether or not a state is able to protect its citizens.¹²⁰

In conclusion, Justice Tremblay-Lamer agreed with the approach in *Capitaine* and provides in her reasons:

While Mexico is a democracy and generally willing to protect its citizens, its governance and corruption problems are well documented. Accordingly, decision-makers must engage in a full assessment of the evidence placed before them suggesting that Mexico, while willing to protect, may be unable to do so. This assessment should include the context of the country of origin in general, all the steps that the applicants did in fact take, and their interaction with the authorities.¹²¹

The case of *Flores-Zepeda* is but one example illustrating the perils of using democracy as the principle measure of determining whether there is effective state protection in a particular country. The application of reference to the democratic nature of a country leads to an overgeneralization of the assessments of state protection and the danger is that such an assessment may lead adjudicators to assume that in all cases from that country, there is effective state protection. This begs the question of why we need the first step. Is it helpful to know what political system the country uses to govern itself in all cases? Unless it is raised by a claimant,

the focus should be on the other factors that adjudicators have focused on when they try to get around the generalized finding that a state has state protection simply because it is “democratic.”

Policy Recommendation: Bringing Back to Basics and Taking Democracy out of the Equation

This paper urges Canadian decision makers in the refugee system to adopt a bold position. While there is a movement to recognizing tools that create efficiency and ease in making determinations, relying on such tools should not be at the expense of those who are vulnerable. We, as advocates, should also be mindful of protecting the very legal traditions that ensure that abuses are not allowed nor rights dismissed. In particular, while we can recognize that tribunals such as the Immigration and Refugee Board are those that do not adhere to strict rules of evidence, the rules should not be abandoned altogether, and those that do exist should not be distorted. Using the factor of democracy to help in determining whether there is effective state protection does nothing but distort the picture in which the claimant is telling his/her story. It does nothing to help in the examination of evidence of whether there is effective state protection. Instead adjudicators and advocates alike should call for a more honest investigation, looking at the personal and particular factors that may illustrate whether or not that claimant would be given protection. In the case of a woman who has suffered from domestic abuse, it is not the regime in which the country is run that will inform, but the protection services in place, and the political will to deal with perpetrators of domestic violence. Claimants from a certain country that claim on political persecution may not be successful due to the protection afforded in that situation. This protection may not be applied similarly or the same to other groups of people, namely women in domestic violence situations or those who identify as gay or lesbian. Whatever, the case, we cannot start with the democratic nature, because it does nothing to inform the reality in which each claimant finds herself or himself. As well, it may be a factor that biases a decision maker when examining cases that involve marginalized communities from a particular country.

In essence, the paper calls for the abolishment of the practice of using the “democracy factor” as a gatekeeper to the adjudicator from examining evidence to rebut the presumption of state protection. Advocates should challenge any attempt by the government to deem any country a “designated country” based on the fact that it is a so-called “democracy.” There is already a burden on refugee claimants to provide “clear and convincing” evidence to rebut the presumption of state protection. Whether or not a state is democratic should not increase the burden. It is not informative

to the task at hand, and it generalizes claims from a particular country. It takes away from the original notion of why the international community decided to recognize and protect refugees. The democracy factor is a dangerous precedent. Any policy which promotes the notion that claimants from certain countries could never be refugees represents a serious threat to both the letter and the spirit of the *Refugee Convention*.

NOTES

1. Michelle Collins, "Two-Tier Refugee System Blasted" *Embassy Magazine* (April 15, 2009).
2. First Reading of Bill C-11 Third Session, Fortieth Parliament, 59 Elizabeth II, 2010 (March 30, 2010).
3. Bill C-11, *An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act*, 3rd Sess., 40th Parl., 2010, cl. 109.1 (assented to 29th June, 2010).
4. Library of Parliament, *Legislative Summary of Bill C-11: An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act)*, Publication No. 40-3-C11-E (Parliamentary Information and Research Service, May 12, 2010) at 7.
5. Citizenship and Immigration Canada, *Designated countries of origin*, online: <http://www.cic.gc.ca/english/reform-safe.asp> (accessed July 5, 2010) [emphasis added].
6. James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths Law, 1993) at 103–105 and 112.
7. *Ibid.* at 125–27.
8. *Ibid.* at 127.
9. *Ibid.* at 129.
10. *Canada (Attorney General) v. Ward*, [1993] S.C.J. No. 74 at para. 50.
11. *Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532.
12. Government of Canada, *Canada-Mexico Relations: a strategic partner for Canada*, online: <http://www.canadainternational.gc.ca/mexico-mexique/bilat/bilat.aspx?lang=en> (accessed July 23, 2010).
13. *Ibid.*
14. *Ibid.*
15. Government of Canada, *Canada-Mexico Relations: Parliamentary Cooperation*, online: <http://www.canadainternational.gc.ca/mexico-mexique/bilat/parlcoop-coopparl.aspx?lang=en> (accessed July 23, 2010).
16. Campbell Clark, "Canada seeks strategic ties by focusing aid on Americas" *Globe and Mail* (February 24, 2009), online: <http://www.theglobeandmail.com/servlet/story/RTGAM.20090223.wforeign24/BNStory/politics/home> (accessed July 23, 2010).
17. "Mexicans, Czechs will need visas to visit Canada" *CBC News* (July 13, 2009), online: <http://www.cbc.ca/canada/story/2009/07/13/visas-mexicans-czechs-refugee.html> (accessed July 23, 2010).
18. Marina Jimenez, "Felipe Calderon: The man who took on the cartels" *Globe and Mail* (May 28, 2010), online: <http://www.theglobeandmail.com/news/world/felipe-calderon-the-man-who-took-on-the-drug-cartels/article1585334/> (accessed July 23, 2010).
19. "Mexicans, Czechs will need visas to visit Canada" *CBC News* (July 13, 2009), online: <http://www.cbc.ca/canada/story/2009/07/13/visas-mexicans-czechs-refugee.html> (accessed July 23, 2010).
20. *Ibid.*; see also Carl Meyer, "Where's the beef? Sizing up Canada-Mexico relations" *Embassy* (May 26, 2010), online: <http://www.embassymag.ca/page/view/mexico-05-26-2010> (accessed July 23, 2010).
21. [2007] R.P.D.D. No. 192.
22. *Ibid.* at para. 12.
23. *Ibid.* at para. 13.
24. *Ibid.* at para. 12.
25. *Ibid.* at para. 15.
26. [2005] R.P.D.D. No. 336.
27. *Ibid.* at para. 6.
28. *Ibid.*
29. *Ibid.* at para. 7.
30. [2007], R.P.D.D. No. 164.
31. *Ibid.* at para. 12.
32. [2006] R.P.D.D. No. 63.
33. *Ibid.* at para. 16.
34. [2004] R.P.D.D. No. 602.
35. *Ibid.* at para. 10.
36. *Ibid.* at paras. 8–9.
37. [2007] R.P.D.D. No. 113.
38. *Ibid.* at para. 20.
39. [2007] R.P.D.D. No. 161.
40. *Ibid.* at para. 11.
41. [2007] R.P.D.D. No. 162.
42. *Ibid.* at para. 12.
43. *Re V.V.C.*, [2008] R.P.D.D. No. 99 at paras. 16–17; *Re Q.N.N.*, [2005] R.P.D.D. No. 918 at para. 9; *Re Y.G.H.*, [2008] R.P.D.D. No. 54 at para. 17; *Re Y.D.U.*, [2008] R.P.D.D. No. 84 at paras. 19–21; *Low v. Canada*, [2006] R.P.D.D. No. 42 at para. 25; *Parrales v. Canada*, [2005] R.P.D.D. No. 326 at para. 23.
44. See *Ward*, *supra* note 10; and *Kadenko*, *supra* note 11.
45. *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para. 46; Mr. Hinzman has since filed a pre-removal risk assessment application and a permanent residence application on humanitarian and compassionate grounds (H&C application) which were denied. The Federal Court denied judicial review applications on both those decisions but the Federal Court of Appeal allowed the appeal for Mr. Hinzman's H&C application on the basis that the immigration officer erred by not considering Mr. Hinzman's beliefs and motivations for claiming conscientious objector status; *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 177. Liberal MP Gerard Kennedy brought forward a private

- member's bill, Bill C-440, in September 2009 to allow war resisters to stay in Canada and halt all deportations. Second reading of Bill C-440 took place in May 2010.
46. *Canada (Minister of Citizenship and Immigration) v. Flores Carillo*, 2008 FCA 94 at paras. 26 and 32.
 47. [2006] R.P.D.D. No. 27.
 48. *Ibid.* at para. 20.
 49. *Flores v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 723.
 50. *Ibid.* at para. 10.
 51. *Gea v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 750.
 52. *Ibid.* at para. 27; see also *De La Rosa v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 98, 2008 FC 83; *Santos v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1038, 2007 FC 793; *Lazcano v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1630, *Baldomino v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1638.
 53. *Ibid.* at paras. 27–28.
 54. [2008] F.C.J. No. 886 at paras. 16–19.
 55. *Farias v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1035; [2008] F.C.J. No. 1292 at paras. 22–24.
 56. *Ibid.* at para. 23–25.
 57. *Bautista v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 126.
 58. *Ibid.* at para. 8.
 59. *Ibid.* at para. 15.
 60. *Huerta v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 586.
 61. *Ibid.* at para. 22.
 62. *Ibid.* at para. 22.
 63. *Ibid.* at para. 25.
 64. *Canto Rodriguez v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 262.
 65. *Ibid.* at para. 24.
 66. *Ibid.* at para. 61.
 67. *Ibid.* at para. 61.
 68. *Bravo Tamayo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 460.
 69. *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359.
 70. *Bravo Tamayo*, *supra* note 68 at para. 49.
 71. *Ibid.* at para. 49.
 72. *Fraser v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1420; *Perez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 548; *Myle v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1127; *Elcock v. Canada (Minister of Employment and Immigration)*, [1999] F.C.J. No. 1438; *A.Q. v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 834.
 73. *Garcia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 79 at para. 14; see also see *Franklyn v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1249 at para. 21.
 74. *Garcia*, *ibid.* at para. 15; see also Immigration and Refugee Board, *Guidelines issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* at section C.2 (“Gender Guidelines”).
 75. *Ibid.*
 76. *Ibid.*; see also *Elcock v. Canada (Minister of Citizenship and Immigration)* (1999), 175 F.T.R. 116 (F.C.T.D.) at para. 15
 77. *Ibid.*
 78. *Ibid.* at para. 16.
 79. See *Flores*, *supra* note 49 at para. 10; *De La Rosa v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 83; *Santos v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 793; *Lazcano v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1630; *Baldomino v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. NO. 1638; *Lopez Gea v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 750; *Pacasum v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 822; *Gallo Farias v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 578; *Campos v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1244.
 80. *Katwaru v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 612 at para. 21. [Emphasis added]
 81. D. Paciocco & L. Stuesser, *The Law of Evidence*, 4th ed. (Toronto: Irwin Law, 2005) at 376 [Paciocco & Stuesser].
 82. David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1999) at 119.
 83. *Ibid.* at 377.
 84. *Ibid.* at 377; *R. v. Zundel*, (1987), 56 C.R. (3d) 1, 31 C.C.C. (3d) (Ont. C.A.); *R. v. Kyrmowski* (2005), 26 C.R. (6th) 207, 193 C.C.C. (3d) 129 (S.C.C.).
 85. *Paciocco & Stuesser*, *supra* note 81 at 376.
 86. *Ibid.* at 376.
 87. *Ibid.* at 377.
 88. *Ibid.* at 382
 89. *Ibid.* at 386.
 90. *Ibid.* at 380; *R. v. Desaulniers*, (1994) 93 C.C.C. (3d) 371 (Que. C.A.).
 91. See *Gonzalez v. Canada (Minister of Employment and Immigration)*, [1981] 2 F.C. 781 (C.A.) at 782; *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 974; *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1036.
 92. *Kankanagme v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1451 at paras. 11–12.
 93. *Castro v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1282 at para. 28.
 94. *H.K. v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1612 at para. 31.
 95. *Ibid.* at para. 31.
 96. Robert A. Dahl, *Democracy and Its Critics* (London: Yale University Press, 1989) at 106.

97. Wolfgang Merkel & Aurel Croissant, "Conclusion: Good and Defective Democracies" (December 2004) 11:5 Democratization at 199.
98. Fareed Zakaria, "The Rise of Illiberal Democracy" in Sondra Myers, ed., *The Democracy Reader* (New York: International Debate Education Association, 2002) at 173.
99. *Merkel & Croissant*, *supra* note 97 at 199.
100. *Ibid.* at 200.
101. *Ibid.* at 205.
102. Thomas A. Koelble & Edward Lipuma, "Democratizing Democracy: A Postcolonial Critique of Conventional Approaches to the 'Measurement of Democracy'" (February 2008) 15:1 Democratization.
103. *Ibid.* at 3.
104. *Ibid.*
105. Thomas Carothers, "How Democracies Emerge: The 'Sequencing' Fallacy" (January 2007) 18:1 Journal of Democracy at 12.
106. Julio Faundez, "On the State of Democracy: Introduction" (December 2005) 12:5 Democratization at 615.
107. William Robinson, "Promoting Polyarchy in Latin America: The Oxymoron of 'Market Democracy,'" in E. Hershberg and F. Rosen (eds.), *Latin America after Neo-Liberalism* (New York: New Press, 2006) at 99.
108. *Ibid.* at 100.
109. *Ibid.* at 101–102.
110. *Ibid.* at 116–117.
111. *Ibid.* at 110 and 117.
112. *Hathaway*, *supra* note 6 at 104.
113. *Flores Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491.
114. *Velazquez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 532, [2006] F.C.J. No. 663 (QL), at para. 6.
115. *Ibid.*; see also *Canseco v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 73, [2007] F.C.J. No. 115 (QL) at para. 14; *Alfaro v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 460, [2006] F.C.J. No. 569 (QL) at para. 18.
116. *Flores Zepeda*, *supra* note 113 at para. 18.
117. *Ibid.*
118. *Capitaine v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 98, [2008] F.C.J. No. 181 (QL), at paras. 20–22.
119. *Flores Zepeda*, *supra* note 113 at para. 19.
120. *Ibid.*
121. *Ibid.* at para. 20; see also *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1211, [2007] F.C.J. No. 1563 (QL) at para 21; *G.D.C.P. v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 989, [2002] F.C.J. No. 1331 (QL) at para. 18.

Jamie Liew is a lawyer in a feminist legal practice in Ottawa, Canada, specializing in immigration and refugee law. She is also an LL.M. candidate at Columbia University.