The ANU Undergraduate Research Journal

Volume Six, 2014
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Jen Fullerton
At The Australian National University (ANU), research is central to everything we do. Our research-led educational offerings provide undergraduate students the opportunity to embrace their curiosity and explore some of the most important questions facing society.

Importantly, *The ANU Undergraduate Research Journal*, published annually by ANU Press, gives our most exceptional students the opportunity to share their work with the wider academic community. The 2014 edition of the Journal reflects the important role ANU plays as the national university by opening up its pages to the work of undergraduate students from across the nation.

The selection of topics in this edition offers the journal’s readers an interesting journey through the expanse of undergraduate research occurring across Australia. The journal’s commitment to showcasing a diverse range of interdisciplinary research is reflective of the value ANU places on its interdisciplinary approach to both research and education.

I congratulate the authors and editors of this year’s journal on the high quality of their work and their contribution to advancing research in Australia.

Professor Ian Young AO
Vice-Chancellor and President
The Australian National University
From the editors

It was a pleasure to edit the manuscripts in Volume Six of *The ANU Undergraduate Research Journal (AURJ)* for 2014. Readers will discover an impressive range and depth of articles, both in terms of disciplinary content and geographical relevance, including contributions focusing on law reform in Japan, the influence of genetics on human behaviour, and military violence in Brazil and Mexico. We are also delighted to include a visual arts exegesis by Jen Fullerton, whose work is featured on the cover of this volume.

This year the articles were selected via two processes. Some were selected by the review committee for the third Australasian Conference of Undergraduate Research, held at ANU in September 2014. Others were highly commended papers from the international 2014 Undergraduate Awards. As a result, this volume represents the best undergraduate research not only from ANU, but from other Australian universities as well.

The quality of these articles reflects the high standard of research supervision at Australian universities, and the capacity of students to undertake interesting and worthwhile research early in their careers. The publication of *AURJ* is an opportunity to showcase the excellent research of these students, while giving undergraduate students a chance to publish their written work early in their careers, whatever direction they may choose following their studies.

We thank those who have been involved in the preparation of this journal. Thank you to all of the contributing authors for their submissions, and for collaborating with us during the editing process. We particularly acknowledge the contribution and guidance of Dierdre Pearce from the Division of Student Life. We also thank ANU Press for their advice and expertise, and Vice-Chancellor Professor Ian Young and Pro Vice-Chancellor (Student Experience) Professor Richard Baker for their ongoing support for *AURJ*.

We hope the readers enjoy this compilation as much as we did.

Jonathon Zapasnik and Alexandra Hogan

*AURJ* 2014 Editorial Team
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The focus of my honours project was to investigate the significance of formal properties in the perception of sculpture. More specifically, it considered the degree to which qualities such as shape, scale, materiality and positioning could combine to create dynamic and compelling sculptures, when there was no overt content or narrative. Considering the work of artists such as Robert Morris, Anne Truitt and Anish Kapoor, and studying movements and art forms such as Formalism, Minimalism and Installation, led to experiments with several materials and forms before constructing sets of non-representational paper sculptures.

I also undertook an analysis of Installation art, to understand the significance of formal spatial qualities on the perception of sculpture – how a work’s positioning in a gallery space could affect the way it is perceived. Exploiting spatial formal properties to create relationships between the sculptures allowed room for relationships to also develop between work and viewer.

The final body of work comprised multiple installations, each containing similar sculptures of various scales, in similar colours and shapes. The differences within, and between, each installation were intended to provide a space for the viewer to perceive, and re-perceive, similar objects in multiple ways.
A man of many names: An archival insight into the life of the convict Sheik Brown

DANIEL MCKAY

Abstract

Sheik Brown was a man of many names; the legend of Sheik Brown, ‘Black Jack’, ‘Jose Koondiana’ and ‘Marridaio’ spread widely through early colonial Australia. Originally from India, Sheik Brown, a sailor by trade, was caught stealing at his lodgings in London and transported to Australia as a convict. But seemingly never wanting to linger in captivity, he became first a recidivist and then a notorious runaway, whose attempts at realising his freedom would define the rest of his life: from bamboozling the colonial authorities to living beyond the frontier with Indigenous people. Although evidence of his life is fragmentary, remarkably the ghostly footprints of his life can be found in archival holdings throughout Australia and the United Kingdom. His relationships with the colonial authorities, other convicts, free settlers and Aboriginal people provides a glimpse into the interactions, lives and experiences of the period. It illuminates not just a fascinating story about the early colonial era, but shows that Australian history is much more global, multicultural and interesting than is sometimes characterised. This research, charting the narrative of Sheik Brown, forms part of a larger team project investigating the multicultural history of early Queensland as part of a residence at the Queensland State Archives with the aid of a University of Queensland Summer Scholarship. The results and the process of this archival research were originally presented on an online blog (studentsatthearchives.wordpress.com).

Introduction

Of all the recidivist convicts that were sent to Moreton Bay, Sheik Brown, also known as ‘Black Jack’, ‘Jose Koondiana’ and ‘Marridaio’, would have to be one of the more unusual. A full-time adventurer, and part-time convict, he absconded on more than one occasion for lengths of time stretching anywhere between
a couple of days to several years. Although evidence of his life is fragmentary, it seems clear he was an intelligent, irrepressible and beguiling character, who defied and bamboozled the colonial authorities, striving to live a life of freedom. Sheik Brown’s interactions with other convicts, colonists and Indigenous Australians also provide a fascinating glimpse into the foreign land that is early colonial Australia, which abounds with untold and forgotten stories of life in the burgeoning new society. The history of the transportation of convicts is not just Australian, or even British. The history of convicts is global, as it provides a somewhat surprising insight into the many intersections between cultures and peoples. The British practice of transporting its convicted criminals to its penal settlement in Australia is just one part of a wider story about the tumult of war, empire, colonisation and forced migration in the eighteenth- and nineteenth-century worlds. Amongst all this upheaval and change lie millions of untold stories of individuals whose lives became embroiled in the great forces of their age. The story of the convict Sheik Brown is just one of these. But while other convicts began their journeys in London, Dublin or Edinburgh, the story of Sheik Brown begins much further afield, on the Indian subcontinent. Although Sheik Brown makes several anecdotal appearances in various historical studies, this is the first systematic study into the narrative of his life story. Connecting all these disparate strands and fragments together, however, has only been possible because of the remarkable recent advancements in the developing nexus of online archives, the digitisation of records, and online newspapers collections, all with search functionality. In this sense, the story of Sheik Brown is both old and modern at the same time — with the ghostly pattern of his footprints discernible only now through innovations in archival storage and access.

Sheik Brown’s early life remains the most indistinct part of his story, but we do know he was born in India around 1802.1 Where precisely is not so clear, however, indications point towards somewhere around Surat or Bombay (now known as Mumbai) on the west coast of the Indian subcontinent.2 It is most likely that he was born into a Muslim family, as both his name and a surviving sample of his handwriting suggests.3 We know even less about his childhood and youth, except for the fact that some time before 1824 he made his way to London. This seems not to be too unusual, with several cases of Indian sailors, or ‘lascars’ as they were known, settling in London and turning up in the archives. In the case of Sheik, he appeared for the wrong reasons

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1 Series 5653, Chronological Register of Convicts 1824–1839 (QSA).
3 CS Ref 33/07365S A28 223–226 (SLQ).
in court records.\(^4\) We can, however, speculate that he was involved in some way in the Napoleonic Wars, as some years later as part of testimony given to support an alias he was using, it was revealed he could speak some French and had knowledge of the French-controlled Île Bourbon off the coast of Africa.\(^5\) Either way, the international maritime network in either a military or merchant context facilitated his arrival in London.

Sheik Brown’s first appearance in the records dates from 1824. He was aged 22, and was arrested and convicted for theft at the Old Bailey criminal court in London.\(^6\) According to the Criminal Register, this was not the first time he had offended. A remark in the margin stating ‘In Newgate before’ indicates that he had already ended up in that most notorious of London prisons, described later that century by Charles Dickens as a ‘gloomy depository of the guilt and misery of London’.\(^7\) According to the trial records, Sheik had been living in a ‘depot for the reception of black men’ run by a merchant named Francis Robinson who lived in an adjoining house. In testimony given by William Green, a clerk, to Francis Robinson, he accused Sheik Brown of having stolen from his room which was also located in the depot:

> On the 5th of March there was nobody but the prisoner and one more man there, and about seven o’clock that morning I missed from my room a blue great coat, two coats, two pairs of trowsers, four waistcoats, a pair of breeches and gaiters, a towel, two black silk handkerchiefs, two pairs of white cotton stockings, five leather gloves, two sovereigns, and six shillings. I had seen them all safe the morning before, about twelve o’clock. I locked my door then, and found it locked in the evening when I went to bed, but the key went very hard. I did not then miss the things, as I did not look for them. About eight o’clock on the morning after I missed them, I saw the prisoner in the depot washing himself.\(^8\)

While this was probably not enough to convict Sheik, the evidence given by the shopkeepers and pawnbroker who had bought Mr Green’s clothing from Sheik settled the case. Mrs Douglas Towns, who lived in her tobacconist father’s shop, told the court:

> The prisoner used to come there to buy snuff, and on Thursday the 4th of March, between two and three o’clock, he came with a great coat and waistcoat to sell. I bought them of him for 7 s. I produce them. He came back again with some

\(^{4}\) Bates and Carter, ‘Enslaved Lives, Enslaving Labels,’ 67–92. Sheik himself was referred to years later as a ‘lascar’.

\(^{5}\) ‘Interior Discovery,’ *The Australian* (Sydney, NSW: 1824–1848) 19 July 1833, 1.

\(^{6}\) Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.0, 4 November 2012), April 1824, Trial of SHEIK BROWNE (t18240407-72).


\(^{8}\) Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.0, 4 November 2012), April 1824, Trial of SHEIK BROWNE (t18240407-72).
things in a towel, and asked if I could get them washed; he had a pair of breeches, a pair of gaiters, five gloves, and a towel. I said I would wash them for nothing, as I had bought the other things. I gave them to the officer on Friday.9

John Dawson, an apprentice pawnbroker, claimed to have ‘two coats which the prisoner pawned on the 4th of March in the evening for 8 s., in the name of Jack Brown’. Sheik tried to sell ‘three waistcoats and a pair of trowsers’ to David Gidgeon, and Gidgeon’s suspicions were raised when ‘he [Sheik] said he wanted money, and had no use for them’. Gidgeon handed them over to James Beechley, the man tracking down the stolen property, and who had already collected the stolen property from Mrs Towns. Beechley told the court, ‘When I apprehended the prisoner I found 17 s. 6 d. sewed up in his drawers. I had asked if he had any money – he said he had only 2 d.’. The combined value of all the items Sheik had stolen was 101 shillings, an estimated modern equivalent of £5,000.10 Indeed, the theft was deemed serious enough for Sheik, aged only 22, to be sentenced to death. This, along with the other court proceedings, was communicated to him via a translator, and no doubt came as a shock regardless of what language he understood. However, in this case being a ‘foreigner’ counted in his favour, with him ‘Recommended to Mercy’ on account of ‘being a foreigner’. Sheik was seemingly not yet out from the shadow of death, for the London Times on 15 April 1824 reported that Sheik and several other convicts were brought before a judge who sentenced them to death, issuing them a stern warning that not all their petitions for mercy could be agreed to and that ‘if any of them received a transmutation of their sentence, it would still be on the condition (which might be considered a hard one under other circumstances) of their final separation from their country and friends’. The judge recommended that:

Whatever might be the result of the petitions of their friends here, there was a throne at which petitions for mercy were never offered in vain. He therefore implored them to consider the awful situation in which they stood, having now forfeited their lives, and lose no time in making their peace with Heaven.11

Sheik Brown was seemingly one of the lucky ones who was afforded mercy, as his sentence was, instead, reduced to transportation for life.

Aboard the convict ship Asia, Sheik left England behind, destined for New South Wales. Although he must have picked up at least some rudimentary English, it is easy to imagine the whole thing must have been confusing and terrifying. Arriving in April 1825, Sheik Brown landed in Sydney just over a year after his original conviction. Once Sheik and the other convicts landed they were posted out on assignment, probably ending up as personal servants.

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9 Ibid.
The next record puts him in the household of Mr George Tomlins, by whom he was accused of ‘stealing various articles of wearing apparel, a brace of pistols, and an umbrella’. An early Sydney paper, *The Australian*, reported the case:

The prisoner had been left in charge of prosecutor’s house on the 16th of November last, and took that opportunity to carry off the property in question. When apprehended some of the clothes were found on his person, the remainder had been left at the house of Clara Parsons, in Phillip-street.

As a result of this new colonial conviction, Sheik was ‘transported’ for another seven years and, as a reoffender or recidivist, sent to Moreton Bay, in what would later become the state of Queensland. Sheik Brown, as prisoner number 757, next makes an appearance in the Chronological Register of Convicts in June 1826. The Chronological Register of Convicts described him as a man of a fraction over 5 feet tall, with a ‘copper colour’ complexion and black hair.

A frequent absconder, Sheik Brown certainly seems to have done his very best to avoid the penal settlement at Moreton Bay. Within only a few days he had run away, living in the bush surrounding the settlement for eight days. The punishment for absconding was flogging, with some prisoners receiving over 200 lashes, as recorded in the Book of Trials kept by the officials of the settlement. This punishment and the hardships of his experience of the bush seem to have initially, at least, warded Sheik off any another immediate attempts at absconding. His next recorded escape was in not until 1828, when he disappeared for over six months. In 1829 he disappeared for 12 days, and in 1830 left the settlement for over two years, living in an area called ‘Big River’. Sheik later reported that this large river where he principally stopped was ‘called by the natives Brimbo, and by some Berin’. Reports came back from other runaways that Sheik, now known by reputation as ‘Black Jack’, had provided them hospitality. One such report was from runaway convict James McCarnie, who recounted how he discovered Black Jack in an Aboriginal camp and stayed with him for a week, learning that Jack was planning on returning to Moreton Bay after he believed his sentence had expired.

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12 ‘Criminal Court, (Friday),’ *The Australian* (Sydney, NSW: 1824–1848) 26 January 1826, 3.
13 TRIAL R v Sheik Brown [1826] NSWSupC8, Macquarie University Law School (www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1826/r_v_sheik_brown/).
15 Series 5653, Chronological Register of Convicts 1824–1839 (QSA).
19 Ibid.
20 ‘Colonial Politics,’ *The Colonist* (Sydney, NSW: 1835–1840) 17 December 1835, 2.
21 Ibid., 1.
But it was not just Sheik who had been extending hospitality. During his time away, he seems to have been befriended by the local Aboriginal people. Unlike other runaway convicts whom the Aborigines often returned to the penal settlement in exchange for rewards like blankets and axes, Sheik seems to have been more successful in forming an enduring relationship with them, cohabiting with them in their camps for long periods of time. It appears that both Sheik and another absconder, George Brown, who was from Ceylon, had Aboriginal wives with whom they had families.22

By 1832, the colonial authorities were unhappy that ‘Black Jack’ continued to evade his punishment. In August, William Dalton, himself a Moreton Bay absconder, was sent from Port Macquarie with the task of bringing in Black Jack.23 Dalton seems to have done his job, because two days after his return, Sheik turned himself in at Port Macquarie.24 His useful information about the abundance of raw materials like wood, salt, stone and food seems to have calmed the wrath of the Chief Magistrate, who made him one of his servants.25 In writing to the Governor, he stated that Sheik had returned voluntarily, in exchange for a promise that he would not be returned to Moreton Bay ‘in consequence of the Prisoner being an unfortunate Black from Bombay and unaccustomed to mess with Europeans’.26 The Governor took a dim view of this, responding to the Chief Magistrate that he should act in the same way he would treat any absconder.27 By this point, however, it was already too late, as Sheik had already fled once more from the colony.

Sheik Brown, meanwhile, planned a cunning return, taking on a new persona in an attempt to avoid capture. Picked up near Port Stevens by a passing schooner, he pretended to be a shipwrecked sailor by the name of Jose Koondiana, who professed to have travelled with the aid of Aborigines across the continent from New Holland (Western Australia) where his ship, The Fanny, had been wrecked. Sheik’s thoroughly detailed, if slightly fanciful tales of his travels, based mainly on his experiences living around ‘Big River’, managed to convince lots of people, including the Bench of Magistrates in Newcastle, that he really was who he claimed to be. Communicating through French and a translator understanding ‘hindustanee’, Sheik seems to have taken in one ‘gentleman at Newcastle’ in particular, who in a letter published by The Sydney Herald, proclaimed the ‘interior discovery’ of the big river by Koondiana. He also wrote that he had satisfied himself in the belief that ‘he has no desire to mislead,

22 Ray Evans, Fighting Words: Writing About Race (St Lucia, QLD: Queensland University Press, 1999), 74–75.
24 Ibid.
25 Ibid.
26 Ibid. No citation given, but most likely in Colonial Secretaries correspondence.
27 Ibid.
n nor any pre-conceived fancies or schemes to uphold by the information he gives’. 28 The Herald’s editorial seemed far more sceptical, noting the odd stories coming out of the area. 29 Though the name of the letter’s author was withheld, a likely contender would be one of the magistrates, Dr Brooks, who not only took in Sheik as a servant, but also refused to give credence to suggestions that Koondiana was not who he said he was. But the game was well and truly given up when Mark Fletcher, a servant of the Australian Agricultural Company who had worked for some time in Moreton Bay, positively identified Koondiana as the absconding convict Sheik Brown. 30 From Newcastle, Sheik was sent to Sydney where he awaited judgment in the prison hulk Phoenix. 31

Brown’s case was not straightforward as there were arguments made that his sentence had expired, while others, who were no doubt embarrassed, advocated for plans to send him to Norfolk Island. In the end, however, a petition signed in Brown’s own hand, addressed to the Governor, was successful, to the extent that in May 1834 it was decided by the authorities to return him to Moreton Bay. 32 It is not quite clear why this happened, but the legal discussions held between the Colonial Secretary, the Governor and the Attorney-General all seem to suggest that there were conflicting views over the status of his ongoing sentence — and this seemed the best solution.

Back in Moreton Bay in 1836, however, Sheik was soon back to his old tricks, as he absconded in June. 33 The following year, he absconded twice, once in January by himself and again in April, this time with George Brown. 34 In a letter to the Colonial Secretary, the new commandant, Captain Foster Fyans, noted that he had taken a far more proactive approach to the ‘apprehension of the runaways’, including the likes of Sheik Brown, writing:

I promised the Natives some reward, if they would accompany any Leut. Officer in the Boat on the same way that Offer and Mr Whyte to with the Boats Crew, left this and proceeded round Bribey Island, directed by the Natives, after a direction of some form, with considerable difficulty and fatigue, I am happy to say, the party fully succeeded in securing the four Runaways from this settlement. 35

The archives regarding Sheik go quiet after this, until 1842, when he was issued with a ticket of leave in Parramatta, NSW. Initially, the ticket of leave only gave him permission to remain in the district of Parramatta. It was later altered

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29 Ibid.
30 CS Ref 33/05498 and O’Keefe, ‘The Runaway Convicts of Moreton Bay,’ 68.
31 CS Ref 33/06659 A2.8 227–228 (SLQ).
32 CS Ref 33/07365S A28 223–226 (SLQ).
33 Reel A2.8 page 227–228 (SLQ).
34 Item ID869688, Book of Returns – Prisoners (QSA).
35 Reel A2.9 pages 491–492 (SLQ) 37/5416 13th June 1837 – From Commandants Office.
by the magistrates to extend to Moreton Bay in 1844.\footnote{Series: NRS 12202; Item: [4/4165]; Reel: 945 (NSWSA).} Having spent so much time in the area, possibly because of family connections, it seems natural that Sheik Brown would want to return to Moreton Bay. The next reference to Sheik appears in February 1844, when he was hired by the pastoralist George Gummie at the rate of £15 per annum for a contract of two years.\footnote{Maurice French, \textit{A Pastoral Romance: The Tribulation and Triumph of Squatterdom} (Toowoomba, Queensland: USQ Press, 1990), vol. 2, 36.}

The last and final newspaper reference made about Sheik is fleeting and macabre. In a letter to \textit{The Moreton Bay Courier}, it was grimly revealed that ‘Sheik Brown and a bullock-driver were killed by the natives within thirty miles of the settlement’ and that their ‘bones are now bleaching near the road to Messrs. Joyner and Masons station on the Pine River’.\footnote{‘Local Intelligence,’ \textit{Moreton Bay Courier} (Brisbane, Qld: 1846–1861) 6 February 1847, 2.} There the story would probably have ended, if it was not for \textit{Tom Petrie’s Reminiscences of Early Queensland}.\footnote{Tom and Constance Campbell Petrie, \textit{Tom Petrie’s Reminiscences of Early Queensland}, 1st ed. (Brisbane: Watson, Ferguson & Co., 1904).} Written by his daughter Constance from his stories, Tom Petrie’s \textit{Reminiscences} were published in 1904, and later serialised in \textit{The Queenslander}. After emigrating with his family from Edinburgh as a child, Tom Petrie grew up with and played with the local Aboriginal children, eventually learning the language of Turrabul and participating in their Turrabul traditional customs, including going on a ‘walkabout’ aged only 14.\footnote{Noeline V. Hall, ‘Petrie, Thomas (Tom) (1831–1910),’ \textit{Australian Dictionary of Biography}, National Centre of Biography, The Australian National University, adb.anu.edu.au/biography/petrie-thomas-tom-4395/text7163, accessed 5 March 2013.}

As a result of his close relationship with the Moreton Bay Aboriginal people, he came to know many of their stories, including the story of Sheik Brown. According to Petrie, he learnt the story of ‘Shake Brown’, or Marridaio as he was known to Aboriginal people, during a corroboree of the Turrabul people.\footnote{‘Sketcher,’ \textit{The Queenslander} (Brisbane, Qld: 1866–1939) 18 Oct 1902: 847; Tom and Constance Campbell Petrie, \textit{Tom Petrie’s Reminiscences of Early Queensland}, 1st ed. (Brisbane: Watson, Ferguson & Co., 1904), 25–27.} Through song and dance they told the story of Marridaio, who had stolen away one of their young women Kulkarawa:

\begin{quote}
A prisoner, a coloured man (an Indian), Shake Brown by name, stole a boat, and making off down the bay, took with him this Kulkarawa, without her people’s immediate knowledge or consent. The boat was blown out to sea, and eventually the pair were washed ashore at Noosa Head — or as the blacks called it then, ‘Wantima’, which meant ‘rising up’, or ‘climbing up’. They got ashore all right with just a few bruises, though the boat was broken to pieces. After rambling about for a couple of days, they came across a camp of blacks, and these latter took Kulkarawa from Shake Brown, saying that he must give her up, as she was a relative of theirs; but he might stop with them and they would feed him.\footnote{Ibid.}\
\end{quote}
When Sheik left this tribe and Kulkarawa behind, however, heading off to Brisbane, he got into trouble when he was confronted by members of the Turrabul tribe:

He got on to the old Northern Road going to Durundur, and followed it towards Brisbane. Coming at length to a creek which runs into the North Pine River, there, at the crossing, were a number of Turrabul blacks, who, recognising him, knew that he was the man who had stolen Kulkarawa. They asked what he had done with her, and he replied that the tribe of blacks he had fallen in with had taken her from him, and that she was now at the bon-yi gathering with them. But this, of course, did not satisfy the feeling for revenge that Shake Brown had roused when he took off the young gin from her people, and they turned on him and killed him, throwing his body into the bed of the creek at the crossing.43

When people travelling on their way to Durundur came across Brown’s body they reported their grim findings to Brisbane, and named the creek Brown’s Creek. Located near Kurwongbah, Brown’s Creek and the Brown’s Creek Road still bear his name. Kulkarawa remained with the Noosa tribe, performing songs about how she missed her own tribe. Tom Petrie recounts how he was there when, after two years, Kulkarawa was brought home:

the parents of the young gin, and all her friends, started crying for joy when they saw her, keeping the cry going for some ten minutes in a chanting sort of fashion, even as they do when mourning for the dead. Then a regular talking match ensued, and Kulkarawa was told all that had happened during her absence, including the finding and murder of Shake Brown (or ‘Marri-dai-o’ the blacks called him), on his way to Brisbane. Then she told her news, and Father heard afterwards again from her own lips of her experiences.44

From this remarkable record, we find the truly final reference made to Sheik Brown, who after all his years of friendly coexistence with the Aboriginal people, broke their customs and died at their hands after taking away one of their young women.

Despite being fragmentary, the archival records, particularly the rich digital archives of newspapers and other early materials, reveal the surprisingly varied and remarkable life of Sheik Brown – a character who by almost every measure effaces the stereotypical image of the Australian convict. Escaping death narrowly in London, he went on to lead the life of a convict and a runaway. Never settling in one place, he left traces of his life across early colonial Queensland and Australia. His relationships with the colonial authorities, other convicts, free settlers and Aboriginal people provide a fascinating glimpse into the interactions, lives and experiences of the period. Seen broadly, his story gives some illustration of the large complex tides of global history – which buffet narrow conceptions of our

43 Ibid.
44 Ibid.
history as just ‘Australian’ or ‘British’ in demonstrating the myriad intersections and movements of cultures and peoples. But for all of this, in spite of what we do know of this man of many names – Sheik Brown, Black Jack, Jose Koondiana and Marridiao – and apart from his yearning desire for freedom, there remain gaps and mysteries in the story of his life waiting to be uncovered.

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Daniel McKay was awarded a prize for his essay ‘Dust and Bluster: An Historical Evaluation of the Political Discourse on Drought in Australia’ at The Undergraduate Awards in 2014. His essay has been published in The Undergraduate Journal and the Burgmann Journal.

The unexpected is what makes history so exhilarating. The thrill is in the chase, as one hunts down forgotten, unknown or hidden stories in the dusty depths of libraries and archives. You never know what you’ll find, or what twists and turns the story will take. However, when I began to research the story of political responses to the Australian experience of drought for a history course, it was wholly unexpected that my research would eventually lead to winning the Historical Studies category of The Undergraduate Awards and receiving a free trip to Dublin to accept a gold medal.

All good stories begin with an even bigger story. History is all about finding and telling such stories, of the people and places that have shaped the world around us. ‘Research’ is such a thunderously dull term for something so exciting. The remarkable Frank Bongiorno demonstrated this in his course on Australian political history, making the stories of our political institutions and politicians come alive. Encouraged to find our own topics for the research essay, I began researching political responses to the Australian experience of drought since European colonisation. This project had particular personal resonance, as I had grown up on a family farm in rural New South Wales during the long drought of the 2000s. As a member of the seventh generation of our family to live on the property, I knew that my experience fitted into a much longer history. My reflections turned to the wider Australian experience of an environmental variability that we take for granted in a ‘land of droughts and flooding rains’. The story of how our political system has responded can only really be told by stepping back from individual droughts and looking at patterns over time.

Entering The Undergraduate Awards is a simple affair. So simple that, months down the track when I received a call from Ireland, I’d largely forgotten even entering. It seemed quite unreal, but after flying into Dublin the day after my last exam, the Irish welcome I received at the Global Summit was an utterly unforgettable experience. Each stage of the summit came in a magnificent historical setting: Dublin Town Hall, Iveagh House, Farmleigh House, Trinity College and Christchurch Cathedral. Locations that over the course of the summit
were peopled with brilliant delegates and guest speakers from around the world. Every room was full of a bright and bubbling optimistic chatter, as people discovered each other’s research and plans for the future. The diverse range of guest speakers brought another dimension to the discussion – hearing from, amongst others, the filmmaker Lord Puttnam, entrepreneur Ingrid Vanderveldt, and former Harvard librarian Helen Shenton. Each had a fascinating story of how they had made careers out of curiosity and ideas.

On the last day of the Global Summit, we were each given the opportunity to present our research in the auditorium at the Google Headquarters. With limited time, and with an interest in sharing some of Australia’s best art to an international audience, I used a selection of famous paintings from our national collections to convey the sense of changing understandings of environment and drought which they captured. From the bucolic arcadies of John Glover, to the more realistic treatments of the Australian landscape in the impressionism of Arthur Streeton, and finally the confronting imagery of Sidney Nolan, we can see an evolution not just in aesthetics, but a total cultural shift in our ways of seeing our environment.

The Global Summit ended on a high, with a black tie award ceremony in Christchurch Cathedral. Winners from each category were presented with a gold medal by Patricia O’Brien, the Irish Ambassador to the United Nations, as well as having their work published in The Undergraduate Journal. The evening finished with a magical dinner in the crypt of Christchurch Cathedral. The sight of everyone seated around a long white table that snaked its way through the undercroft, between the arches and great white marble eighteenth-century tombs, illuminated by unseen lights, will long be etched in my memory.

If I had deliberately set out to write a ‘winning’ essay, I would never have been so fortunate. Good research comes about by finding something that you are passionately curious or intrigued by. In the case of history, that’s following an interesting story and working out what that tells us about ourselves. If you find something fascinating, chances are someone else will too. It is such a chance that is worth pursuing: entering The Undergraduate Awards is easy, the hard work of researching and writing for your essay is already done. By taking the time to fill out a form and upload a file, you have nothing to lose, and everything to gain. You may well just have an unexpected story of your own to tell.

Bibliography


The Australian woman movement, 1880–1914: Sexuality, marriage and consent

REBECCA PRESTON

Abstract

The Australian woman movement (1880–1914) played a central role in shaping contemporary sexual discourse and contributing to the eventual recognition of female sexual pleasure in Australia. While most historiography has focused on the more well-known suffrage campaigns, this essay explores feminist attempts to enhance women’s sexual autonomy through reforming existing sexual relations, particularly in marriage, and contesting contemporary medical discourse which defined male sexuality as ‘hydraulic’, namely automatically aroused, and female sexuality as ‘hysterical’. The early Australian feminists publicly challenged Victorian constructions of sexuality and sought to redefine male–female sexual relations by abolishing the double standard of sexual morality. Studying the woman movement through the lens of sexuality is important, as issues of sexuality were inextricably linked to more well-known political and economic campaigns for suffrage, citizenship and equal pay. Feminist campaigns to reform sexuality in both the public and private spheres were also central to broader political debates concerning the health and future of Australia’s population, and the declining birth and marriage rate. A study of feminist campaigns to reform domestic sexual relations, primarily through enhancing women’s autonomy in the marital bedroom, and campaigns to improve public sexual relations through regulating prostitution, raising the age of consent and reducing the occurrence of venereal disease through education, reveals the complex interactions between various sectors of colonial society, including feminist organisations, the medical profession, the Australian government, the military and religious groups. As such, this study provides a more nuanced understanding of late nineteenth- and early twentieth-century Australian political and social life.
Concerns about male and female sexuality were fundamental to the central ideas and campaigns of the woman movement in Australia between 1880 and 1914. The woman movement encompassed the ideas of prominent women activists and the activities of women’s clubs, literary associations, temperance societies and suffrage leagues. The movement primarily aimed to achieve suffrage for women as a means to ameliorating their legal, economic and sexual inequality. Although leading activists were politically diverse, they shared a collective consciousness derived from a sense of passion for women’s enfranchisement and freedom from sexual degradation and exploitation. Due to the high marriage and birth rates in Australia, the woman movement subscribed to the ‘separate spheres doctrine’, primarily focusing on protecting married women in the private, domestic sphere. This essay will demonstrate the paramount significance of sexuality to the woman movement by assessing two central campaigns – reform of the condition of marriage and raising the age of consent. Both campaigns centred on changing the sexual double standards applied to men and women, which feminists believed were the causes of female sexual degradation and male sexual excess and immorality. This essay seeks to highlight the ways in which early feminists challenged contemporary articulations of male and female sexuality.

The importance of the woman movement to Australian feminist history has frequently been overlooked by twentieth-century historians. Feminist historian Anne Summers popularised the view that early feminists were ‘God’s Police’. These women, according to Summers, ‘discourage[d] women from enjoying their sexuality’ and advocated for the ‘Victorian characterisation of women as pure and noble … and as needing special protection’. Summers concluded that early feminists failed to ‘provide a radical alternative vision for women’ as they extolled women’s maternal role and did not ‘delve more deeply into the causes of women’s oppression’ or ‘examine the differing aspirations of women themselves’. Despite the sometimes dismissive approach towards the achievements of suffrage women, feminist historians have made important historiographical contributions through exploring issues of sexuality in relation to the woman movement. Historians such as Judith Allen, Marilyn Lake and Susan Magarey analyse the ways in which early feminists challenged the ‘masculinist national culture’ of Australia by redefining contemporary understandings of male and female sexuality.

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1. This thesis uses the expression ‘woman movement’ because this was the phrase adopted by leading feminists in the late nineteenth and early twentieth centuries. See e.g. Women’s Political Association, The Life and Work of Miss Vida Goldstein (Melbourne: Australasian Authors’ Agency, 1913).
4. Ibid.
In the late nineteenth century, Australia was an ‘intellectual ferment’ of radical political ideologies, including nationalism and socialism. The growth in employment and educational opportunities for women led to the emergence of intellectual middle-class women and an urban bourgeoisie. It was in this context that the woman movement emerged, challenging Victorian gender roles and ideals of male and female sexuality. The woman movement developed independently in each state and territory, particularly flourishing in the urban centres of Sydney, Melbourne and Adelaide. Feminist ideas circulated through public discourse, parliamentary petitions, various societies and organisations and feminist newspapers and journals, such as *The Dawn* and *Woman’s Voice*. These feminist journals will be examined to shed light on the opinions and ideas of leading activists and their motivations for particular campaigns.

The campaign for women’s suffrage and citizenship was inextricably linked to reforms to alter women’s position as degraded sex slaves. Women activists focused their campaign for sexual reform on married women, as wives epitomised the sexual exploitation and degradation of women. Marriage reflected the double standards of morality and sexuality between the sexes. Women who were trapped in loveless marriages were viewed as victims of the coercive exercise of husbandly conjugal rights, which resulted in further oppression from bearing and rearing large families. Feminists such as Rose Scott, Louisa Lawson and Ada Cambridge believed that married women sacrificed their bodies and independence to satisfy their husband’s sexual desires and conform to ideals of respectability and social status. In *The Dawn*, Lawson argued that the ‘marriage career’ resulted in the ‘abandonment of individuality’ and the wife was ‘expected to endure nightly’ her fate in the ‘chamber of horrors’. This theme of sexual exploitation in the marital bedroom is similarly expressed in Ada Cambridge’s poetry. In her poem, *A Wife’s Protest*, Cambridge emotively depicts the ‘creeping terrors’ of ‘each black night’ – ‘I lay me down upon my bed / A prisoner on the rack / And suffer dumbly, as I must’. Cambridge described the feminist concern of enforced maternity, later termed marital rape.

Women activists sought to improve women’s ability to negotiate marital sex by reforming male sexuality and advocating women’s sexual autonomy – manifested in their right to voluntary motherhood. Sexual coercion in marriage was viewed as a result of uncontrollable male sexuality, combined with women’s
endurance of men’s ‘selfish animalism’ without resistance.\footnote{Rose Scott, quoted in Allen, \textit{Rose Scott}, 90.} Echoing Victorian ideals, male sexuality in the late nineteenth and early twentieth centuries was depicted as helplessly ‘hydraulic’ — men were at the mercy of their natural urges.\footnote{Magarey, \textit{Passions of the First Wave Feminists}, 91.} The woman movement challenged the idea that male sexuality was hydraulic by urging mothers to educate their sons in a manner which would abolish sexual double standards. Mothers were to educate their sons to control ‘the most dangerous instinct of his animal nature’ and ‘show him … the dire physical effects of excessive indulgence in this passion’.\footnote{Ohara, ‘The Problems of the Streets’, \textit{The Woman’s Voice} 1:5 (1894), 66.} In conjunction with reforming male sexuality, early feminists believed women could use self-help to improve their marital position by being ‘selfish for the cause of progress’.\footnote{Dora Falconer (Louisa Lawson), ‘The Legal Link’, \textit{The Dawn} 3:3 (1890).} Lawson encouraged women to enhance their ‘individualism’ and ‘have more dignity’, ‘worth’, ‘liberty’ and ‘respect’, so that ‘there will be no need to change the method of marriage relationships’ as women will be ‘a better treated class’.\footnote{Ibid.} Through educating the moral consciousness of society and changing attitudes towards male and female sexuality, early feminists hoped that women would gain sexual autonomy and be placed in a privileged position in marriage.\footnote{Allen, ‘Our Deeply Degraded Sex’,71.}

In order to change the condition of marriage, women activists advocated various reforms, including contraception, sexual restraint, abstinence and marriage based on love. Marriage based on love was advocated by most feminists as a necessary means to altering the position of women in marriage and reforming attitudes towards marital sex. Support for other solutions, particularly contraception, was divided as many women, such as Maybanke Wolstenholme and Scott, believed that such measures did not change the fundamental issue of women being used as sexual property by men. Love, however, was widely accepted as part of the solution to a happy marriage. Lawson argued that ‘marrying for wealth, position, or any consideration other than love’ was the primary reason for ‘matrimonial infelicities’.\footnote{Dora Falconer (Louisa Lawson), ‘Unhappy Love Matches’, \textit{The Dawn} 2:2 (1889).} She noted, however, that ‘love matches’ can be ‘equally unhappy’ and ‘perfect confidence and absolute truthfulness’ are necessary in addition to love.\footnote{Falconer, ‘Unhappy Love Matches’.} Agnes Benham similarly promoted love as ‘the universal redeemer’.\footnote{Agnes Benham, \textit{Love’s Way to Perfect Humanhood: An Appeal to Thoughtful People} (Adelaide: The Century Printer, 1904), 37.} She argued that ‘love, not marriage, sanctifies the act of procreation’.\footnote{Ibid., 38.} The idea that sex, especially marital sex, should be based on love is similarly explored in Cambridge’s poem \textit{Fallen}:
… She who, for vulgar gain
And in cold blood, and not for love or need,
Has sold her body to more vile disgrace –
… Wife by the law, but prostitute in deed,
In whose gross wedlock womanhood is slain.  

Cambridge stressed the idea that marital sex was analogous to the sexual contract between a female prostitute and her male client; as such a contract was loveless and based on satisfying male sexual desires. Cambridge extended this idea further in her poem *A Wife’s Protest*, suggesting that if ‘my ragged sister of the street … gave her all for love … her crown of womanhood was not ignobly lost’.  

Rose Scott held a more sceptical view of love as a basis for sex and marriage. She believed that men’s love for women was merely ‘the indulgence of an animal passion’. She advocated sexual abstinence as the only solution to protect women from the sexual slavery of marriage and the dangers of pregnancy and childbirth. The *Woman’s Voice* — a feminist journal founded by Wolstenholme — also cautioned women against ‘free-love’ as an alternative to feminist attempts to ‘alter the marriage customs’. Reforming the condition of marriage was at the forefront of the woman movement as it was a microcosmic reflection of male exploitation of women in the public sphere, namely through prostitution and the seduction of young girls.

As well as shifting attitudes towards marital sex, the woman movement campaigned for legal reform to protect the sexual exploitation of young girls. The seduction and abandonment of young girls by older men reinforced the belief that hydraulic male sexuality was a primary cause of women’s oppression. This moral panic about the brutal effects of uncontrollable male sexuality, especially among the male youth, was reaffirmed in the aftermath of the Mount Rennie case in 1886. The case involved the conviction of nine young men, four of which were publicly hung, for raping 16-year-old Mary Jane Hicks. The woman movement was animated by a profound sense of feminine vulnerability and anxiety about unrestrained masculine sexuality. This protection-centred approach was a product of contemporary dangers associated with sex. Such dangers included venereal disease, the social shame of illegitimate children, sexual violence inflicted by drunken men and the severe health risks of pregnancy and childbirth. To protect young girls from sexual exploitation and

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23 Cambridge, *Unspoken Thoughts*, 94.
24 Ibid., 101.
26 Rose Scott, quoted in Allen, *Rose Scott*, 92.
subsequent prostitution, women activists campaigned to legally raise the age of consent to 17 in New South Wales and 21 in Victoria. As president of the Women's Political Education League, Scott was actively involved in the age of consent campaign in New South Wales. Scott petitioned to increase support for the Vice Suppression Bill, tabled in 1892 by J. C. Nield. The objectives of the bill 'were chiefly the protection of youth, and the suppression of establishments of a notoriously immoral character'. The Bill proposed to criminalise seduction with the promise of marriage and raise the age of consent of girls from 14 to 16 years of age. The aims of the 1892 Bill were ultimately implemented in the Crimes (Girls’ Protection) Act 1910, raising the age of consent to 16 years and making it illegal for brothels to employ girls under the age of 18 years.

The age of consent campaign was particularly contentious, receiving divided support within the woman movement. Raising the age of consent was premised on the fact that men were the seducers and primarily responsible for the demise of young women and subsequent illegitimate children. This assumption fundamentally challenged the depiction of male sexuality as hydraulic, as extramarital sex and/or the seduction of young women was not deemed natural, necessary or inevitable. By redefining male sexuality, the age of consent campaign sparked significant confrontation over sexual mores and power. This led to divided support among suffrage women, as many were unwilling to blatantly undermine male sexual dominance or shift responsibility for illegitimate children to men. Several male parliamentarians had similar objections to raising the age of consent. Mr Philip Henry Morton, a member of the Vice Suppression Bill Committee, feared that such legislative reform would ‘interfere with [male] liberty’ and improvements would be more effective through ‘the gradual development of the moral sense of the people’. The age of consent campaign also served to diminish sexual double standards. Scott objected to the categorisation of women according to male sexuality. In particular, she criticised the idealisation of virtuous women and the ostracism of fallen women, as the latter category was the result of men's sexual indiscretion. In an unpublished speech, Scott described men as occupying the ‘pulpits’ while preaching ‘righteousness’. In addition to legislative reform, feminists encouraged mothers to educate their sons to avoid premarital sex, particularly with young women. According to The Woman’s Voice, mothers needed to fulfil this educative duty to ‘acquit herself of all blame’ for ‘her fallen sister’.

30 Ibid.
31 Anonymous, ‘Suppression of Vice Bill’, The Sydney Morning Herald, October 31, 1892.
32 Crimes (Girls’ Protection) Act 1910 (NSW) ss 2, 5.
33 Allen, ‘Our Deeply Degraded Sex’, 75.
34 Allen, Rose Scott, 116–117.
35 Anonymous, ‘Suppression of Vice Bill’.
36 Rose Scott, quoted in Allen, ‘Our Deeply Degraded Sex’, 75.
promoted the idea of universal sisterhood, whereby mothers were to take moral responsibility for the protection of vulnerable women, including young girls and prostitutes.

Conclusion

Male and female sexuality was a primary concern of the woman movement, as contemporary articulations of sexuality formed the ideological basis of early feminist campaigns. The woman movement ultimately sought freedom from masculine power and the unrestrained exercise of male sexual passions. Women activists campaigned to end female sexual degradation in both the private sphere, through reforming the condition of marriage, and the public sphere, by raising the age of consent. Feminists prioritised changing the moral consciousness of society by challenging hydraulic male sexuality and encouraging women to shed ‘the yoke of servitude’ by asserting independence over their ‘soul and flesh’.38 Although reforming male sexuality was a primary concern, women activists similarly encouraged women to control their own sexuality through marrying for love, educating their sons that ‘the degradation of a woman is his own degradation’ and/or abstaining from sex.39 The principle concerns of the woman movement centred on sexuality and played an important role in advancing female autonomy and improving legal protection for women.

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38 Cambridge, Unspoken Thoughts, 142.


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Women in the ancient world are in many respects enigmatic. Ancient literary sources are almost devoid of female voices, and modern archaeologists, until recently, have placed little value on what can be learned from domestic spaces. In the last nine decades however, the study of women in ancient Athens has been a rapidly expanding field of enquiry. In this essay, I discuss textile manufacture in all of its stages and analyse women’s involvement in the production of both domestic and commercial textiles. In the ancient world, textiles were extremely valuable, and the spinning and weaving of wool and flax were not only necessary skills for a woman to possess, but also highly respected skills. Modern historians maintain that the textile industry was forced upon citizen women and that it was too closely associated with slave labour to be especially valued. Through an analysis of textile manufacture in classical Athens, along with an examination of the workspaces of women, I argue, rather, that textile manufacture was a valued contribution to the ancient Athenian domestic economy.

Introduction

First, as we wash wool in a bath to rid the fleece of burrs, so we drive out from the city the parasites and wretched fellows; we card them out and pick them off ... Then we gather the wool together and make a large ball ready for spinning. From this ball, we weave a strong cloak for the state.

(Aristophanes, Lysistrata, 574–586; own translation)

In ancient Athens, women of all classes were responsible for the manufacture of textiles. Spinning and weaving, the methods by which textiles are made, were essential skills. The perceived value of these skills to the domestic economy of classical Athens is difficult to measure as they represented very different things to women of different classes. Slaves were forced to engage in the monotonous and time-consuming labour by their masters, whereas for women of the elite
weaving was seen as an honourable task. For the ‘average’ Athenian citizen woman, weaving was simultaneously the mark of a good wife, a religious duty, a domestic responsibility, her traditional role, and, of course, a contribution to the oikos. Some modern historians maintain that the textile industry was forced upon citizen women to keep them secluded in the house and that it was too closely associated with slave labour to be especially valued.¹ Through an analysis of ancient texts and archaeological evidence I examine this proposition, but my principal argument is that the creation of textiles contributed directly to the Athenian domestic economy.

The value of textiles

With the coming of the Industrial Revolution, cloth has become cheap and quick to produce and, in the West at least, we give cloth no more thought than a natural material such as wood or stone. In ancient Greece, however, weaving was recognised as particularly important to the economy. In the world of Homer, textiles were extremely valuable items and, like gold, were a measure of wealth: Odysseus in Homer’s Odyssey is often given gifts of fine cloaks, alongside other valuable items (Hom. Od. 14.519–567, 19.175–218, 19.240–255). His garments are described as being as fine as an onionskin or otherwise very luxurious (Hom. Od. 19.225–234). The ransom to be paid by Priam for his son Hector included 12 each of robes, cloaks, coverlets, white mantles and tunics (Hom. Il. 29.228–232). In classical Athens, textiles remained valuable items and, as Pomeroy observes, could be used domestically, traded or turned into cash.² Demosthenes lists his mother’s apparel as part of his inheritance, along with his father’s factories, slaves and gold (Dem. 27.10), and Ischomachus explains that he keeps his most valuable blankets in the secure storeroom of his house (Xen. Oec. 9.3). Ischomachus also informs his wife that ‘whenever you take a slave who has no knowledge of spinning, and teach her that skill so you double her value to you’ (Xen. Oec. 8.41). This evaluation gives us some evidence of the degree to which textiles in classical Athens were valued. The Gortyn law code of the city of Gortyn in southern Crete stipulates that, because of the inherent value of textiles, upon divorce, women were entitled to a large fraction of the textiles that they had produced. Although it is not known whether a similar provision existed in Athens, it confirms the importance of textiles in the Greek world and suggests that the labour of production was to some extent measurable.

¹ Gomme 1925, 1–25; Wright 1923; Pomeroy 1975, 71.
² Pomeroy 1994, 62.
Wool and linen were the most commonly used fabrics in ancient Athens. There is also evidence of silk clothing introduced to Athens during the classical Greek period. Silk was a luxury item. Its production, for the most part, was based in China and India, which produced ‘wild silk’. The island of Amorgos in the Aegean Sea was another possible source. Elizabeth Barber notes that imported silk could be rewoven in Europe. This would have been quite a difficult task on the traditional Greek warp-weighted loom. There is no doubt that textile manufacture in general was particularly time-consuming: the process of preparing wool or flax, spinning the fibres and finally weaving the thread, generally on an upright loom, to make cloth could take many weeks, depending on the complexity of the final product.

Textiles were used in great quantities as furnishings, garments and bedding, among other things. They were regularly sold and traded in Athens, as detailed below, and this implies that textiles had an inherent economic value. Importantly, however, they were also impressive symbols of the wealth of a household. In the home, girls learned to work wool and to weave, spending much of their time working on their trousseau. A woman’s trousseau, the garments, soft furnishings and cloths that she produced during childhood, represented her contribution to a marriage. Further, Thucydides lists linen clothing, together with gold brooches, as symbolic of wealthy Athenian citizens who lived a luxurious lifestyle (1.6.3).

Evidence for the wide range of textile items comes predominantly from vase paintings. In The Australian National University (ANU) Classics Museum there are depictions of men’s and women’s clothing as well as shawls, blankets, seat coverings and bedding (Figure 1; ANU Classics Museum, 65.32, Bull-Horn Rhyton). Close examination of garments depicted in vase paintings and descriptions of cloth in literary sources make it clear, however, that many of the textiles produced were not simple blankets or plain garments. From Odysseus’ robes to the intricate woven designs that are worn by women in vase paintings, the evidence attests to the creativity and skill that was necessary to produce such items.

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3 Fragments of silk wrappings have been found in a sundried brick tomb in the Athenian Kerameikos. The tomb was erected at the end of the fifth century BCE, and is suspected to be the burial plot of Alcibiades (Knigge 1991, 109–110).
4 Miller 1997, 77–78; Richter 1929, 27–33.
5 Barber 1991, 32.
6 For a description of the warp-weighted loom see: Manufacturing textiles.
7 Demand 1994, 10.
Manufacturing textiles

Prior to the invention of the spinning wheel in medieval Europe, thread was spun on a drop spindle and all cloth woven on handlooms. A drop spindle is composed of a circular clay weight, called a spindle whorl, attached to the bottom of a short wooden rod. The spindle whorl is used to give the spindle momentum as it turns (ANU Classics Museum, 01.05, spindle whorl, 3rd–1st century BCE). When tied to a length of raw wool, the spindle spins quickly and produces a continuous thread. It requires a great deal of practice to create a length of thread that is strong enough and thin enough to be used to weave cloth. In Greece, the most common way to weave was on a warp-weighted loom. This was an upright loom in which the threads were held taut at the bottom by weights (Figure 2). These loom weights appear prolifically at archaeological sites throughout the Mediterranean (ANU Classics Museum, 01.03, seven terracotta loom weights, 3rd–2nd century BCE). Indeed, they are so common that, until
recently, little attention was paid to them. In the excavations of Troy, thousands of loom weights and spindle whorls have been uncovered and are now on display at the Archaeological Museum of Istanbul.\(^8\)

Unfortunately, very little actual cloth has survived from the period. Further, at early excavations throughout the Mediterranean, textile fragments were often discarded as ‘rags’. Similarly, many textile tools, like spindles and the looms themselves, which are made of wood, no longer remain. For these reasons, Barber has described researching the work of ancient women as ‘finding the invisible’.\(^9\)

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Figure 2. Black-figure terracotta lekythos, attributed to the Amasis Painter, Greek, Attic, c. 550–530 BCE.


\(^8\) Edmunds, Nagy and Jones (no date) 7–8.

\(^9\) Barber 1995, 286.
In order to attain a comprehensive and balanced view of the lives of women, it is crucial that many less conventional sources are studied. Archaeologists now recognise the wealth of information that can be gained from examining deposits of artefacts associated with the production of textiles. These sometimes enable them to draw conclusions about where women would have worked in the household and, potentially, how much cloth each household could produce.\textsuperscript{10} As noted above, domestic archaeology is a burgeoning field of study.

The importance of women’s roles in the manufacture of textiles for domestic use

The role of women in textile manufacture dates back to the Neolithic period. This seems to be because women were charged with the care of children and, as a result, tended to work in ways that were compatible with this duty. Dangerous work and tasks that demanded uninterrupted attention were unsuitable for women and tended to be done by men, whereas tasks such as cooking food and spinning and weaving wool were well suited to and compatible with child-rearing.\textsuperscript{11} A black-figure Attic plaque dated to the sixth century BCE depicts a woman weaving at a horizontal loom while a girl sits and plays behind her (Figure 3).

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure3.jpg}
\caption{Attic black-figure plaque, c. 560 BCE. Athens, National Archaeological Museum, 2525. Photo: Sarah Muller.}
\end{figure}

\textsuperscript{10} Measuring the quantity of domestically produced cloth, however, is notoriously difficult, and, currently, there is limited evidence to support any conclusions.

As far back as the Greek Dark Ages (1100–800 BCE), female burials are identified by spindle whorls and the earliest myths indicate that, while men were given ploughs to work the land, women were given looms.  

Many classical texts clearly define the creation of domestic textiles as the responsibility of women. In the idealised house of Ischomachus, his wife is responsible for making textiles and supervising the slaves who carry out the weaving (Xen. *Oec.* 7.20–23; also Men. *Sam.* 233). The myths of ancient Greece closely link women with weaving: Ariadne gave the thread to Theseus that led him to the centre of the Minoan labyrinth and safely back out again (Hom. *Il.* 18: 591–592); in Homer, Penelope, wife of the great Odysseus, wove by day and unravelled by night (Hom. *Od.* 24.125–146); and Helen is similarly preoccupied during the day at her loom (Hom. *Il.* 3.125–130; also Ovid. *Met.* 6.1–25). Grave stelai also attest to this female occupation. During the fourth century in particular grave stelai commonly depicted domestic scenes, including women with spindles, baskets of wool, chests or children. It is important to remember that only wealthy Athenians could afford elaborate memorials like these; such images are probably reflections of the upper class. Nevertheless, they provide further evidence of the link between women and textile manufacture.

There are also examples in the literary record of supposed reversals of traditional gender roles. A prime example of this is Lysistrata, who in Aristophanes’ play of the same name, declares:

> Girdled now sit humbly at home,
> Munching beans, while you card wool and comb.
> For war from now on is the Women’s affair. 

Lysistrata later specifically uses the metaphor of wool working to explain the way in which Athens can stop the civil strife it was experiencing by expelling the warmongers: she likens the warmongers to burrs that must be picked out of the wool before it can be spun into a cohesive thread, or a cohesive society (Ar. *Lys.* 568–613).

The motivations behind Aristophanes’ work are challenging to reconcile. Although he portrays his protagonist Lysistrata as a powerful and commanding woman, he does so in the context of a comedy in which conventions are often overturned for comic value. He also portrays the forceful heroine as childless and masculine. In this way, Aristophanes is able to emphasise the brilliance and potential of Lysistrata, far removed from the constraints placed on ordinary women. By creating an overtly masculine heroine he in fact works to reinforce

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12 Pomeroy 1975, 199.
13 Osborne 2011, 65.
14 Vetter 2005, 63.
gender stereotypes rather than present a plausible scenario of powerful female leaders. Aristophanes’ resounding message is that the place of women is in the home attending to household tasks.

A man in classical Athens, unless he was a slave or metic, would not normally be expected to perform a woman's task. Thus, in Aristophanes’ *Birds*, Cleisthenes is portrayed as particularly effeminate when he is depicted weaving like a woman instead of bearing arms (Ar. *Birds*, 829–31). Xenophon, in a discussion on the roles of the sexes, writes that the gods made men more suited to outdoor tasks and women more adapted to indoors (Xen. *Oec.* 7.23). He went further to argue, ‘each member of the pair is the more useful to the other, the one being competent where the other is deficient’ (Xen. *Oec.* 7.23). This is an echo of Homer’s lines ‘by how much men are expert of propelling a swift ship on the sea, by this much are women skilled at the looms’ (Hom. *Od.* 7.108–111). It is important to remember, however, that this binary male/female divide may not necessarily have represented reality: we should recall the case of Demosthenes, who makes and sells ribbons with his mother (Dem. 57.31). Nevertheless, the traditional demarcation of the roles of men and women attests neither to the servitude nor the liberty of women, merely that each has their separate responsibilities, and that both contribute to the functioning of the community.

**Weaving: An honourable skill**

Weaving was not only a necessary duty of Athenian women, it was also an honoured skill that was held in high esteem.\(^{15}\) Skill at wool working was an important and desirable quality to look for in a wife no matter what class she belonged to: Ischomachus explains that he provides shelter for his wife so that she may undertake ‘the rearing of infant children … making food out of the harvest [and] … the making of clothing from wool’ (Xen. *Oec.* 7.10–21). In the epic tradition, all classes of women are represented spinning and weaving wool: Helen in the *Odyssey* is given a golden distaff on which to spin wool (Hom. *Od.* 4.130), and in the *Iliad* Penelope weaves upon the loom described at line 2.94; also in the *Iliad*, a poignant simile describes a hard-working woman who weighs and spins wool in order to support her family (Hom. *Il.* 12.432–435). It was a common domestic occupation that was universally practiced: even into Roman times, spinning and weaving by women at home remained a symbol

\(^{15}\) Hooper 1947, 18.
of traditional mores.\textsuperscript{16} Clearly, textile manufacture was strongly linked with the virtue and dignity of the mature citizen woman, who thereby embodied stability and cohesion.\textsuperscript{17}

On inscriptions found in Athens there are lists of women who were manumitted in the city between 349–320 BCE. In these lists there is a predominance of wool workers. This attests to textile manufacture as being an important undertaking not only for citizen women but also for slaves.\textsuperscript{18} Because of this, social historians such as Pomeroy have argued that, although women’s work was necessary to the functioning of society, it was too closely associated with the monotonous and laborious work of slaves to be especially honourable.\textsuperscript{19} The work of men, on the other hand, included tilling the fields and sowing and harvesting crops – work which was also undertaken by slaves and which seems itself dull and demanding. This work, although equally as important to the Athenian household as was the production of clothing and bedding, seems not to hold the same stigma.

Wool working was not restricted to citizen women, freedwomen and slaves, but was also undertaken by highborn women. Each year in Athens two young women were responsible for the creation of a woollen garment for the statue of Athena that stood on the Acropolis. This was part of a major religious ceremony, the procession of the Panathenaean, which honoured Athena, the patron goddess of Athens and the patroness of weaving. The privileged women were chosen from among the elite class to weave the garment over a period of nine months.\textsuperscript{20} Their involvement in the religious procession demonstrates that women had a firm place in public worship. Of course, this was not the only involvement women had in religious affairs. In Aristophanes’ Lysistrata we learn details of a number of cult celebrations conducted by women, such as that in honour of Adonis, as well as other more solemn acts of worship (636–647). Women in myth were also associated with weaving, the most notable being Helen, Penelope and Andromache. This strong connection between myth, religion and the craft of wool working show that spinning and weaving were familiar, essential activities, conspicuously associated with women and respectability.

\textsuperscript{16} Hooper 1947, 20.
\textsuperscript{17} Sheramy Bundrick (2008, 283–334) examines the prominence of domestic imagery on vase paintings during the sixth and fifth centuries BCE. During this period, particularly from the Battle of Salamis (480 BCE) to the end of the Peloponnesian War (404 BCE), the social and political climate in Athens was tumultuous and the city was in a near-constant state of war. Bundrick argues that, in response to this turmoil, there is a clear trend to promote an ostensible appearance of peace and stability, in particular, a stable and harmonious oikos, and that images of women in domestic settings on vase paintings increased significantly. Such scenes included marriages, women spinning and weaving, and women in the household. This is an interesting idea and suggests that, for the ancient Athenians, images of women in such a domestic setting, in particular women weaving, reassured the population of the preservation of peace at home and was something of a psychological comfort. I argue, however, that there is not yet enough evidence to confirm this assertion.
\textsuperscript{18} Tod 1946, vol. 2, 1553–78.cf.m.
\textsuperscript{19} Pomeroy 1975, 71.
\textsuperscript{20} Barber 1995, 151.
Weaving workspaces

In order to gain a deeper understanding of the freedoms afforded to women, there has been much recent interest in the analysis of the physical space in which women lived their lives. Several influential, though somewhat controversial, studies have examined whether the household was divided along gender lines and, if so, how. Susan Walker and Penelope Allison have undertaken important studies in this area. They point to archaeological deposits of objects associated with women, such as loom weights and spindle whorls, in order to interpret the spaces occupied by their users. Walker, through her examination of vase paintings in which men and women are respectively associated with typically masculine objects and typically feminine objects, argues that, ‘we are seeing the work of vase painters who were raised in a society and were working for a clientele that thought of space as gendered’. But it is important to remember that spinning and weaving were tasks that could be easily moved at will. Pomeroy, Walker and Allison, among other social historians, have all advised caution when attempting to understand the use of space in the ancient world. Allison, with respect to the Roman world, warns that ‘behaviour was more important than fixed architectural elements’, meaning that although we may find loom weights in a particular room of the house, there is no reason why such looms could not have been used in any other area such as the courtyard or the hallways. As the work of women would have required good light, we come across vase paintings that regularly depict women working between columns, indicating they were in the courtyard of the house.

Archaeology indicates that the household, as we have seen above, rather than being a place of isolation was in fact a backdrop for social integration. We can see that men and women from different classes would meet in the oikos and that the evidence to support exclusively female and male spaces in Athenian households is tenuous.

Selling the surplus

In order to achieve self-sufficiency in textile production, landed Athenians reared sheep and goats for their own wool stocks. Hodkinson writes that wealthy farmers who were able to maintain 50 to 70 sheep could make significant

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22 Walker 1993, 151. Most vases would have been commissioned by wealthy Athenians; ‘art for art’s sake’ was an idea of nineteenth-century Romantics.
23 Allison 1999, 151.
24 ‘Attic red-figured kylix’, attributed to the Oedipus painter, c. 470 BCE.
women and textile manufacture in classical Athens

profits from the sale of wool. However, not every family kept their own animals nor were the womenfolk in every family solely engaged in weaving for private consumption. This is why in the primary sources we see examples of wool salesmen who sold their goods to those who had no access to their own sheep, such as in Aristophanes’ comedy *Frogs*. In the marketplace, the character Dionysus remarks that wool merchants regularly wet their wool to make it heavier in order to get a higher price: ‘like fabric salesmen he made his verse wet just like the wool’ (*Ar. Frogs*, 1386).

Although the majority of textiles would have been produced for domestic use, there are examples of women in fifth and fourth-century BCE Athens selling what they had made. Most likely this was excess that had been produced and was surplus to domestic requirements. We find an example of women working wool in order to earn money in Demosthenes’ law court speech *Against Euboulides*, in which the speaker defends his mother who sells ribbons in the marketplace (*Dem.* 30–36). Just how these ribbons were manufactured is unclear but we can assume that some form of wool working was necessary to produce them. The speaker also makes it clear that if their household had been wealthy, his mother would have had no need to sell ribbons, but, as they were poor, they required the extra income. Although the prospect of women working in the *agora* was not considered the ideal in ancient Athens, it seems as though it was nevertheless a common occurrence.

In Xenophon’s *Memorabilia*, Socrates attempts to remedy the disparaging way in which female producers and vendors are viewed. The highborn Aristarchus complains that due to the political strife in Athens his house was crowded with female relatives who were seeking safety (*Xen. Mem.* 2.7.2). The women had no means by which to support themselves and Aristarchus was struggling to keep them. To remedy this, his friend Socrates advised that he should put them to work making clothes and sell what they produce. Socrates explains that this is a suitable occupation even for the highborn women among them

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25 Hodkinson 1988, 64.
26 See also *Ar. Frogs*, 1346–51.
27 Elsewhere in the Greek world, Leonidas of Taras, admittedly outside the time and space with which we are concerned, describes the life of an 80-year-old spinning woman: ‘Often had she thrust sleep away from her, morning and evening, to ward off poverty. She used to sing to her spindle and help-mate distaff, and by the loom until the dawn she spun with the Graces that long task of Athene, or with wrinkled hand on wrinkled knee smoothed thread sufficient for the loom, a lovely woman. At eighty years, beautiful Platthis, who wove so beautifully, beheld the waters of Acheron’ (*Leonidas of Tarentum*, AP 72. 7.726). This epitaph implies that the woman, although pitied in death, was not pitied for her work. Barbara Hughes Fowler writes: ‘[i]t is comforting to know that not all women, not even those who had to work for their living, were considered grotesques’ (*Fowler* 1989, 100).
(Xen. Mem. 2.7.12). The views of Demosthenes and Aristophanes demonstrate that women, if need be, sold the goods of their labour. In general, however, and despite Socrates’ assertion, retail trade was not a highly respected profession.28

Conclusion

Studies of ancient Athenian women have too often focused on their lack of economic freedoms rather than their contributions to the economy. I argue that if work is valued, then workers are valued, and in fifth-century BCE Athens, thread and cloth mattered. Representations of women spinning and weaving abounded within this period, which indicate that the work of women was a valued asset to society. Women who could weave were more desirable and well-respected. For ancient Athenians, spinning and weaving was a necessity; it was also a metaphor for human skill, honour, cohesion and life. To confirm the importance of thread work, it commonly appeared in mythology and is strongly tied with the most important goddess of ancient Athens: Athena. Textile manufacture was central to the ancient Athenian domestic economy and the role of women in the Athenian textile industry was significant.

Bibliography

Ancient sources


Women and textile manufacture in classical Athens


Modern sources


Refugees, citizens and the nation-state: Unrecognised anomalies and the need for new political imaginaries

KATJA THEODORAKIS

Abstract

Following unrelenting violence in places like Sudan, Syria and Afghanistan, as well as widening economic polarisation globally, a steady flow of refugees and asylum seekers is a common occurrence at borders across the world. As many Western countries are responding with increasingly militarised border protection regimes, deterrence measures and harsh detention policies, refugee politics have become a controversial issue. Accordingly, a thorough understanding of the discourse surrounding refugee problems is vital to the field of international relations as it brings into focus an asymmetrical power relationship between those inside and outside the protection of the state system (Haddad 2008; Nyers 2006). This essay provides a critical analysis of the dynamics of political belonging and exclusion underpinning the international order of sovereign nation-states. As such, it questions how the figure of the refugee challenges the legitimacy of this system as the principal organising unit of the political community in the twenty-first century. Drawing on Arendt’s (1967), Agamben’s (1998) and Bourdieu’s (1994) critiques of sovereignty, it examines the founding myths, processes of collective identity formation and genealogy of power relations inherent in the present order. It highlights the role of refugees, conceptualised as ‘unrecognised anomalies’ as the nation-state’s necessary ‘constitutive Other’, illustrating the exclusionary logics upon which existing political communities are established. It concludes that the figure of the refugee, as a haunting challenge to the ethical parameters of bounded citizen identities, constitutes a vital moral impetus for imagining and conceiving less hierarchical, more just political arrangements.
The only true political action ... is that which severs the nexus between violence and law. And only beginning from the space thus opened ... will [we] then have before us [...] not a lost original state, but only the use and human praxis that the powers of law and myth had sought to capture in the state of exception.

(Agamben 2005, p. 88, paraphrased and emphasis added)

Only with a completely organized humanity could the loss of home and political status become identical with expulsion from humanity altogether .... The world found nothing sacred in the abstract nakedness of being human.

(Arendt 1967, pp. 297, 299, emphasis added)

The quotes prefacing this essay illustrate an ethical problem associated with the nation-state system, namely how the rules of necessity and force treat humans as mere means, and not ends in themselves (Linklater 1990, p. 101). This is evident in an incident where the United States of America (US) government deliberately withheld the names of a group of illegal immigrants who died when the plane deporting them back to Mexico crashed. The fact that the US government only released the names of the victims who were ‘proper’ American citizens was made public through Woodie Guthrie’s song ‘Deportees’, which protests the government’s intentional denial of their identity and dignity as fellow human beings: ‘Goodbye to my Juan, goodbye Rosalita, adios mis amigos, Jesus y Maria; you won’t have your names when you ride the big airplane, all they will call you will be “deportees”’ (quoted in Martin 2013).

The state’s classification of illegal immigrants as nameless and anonymous is a salient illustration of the prevailing view of citizenship as the only authentic political identity, affirmed by those not considered a rightful part of its national community, which only fall under the abstract category of ‘naked humans’ (Arendt 1967, p. 299; Nyers 2006). This is especially pertinent in a world that is more than ever characterised by tensions between developed nation-states and people flows from developing countries (Doty 2009, p. 180).

This essay enquires into this asymmetrical power relationship, and asks precisely how the figure of the refugee, as a person outside the legal protection of the nation-state, questions this system’s legitimacy as the principal organising unit of political community in international relations. Examining dynamics of political belonging and exclusion from a critical perspective reveals the present political order as historically constructed and divided into hierarchical, Eurocentric binaries of lawful insiders and what Arendt calls ‘unrecognized anomalies’ (1967, p. 287).
This way, the refugee, as the nation-state’s ‘constitutive Other’ (Nyers 2006; Said 1978, p. 7), exposes the exclusionary logic of existing political communities as mythologies of naturalised Western superiority. By drawing on existing critiques of ‘the Sovereign’, such as those of Arendt (1967), Agamben (1998 and 2005), and Bourdieu (1994), this essay concludes that refugees not only challenge the ethical foundations of sovereignty, bounded political communities and citizen identities but, by problematising their totalising claim to power, constitute an important impetus for conceiving alternative political imaginaries.

Following from Nyers’ emphasis on the nation-state’s need for a ‘constitutive Other’ as an instrument for legitimising its sovereignty and collective identity (2006, p. 2), this paper treats the figure of the refugee from a critical perspective that views the dominant order as inherently uneven and marked by historical acts of power:

The images of being political bequeathed to us come from the victors, those who were able to constitute themselves as a group, confer rights on and impose obligations on each other, institute rituals of belonging […], and above all, differentiate themselves from others, constructing an identity and an alterity simultaneously.

(Isin 2002, p. 2)

This way, the current political system is analysed from the vantage point of its alterity, rather than from what it constitutes as normal, in order to expose the underlying dynamics of power and exclusion. This is because only a perspective that recognises the historically ascribed role of the ‘Other’ can ‘intervene in those ideological discourses of modernity that attempt to give a ‘hegemonic normality’ to the uneven development … and disadvantaged histories of nations, races, communities and peoples’ (Bhabha 1994, pp. 172, 175–6, 194). Therefore, the refugee is recognised here as a result of the history of misrepresentation and discrimination inherent in the present political order (Shapiro 1988, p. 102). To show how this order came into being, the following section examines the genealogy of power relations intrinsic to the nation-state system, especially in reference to its founding myths and exclusionary dynamics of collective identity formation.

Accordingly, an understanding of the present order, in light of its effects on those outside of its benediction, has to start with the question of how the nation-state has been historically constituted as the natural mode of subjectivity and political organisation. As the essential building block of the international system,
the nation-state is defined as ‘an exclusionary political space (territoriality) ruled by a single, supreme centre of decision-making which claims to represent a single political community or identity’ (Devetak 1996, p. 201).

This way, it is predicated on the principles of sovereignty, territory, and a unitary, coherent society based on a shared identity, what Arendt calls the ‘trinity of state-people-territory’ (1967, p. 282). Within this national and territorial allegiance, citizenship is based on an implicit social contract by which citizens extract rights and protection in exchange for submitting to a centralised authority. Developed in classical political thought by Bodin and Hobbes, as well as by Locke and Rousseau in its liberal version, this sovereign power is legitimated by the apparent necessity of the citizen to submit his naturally digressive behaviour to particular collective rules that ensure the wellbeing of all (Shapiro 2009, pp. 232–3; Jennings 2011, pp. 29–31). This modern rationality of a necessary social contract results in the obliteration of all preceding forms of cultural, religious, legal and economic authority as these are subsumed into one single concept of political power that alone can guarantee the rule of law (Jennings 2011, p. 3; Schmitt 1996, pp. 19–25). The nation-state is thus founded on the division between constitutive power and constituent power, the former being the citizenry or nation as its inherent source, and the latter comprising the state as the necessary and only lawful representation of the people’s power. The ideological relationship between these two powers is crucial for an understanding of sovereignty, as the concentration of power into the hands of the state is legally and morally justified by its claim to represent the interests of its people (Agamben 1998, pp. 39–48; Arendt 1967, pp. 275–8; Jennings 2011, pp. 29–31).

The founding narrative of ‘the people’ as the only legitimate foundation for sovereign statehood was consolidated as the essential principle of political organisation during the French and American revolutions (Hobsbawm 1990, pp. 14–18). This narrative exclusively enshrined the ‘Rights of Man’ within the territorially bounded nation-state as ‘the natural order of things, a system of principles as universal as truth and the existence of man’ (Paine 1995, 1

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1 Jennings (2011) provides a sophisticated overview of the history and critiques of sovereignty that pays attention to the finer differences and contradictions between the classical modern tradition, liberal political modernity and the revolutionary school of thought, whereas Shapiro subsumes the proponents and critics of sovereignty respectively under more general headings. Whilst being aware of these differences, the framework of this short essay only allows for a simplified genealogy that unfortunately cannot address these nuances.

2 Again, this differentiation between constitutive and constituent power has been subject to much scholarly debate, such as evident in Agamben’s in-depth discussion in ‘Potentiality and Law’ (1998, pp. 39–48) and Jennings’ fine-grained analysis of the differences in Arendt’s, Agamben’s, Sorel’s Benjamin’s, Derrida’s and Schmitt’s conceptualisations of sovereign power. Yet, this cannot be addressed here in detail and my conceptualisation of these two powers rests on a simplified version of Jennings’ argument that moves away from Agamben’s radical, Aristotelian de-legitimisation of political power and instead remains within Arendt’s framework that upholds this distinction between constitutive and constituent power (2011, pp. 47–9).
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(470–1). Enjoying the privileged status of citizenship based on rights and responsibilities automatically constitutes the identity and sense of self of each person within this bounded community, as ‘man is everything in the formation of this sacred thing which is called a people’ (Renan 1992 [1882], p. 18).

Additionally, ‘the citizen is a man in enjoyment of all his “natural rights”, completely realizing his individual humanity, a free man simply because he is equal to every other man’ (Balibar in Donald 1996, p. 179). This shows how the production of subjectivity and citizenship was exclusively linked to the nation-state.

As a result, sovereign power became institutionalised not only as the exclusive source of political identity and expression of ‘natural’ rights such as equality before the law, property, and freedom from oppression, but also as the only way to maintain law and order in international society (Mayall 1990, p. 2). Based on these ideological legitimisations, nation-state sovereignty was hence seen as the ultimate fulfilment of the inalienable Rights of Man, and therefore consolidated as the primary expression of being political, and for that matter, of being in the world per se (Agamben 2000, p. 21; Nyers 2006, p. 17).

This way, mankind is joined as one through the organisation into sovereign societies, which together form a universal ‘totality’ (Adorno 2006, p. 49), or what Arendt calls ‘a completely organized humanity’ based on regimented political belonging and centralisation of power (1967, p. 297). For this end, such unified identities were deliberately constructed as ‘sacred’ through essentialised narratives, ‘foundational fictions’ and myths of primordial belonging and certainty, such as those evident in national anthems, which, despite claiming to express each people’s unique history and culture, are strikingly similar and built on the same banalities of a shared, historical glory (Anderson 1991, pp. 2–8; Bhabha 1990, pp. 291–7; Halliday 2005, pp. 12–13; Hobsbawm 1992, pp. 1–14).

In summary, this simplified genealogy has illustrated how the unified, sovereign order of the nation-state system has been historically constructed as the only normal and hence necessary political and moral community. The next section addresses the ethical problems associated with this triumph of Enlightenment modernity and addresses the position of the refugee for highlighting the hierarchies of power and exclusion inherent in this system.

Representing national societies as formed by a consensual social contract invariably draws attention to those figures excluded from its mythical organisation and citizen subjectivities (Shapiro 2009, pp. 239–40). This is because understanding the perceived unity and cohesion of a group with a collective consciousness ‘entails the radically disturbing recognition that it is
only through the relation to the Other, [...] what has been called its *constitutive outside* that the positive meaning of any term – and thus its ‘identity’ – can be constructed’ (Hall 1996, pp. 4–5).

This need for alterity within the discourse of political belonging then sheds light on the hierarchical nature of the international political order, as sovereign territorial states not only draw borders between each other but inadvertently create demarcations between privileged citizens inside these borders, and those on the outside (Walker 1993). Following the fictional process by which natural-seeming national unity is constructed from imagined traditions and cultural authenticity, this collective identity formation therefore needs to be seen as a discursive activity occurring within the interplay of power and exclusion (Nyers 2006, p. 7). This process of classification and exclusion is manifested in the modern sovereign nation-state system since, as an Enlightenment ideal representing institutionalised Western superiority, it has traditionally relied on such processes of ‘Othering’ (Chatterjee 1986; Haddad 2008; Said 1978). This practice is strikingly illustrated in an original version of the national anthem of Australia, which states that ‘for loyal sons beyond the seas, we’ve boundless plains to share’, while at the same time issuing the warning that ‘should foreign foe e’er sight our coast or dare a foot to land, we’ll rouse to arms … to guard our native strand’ (NLA 2013).

It is not hard to see how this ‘foreign foe’, opposed to a nation’s nativity and her ‘loyal sons’, is in the present historical circumstances embodied in the figure of the refugee as a threat to national cohesion, identity, and the integrity of the international order. The refugee can be situated within the Eurocentric discourse of the nation-state as the new Oriental subject, the subaltern counterpart to the citizen that emerges from the ‘margins of modernity’, quite possibly in a pre-modern-looking boat that has washed up on the shores of our ‘boundless plains’, and, in its unlawful ‘Otherness’, makes the identity of nation-state citizens not only possible, but meaningful (Bhabha 1994, p. 176; Said 1978, pp. 6–8; Haddad 2003, pp. 298–9). This discursive practice of categorisation manifested in this hierarchical binary is made possible through the deliberate construction of the outsider as a threat flowing from its loss of citizenship which, as previously argued, is equated with its loss of the Rights of Man. Or, as Shapiro contends, ‘to the extent that the Other is regarded as something not occupying the same moral space as the self, conduct towards the Other becomes more exploitative’ (1988, p. 102). This clearly marks the nation-state as a system of unethical exclusion that rests upon the classification of humanity into lawful subjects and abject, ‘unrecognized anomalies’ (Arendt 1967, p. 287).

The fact that the nation-state has the power to categorise humanity into ‘loyal sons’ and ‘foreign foes’ is a salient illustration of Schmitt’s conceptualisation of the political as resting on a ‘friend/enemy distinction that makes possible
the legitimisation of state power and shapes its political motives and actions’ (1996, p. 26). Consequently, the refugee’s haunting, lawless presence exposes the exclusionary logics of existing political communities and deconstructs the homogenous unity and cohesion of individual nations as mythologies of Western superiority, or what Agamben calls the ‘powers of law and myth’ (2005, p. 88). This way, the political order is revealed as founded on the ontology of inclusion and exclusion, or, in Arendt’s words, on a ‘law of difference’ which proves that humans are ‘not born equal … but become equal only as members of a group’ (1967, p. 301–2).

Seeing the refugee as a product of the state’s power to categorise humanity into friends and enemies therefore calls into question the self-evident validity of the nation as the legitimate foundation for sovereign state power and thereby problematises the very concept of sovereignty itself. This is because by viewing the constituent base of sovereignty as constructed through logics of exclusion and division, the constitutive power of the sovereign state ceases to be a means of representing the Rights of Man and instead becomes a self-serving end in itself (Linklater 1990, pp. 100–1). This way, it reveals that it was never truly founded on principles of equality and moral universality, but on a rationalist logic of subjection that invariably leads to a violation of the very source of its constituent power (Arendt 1967, p. 275; Jennings 2011, p. 30; Shapiro 2009, p. 232). Following Schmitt’s definition of sovereignty as the power to suspend the validity of the law and decide on the ‘state of exception’, Agamben shows how the logic of sovereignty thus involves an abuse of its power by placing itself outside the very law that should constrain it (1998, pp. 15–7). This way, the refugee as the constitutive ‘Other’ that makes the existence of the sovereign nation-state possible consequently highlights the acuteness of Benjamin’s contention that ‘the tradition of the oppressed teaches us that “the state of emergency” in which we live is not the exception but the rule’ (quoted in Jennings 2011, p. 38).

This ‘paradox of sovereignty’ consequently means that the exception becomes the principal determinant of political life, as the sovereign makes itself the measure of all things and decides on who is included and excluded in the political community, without being held accountable (Jennings 2011, p. 38). According to Bourdieu, state power thus becomes totalising, as ‘to endeavour to think the state is to take the risk of taking over (or being taken over by) a thought of state’ (1994, p. 1). This reification of state power can therefore be seen as ‘symbolic violence’ as the self-interested capacity to guarantee the reproduction of power is justified by presenting these discursively produced historical assumptions and misrepresentations as a natural part of the habitus of sovereignty (Eagleton 1991, p. 156; Lardinois & Thapan 2006, pp. 89–91). This way, sovereignty is
once more exposed as ‘history turned into nature’, as the power of the nation-state seeks to maintain itself by upholding the reified categories of citizens as ‘loyal sons’ and non-citizens as ‘foreign foes’ that it is founded on.

Consequently, by deconstructing the ‘natural’ connection between nation and state as the basis of sovereign legitimacy, the entire existence of the modern political system, as predicated upon this subsuming logic, is challenged by the very figure that it sought to alienate from its version of humanity. Albeit in an unsettling way, the refugee echoes in the dictum that ‘the only way to deal with an unfree world is to become so absolutely free that your very existence is an act of rebellion’\(^3\) – only in this case becoming free means being without country. Put succinctly, from their haunting presence on our shores and borders then comes the profound realisation that the refugee, despite (or maybe because of) lacking rights and freedom, can be seen as the quintessential figure of resistance, whose abject existence outside the law constitutes an act of involuntary rebellion against the very ‘powers of myth and law’ that expelled him or her from their logic – at least for those willing to see.

Following the importance of the refugee for highlighting the ethical impasses of the present system, it is important to also look to possible alternatives, as no problematisation would be complete without at least imagining a different order. Based on a Gramscian optimism of the will, I have therefore deliberately given this intellectually rather pessimistic analysis of the present a title that reflects this hope for future possibilities. Following Agamben, I agree that the very idea of legality as attached to citizenship must be opposed, since, as this essay has demonstrated, it is this very principle, or ‘nexus between (state) violence and law’, that causes the present ethical impasse within the nation-state system (2005, p. 88).

Yet, the concrete consequences of this stance remain shrouded in a spirit of idealistic uncertainty, as proposals for alternative ways of being political, such as Agamben’s ‘human praxis beyond the powers of law and myth’ (2005, p. 88), do not go further than providing a much-needed utopian impetus for thinking about changing the present. This is true also for Arendt’s (1967), Linklater’s (1998) or Habermas’ (1988) visions of alternative political communities, which, unlike Agamben’s (2005), do not oppose political power per se, but imagine it to be transformed by a shared, deeply held desire for a more ethical order based on our common humanity.

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\(^3\) This widely used quote is commonly attributed to Albert Camus, yet despite an intensive search, I have not been able to confirm this or find a reference. This is why the quote is included as a ‘dictum’, without directly relating it to Camus.
The lack of a concrete agenda for replacing the current order, however, is not to be equated with a lack of action and change. This is because how we understand and theorise the world provides the platform from which we launch our actions, as encompassed in the words of W.H. Auden, a poet known for his critical engagement with the moral and political issues of modernity:

[I]n politics theory and practice cannot be separated … [as] politics must be kept in bounds by democratic institutions, which leave it up to the subjects of the experiment to say whether it shall be tried, and to stop it if they dislike it … because, in politics, there is a distinction, unknown to science, between Truth and Justice.

(from the poem ‘Tyranny’, 1970)

In this way, exposing systems of power with their inherent unjust hierarchies, and imagining new political communities in their place is crucial for a just order. Auden himself believed that the political problem of the modern age was that ‘the only thing liberalism knows to offer is more freedom’, which unfortunately results in a lack of rigorous moral necessity (quoted in Arana 2009, p. 17). As I have demonstrated, this overemphasis on freedom for some, at the expense of justice for others, becomes an especially salient problem in a world ordered by a hierarchical international system divided into deserving and undeserving subjects.

Consequently, realising that ‘there are many countries in our blood’ (Greene 2007, p. 86), and living in a way that reflects loyalty to a shared humanity rather than one country alone, is a big step towards much-needed new political imaginaries – due to the tragic figure of the refugee highlighting it for those willing to recognise his or her silent message.

Bibliography


The securitisation of aid and the associated risks to human security and development

KARI PAHLMAN

Abstract

Since 9/11 there has been an increasing movement toward the securitisation of development aid. That is, the tendency for donor governments to view security and development as interconnected within a ‘security-development nexus’. It reflects the growing concern toward so-called ‘failed’ or ‘fragile’ states where underdevelopment has come to be seen as dangerous, especially in light of new wars, refugee crises, migration and terrorism. This paper is concerned with how the securitisation of aid poses risks for development work, specifically within the human development and human security agenda that emerged in the 1990s as an alternative framework to the traditional models of economic development. This paper finds that both in terms of where aid is located and the way in which it is delivered on the ground, the securitisation of aid poses significant risk to the human security and human agenda insofar as it fails to address the underlying causes of insecurity and underdevelopment. It concludes that the associated risks to the human security agenda can be seen by questioning whose security interests are being served through the securitisation of aid.

International aid is one of the most powerful weapons in the war against poverty. Today, that weapon is underused and badly targeted … and much of what is provided is weakly linked to human development.¹

In the early 1990s, the human security and development agenda emerged as a new framework for addressing underdevelopment in many parts of the world.\(^2\) At the same time, there has also been an increasing trend for traditional donor governments to view development and security as interconnected, within a new security-development nexus.\(^3\) One consequence has been the securitisation of aid.\(^4\) This paper is concerned with how the human security and human development agenda is impacted. It will argue that through the strategic allocation of aid by donors, and the blurring of military and development activities on the ground, the securitisation of aid undermines the capacity for human development and the achievement of sustainable human security. This paper will first detail the concepts of human security and development, as well as the securitisation of aid. It will then discuss the major risks of this trend. It will highlight United States of America (US) aid to Afghanistan and the use of Provincial Reconstruction Teams (PRTs) as a classic example of the securitisation of aid and its associated risks.

The human security and development agenda emerged in the early 1990s as a new way of conceptualising and approaching development.\(^5\) This framework has come about as an alternative to the now widely criticised economic growth model of development, and the focus on the Growth National Product (GNP) indicators, affirming that even high GNP and economic growth often fails to address the socioeconomic deprivation and lack of empowerment experienced by many people around the world.\(^6\) Human development places

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the individual at the heart of the development objective, as both the means and ends of development, and focuses on enlarging people’s capabilities and choices. Human security expands on human development, acknowledging that traditional realist notions of security are no longer adequate to address the new threats faced by people around the world. Human security emphasises the need to ensure freedoms so that people can safely exercise their capabilities and choices. It stresses two main forms of security: freedom from fear and freedom from want. Critically, it aims to address not only the acute security threats that impact the individual, but also the more chronic non-military threats that perpetuate insecurity, including but not limited to poverty, disease and political repression.

At the same time as the human security agenda has been popularised, there has also been an increasing trend for traditional donor governments to view development and security as interconnected. This coupling of development and security within foreign policy and development discourse has come to be referred to as the ‘security-development nexus’. It reflects the increasing concern toward so-called ‘failed’ or ‘fragile’ states where underdevelopment is now seen as dangerous. This has become particularly evident in light of

9 Ibid., 3, 5.
new wars, refugee crises, migration and threats of international terrorism.\textsuperscript{15} Development is now understood to be a critical prerequisite to national security, viewed alongside defence and diplomacy as a means of pursuing political, economic and security interests.\textsuperscript{16} One of the major consequences of this development-security nexus, especially since the events of 11 September 2001, has been the securitisation of aid.\textsuperscript{17} That is, the use of aid as a form of ‘soft power’ in the pursuit of the donor’s own political and security objectives.\textsuperscript{18} As Mark Duffield notes, however, the securitisation of aid is not just a matter of policy; the implications are significant.\textsuperscript{19} The securitisation of aid poses two major risks to human security and development that will be discussed here. The first is the strategic allocation of aid that sees some countries prioritised over others for assistance, as well as the conditionality of such aid.

Aid distribution is increasingly influenced and skewed by geopolitical security objectives.\textsuperscript{20} That is, donor countries allocate aid according to where they perceive their national security interests to be at threat, or where they are militarily engaged.\textsuperscript{21} This can be seen in the ever-increasing shift from multilateral to bilateral aid giving, allowing donor governments greater flexibility to pursue their own security objectives.\textsuperscript{22} Essentially, it is argued that donors are now using aid as a form of ‘soft power’ to try and tackle terrorism and defend their own national security interests, ‘rather than as a part of a more generous look at sustainable and peaceful development’ around the world.\textsuperscript{23} In fact, there are growing concerns within the development literature that aid, and development assistance more broadly, is returning to a kind of ‘Cold War
mentality’ insofar as traditional national security interests are outweighing human development as the main objective. It has been noted that in pursuing geopolitical objectives, aid flows in many cases are largely unconnected to the degree of poverty or insecurity felt by people in the beneficiary countries. Ultimately, the securitisation of aid means such development assistance is in reality working for traditional security objectives, rather than the long-term human security and development of those in developing countries.

This kind of skewed aid has several important consequences for human security and development. In particular, as articulated by Duffield, development aid can no longer be seen as neutral, but rather as an extension of Western foreign policy. This can be exemplified in the diversion of aid to the so-called ‘War on Terror’, where 34 per cent of all increases in ODA (official development assistance) since 2000 have gone to Afghanistan and Iraq. While aid given by the US since 2002 has increased, the majority has gone to the Department of Defense (DoD) for assistance in Iraq and Afghanistan. Increased from 5.5 per cent in 2002, the DoD accounted for 21 per cent of US aid by 2006. Furthermore, while neither Iraq nor Afghanistan were among the top 10 recipients of US ODA in 2001, by 2005 they were first and second highest recipients respectively. These two front line states on the ‘War on Terror’ were the top two recipients in 2012, with Afghanistan number one. The bilateral share of US ODA was also raised from 72 per cent in 2001 to 92 per cent in 2005. The fact that there are a few ‘favoured’ countries disproportionately benefiting from ODA has led some to argue that poverty has been replaced by terrorism as the main development objective. Therefore, countries that are perhaps more stable or are simply not a foreign policy objective, yet still desperately poor, are being overlooked and losing out on much-needed development aid and assistance. Essentially, countries that do not present as a security threat to donor states miss out on

25 Duffield, Global Governance and the New Wars, 35.
30 Ibid.
35 Oxfam International, Whose Aid is it Anyway? 5.
aid despite equal, if not greater vulnerability, cementing the growing concern that aid allocation is increasingly less correlated to need.\textsuperscript{36} Such trends are also critically reducing the already limited resources available to poor countries, undermining prospects for human security and development.\textsuperscript{37} Furthermore, it has been noted that socioeconomic indicators in Afghanistan and Iraq have failed to show significant progress despite the amount of aid committed to them, demonstrating that human development has been trumped by national security as the main aid objective.\textsuperscript{38}

Related to the strategic allocation of aid, another risk to the human security objective associated to the securitisation of aid is the conditionality of aid.\textsuperscript{39} Specifically, the way in which aid has become conditional on military cooperation, seen in the way US aid has in many cases become conditional on the willingness of recipient countries to join the fight against terrorism.\textsuperscript{40} By 2004, the US Agency for International Development (USAID) had classified countries ‘according to the extent to which they were supporters of the war’. The political and military conditionality of American aid has been exemplified by America’s support for countries in Central Asia based on their allegiance to the Coalition’s military interventions in Afghanistan in 2001.\textsuperscript{41} Uzbekistan, for example, by allowing the deployment of US troops on its territory, was promised aid to the value of US$1.6 million and its government went from the status of ‘non-reformer’ to key ally of the US by October 2001.\textsuperscript{42} These forms of conditionality demonstrate the way development aid is increasingly tied to the ‘politics of bilateral support and foreign policy priorities’,\textsuperscript{43} rather than notions of human development and security. Moreover, the securitisation of aid in this way risks supporting dubious regimes simply for taking a role in the War on Terror, threatening progress toward genuine human development and security as they are no longer the main criteria for aid donation.\textsuperscript{44} Aid conditionalities can also be seen to implicate civilians on the ground in conflict zones, as it is used to ‘buy’ cooperation with military forces, or information.\textsuperscript{45} This was demonstrated in 2004 when US Army personnel distributed leaflets threatening the loss of aid.

\textsuperscript{36} Ibid.; Macrae and Harmer, ‘Beyond the Continuum’, 5.
\textsuperscript{38} Harborne, ‘Aid: A Security Perspective’, 42.
\textsuperscript{40} Tadjbakhs and Chenoy, Human Security, 217; McKay, ‘Security and Development’, 337.
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid.
\textsuperscript{43} Ibid.
\textsuperscript{45} Oxfam International, Whose Aid is it Anyway? 2.
if people did not come forward and share information about Al-Qaeda or the Taliban.\textsuperscript{46} Conditionalities essentially place greater emphasis on aid as a means of protecting traditional security concerns, taking the focus away from the fears and wants of the individuals, and undermining prospects for human security and human development.\textsuperscript{47}

The second major risk to human security and development associated with the securitisation of aid is the blurring of aid and military objectives.\textsuperscript{48} There has been an increasing trend for military units to take part in the delivery of both development and humanitarian aid.\textsuperscript{49} In conflict zones particularly, where NGOs or other agencies may not be able to operate due to ongoing insurgency, the armed forces are playing a greater role in the provision of aid.\textsuperscript{50} Aid agencies are now also working alongside and cooperating with the military to provide development assistance, and vice versa.\textsuperscript{51} Because aid organisations are now working in the same space as the military, local populations are increasingly identifying them as affiliated and as political actors in and of themselves.\textsuperscript{52} This is even more apparent with NGOs that in some cases must display identification, such as those which were required to fly the US flag if they accepted funding from USAID.\textsuperscript{53} This means, as noted by Mark Duffield, that it is ‘increasingly difficult for NGOs to separate their own development … activities from the pervasive logic of the North’s own security regime’. Essentially, as a result of the securitisation of aid, the distinction between NGOs, civilian agencies and military combatants has become more difficult to distinguish, and any neutrality and impartiality is severely compromised.\textsuperscript{54} This risks not only the safety of aid workers, but also their relationship with local civilians, ultimately compromising their ability to ensure the freedoms and choices of people on the ground.\textsuperscript{55}

\textsuperscript{47} Ibid., 201.
\textsuperscript{50} Fishstein and Wilder, \textit{Winning Hearts and Minds}? 22; Howell and Lind, ‘Manufacturing Civil Society and the Limits of Legitimacy’, 728.
\textsuperscript{52} Ibid., 731.
The delivery of development assistance in such a securitised way has also seen aid become short-sighted, with an emphasis on ‘quick-impact’ and visible projects, evident in aid given to Afghanistan.\footnote{Fishstein and Wilder, \textit{Winning Hearts and Minds}? 22, 24.} It has been argued that military involvement has focused on short-term projects to consolidate military successes and ‘win the hearts and minds’ of local people to gain their trust.\footnote{Ibid., 23, 41; Howell and Lind, ‘Manufacturing Civil Society and the Limits of Legitimacy’, 731.} In fact, as defined by the US Army Manual \textit{Commanders’ Guide to Money as a Weapons System}, aid is a nonlethal weapon that should be used to win hearts and minds.\footnote{Oxfam International, ‘Quick Impact, Quick Collapse: The Dangers of Militarized Aid in Afghanistan’, oxfam.org, \url{www.oxfam.org/sites/www.oxfam.org/files/quick-impact-quick-collapse-jan-2010.pdf}, (26 January 2010) accessed 4 April 2014, 1.} Essentially, within the security-development nexus, short-term development assistance and ‘quick-impact’ aid projects administered by military personnel are increasingly being used to capture a more cooperative civilian population who would be willing to share intelligence information with them.\footnote{Fishstein and Wilder, \textit{Winning Hearts and Minds}? 23; Howell and Lind, ‘Manufacturing Civil Society and the Limits of Legitimacy’, 731.} However, the short-term nature of development aid delivered in this way, and the pressure to spend money quickly, have significant consequences.\footnote{United Nations Development Programme, \textit{Afghanistan National Human Development Report 2004}, 216.} Donors have become tied to a culture of short-term budgets, financial accountability and timely disbursement of funds, measured by indicators of expenditure rather than social impact.\footnote{Ibid.} In fact, aid delivery within this ‘war-aid economy’ as it has been termed, has actually perpetuated instability in some cases, fuelling corruption, reinforcing unequal power relations, favouring or at least being seen to favour some groups over others, and providing resources to be fought over.\footnote{Fishstein and Wilder, \textit{Winning Hearts and Minds}? 3, 5.} It has also been seen to increase aid dependency, rather than promote long-term capacity-building or economic independence.\footnote{Ibid.} The way in which the securitisation of aid prioritises quick and visible spending demonstrates it is not geared toward long-term human development or security.

PRTs in Afghanistan are a pertinent example of the blurring of development and military activities and the risks it poses to the human security and the development agenda. Designed as joint civilian-military units, PRTs were introduced in Afghanistan by the US in 2002 as a means of aid delivery to try and improve stability and reconstruction.\footnote{Howell and Lind, ‘Manufacturing Civil Society and the Limits of Legitimacy’, 732.} In doing so, PRTs were tasked to ‘win the hearts and minds’ of Afghans through the delivery of small-scale, quick-impact reconstruction and development projects, largely measured in terms of

\begin{thebibliography}{99}
\bibitem{Fishstein and Wilder, Winning Hearts and Minds?} Fishstein and Wilder, \textit{Winning Hearts and Minds}? 22, 24.
\bibitem{Howell and Lind, ‘Manufacturing Civil Society and the Limits of Legitimacy’} Howell and Lind, ‘Manufacturing Civil Society and the Limits of Legitimacy’, 731.
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\end{thebibliography}
time and money spent.65 This was particularly the case in the south and east of the country, where NGOs and other agencies were unable to operate because of insecurity and instability.66 However, as noted in the Afghanistan Human Development Report as early as 2004, PRTs ‘are proving to be an inadequate and dangerous vehicle for the provision of security and their new [development] role is increasingly hard to distinguish from that of genuine humanitarian and development aid workers’.

The implications and risks to human security and development associated with the blurring of aid and military activities, as exemplified by PRTs in Afghanistan, are extremely consequential. Development projects implemented through this ‘dual-pronged’ developmental and militaristic strategy have been noted to be poorly implemented, unsustainable, low quality and of little development value.67 They have also been criticised for not addressing Afghanistan’s fundamental needs or human security problems such as high unemployment.68 Inhibited by lack of local knowledge, unfamiliarity with the environment and social networks and structures, as well as their dependency on interpreters, it has been argued that military-led development has resulted in poor outcomes.69 Critically, the war-aid economy has also been shown to perpetuate severe corruption and create perverse incentives to maintain insecure environments.70 The majority of American development aid funds have been concentrated in the more insurgency-affected areas of Southern Afghanistan, because as discussed previously, the main criteria for the targeting of US aid has increasingly been national security, rather than poverty or development as an end in itself.71 However, such prioritisation of these more insecure areas, despite lacking evidence that aid is promoting stability or security, has meant that the need to perpetuate insecurity has been recognised, particularly by security contractors who have been seen to ‘create a problem to solve a problem’.72 Such consequences demonstrate the risk of the securitisation of aid to the freedoms and security of the Afghan people.

It can therefore be seen that the securitisation of aid certainly poses significant risks to human security and development. Both in terms of where aid is allocated based on tradition security objects of donor states, and the way in which it is delivered on the ground, the securitisation of aid fails to address the

68 Fishstein and Wilder, Winning Hearts and Minds? 46, 50.
69 Ibid., 48.
70 Ibid., 3.
71 Howell and Lind, ‘Manufacturing Civil Society and the Limits of Legitimacy’, 731.
underlying causes of insecurity and underdevelopment. Exemplified primarily by US aid to Afghanistan, the securitisation of aid places traditional state security concerns at the centre of the development objective rather than the individual, undermining the capacity for human development and neglecting the fears and wants faced by people in their daily lives. Such a narrow security objective cannot ensure the human security and development of the Afghan people, nor those experiencing human insecurity in other parts of the world. Ultimately, by questioning whose security interests are being served through the securitisation of aid, the associated risks to the human security agenda can be seen.

Bibliography


Globalisation and state power: The question of context

DUC DAO

Abstract

The phenomenon of economic globalisation, broadly defined as the increase in the magnitude and extent to which economic relations transcend national boundaries, has underpinned many important developments in the global economy in recent decades. This carries significant implications to the management of economic affairs, not least with regards to the ability of states to maintain control of economic relations within their borders. While some scholars advance the thesis that there has been an erosion of state power – a ‘retreat of the state’ – in the face of globalising forces, others contend that the state remains the central force in the global economy. This essay critically engages existing literature on globalisation and state power. It finds that the relationship between these two forces is one of mutual constraints and reinforcements, and thus an objective answer to the question of ‘retreat’ is more difficult than commonly thought. More importantly, this question is unable to provide a comprehensive picture of the position of the state in the globalised world as it fails to take into account certain key developments in the global economy as well as the existing variations in the nature of the state. As such, the essay proposes a new paradigm for the study of the influence of globalising forces on the state that frames globalisation as providing a distinct context for the exercise of state power.

One of the most significant developments in the world economy over the last few decades has been the process of globalisation. Although a much-contested concept, in the broadest sense, economic globalisation refers to the increase in the magnitude and extent to which economic relations transcend national boundaries.¹ This raises important questions regarding the implications of such changes, not least one which concerns the ability of the state to maintain control of economic affairs within its borders. Some scholars, most notably Susan Strange, put forward the thesis that there has been an erosion of state power.¹

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power – a ‘retreat of the state’ – in the face of globalising forces. Critics of this thesis contend that states remain the dominant force in the global economy. It is neither possible nor advisable to conclude that there exists any general trend in the power of the state. The contemporary period of globalisation should instead be seen as providing a new context in which state power is exercised. This essay critically engages the ‘retreat of the state’ thesis and assesses three major dimensions in state–globalisation relations which the thesis has not adequately addressed: possibilities for mutual benefits; ambiguous causal connections; and the issue of baseline for comparison. It argues that even if such dimensions can be brought into the equation, it is inevitably a problematic undertaking to objectively affirm whether the state in general has been in ‘retreat’ due to the lack of impartial standards for evaluation. This essay then explains how the question of ‘retreat’ makes it hard to visualise how globalisation has transformed the nature of state power because of two main reasons: it is unable to capture important developments in the global economy, and it risks neglecting the existing diversity in the nature of the state. The essay concludes by making the case for context as the more appropriate way to frame the relationship between states and globalising forces.

Observers who diagnose a ‘retreat of the state’ identify an inverse relationship between state power and the intensity of globalisation. The general claim put forward by ‘retreat’ scholars is that the magnification and extension of economic relations across traditional boundaries has eroded the ability of states to autonomously influence transactions within their own borders. This eclipse of state power plays out through three main processes: the proliferation of international trade; the transnational integration of production processes; and the worldwide flow of finance. The technological advances that propel globalisation allow non-state economic actors such as multinational corporations, private banks, and investors – the direct drivers behind such processes – to easily move their assets to the most favourable location to maximise returns. In this competitive environment, states must be more accountable to such actors or risk facing debilitating economic penalties. In particular, governments need to eventually abandon interventions that are deemed inimical to the operation of free markets, such as the provision of welfare or the protection of the

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environment. Many analysts thus sustain that governments are faced with a ‘race to the bottom’ defined by the convergence of state regulation standards to the lowest common denominators.

The relationship between globalising forces and state power is more complicated than the ‘retreat of the state’ thesis suggests. The constraints that globalisation places on states are often exaggerated. A survey of empirical evidence shows that a ‘race to the bottom’ has not occurred. Duane Swank demonstrates how economic openness has not exerted overwhelming pressures on states in the Organisation of Economic Co-operation and Development (OECD) to retrench welfare regimes. OECD states, instead, retain considerable policy autonomy to respond to domestic demands for more intervention to correct inequities in the markets. Similarly, there is evidence in other spheres, including trade, financial integration, and monetary sovereignty in which states retain considerable ‘room to move’ in the face of globalising forces.

Even if ‘retreat’ scholars may have indeed overstated the constraints of globalisation, the more important oversight in their argument is the assumption that the relationship between state power and globalising forces is one that is necessarily antagonistic. The case can be made that mutual benefits can be derived from the interaction between these two variables. There is little debate that governments are needed to perform essential functions such as enforcing the rule of law and protecting property rights, but they may also actively facilitate the efficient distribution of resources. Calculated state intervention can generate competitive advantage to promote trade growth. This has been demonstrated by the experience of East Asian economies like Korea and Taiwan in the last few decades. Although they have pursued economic development through a variety of strategies, there is a broad consensus that governments have played a key role in their success. Government programmes can also benefit multinational producers by improving human and physical capital. Even in the financial sector where private power is supposed to be the most influential relative to the state, it is arguable that state regulation can be useful to facilitate the efficient

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6 Ibid.
11 Garrett, ‘Global Markets and National Politics: Collision Course or Virtuous Circle?’ 801.
operation of market forces. This is especially applicable after the recent global financial crisis (GFC), when it has been amply demonstrated that the global flow of finance can be debilitating when left solely in private hands. Thus, it is possible to construct a counter-narrative that the three globalising processes that are often thought to inevitably cause the ‘retreat of the state’ can actually benefit from more state power.

Globalisation can even strengthen states in certain aspects. Emerging economies such as China have taken advantage of the transnational flows of finance and commerce to exert influence on global markets through several channels, including state-owned enterprises, commodity revenues, foreign reserves and sovereign wealth funds. Furthermore, ‘retreat’ scholars have commonly disregarded an important dimension of economic relations: the mobility of labour. There has been a general increase in barriers to immigration in developed economies, except for skilled or wealthy individuals. One possible explanation for this trend concerns the effect of domestic pressure to protect wages and national identity from the potentially disruptive effects of globalisation.

Secondly, the cause–effect relationship between the state power and globalising forces must be re-evaluated. Many ‘retreat’ accounts, including that of Susan Strange, see states only as passive ‘victims’ rather than active agents in the process of globalisation. Even if it can be accepted that the state has been in decline, it is necessary to establish that it is globalisation that is responsible for this trend to logically validate the ‘retreat’ thesis. Yet, technological innovations alone cannot explain why globalisation has occurred; governments have made deliberate choices to permit transnational economic relations. The high level of financial integration witnessed today is a product of the movement by many states to lower restrictions to the flow of finance across their borders, which started in the 1980s. A major motivation behind this shift was the growing acceptance of the neoliberal doctrine in economics which contends that state intervention is detrimental to economic development. Here, it is useful to reflect on the notion of ‘retreat’. It is only possible to conclude that the state has been in ‘retreat’ if its capacities to shape economic outcomes have actually declined,

18 Ibid.
Globalisation and state power

not if it still has such capacities but has opted not to deploy them. The latter can explain many changes in state–market relations. For instance, when the GFC posed a challenge to the predominant neoliberal ideology, leaders in the push towards financial liberalisation, including the US and Britain, aggressively reasserted themselves in financial markets by taking high stakes in financial corporations. In fact, some policymakers have deliberately misrepresented globalisation as an exorable force to justify unpopular decisions. Even the misinformed belief that globalisation is an inexorable force may push states to implement policies consistent with the retreat thesis. This finds evidence in many policy debates on European integration. Any comprehensive account of the relationship between state power and globalising forces must be aware of such ambiguities in the causal connection between these two variables.

Thirdly, to say that there has been a general ‘retreat of the state’ raises the question: what is the baseline used for comparison? With respect to a historical baseline, the retreat thesis has overlooked important developments in the history of the global economy. Economic globalisation is not a recent phenomenon. In certain ways, the intensity of transnational economic relations during the Gold Standard period is just as, if not greater than, that which has been observed over the last few decades. For example, the significance of trade relative to Gross Domestic Product (GDP) of OECD countries was generally higher in 1913 than in 1973. In fact, the debate on the loss of state autonomy is not entirely novel. At the beginning of industrial capitalism, classical economists such as Adam Smith and David Hume had already predicted that the state would be restrained by the intensified capital mobility. In retrospect, it is clear that there were certain periods since then, such as during the Great Depression, in which states had extensive control over national economies. Furthermore, it is necessary to query the reference point in terms of state power from which the measurement is made. If states proved to be in control in previous periods of globalisation, in what ways do the current economic conditions really present new challenges to state power? As ‘retreat’ scholars have failed to satisfactorily address this question of baseline, they have not provided an adequate account of the limits globalisation places on state power.

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22 Hirst and Thompson, Globalisation in Question: The International Economy and the Possibilities of Governance, 26–31.
23 Garrett, ‘Global Markets and National Politics: Collision Course or Virtuous Circle?’, 793.
What is clear from the above discussion is that the ‘retreat’ thesis has been misguided in adopting a narrow view of the relationship between state power and globalisation. Nonetheless, the centrality of the state in the contemporary global economy should not be overemphasised. It is sound to compare the current period of globalisation with that in the past to highlight a deficiency in the ‘retreat’ thesis, but it would be mistaken to conclude from such a comparison that the present state of affairs is ‘business as usual’. The existing period of globalisation is unique in many ways. The amount of private capital and its level of mobility are exceptional; the degree of functional integration between global production and distribution processes is also unprecedented. Noting the possibilities that states have been empowered by such developments, some state-centric scholars believe that globalisation should be conceptualised as the realist competition between states for power in the world economy. However, the power of non-state economic actors is by no means negligible. The Asian financial crisis demonstrates that governments’ attempts to balance against the mobilisation of private capital can be futile. Even if it can be argued that states remain in control, the very fact that policymakers have to factor in the potential reactions of private forces means it is imprudent to look at states alone in analyses of globalisation.

As demonstrated, the relationship between state power and globalising forces is one of mutual constraints and reinforcements. If it can indeed be measured whether there has been a general ‘retreat of the state’, it is necessary to weigh the evidence from both sides. However, there exist no objective criteria for impartial evaluation. Any sort of scale that can be devised has to rely on the arbitrary assessment of conflicting elements that would certainly be controversial. For example, while most would view that neoliberal economic reforms entail a smaller role for the state, Sorensen sees that states have actually been strengthened in such processes through more regulatory power. It might not be possible to satisfactorily settle the debate.

More fundamentally, it is necessary to take a step back and critically assess whether the question of ‘retreat’ necessarily provides a comprehensive view of the place of the state in a globalised world. Firstly, the debate is not able to capture some important developments in the contemporary international economic order. The challenges of a globalised world economy create incentives

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26 For examples of such claims, see Setser, ‘A Neo-Westphalian International Financial System?’ and Bremmer, ‘State Capitalism Comes of Age: The End of the Free Market?’.
Globalisation and state power

for new forms of governance at the international level. Innovations in communication and transportation technologies have aided the emergence of interstate institutions and networks like the World Trade Organization, which manages transnational economic relations. The global civil society has also developed, which consists of transnational relations between non-state actors in the form of non-governmental organisations or professional associations. The emergence of such new developments has significantly altered the ways actors interact in the world economy and this has transformed the nature of state power. The point of this essay is not to explore these discussions in depth, but to highlight the fact that this transformation cannot be captured by the simple dichotomy that the state is winning or losing.

Secondly, even if it was possible to settle whether there has been a general retreat of the state, the conclusion risks misrepresenting ‘the state’ as a uniform identity despite existing diversity in the nature of the state. Here, the question is not which baseline should be used for evaluation, but whether a baseline can be used at all. Most debates around the ‘retreat’ thesis can make general claims about state power because they primarily use advanced states in Western Europe, North America and Japan as the reference point. These states share developed features with regards to government, nationhood, and economy. Such analyses marginalise a significant number of states whose developments differ significantly from that of advanced states. In the least developed states, especially those in sub-Saharan Africa, governments are often controlled by corrupt rulers who appropriate economic benefits only for themselves and their clients. Another group of states, including China and India, have not developed the full structure of the advanced states, but have been influencing the world economy in significant ways. A comprehensive analysis of the relationship between the state and globalising forces must take into account such variations and thus cannot be restricted to any general trend.

If it is neither possible nor desirable to question whether the state has been in retreat, then how should the relationship between the state and globalising forces be conceptualised? The answer is that the contemporary period of globalisation sets a new context for the exercise of state power. This context is characterised by the intensified level of interaction between economic agents

29 Ibid., 60–61.
31 For more in-depth discussions, see Sorensen, The Transformation of the State: Beyond the Myth of Retreat, 59–82 and Scholte, ‘Global Civil Society.’
32 Sorensen, The Transformation of the State: Beyond the Myth of Retreat, 46.
33 Ibid., 7–14.
34 Ibid., 51–58.
aided by technological innovations that increases the extent and speed with which transnational relations can be conducted. The new focus on context shifts the point of reference away from the state. As such, it is now possible to consider broader forms of interaction between the state and other forces in the world economy. It is also no longer necessary to assume a degree of uniformity in the nature of the state. Accordingly, states with a variety of characteristics can now be analysed with respect to how their power is transformed by new developments brought about by globalisation. If studies on the relationship between the state and globalising forces could be framed by the context in which it occurs instead of the question of ‘retreat’, much more valuable insights would be produced.

Over the last few decades, the nature of state power has undergone important changes owing to the process of economic globalisation. In attempting to conceptualise such changes, scholars who argue that there has been a general ‘retreat of the state’ have misguidedly adopted a narrow view of the dynamics that are taking place. If one takes the question of ‘retreat’ as the starting point for analysis, it is not possible to reach an objective assessment on the new arrangements between states and globalising forces. In fact, it may not even be advisable to ask such a question in the first place, because it is unable to address broader forms of arrangements between states and other actors in the world economy, and it unrealistically assumes a degree of uniformity in the nature of the state. Scholars who attempt to conceptualise the current state–globalisation arrangements need to move on from arguing whether the state has been in ‘retreat’. The more appropriate question to ask is how the context in which state power is exercised has been transformed in the current period of globalisation. It is necessary to move the point of reference from the state if one wishes to produce a more comprehensive account of the relationship between states and globalising forces. Only then is it possible to establish meaningful examinations to produce useful insights into the contemporary world economy.

**Bibliography**


Police violence as the greatest threat to public security: Gendarmerie in Brazil and Mexico

DILINI FERNANDO

Abstract

Crime and violence threatens the lives of millions of citizens living in Latin America, a region that hosts the infamously high crime capitals of the world. A fundamental feature of this dire condition is institutional corruption and violence. This brief assesses the effectiveness of a gendarmerie policy in Latin America, with perspectives from the military police of Brazil and the recently instated ‘National Gendarmerie’ in Mexico. These perspectives indicate that although military policing is sufficient to combat large-scale crimes such as drug trafficking, the empirical evidence of continued organised crime and the predisposition to violence has created a backlash threat to civilian security. This policy brief identifies the institutional challenges that prevent a gendarmerie from functioning compatibly within existing fragile democracies of Latin America. In the way it is systematically embedded within government and extrajudicial institutions, organised crime is easily concealable in Latin America, and greatly challenging to scrutinise. This policy brief recommends the professionalisation of the police force, institutional reform to improve accountability of the state, and the reduction of social inequalities as paramount to improving public security. In essence, the dynamic of a monolithic military elite must be destabilised to alleviate social inequalities that trap a particular group of society in an endless cycle of crime and violence.
Policy brief objective

This policy brief will assess the effectiveness of a gendarmerie policy in Latin America, with perspectives from the military police of Brazil and the recently instated ‘National Gendarmerie’ in Mexico. While there are identifiable advantages of militarisation in increasing public security and combating crime, major institutional challenges exist that prevent it from becoming a solid solution to citizen insecurity, which must be addressed urgently. This brief is written for an international development organisation with a specific focus on social reform and reducing inequalities between society and the state.

The problem

Crime and violence threatens the lives of millions of citizens living in Latin America, a region that hosts the infamously high crime capitals of the world, including Mexico and Brazil. This is shown in the significantly high rate of homicide, organised crime, national gangs, kidnapping, and drug trafficking cases. For example, between 2003 and 2007, more than 240,000 people were murdered in Brazil. A fundamental feature of this dire condition is institutional corruption and violence. Police of the region are notorious for persistent human rights violations, where kidnappings, torture, and abuse are used as means of punishment of common criminals, controlling the opposition, and even as investigative tools for crime confessions. In the way it is systematically embedded within government and extrajudicial institutions, organised crime is easily concealable in Latin America, and greatly challenging to scrutinise. Furthermore, social inequality is a major causal factor of targeted victimisation, stemming from high levels of poverty and unemployment, and the absence or weakness of state accountability, basic social services, and criminal justice institutions. Brazil is one of the world’s most unequal countries in wealth distribution: a single road separates Rocinha, the largest favela or shantytown

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in Rio de Janeiro, from a wealthy neighbouring community, distinguishing deplorable inequalities in employment, income, security, wellbeing, and life expectancy.  

While the appropriate response to citizen insecurity is varied and indistinct, what is clear are the consequences of inadequate institutions of law and order, which often become themselves the major source of insecurity. Corruption and the lack of accountability of the state is the greatest challenge to combating crime in the existing fragile democracies of Latin America, which must be addressed urgently. The challenge is twofold: first in combating societal crime and violence, and second in addressing police violence and social inequalities that further increase citizen insecurity. The intended outcome of this brief is to promote the establishment of strong institutions of public security that mandate the regulated use of police authority, and the rebuilding of citizen security.

Implications and shortcomings of gendarmerie policy

Militarisation is one of the current strategies to increase public security and combat crime within several Latin American countries. Similar to the French gendarmerie, the police and armed forces of Brazil and Mexico are inextricably controlled by the same group of authority. In theory, the military character and function of a gendarmerie is compatible with democracy, provided the police force is not subordinated to the armed force, or guided by military criteria. Militarisation by nature encourages the excessive use of force, and this often has significant consequences for citizen insecurity due to its tendency to violate human rights. Hugo Frühling, a public policy scholar of citizen security in Latin America, identifies two features of a military police force that perpetrate this outcome: firstly, military police doctrine places little importance on the rights of individuals; secondly, hostile relationships are created between the police and citizens, where social profiling and violence is used to combat crime. This relationship between citizen and state will be examined in the two empirical case studies of military policing in Brazil and Mexico.

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Case study I: Military police in Sao Paulo and Rio de Janeiro

The civil and military police of Brazil serve specific functions: the military police are charged with the duty of patrolling streets, maintaining peace, and investigating crimes in progress, while the civil police investigate committed crimes. The first point of contact with crime within society is therefore the responsibility of the military police.

The effectiveness of military police in public security in Brazil is most apparent in its efforts against drug trafficking. The installation of Pacifying Police Units (UPPs) in Rio, for example, has had success in maintaining a permanent, physical presence in the favelas that were previously controlled by drug traffickers. A significant reduction in violent crime in specific favelas corroborates the success of this form of military presence, as shown in one study by the Institute of Public Safety of Rio de Janeiro indicating the number of homicides in Rio declining from 2,155 in 2009 to 1,422 in 2011.

Consequently, UPPs are resource-intensive, requiring a high number of policemen in any given area. It therefore poses a great risk that only certain areas receive these well-developed forms of public security, perhaps even driving crime and drug trafficking to smaller, poorer areas.

Despite measures of improving the moral function of gendarmerie in democratic society, such as UPPs and the post-Carandiru Massacre education of individual human rights, incidences of police brutality and citizen insecurity continue to undermine the quality of public security services in Brazil.

Robert Gay, a sociologist of Latin American development and democracy, presents a number of factors that challenge the prevention of police homicide:

- Initial investigation of the crime scene lies at the hands of the police, who are often the perpetrators. Bodies are often removed and taken to local hospitals to create the impression of assisting victims, while simultaneously compromising the evidence.
- Police always claim to be acting in self-defence.
- Widespread use of unregistered and unauthorised guns.

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Police violence as the greatest threat to public security

FIFA World Cup 2014

The international attention and pressure on Brazil for strong public security measures is immense in the current climate of the FIFA World Cup 2014 and the Olympic Games 2016. The manpower of public security for the event has been increased significantly, with over 150,000 police recruited, according to Andrei Rodrigues of Brazil’s Ministry of Justice. While the manpower is promising, the question remains how well trained these security forces are to control their weaponry. Concurrently, in anticipation of the event, several protests had turned violent between citizens and military police in disapproval of the construction of 12 stadiums amounting to over US$3 billion. Gay’s analogy can be applied here, where the right of the military police to act in self-defence is in conflict with the citizens’ right to voice their democratic rights on domestic issues of concern.

Case study II: ‘National Gendarmerie’ in Mexico

The announcement of a ‘National Gendarmerie’ (GN) for 2014 is the current public security campaign in Mexico, under President Enrique Peña Nieto. With the primary focus on combating drug cartels, the GN comprises 10,000 active duty military personnel, with the intention of expanding its manpower to around 50,000 by 2018. These military officers are offered financial incentives, full military benefits, and remain subject to military law, though the GN operates under civilian control and jurisdiction. While there is significant likelihood that the new gendarmerie will establish effective disciplinary measures and deter drug trafficking, increased militarisation will not reduce citizen insecurity. As defined earlier, gendarmerie is compatible with democracy insofar that police forces are not subordinated to armed forces or military criteria. However, the GN in Mexico is solely formed from military personnel, who remain subject to military law. Military forces are trained to combat an armed enemy with overwhelming force, while police forces are civilian corps trained to address public security with minimal force, and to cooperate with citizens.

Maureen Meyer, a senior Associate of the Washington Office for Mexico and Central America, examines the inherent risk of having military-trained forces in close contact with the civilian population. Meyer foresees the potential harm to human rights that will arise from the GN: Mexico’s National Human Rights

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Commission substantiates a fivefold increase in human rights violations by members of the Mexican army, with a rise to 1,503 cases of organised crime in 2012, including torture, extrajudicial execution, arbitrary detention, and enforced disappearances. Meyer argues that unless there are strong internal and external accountability mechanisms, a Mexican gendarmerie will commit the same pattern of human rights abuse of the population as seen in past decades.¹³

Evidently, there are underlying institutional challenges within Mexico’s national law enforcement structure that are susceptible to corruption and abuse of power.

Table 1: Public opinion data collected by Latinobarómetro in 2011¹⁴

<table>
<thead>
<tr>
<th>Satisfactory with performance of institutions: Police</th>
<th>Brazil</th>
<th>Mexico</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very satisfied</td>
<td>2.90%</td>
<td>2.60%</td>
</tr>
<tr>
<td>Rather satisfied</td>
<td>21.20%</td>
<td>15.80%</td>
</tr>
<tr>
<td>Not very satisfied</td>
<td>42.20%</td>
<td>46.20%</td>
</tr>
<tr>
<td>Not at all satisfied</td>
<td>33.20%</td>
<td>34.40%</td>
</tr>
<tr>
<td>Unsure</td>
<td>0.50%</td>
<td>1.00%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Progress on reducing corruption in state institutions (Within two years)</th>
<th>Brazil</th>
<th>Mexico</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very much</td>
<td>4.10%</td>
<td>5.20%</td>
</tr>
<tr>
<td>Something</td>
<td>29.60%</td>
<td>24.20%</td>
</tr>
<tr>
<td>A little</td>
<td>38.10%</td>
<td>33.90%</td>
</tr>
<tr>
<td>Nothing</td>
<td>25.10%</td>
<td>33.70%</td>
</tr>
<tr>
<td>Unsure</td>
<td>3.20%</td>
<td>3.00%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Would you support a military government?</th>
<th>Brazil</th>
<th>Mexico</th>
</tr>
</thead>
<tbody>
<tr>
<td>Would support in place of a democracy</td>
<td>21.80%</td>
<td>37.10%</td>
</tr>
<tr>
<td>Would not support under any circumstances</td>
<td>67.40%</td>
<td>53.30%</td>
</tr>
<tr>
<td>Unsure</td>
<td>10.80%</td>
<td>9.60%</td>
</tr>
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</table>


Empirical data derived from public opinion offers invaluable insight on the effectiveness of societal structures in practice. Table 1 displays public opinion data related to the functioning of democracy and public policy in Brazil and Mexico in 2011, as generated by the Latinobarómetro from a sample group. The first survey shows over 70 per cent of respondents to be partially satisfied or unsatisfied with the performance of police institutions. The second survey, on the management of corruption, can be seen to correlate with the satisfaction of police institutions, with the majority of results ranging from partially satisfied to unsatisfied. This potentially indicates that the measure to which citizens are satisfied with police institutions is linked to the institutions’ ability and progress in reducing corruption. If so, citizens place a significant amount of reliance on police institutions to ensure public security and reduce corruption, though it is yet to deliver solidly positive results. The final survey displays significant resistance against a military government in Brazil, while in Mexico just over 50 per cent of results would not support it under any circumstances.

Recommendations

While a gendarmerie provides a strong institution that enforces the rule of law and punishment, it presents a high risk of monopolisation and abuse of social and military power by the elite. In order for public security to be effective and reliable to citizens, there is an urgency to improve state accountability and reduce the corruption and social inequalities that perpetrate high crime rates. This policy brief identifies three institutional challenges that an international development organisation must primarily focus on, if military protection is to function compatibly within Latin American democracies.

Professionalising the police force

The training of police forces must be civilian-oriented, not militarily-oriented. Re-education in human rights will reinforce the necessity of protecting the civilian population, of which all members have human and democratic rights that must be made known to both citizens and state actors. Institutional reforms must also include the establishment of norms and codes of conduct, and official assessment criteria for crime investigation.

Monitoring police corruption and organised crime

Strong internal institutions to monitor accountability and punish police brutality must be improved at municipal, state, and federal level. The state must be the guarantor of security, basic services, and the constitutional rights of all members.
of the population, with presence in all parts of the city. The enforcement of an ombudsman will also strengthen the role of civilian control and jurisdiction within public security institutions.

Addressing social inequalities and power imbalances

There is an urgent need to regulate the power held by the authority, and prevent the use of social profiling in crime investigation. This can be addressed through community policing techniques to establish a dialogue and relationship of trust between citizen and state. The strengths of this recommendation can be seen in the Dominican Republic’s Plan de Seguridad (PSD), instated by President Leonel Fernández in 2005, where institutional reform focused on strengthening and professionalising the police force, while genuine civilian security was redefined to include improving social services, providing civilians with protection to move about freely.

Conclusion

This policy brief identifies the institutional challenges that prevent a gendarmerie from functioning compatibly within existing fragile democracies of Latin America. Perspectives from military public security in Brazil and Mexico indicate that although military policing is sufficient in combating large-scale crimes such as drug trafficking, the empirical evidence of continued organised crime and the predisposition to violence has created a backlash threat to civilian security. An international development organisation must urgently address these institutional challenges if military protection is to function as a reliable institution of security and justice in Latin America. This policy brief proposes the professionalisation of the police force, institutional reform to improve accountability of the state, and the reduction of social inequalities as paramount to improving public security. In essence, the dynamic of a monolithic military elite must be destabilised to alleviate social inequalities that render a particular group of society to be trapped in an endless cycle of crime and violence.

Bibliography


A critical examination of the idea of evidence-based policymaking

KARI PAHLMAN

Abstract

Since the election of the Labour Government in the United Kingdom in the 1990s on the platform of ‘what matters is what works’, the notion that policy should be evidence-based has gained significant popularity. While in theory, no one would suggest that policy should be based on anything other than robust evidence, this paper critically examines this concept of evidence-based policymaking, exploring the various complexities within it. Specifically, it questions the political nature of policymaking, the idea of what actually counts as evidence, and highlights the way that evidence can be selectively framed to promote a particular agenda. This paper examines evidence-based policy within the realm of Indigenous policymaking in Australia. It concludes that the practice of evidence-based policymaking is not necessarily a guarantee of more robust, effective or successful policy, highlighting implications for future policymaking.

Since the 1990s, there has been increasing concern for policymaking to be based on evidence, rather than political ideology or ‘program inertia’ (Nutley et al. 2009, pp. 1, 4; Cherney & Head 2010, p. 510; Lin & Gibson 2003, p. xvii; Kavanagh et al. 2003, p. 70). Evolving from the practice of evidence-based medicine, evidence-based policymaking has recently gained significant popularity, particularly in the social services sectors (Lin & Gibson 2003, p. xvii; Marston & Watts 2003, p. 147; Nutley et al. 2009, p. 4). It has been said that nowadays, ‘evidence is as necessary to political conviction as it is to criminal conviction’ (Solesbury 2001, p. 4). This paper will critically examine the idea of evidence-based policymaking, concluding that while research and evidence should necessarily be a part of the policymaking process and can be an important component to ensuring policy success, there are nevertheless significant complexities. It will first consider what evidence-based policymaking is before highlighting its advantages. It will then discuss the issues inherent in the concept, focusing on the political nature of policymaking, the question of what counts as reliable evidence and whose evidence it is, as well as the capacity for evidence to be misrepresented through selective framing.
(McConnell 2010, p. 129). It will use the example of Indigenous policymaking in Australia to highlight some of the major issues. It will be demonstrated that evidence-based policymaking poses significant challenges to policy success.

Evidence-based policymaking, although considered so self-explanatory that it is often not defined in the literature, can be broadly understood as a process that uses rigorous and objective evidence to inform policy development, implementation and practice (Marston & Watts 2003, p. 144; Nutley et al. 2009, p. 5; AGPC 2009, p. 3). The concept is underpinned by three main characteristics: namely, that evidence should be rigorously tested and capable of replication; that evidence should be robust and methodologically sound; and that the process should be transparent (AGPC 2009, p. 3). The concept gained popularity with the election of the Blair Government in the United Kingdom in 1999 on the platform of ‘what matters is what works’ (Banks 2009, p. 3; Nutley et al. 2009, p. 4; Sanderson 2002, p. 3; Nutley 2003, p. 2). The Blair Government has been characterised as pragmatic and anti-ideological, as they spoke of questioning ‘inherited ways of doing things’ (Blair & Cunningham 2009, p. 16; Solesbury 2001, p. 6; Nutley 2003, p. 3). They asserted the need to develop policies in respect to the evidence rather than as short-term responses to political pressures, and to end ideologically driven decision-making (Blair & Cunningham 2009, p. 15; Banks 2009, p. 3).

The rise of evidence-based policymaking has also coincided with a decline in confidence in professionals, and an ever-increasingly educated and questioning public (Nutley et al. 2009, p. 4; Solesbury 2001, p. 6). It has been argued that the evidence-based policy agenda marks a decline from the ‘priesthood’, which had traditionally characterised the operation of professionals ‘reliant on the unquestioning faith of their followers’ (Pawson 2006, p. 3; Solesbury 2001, p. 6). People are now less inclined to accept professional practice and power on trust (Solesbury 2001, p. 6). Rather, professionals must be able to explain the appropriateness and efficacy of their advice, with particular focus on cost-benefit and efficiency (Solesbury 2001, p. 6; Marston & Watts 2003, p. 148). This growing emphasis on evidence-based policymaking has also been seen as part of a greater modernisation agenda of ‘progress informed by reason’ (Sanderson 2002, p. 1; Cherney & Head 2010, p. 510). It can be understood as an attempt to professionalise and reform service delivery and practice, with policymaking an exercise in systematic problem-solving underpinned by data, risk analysis and the identification of “what works” (Cherney & Head 2010, p. 510; Marston & Watts 2003, p. 145). Essentially, evidence-based policymaking is argued to be a way of modernising policymaking, approaching social issues with rationality in an apolitical and scientised manner (Marston & Watts 2003, p. 145; Pawson 2006, p. 6; Anderson 2003, p. 226).
One of the main arguments advanced by proponents of the evidence-based policy agenda is that evidence is important to ‘modernise and depoliticise’ policymaking in the way that it filters out decision-making bias (McConnell 2010, p. 128). Policies that intervene in the lives of people must be informed by transparent, up-to-date and rigorous research (Hammersley 2005, p. 86). Specifically, policy should not be driven by ideology, but rather objective evidence of what works (Banks 2009, p. 4; Parsons 2002, p. 45; Jensen 2013, p. 3). Without evidence, policymakers can only rely on political ideology, intuition, prejudice, or theory alone, at best (Banks 2009, p. 4). Such resulting policies, despite good intentions, have greater potential to go wrong and lead to costly mistakes, also falling prey to the ‘law of unintended consequences’ (Banks 2009, p. 5). Essentially, evidence is an important counterweight to neutralise the political energy and vested interests from which policies often emerge (Banks 2009, p. 5, 7). Therefore, evidence is seen as a persuasive mechanism to overcome political ideology and special interest influence, and ensure the policy debate is robust and well informed (Banks 2009, p. 7; Sanderson 2002, p. 3; Nutley et al. 2009, p. 11).

The argument then follows that evidence is necessary to ensuring policy success (McConnell 2010, p. 128). Evidence can not only aid understanding of the likely effectiveness of policies in terms of what works in what circumstances, but it can also inform decisions about how to improve policies through evaluation processes (Sanderson 2002, p. 4). Advocates suggest that research is critical to understanding the intended and unintended effects and impacts of policies and programs (Hammersley 2005, p. 87). It is further argued that the validity of recommendations and policy options underpinned by research is likely to be much greater than those informed by professional experience (Hammersley 2005, p. 89). Moreover, evidence of program outcomes can also be used as a measure of programmatic success, or indeed failure (Marsh & McConnell 2010, p. 573). That is, evidence of program outputs and outcomes, such as that found in evaluations and audit reports, for example, is often cited by politicians and policymakers alike to demonstrate the success of policies and programs (Marsh & McConnell 2010, pp. 571, 573).

At face value, it is not hard to understand why the idea that policy should be evidence-based has gained such strength (Hammersley 2005, p. 86). In fact, it would be difficult to imagine anyone suggesting that policy should be based on anything other than good evidence (Marston & Watts 2003, p. 144). However, the notion of evidence-based policymaking is extremely problematic in several ways and has drawn a significant amount of criticism. One of the major issues that advocates of the concept fail to acknowledge is that policymaking in and of itself is an inherently political process (Marston & Watts 2003, p. 145; Lewis 2003, p. 250; Nutley et al. 2009, p. 20). It would be foolish to assume that
research evidence can offer completely objective solutions to political problems such as those concerning education, social welfare or criminal justice (Nutley et al. 2009, pp. 4, 7; Nutley 2003, p. 3). Furthermore, critics of evidence-based policymaking have argued that evidence and evaluation itself is political in the way it is articulated, as all knowledge is socially constructed and contingent (Pawson 2006, p. 6; Taylor & Balloch 2005, p. 1). Policymaking will never be apolitical or conflict-free, and although certainly helpful for informing the judgements of policymakers, scientific research cannot negate its political nature (Anderson 2003, p. 235; Banks 2009, p. 4).

What counts as evidence is also a concern. The evidence considered to inform evidence-based policymaking is that which has been produced through applied, often academic research (Head 2008, p. 4; Solesbury 2001, p. 8). It is argued that what counts is what has been produced through quantitative methodology and has been tested and validated (Sanderson 2002, p. 6). That is, what can be ‘counted, measured, managed, codified and systemized’ (Parsons 2002, p. 57). However, the evidence-based policymaking agenda gives little recognition to the multiple evidence bases and forms of knowledge that are necessary to understanding the problems in question, and the prospects of successful intervention (Head 2008, p. 1; Nutley 2003, p. 3). For example, lay knowledge has traditionally been considered as a less important form of evidence, often dismissed as subjective or anecdotal (Maddison 2012, p. 271; Anderson 2003, p. 228; Marston & Watts 2003, p. 145). However, for many complex issues in the social sphere, technical approaches and systematic research methodologies are inadequate (Head 2008, p. 4). There instead needs to be a greater value placed on stakeholder perspectives and social relations, and evidence gathered through community engagement, including consultations and public inquiries (Head 2008, p. 4; Maddison 2012, pp. 271, 274).

Following this, it should also be noted that not all evidence in the policy process is equal, but that there is a ‘hierarchy of knowledge’ (Marston & Watts 2003, p. 145; Maddison 2012, p. 271). The types of evidence that are used and valued in the process represent important power dynamics in policymaking (Maddison 2012, p. 273). Often, they support the dominant and prevailing ways of thinking about the world, rarely challenging the distribution of power in contemporary society (Stevens 2011, p. 250; Maddison 2012, p. 275). This can be explained in the way the powerful are much better positioned to influence the production and dissemination of research (Maddison 2012, p. 272). As Alex Stevens (2007) notes, marginalised groups, as well as non-elites in the policymaking field:

… have less access to the sources of research and its dissemination; they are less able to impose their interpretations of research evidence on a wider public … or to impose strain on those who produce or disseminate unhelpful research … [and] they have less of a role in framing policy (p. 29).
Such a hierarchy of knowledge demonstrates that evidence-based policymaking is far from neutral (Marston & Watts 2003, p. 145). Rather, it is extremely value-laden in the way that some forms of evidence are considered more valid than others, reflecting power relations (Marston & Watts 2003, p. 145; Nutley et al. 2009, p. 20).

The reliability of evidence is also important, and it must be emphasised that no evidence is completely infallible (Hammersley 2005, p. 88). It is necessary to recognise that the process of researching and evaluating, similar to any other human endeavour, inevitably and unavoidably relies on interpretation and judgement (Hammersley 2005, p. 89; McConnell 2010, p. 129; Banks 2009, p. 17; Marsh & McConnell 2010, p. 573). Producing research can only be guided by methodological principles, but never governed (Hammersley 2005, p. 89). Research guidelines can never entirely remove the element of judgement that is always involved (Hammersley 2005, p. 92; Banks 2009, p. 17). Furthermore, it can be argued that because of the fallible nature of evidence, it should be reasonable to expect policymakers to critically assess and analyse research claims, drawing on their professional experiences and knowledge in doing so (Hammersley 2005, p. 88). It has been said that judgement should not be thought of as an inevitable source of bias any more than methodological rigor should be trusted as a source of neutrality or validity (Hammersley 2005, p. 92).

The question of who produces the evidence or how it becomes known and discussed is also critical for understanding the reliability of evidence (Nutley et al. 2009, p. 18). In many policy areas, networks of organisations and interest groups outside of government have emerged that have a significant role in shaping policy (Nutley et al. 2009, p. 19; Nutley 2003, p. 11). These include charitable agencies, campaign organisations, lobby groups, and think tanks, who have an active research function (Nutley et al. 2009, p. 19). While it has been argued that these groups represent a democratising of the policy process in that it is more participatory and there is greater diversity of perspectives, the values and assumption embedded in their research and analyses must not be taken for granted (Nutley et al. 2009, pp. 19, 20). Many of these interest groups involved in such research advocacy:

may devote considerable resources to exploiting and developing the evidence base, and they can be seen to deploy a number of strategies to increase the impact that their evidence informed advocacy may have on policy (Nutley et al. 2009, p. 19).

Essentially, in many cases, the research conducted by these groups is not ‘in the interest of knowledge, but as a side effect of advocacy’ (Weiss 1986, p. 280).
The last major issue with evidence-based policymaking is not only multiple evidence bases, but also the selective framing and partisan use of evidence (McConnell 2010, p. 129). That is, the way evidence can be promoted or ignored in the policymaking process, depending on political objectives (Pawson 2006, p. 5; Head 2008, p. 5; McConnell 2010, p. 129; Sanderson 2002, p. 5; Nutley et al. 2009, p. 10). While still seeking to legitimise their policies by highlighting the use of evidence, policymakers can cherry pick the evidence that best supports their already established opinions and platforms (Sanderson 2002, p. 5; McConnell 2010, p. 129; Head 2008, p. 5). In other words, evidence will only be used when it aligns with ideological values, suits pre-existing politically motivated priorities, or does not challenge the status quo, hence the ironic term ‘policy-based evidence’ (Banks 2009, p. 8; Sanderson 2002, p. 5; Nutley et al. 2009, p. 8). Evidence is never simply “out there”, unproblematised and just waiting to inform rational policy choices’ (Maddison 2012, p. 273). Rather, policymakers who may already be committed to particular policy outcomes can influence the extent to which some evidence is used to inform decisions and other evidence is ignored or dismissed as irrelevant (Maddison 2012, p. 273; Head 2008, p. 5). Furthermore, the selective framing of evidence also has significant implications for research and science, in that politics now has influence over what research gets endorsed or supported, and how it is conducted (Nutley et al. 2009, p. 8). This is extremely problematic for those who consider the separation of research and policy as essential to holding governments accountable in the way that independent research can ‘speak truth to power’ (Nutley et al. 2009, p. 8).

Indigenous policy is a pertinent example of the complexities of evidence-based policymaking and the embedded power dynamics. The domain of Indigenous policy in Australia has been described as ‘turbulent’, that is, highly contested, ‘ideologically fraught’, marked by significant conflict in values, and where evidence-based arguments often become highly politicised (Head 2010, p. 81; Maddison 2012, pp. 270, 273). This is particularly evident in terms of what exactly counts as evidence (Maddison 2012, pp. 270, 271). It has been argued that ideological notions of race and racial superiority have been influential factors in deciding what counts as evidence to inform Indigenous policy (Maddison 2012, p. 271). It is acknowledged that some non-Indigenous researchers are much better able to influence the policy debate, while Indigenous knowledge is often ignored or dismissed (Maddison 2012, p. 271; Anderson 2003, p. 228). Moreover, the focus on technical and academic research, which is largely not informed by Indigenous perspectives and yet tends to carry the most weight with governments, ignores other important sources of evidence (Maddison 2012, p. 271). Indigenous voices and ways of knowing, as well as evidence gathered through public inquiries and consultation that captures their experiences and knowledge, are often crowded out in the policy field by more mainstream evidence that support government platforms (Maddison 2012,
A critical examination of the idea of evidence-based policymaking

p. 271; Anderson 2003, p. 228). However, as Ian Anderson (2003) argues, despite the interpretive challenges these forms of knowledge present, without engaging them within policymaking, it is ‘inconceivable that there should be any other way of enabling Aboriginal participation in … policy development’ (p. 228).

It is not only ideology that influences the evidence base used in Indigenous policymaking, but also the institutional mechanisms that allow some perspectives to be heard over others (Maddison 2012, p. 272). Indigenous policymaking in Australia essentially takes place in a context of severe structural inequality where ‘governments hold almost all the cards’ (Maddison 2012, p. 272). Indigenous peoples are only involved in policymaking as a matter of choice by governments, rather than as a requirement (Chesterman 2008, p. 421). Moreover, their limited ‘institutional capacity’ means their voices can be less heard by policymakers (Maddison 2012, p. 272). This is exemplified in the dismantling of the Aboriginal and Torres Strait Islander Commission (ATSIC) by the Howard Government in 2005 and their refusal to establish another national entity with policymaking power in its place (Chesterman 2008, p. 419). While there are now independent entities, there is no longer a representative Indigenous body within government empowered to engage in the policymaking processes concerned with Indigenous affairs in the capacity that ATSIC did (Chesterman 2008, p. 421). While there were certainly problems with ATSIC, there are now nevertheless implications for the ability of Indigenous peoples to participate in and influence the evidence-based policymaking process in Australia.

The use and framing of knowledge and evidence is also apparent within Indigenous policymaking, exemplified by the Northern Territory Intervention of 2007 (Maddison 2012, p. 269). The Intervention was a legislated response to allegations of child abuse within Aboriginal communities in the Northern Territory (AGDSS 2012). It included increased law enforcement, including the deployment of Australian Defence Force troops, new restrictions on pornography and alcohol, as well as changes to the provision of welfare, among other things (AGDSS 2013; Chesterman 2008, p. 419). According to the then Prime Minister John Howard and then Indigenous Affairs Minister Mal Brough, the response was heavily based on, and informed by, the evidence presented in the Little Children are Sacred report commissioned by the Northern Territory Government (Maddison 2012, p. 269). However, Pat Anderson (2011), co-author of the report, has criticised the government for not acknowledging or respecting the evidence that was put forward, adopting a strategy of ‘imposed solutions and paternalism’ rather than one ‘based on empowerment and inclusion’ which the evidence had suggested (p. 27). Anderson remarks in relation to the government’s response:
So, where was the evidence-base for this radical re-shaping of policy, for this return to a paternalistic approach to problem-solving? Simply: it was absent … There was no attempt to address the fact that the vast majority of the evidence pointed in exactly the opposite direction to where the policy was going ... (p. 27).

Anderson also notes that the decision-making process for the Intervention took place largely behind closed doors (p. 28). However, it can nevertheless be argued that although there was no contestation about the fact that action was necessary, the evidence was likely used simply to advance prevailing political objectives (Anderson 2011, pp. 28, 29). As Anderson notes, some have argued the Intervention was a political exercise to gain advantage in an election year while others have seen it as an opportunity to advance the government’s ideological agenda of undermining Indigenous rights, particularly land rights (p. 28). Others argue that even if the motives were genuine, it was marked by ignorance, prejudice and certainly not based on the evidence (Anderson 2011, p. 28). Moreover, it was not the rational kind of policy process heralded by the evidence-based agenda (Anderson 2011, p. 29). It can therefore be seen that despite access to evidence and the rhetoric of evidence as the basis for policy, policymaking is certainly not immune from greater ideological influences (Maddison 2012, p. 271).

This paper has considered the advantages of evidence-based policymaking as well as identified the challenges inherent in the concept. Certainly the idea that policymaking should not be based on evidence is something that not even the harshest critics of evidence-based policymaking would promote, and it should not be concluded that scientific research is not valuable or does not have anything important to contribute (Nutley et al. 2009, p. 7; Parsons 2002, p. 57). However, the political nature of policymaking necessarily makes the concept of evidence-based policymaking incredibly complex. It must also be critically questioned what counts as evidence in the first place, and such evidence needs to be placed in a wider context of other important forms of knowledge (Head 2008, p. 4). The matters of whose evidence is informing policy decisions, the potential fallibility of such evidence, as well as the selective use of it to support political objectives must also be examined. Exemplified by Indigenous policymaking in Australia, it can be argued that the practice of evidence-based policymaking is not necessarily a guarantee of more robust, effective or successful policy (Maddison 2012, p. 271). Research evidence is clearly only one of the factors influencing policymaking and therefore, evidence-aware or evidence-informed may be more appropriate terms for the concept (Nutley et al. 2009, p. 7, Marston & Watts 2003, p. 145; Cherney & Head 2010, p. 509).
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The legal utility of performative practices: The case of Hong Kong

SHERWOOD DU

Abstract

The relationship between Hong Kong and the People’s Republic of China is one of the most intriguing puzzles of the twenty-first century. However, while political aspects of Hong Kong’s post-transfer era have been widely documented, there is little existing literature detailing the transition from legal theory perspectives. A precursory glance of Hong Kong showcases a cosmopolitan international city, famous for its abundance of oriental delicacies and alluring attractions complete with the signature glow of its illuminated skyline. This paper will present Hong Kong in a different light: a city captive to different perspectives of its legal philosophy foundations. On 10 October 2012, legislative councillor Raymond Wong Yuk-man strategically coughed in key passages of the ‘Oath of Legislative Councillors’, effectively omitting all references to the People’s Republic of China as prescribed by law. To examine how this was made possible, four main terms will be introduced: rule of law, rule by law, performative and performance. The central theme of this paper explores the utility of performatives as a mechanism to moderate normative discourses and measures their functional value against its effects in the social sphere. The difference between performatives and performances will be highlighted to demonstrate limitations to the coercive elements of performative practices intended by the oath’s framers. The second part of this paper undertakes to explain the significance of the subversion of the swearing-in ceremony and its repercussions. A key observation is that the effectiveness of written law is limited by the spirit of conscience, the last refuge of Hong Kongese cultural identity.
Introduction

Tuesday 1 July 1997 marked a new chapter in Hong Kong. Its 156-year-old status as a British colony was ended by the transfer of sovereignty to the People's Republic of China (PRC). Despite meticulous planning by the British and Chinese governments to ensure a smooth transition, Hong Kong's contemporary landscape is marred by controversies revolving around PRC's encroachment upon Hong Kong's unique independence, known as the 'One Country: Two Systems' principle. This article focuses on the Hong Kong Legislative Council oath of office as a mirror reflecting the frayed relationship between the grassroots Hong Kongese and PRC authorities. First, the conceptual differences between Hong Kong and the PRC of what law is will be provided as an account of how the performative oath was intended to function by its framers. Second, it is advanced that the oath was designed to ensure Hong Kong's elected representatives recognise PRC rule as legitimate by way of performative practices. Although performative practices aim to entrench hegemonic interests in reinventing Hong Kong's social identity, performatives are susceptible to be undermined by their very own nature of performance.

Context

Concepts of law

The Hong Kong–PRC context provides an insight into the oath's requirement of swearing 'allegiance' to the PRC and reasons as to why it is unpalatable to grassroots Hong Kongese. The PRC is widely regarded as anti-rule of law with the potential to affect Hong Kong's rule of law culture in the post-transfer era. Although it is noted that Hong Kong's rule of law may be criticised as a product of institutional and cultural factors, it is clear that the oath of allegiance to the PRC is a significant marker in the post-transfer period.

References

3 Ibid., 140.
4 It reads:
I swear that, being a member of the Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China and serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity.
6 Oath of Legislative Councillors, s 19.
of British colonialism, this article distances itself from the political sphere to isolate the debate in the frame of theoretical differences between Hong Kong–PRC philosophies of law. In modern society, for any authority to be accepted as legitimate, its source of power must stem from law:

… the significance of law for social theory is affirmed in the most unambiguous terms. Law is the foundation of central structures of social life; a set of processes and procedures on which society’s very integrity depends.

From the 1970s, incremental shifts towards a rights discourse was introduced to Hong Kong so that its populace was accustomed to expect governments to act with procedural fairness and provide access to avenues of legal redress; contrasted with the PRC portrayed as without such systematic legal safeguards. The example of the Tienanmen Square Massacre animates fundamental differences between Hong Kong and PRC concepts of law by how protestors were handled in the respective territories: ‘Hong Kong – city of law – and Beijing – city of tanks’. The massacre encapsulates the notion of Hong Kong grounded in the rule of law, and PRC as rule by law. While rule of law is an institutional guarantee against the abuse of power by government, rule by law is merely when the law is used as a means to an end for purely governmental interests. Under a rule of law system, a government’s legitimacy in the eyes of its populace is founded from the concept self-determination, ‘citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees’. In contrast, rule by law was dramatically demonstrated when PRC used the caricature of law as a pretence to preserve its own power by violently suppressing civilian dissident voices. Rule by law also explains the rationale behind the irony of the ruling PRC Communist Party reaping the fruits

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8 Michael Wesley provides an illustrative account of Hong Kong–PRC political relations:

It used to be the case that mainlanders were the poor cousins. The trickle of them that used to come into Hong Kong would sort of wander around, sort of with their mouths open, looking at the opulence and the beautiful buildings and everything, and the Hongkongers were the rich ones who would look down on these sorts of country bumpkins. The shoe is on the other foot now of course in terms of wealth, where the mainlanders that generally come to Hong Kong are fabulously wealthy, much wealthier than most Hongkongers, and I think they probably quite enjoy acting in ways that they know irritate the locals, just to, you know, sort of flaunt their new found wealth, and of course, the fact that now Beijing really has this former colony under its control. ABC Radio National, ‘Hong Kong Residents Lash Out Against “Uncivilised” Chinese Tourists,’ PM, 13 May 2014 (Michael Wesley), www.abc.net.au/pm/content/2014/s4003860.htm.
9 Roger Cotterrell, Law, Culture and Society: Legal Ideas in the Mirror of Social Theory (Ashgate, 2006) 26 (citations omitted).
10 Jones, above n 7, 53.
11 Ibid., 52. After the 4 June incident, over one million people protested peacefully in Hong Kong.
of capitalism. Because rule by law categorises ‘law as a technology devoid of values’, it permits the facilitation of capitalism as a utility that is sanctioned by the state to further its own goals of state-building. Ignoring the causal link between an individual’s economic power and political privilege, the ethos of rule by law severs the normative underpinnings as to why law should be obeyed; it ‘collapses the political, the social and cultural into the legal: the legal is then submerged into the economic’. Legitimacy under rule by law is not obtained by appealing to social values, but by the sole reason of the existence of law as a command, where its subjects are required to adopt a performative attitude in that law is complied with ‘out of respect for the law’, enforced by state sanction.

Before the transfer of sovereignty, to Hong Kongers the rule of law was cherished as a differentiating characteristic from the PRC as an important normative identity that transcends criticisms of residual colonialism. It was emblematic of the freedoms to criticise authority and guaranteed civil liberties against abuse of power by government, a luxury not afforded in the PRC. Jones describes this phenomenon in layperson terms as a differencing factor between Hong Kong and PRC ideas about law:

Talking about law has become a means of keeping this ‘Other’ at bay, of differentiating oneself as ‘Hong Kong Chinese,’ of mapping out the future in the hope, one suspects, of exercising some control over it. From Jones’ account, we can infer that Hong Kong’s ideology of law has a potent flavour of self-determination and, hence, subscribes to the rule of law. However, in the post-transfer era, rule of law is threatened by irreconcilable differences between Hong Kong and PRC philosophies of law. Before delving into techniques PRC deploys to substitute rule of law with rule by law, it is useful to turn to Hong Kong’s contemporary governance framework to explain the challenges to Hong Kong’s rule of law ideology.

Administrative governance insights: Hegemony hiding in plain sight

When PRC resumed sovereign control over Hong Kong, the PRC promised a ‘One Country: Two Systems’ arrangement. This slogan purported to allow Hong Kong the same degree of autonomy as before 1 July 1997:

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14 Jones, above n 7, 54.
16 Jones, above n 7, 55.
17 J.L. Austin, How to Do Things with Words (Oxford University Press, 1962) 4–5; Habermas, above n 13, 448.
18 Jones, above n 7, 53 (emphasis added).
The legal utility of performative practices

The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.19

While the populist mantra may be heralded as a success because of its associated promise to not interfere with Hong Kong’s capitalist system,20 the same cannot be said with its promise to not interfere with Hong Kong’s ‘way of life’ – its self-determination culture under the rule of law.21 At this point it is logical to ask, why would the PRC allow capitalism but not the territory’s status quo social conditions? The answer lies in the PRC’s legal philosophy: rule by law. The way PRC authorities selectively operate article 5 is linked to the previous discussion of law as a utility without values under rule by law.22 Prima facie, allowing capitalism to exist with its socialist antithesis should be analogous with allowing the theories of rule of law and rule by law to coexist. However, the delicate difference between the two analogue subjects is that while the former explains the operation of social theory under peripheral concepts of the use of law, the latter concerns the core notions of what law is. Thus, as the question of what law is must be answered in absolute terms,23 then it follows that the appeal of the rule of law as effecting institutional safeguards is irreconcilable with rule by law as blunt commands. As the PRC occupies the role of the hegemonic power in Hong Kong–PRC relations, it is improbable for the PRC to not attempt to alter the core of the Hong Kong legal system in transcribing its rule by law mentality into social reality,24 as evidenced by the recent publication of a PRC White Paper which purports to reduce Hong Kong’s objective political autonomy into merely a subjective feature to be enjoyed only by ‘authorization’ of the PRC.25 In addition, interference in Hong Kong’s affairs is enshrined in Hong Kong’s judicial system where the Court of Final Appeal is required to

19 Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, art 5 (‘HKSAR Basic Law’) (emphasis added).
21 HKSAR Basic Law, art 5.
22 Ibid.
23 Tamanaha, above n 12, 3.
24 Joseph Raz provides the proposition of law as a political institution:

The law is, however, not merely a set of guides for court decisions. It is a political institution of great importance to the working of societies and to their members. From this point of view a British person cannot say ‘Polish law is my law’ just because it will be followed by British courts when their conflict-of-law rules direct them to do so. The distinction between standards that the courts have to apply and those that are the law of the land is vital to our ability to identify the law as the political institution it is.

seek interpretation from the PRC for Hong Kong–PRC issues.\textsuperscript{26} Interference is also rooted in the executive branch.\textsuperscript{27} First, the Chief Executive (CE) serves as the principal of the government and reserves the right to appoint officials to the Executive Council.\textsuperscript{28} Second, the CE is empowered to select and remove the Secretaries and Deputy Secretaries across all government bureaus.\textsuperscript{29} Third, the CE is empowered to select and remove judges throughout the court hierarchy system.\textsuperscript{30} The critical aspect of this arrangement is that the position of CE itself is appointed by the PRC following ballot results from a PRC-controlled 1,200-person nomination committee whose composition represents 0.02 per cent of Hong Kong residents.\textsuperscript{31} The aforementioned public officers are selected by the CE – who are only ‘nominated’ because the CE requires the express approval of the PRC for such candidates to be officially appointed.\textsuperscript{32}

In contrast, the legislative branch goes through more comprehensive elections than the CE selection process.\textsuperscript{33} It is perceived at the grassroots level as a more representative vehicle of Hong Kongese interests than the CE, judicial and executive branches. In theoretical terms, the Legislative Council reflects the populace’s perceptions of having institutional safeguards against the command and control elements of Hong Kong’s governance system. However, upon successful election, prospective legislative councillors are faced with a dilemma: how to resolve the conflict between rule of law and rule by law in partaking in the oath? How can legislative councillors serve the interests of their constituencies without the freedom to oppose government legislation against PRC interests in

\textsuperscript{26} HKSAR Basic Law, art 158; Anthony Mason, ‘The Hong Kong Court of Final Appeal’ [2001] 2(1) Melbourne Journal of International Law 216, 219. The PRC White Paper has also attracted the ire of the Hong Kong legal community which denounced it as threatening the territory’s judicial independence and undermining the rule of law: Edward Ngai and Chester Yung, ‘Hong Kong Lawyers March for Judicial Independence,’ The Wall Street Journal (online), 27 June 2014, online.wsj.com/articles/hong-kong-lawyers-march-for-judicial-independence-1403873329.

\textsuperscript{27} HKSAR Basic Law, c 4 (Political Structure).

\textsuperscript{28} Ibid., arts 43, 55. For an overview of the Executive Council’s (ExCo) functions, see Paul Morris, Flora Kan and Esther Morris, ‘Education, Civic Participation and Identity: Continuity and Change in Hong Kong’ (2000) 30(2) Cambridge Journal of Education 243, 251.

\textsuperscript{29} HKSAR Basic Law, art 48(5).

\textsuperscript{30} Ibid., art 48(6).

\textsuperscript{31} Ibid., art 45; Annex I (Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China Concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region, approved at the Sixteenth Session of the Standing Committee of the Eleventh National People’s Congress, 28 August 2010, Instrument 2); Te-Ping Chen, ‘Meet Hong Kong’s Voters — All 1,200 of Them,’ The Wall Street Journal (online), 19 March 2012, blogs.wsj.com/chinarealtime/2012/03/19/meet-hong-kong%E2%80%99s-voters-all-1200-of-them/.

\textsuperscript{32} HKSAR Basic Law, art 48(5)–(6).

\textsuperscript{33} Ibid., art 68. For a comprehensive analysis of the Legislative Council’s electoral process and commentary on Hong Kong’s direct and functional constituency elections, see Gladys Li and Nigel Kat, ‘The Legal Status of Functional Constituencies’ in Christine Loh and Civic Exchange (eds), Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council (Hong Kong University Press, 2006) 143, 143–154.
swearing ‘allegiance’ to the PRC?\textsuperscript{34} The next part of this analysis will evaluate the framer’s purpose behind the oath, contending that its performative nature backfires on its creators.

\section*{Performatives: A double-edged sword}

\subsection*{Origins}
J.L. Austin is credited to have coined the term performative.\textsuperscript{35} Performatives arise in speech acts when ‘the issuing of the utterance is the performing of an action’,\textsuperscript{36} such that saying a performative phrase does not mean to describe the operative effect of the utterance other than ‘to do it’.\textsuperscript{37} For example, at a wedding when the words ‘I do (take this woman to be my lawful wedded wife)’ are uttered,\textsuperscript{38} it is commonly accepted as completing the requirements for a marriage ceremony. Austin contends that when people say ‘I do’, it is not really the end of the meaning of the phrase. Instead, the speech of ‘I do’, needs to be qualified by actions or further phrases to give meaning to the words: ‘when I say, before the registrar or altar, &c., “I do”, I am not reporting on a marriage: I am indulging in it’.\textsuperscript{39} To clarify, saying ‘I marry you’ does not automatically fulfil the act described by the utterance as a reality. The phrase must be qualified by complementary actions:

\ldots it is very commonly necessary that either the speaker himself or other persons should also perform certain other actions, whether ‘physical’ or ‘mental’ actions or even acts of uttering further words.\textsuperscript{40}

Thus, performative utterances only describe commitments to spoken words which require further actions to fulfil its contents. The next section will outline the usages of performatives in circumstances where performance is mandatory.

\subsection*{Performative function}
The effects of a performative vary according to its intended context. While basic performatives such as ‘thanking’ and ‘notifying’ are informal communications, when people formally say ‘I do’ to a marriage, they are accepting the institutional framework that qualifies the meaning behind the phrase.\textsuperscript{41} Similarly, swearing

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\begin{enumerate}
\item \textit{Oath of Legislative Councillors,} s 19.
\item \textit{Austin, above n 17, 4.}
\item \textit{Ibid., 6.}
\item \textit{Vikki Bell, ‘Performative Knowledge’ (2006) 23(2–3) Theatre Journal 214, 214.}
\item \textit{Austin, above n 17, 12.}
\item \textit{Ibid., 6 (emphasis added).}
\item \textit{Ibid., 8 (emphasis in original).}
\item \textit{Lorenzo Fiorito, ‘On Performatives in Legal Discourse’ (2006) 19(2) Metalogicon 101, 102.}
\end{enumerate}
allegiance to a particular institution requires a deeper internal acknowledgement and explicit acceptance of the contents of what is being sworn to.\textsuperscript{42} Turning back to the oath, it is worth revisiting that the ‘PRC’ is scripted no less than three times, qualified by the phrase, ‘in full accordance with the law …’.\textsuperscript{43} It is advanced that the oath is designed to inhibit a subconscious link to a partaker’s mind such that the terms ‘in full accordance with the law’ is associating the PRC’s rule by law as the principle governing the Legislative Council and, in turn, the Hong Kongese populace as their electors.\textsuperscript{44} On an aesthetic level, the televised nature of the swearing-in ceremony augments the performative’s influencing power as it permeates the public sphere.\textsuperscript{45} The public dissemination of the performative ceremony in Hong Kong’s unicameral legislative chamber purports to influence a viewer’s mind of the oath’s normative authenticity.\textsuperscript{46} This is further entrenched by the oath being repeatedly cited by all legislative councillors after every election. The performative via repetition\textsuperscript{47} seeks to reconfigure the roots of Hong Kong’s rule of law ethos by ritualising the oath to create a precedent atmosphere, giving the illusion of the oath as an already established social norm. In turn, it is expected by PRC authorities that when the oath is performed, its function seeks to reinvent social reality:

\ldots the appearance of substance is precisely that, a constructed identity, a performative accomplishment which the mundane social audience, including the actors themselves, come to believe and to perform in the mode of belief.\textsuperscript{48}

Hence, when legislators swear allegiance, they do so to an alternative social context that seeks to replace the status quo. To emphasise, when prospective legislative councillors swear allegiance to the PRC, they are contributing to the PRC project of rule by law eclipsing rule of law in Hong Kong’s social discourse. It also follows that the authority behind the performative to bind legislators to act out the oath is nothing other than the enforcement mechanism of law itself – a key indicia of the nature of rule by law.\textsuperscript{49} As rule by law is imposed by the

\begin{itemize}
\item \textsuperscript{42} Ibid.
\item \textsuperscript{43} Oath of Legislative Councillors, s 19 [citations omitted].
\item \textsuperscript{44} Raz, above n 24, 15.
\item \textsuperscript{45} Legislative Council of the Hong Kong Special Administrative Region of the People’s Republic of China, Legislative Council Secretariat (Public Information Division) (2014) LegCo, www.legco.gov.hk/general/english/sec/corg_ser/pi.htm. While this paper focuses on the Legislative Council oath, similar ceremonial performatives are scripted in the office of Chief Executive, executive and judicial branches, reflecting a concerted effort by PRC authorities to consolidate social control over the territory: Oaths and Declarations Ordinance (Hong Kong) cap 11, ss 16–22; HKSAR Basic Law, art 104.
\item \textsuperscript{47} Butler, above n 5, 526.
\item \textsuperscript{48} Ibid. (citations omitted).
\item \textsuperscript{49} Rachel Sanders, ‘Justice at Trial: Dramatic Ironies of the Postracial State’ (2013) 9(1) Law, Culture and the Humanities 133, 148.
\end{itemize}
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performative oath, the illusion of rule of law renders its partakers complicit in accepting attempted alterations to the status quo. This finding has not gone unnoticed and some legislators use active and passive tactics to undermine the performative oath.

Active resistance

In 2004, a legislator sought judicial review to challenge the oath by asking the court whether the oath could be personalised according to personal values:

I, Leung Kwok-Hung, solemnly, sincerely, and truly declare and affirm that I swear by the people of China and the residents of Hong Kong, as well as the principles of democracy, justice, human rights and freedom that, being a member …

In determination, while the presiding judge appreciated the amendment’s sentiments, it was found to be not in line with the positivistic colour of the oath:

It constitutes a solemn declaration, a form of promise, which binds the maker to a particular code of conduct … no matter how laudable the sentiments expressed in them — are not prescribed by the Ordinance.

The performative oath is designed to bind legislators to fulfil it at the penalty of expulsion from office. Similar to Butler’s analysis of performatives rendering ‘social laws explicit’, the oath aims to reinvent social reality by enforcing its strict performance according to its framer’s prescription. Furthermore, although the case judgment concurred that the oath was not inconsistent with article 32 of the Basic Law – the right to freedom of conscience – it is respectfully concluded that the case reasoning was erroneous as it did not take into account the use of performatives to promote singular legal philosophies in concluding that, ‘It is no form of indoctrination nor can it be described as any form of attempt to influence the applicant’s conscious or subconscious mind’. Without repeating the previous discussion on the mechanics of performativity in Hong Kong’s social context and theories of legal philosophy, it can be seen that performatives reinforce hegemonic interests by forcing obedience and disallowing the dissenting values of rule of law proponents.

50 The rest of the modified version of the oath is unamended. See Oath of Legislative Councillors, s 19 (citations omitted); Leung Kwok-Hung v Legislative Council Secretariat [2004] HKCFI 883 (6 October 2004), [7] (emphasis in original).
52 HKSAR Basic Law, arts 79(7), 104.
54 HKSAR Basic Law, art 32.
56 Sanders, above n 49, 133.
Passive resistance

The weakness in performative acts is that since they are identified by physical actions and utterances, they cannot be considered true or false but only ‘felicitous or infelicitous’. While the oath encourages active acceptance of PRC’s interference in Hong Kong, the fatal flaw in this strategy is that although physical actions can be controlled by the law, subversive intentions cannot be neutralised if actions are performed insincerely. For example, if a misbehaving son says to his father, ‘I promise to do anything you ask me to do’, the father based on intuition would not interpret the son literally. In 2012, veteran legislator Wong Yuk-man strategically coughed in key passages of the oath, effectively omitting all references to ‘PRC’. Although Wong subsequently volunteered to retake the oath amidst criticism of it not being performed ‘in full accordance with the law’, his passive resistance is demonstrative of a performative’s weakness. Consequently, at Wong’s second swearing-in ceremony, Wong changed his tone throughout the oath in highly vocalising ‘Hong Kong’ and ‘People’ while whispering ‘PRC’. Even when another legislator challenged the legal validity of the second oath, the President of the Legislative Council ruled that it was in compliance with the Basic Law. So whether a performative succeeds in its designed intention is dependent on how it is performed by its recipients and how it is received. In essence, ‘the outward utterance is a description, true or false, of the occurrence of the inward performance’. Hence, one can always claim to be passively undermining the performative oath’s intended function if the performed action is not actually believed.

Conclusion

At the macro level, performatives can be harnessed to bind performers to particular forms of conduct to facilitate the reconstruction of social narratives in the public domain. At the micro level, performatives act as a scan to identify
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those who accept or resist them. In turn, the oath’s requirements act as hurdles against its detractors while rewarding its supporters with public office. Its purpose appears to succeed from bottom-up and top-down perspectives. However, its utility is dependent on how it is performed and received by its framers. Actioned subversively, its intended function fails when it is performed for superficial display. Performative weapons deployed for social engineering purposes can be undermined by their transactional nature: since performance is mandatory, acceptance of completed performances by their framers is also compulsory as legislators are inducted into office. Legislators can continue to advocate fearlessly for Hong Kongese interests while murmuring the scripted oath because the only validator of their consciences is who they see in the mirror.

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Whither Japan’s Heisei reforms?
A systems approach to analysing legal changes in Japan

SARAH XIN YI CHUA

Abstract

A wave of legal reforms since the 1990s, known collectively as the ‘Heisei reforms’, has sparked lively debate about whether Japan is at a turning point. Indeed, the task of understanding the fitful and ambiguous pathways of normative and behavioural change that followed remains a Herculean one. Rather than confining these irreducibly diverse phenomena to simplistic but ultimately uninformative theoretical abstractions, this paper adopts a systems approach which locates its analysis in the complex dynamics which underpin the Heisei reforms and provides an analytical framework to explore the multifaceted processes of change that have accompanied the reforms in practice. In this way, a systems approach offers a richer methodology to evaluating the reforms’ effectiveness in generating desired change. By applying this approach to case studies in information disclosure, corporate governance and gender equality reforms, this paper argues that the Heisei reforms have reshaped political, economic and social dimensions of Japanese society in ways that other approaches may have overlooked. While the reforms have appeared evolutionary rather than revolutionary, they have nevertheless laid the foundations for potentially transformative change in the long term by starting to challenge the established societal norms and discourses that mediate law and legal change in Japan.

Introduction

With its time-honoured history of incorporating external legal influences, Japan’s legal system has been dubbed a ‘paradox’ that interweaves the antinomies of continuity and change.¹ Major legal reforms in Japan since the 1990s, known collectively as the Heisei reforms, have been touted as another

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¹ John Owen Haley, Authority without Power (Oxford University Press, 1991) 3.
key turning point in its legal landscape. As the magnitude of change fails to fulfill expectations over time, doubts about the effectiveness of the reforms begin to fester. For some, the basic structures of Japanese society remain ‘untouched’ by the Heisei reforms, portending merely a superficial rather than a profound change. For others, the Heisei reforms retain considerable promise by having initiated a gradual but momentous shift in mindsets. Ultimately, the diverse and often inconsistent trajectories of change that have occurred across Japanese society severely hamper efforts to generalise on the Heisei reforms’ overall success. Instead, by considering how law and society intertwine in discourse to shape the normative agendas of the Heisei reforms, systems theory appreciates the complex dynamics underpinning legal change and thus offers a richer evaluation of their effectiveness.

This paper first examines the Heisei reforms’ development as a legal project. Next, it outlines systems theory and demonstrates its strengths as a methodology for evaluating legal reform in Japan. Using this systems approach, this paper then examines the case studies of information disclosure, corporate governance and gender equality. This provides for an evaluation of the Heisei reforms as a composite picture of interrelated political, economic and social dynamics. Altogether, these case studies demonstrate that the Heisei reforms represent an attempt to fundamentally reshape aspects of Japanese society. Their success, however, has been mitigated and influenced by a range of political, economic and social factors beyond the control of law-makers in Japan. Finally, drawing on the dynamics of reform from all three case studies, this paper demonstrates that, by reshaping the societal norms and discourses underlying legal changes in Japan, the Heisei reforms have nevertheless laid the foundations for potentially transformative change in the long term.

Japan’s Heisei reforms: A background

Initially designed as cohesive strategies to reinvent Japan in a period of profound political, economic and social change, the Heisei reforms have evolved into an eclectic mix of ad hoc efforts to mediate the diverse interests at stake. The complex
and disparate ways in which the Heisei reforms were unleashed occurred against an interplay of internal crises and external pressures for change, generating imperatives to reform all levels of society: reinvent the Japanese government’s credibility, overcome economic mismanagement, and improve gender relations to maintain a viable social order. Through it all, to minimise the dislocations across Japanese society that could come with abrupt change, the dynamics of reform also had to temper wide-ranging change with a degree of continuity. Moreover, despite a general recognition of the need for change in Japan, there were marked disagreements on its execution including among vested interests who sought to preserve their advantages and strengthening voices of diverse groups seeking reform in specific directions. Accordingly, pathways for reform had to be carefully calibrated and continuously revised to manage tensions among competing interests during a transitional period where new practices and institutions were to emerge alongside a discredited regime. Therefore, from the start, the multifaceted and sometimes conflicting imperatives for change augured fitful and incremental, yet potentially transformative, processes of reform in the coming decades.

Theoretical framework

In evaluating the Heisei reforms, systems theory provides the nuance appropriate to an analysis of the multifaceted processes of change that have accompanied the legal reforms in practice. Systems theory argues that legal reforms are conceived and integrated in society through communication by human agents. Here, the concept of legal reforms not only comprises a state’s legal instruments such as legislation and doctrines but also broader guidelines of behaviour such as tacitly accepted social norms. Accordingly, discourse among human agents can occur in multiple ways, including formal and informal spoken interaction or written texts, and through multiple dimensions, especially political, economic, moral and legal modes of communication. On the one hand, society uses internal frames of reference that exist to understand and communicate changes in considering possibilities for legal reform, creating their own reality and
meanings from new ideas and practices. On the other hand, legal reforms influence local thinking by shaping contingent understandings and practices in society. These discursive processes of interpretation, selection, adaptation and implementation of legal reforms ‘unleashes an evolutionary dynamic’, where society is reconfigured in adapting to different models of regulation as much as newly introduced rules are modified through their application and integration into society.

The benefits of this approach in evaluating Japan’s Heisei reforms are two-fold. Firstly, systems theory conceives legal reforms as communicative events that are socially constructed and thus inherently subjective. Accordingly, it avoids conceptual problems of assessing the reforms’ effectiveness against broad essentialist standards such as ‘justice’ and ‘rule of law’, which tend to presuppose objectivity where no such objectivity in fact exists. Secondly, by locating communication in the recipient country’s empirical context of political, economic and social structures, this framework facilitates a multiparametric analysis that considers the diverse elements underlying the Heisei reforms in Japanese society. Altogether, this allows theory to trace in a more precise fashion the complex and multifaceted connection between the Heisei reforms and Japanese society in practice.

Based on systems theory, a two-step methodology can be formulated to evaluate the Heisei reforms’ effectiveness. Under this framework, where there is communicative interaction about possible legal changes in a society, a normative agenda is discursively constructed within a context of longstanding beliefs and practices. This normative agenda reflects the influences of a range of stakeholders and is realised through enacting legal reforms. Accordingly, in considering the normative agenda that has been created through this process, the first step assesses the extent to which the Heisei reforms have reflected a significant transformation of Japanese society. Next, the second step evaluates how much behavioural change has occurred according to the normative agenda arrived at in the first step. Therefore, it is against these two criteria of normative and behavioural change that has occurred from the Heisei reforms’ institution that this paper evaluates their strengths and weaknesses.

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16 Gillespie, above n 11, 681.
17 Ibid., 680.
18 Tanase, above n 8, ix; Gillespie, above n 11, 681.
19 Gillespie, above n 11, 719.
20 Ibid.
21 Ibid.
22 Ibid., 720.
23 Ibid.
Evaluation

Information disclosure reforms

While in truth a reflection of normative change that had already occurred at the level of local government, the national information disclosure laws ultimately enacted in the 1990s nevertheless symbolise a fundamental reshaping of citizen–state relations in Japan. Despite the bureaucracy’s recognition that responsibilities to perform its functions competently flowed from the strong and privileged position that it had long occupied in Japanese society and of the consequences for Japanese citizens of their decisions, it did not regard its relationship with citizens to entail a concomitant normative duty of ‘accountability’ to explain its actions. For their part, citizens regarded the bureaucracy with a ‘mixture of fear and reverence’. While longstanding Liberal Democratic Party (LDP) governments were seen as uninterested in adopting a national law requiring information disclosure to citizens, the eventual enactment of the Administrative Information Disclosure Act 1999 (the AIDA) reflected the significant normative change that had already been achieved at the local government level. Although terms including ‘transparency’ and ‘accountability’ had barely entered into mainstream discourse before, these concepts gained increasing credence across Japanese society as more progressive local governments exercised their constitutional autonomy from the national government and sought to incorporate disclosure reforms in their jurisdiction. Likewise, the use of these newly created legal avenues to expose public officials’ misuse of public funds have been credited with further increasing public awareness and support for information disclosure reforms. Whether or not Repeta can rightly claim a ‘national consensus’ in favour of information disclosure reform by the early 1980s, it is nevertheless true that a substantial change in the normative agenda in relation to information disclosure had occurred by the time of the 1999 Heisei reforms. By then, each prefecture had initiated disclosure guidelines or ordinances.

25 Kingston, Japan’s Quiet Transformation, above n 4, 46.
29 Kingston, Japan’s Quiet Transformation, above n 4, 46.
31 Ibid., 6.
1999 the need for government to respond to all information disclosure requests, this symbolised the national government’s acceptance of the changed normative agenda in citizen–state relations. Article 1 of the AIDA, for example, stated its perceived necessity in ‘ensuring that government fulfils its duty to explain its various operations to the people and contributing to the promotion of a fair and democratic administration subject to the proper understanding and criticism of the people’. Therefore, while the Heisei reforms in favour of information disclosure can more accurately be said to have mirrored a marked social transformation rather than having been the cause of this change, they undoubtedly reposition the bureaucracy in Japanese society.

However, while these reforms seek to reshape Japan’s citizen–state relations, the extent of behavioural change towards disclosure has been limited due to institutional dynamics and the bureaucracy’s reluctance to relinquish its historically privileged position in Japanese society. While some have suggested that the bureaucracy’s control over staffing decisions of the Supreme Court may be responsible for the latter’s general reluctance to rule in favour of information disclosure, their willingness to overrule lower court decisions excepting governments from disclosure requirements at best demonstrate that judicial attitudes have been mixed. By contrast, the bureaucracy’s response to the reforms has been less surprising. Reflecting Kingston’s observation that ‘old habits cannot be abruptly reversed by legal fiat’, the bureaucracy has resisted the adaptation to a relationship of accountability to citizens. Here, the bureaucracy has been accused of inefficiently handling disclosure requests and having engaged in a ‘time-consuming process of weeding out “inconvenient” documents’ prior to the law’s commencement. Likewise, Boling’s suspicion that the ‘bureaucracy’s law-drafting monopoly’ would result in ‘ambiguous’ legislative terms allowing bureaucrats continuing discretion has been vindicated. The law, as it is drafted, provides for access to ‘documents held by the administration’, and denies recourse to require disclosure where a document containing certain information has not been generated or has already been disposed of. Therefore, while the requirement to put in place procedures

32 See e.g. Kingston, Japan’s Quiet Transformation, above n 4, 52, 56.
36 Kingston, Japan’s Quiet Transformation, above n 4, 48, 54.
37 Ibid., 48, 54.
38 Ibid., 53, 56.
39 Boling, above n 26, 20, 37; see also Kingston, Japan’s Quiet Transformation, above n 4, 54.
for the handling of information since the law was introduced may couple with bureaucracy training programs to bring about a significant longer-term behavioural change towards transparency, the Heisei reforms of themselves have proven a flawed attempt to achieve this new normative agenda thus far.

Corporate governance reforms

In the area of corporate governance, the Heisei reforms’ attempts to reorient the emphasis from preserving stakeholder relationships to protecting shareholder interests demonstrate an attempt to significantly transform Japanese commercial society. Previously, Japan’s normative agenda promoted a ‘community firm’ model of corporate governance that aimed primarily to serve their stakeholder base of employees, institutional investors and business partners rather than their shareholders.41 Owing to the social and political realities of the postwar economy that generated serious labour unrest at the time, corporations became convinced that strong labour-management relations and fixed, long-term employment ensured the firm’s productivity.42 Moreover, to secure stability of their operations, firms offered their trading partners, and the Japanese banks that funded their corporate activities, substantial shareholdings as recognition of continuing business relationships.43 Coupled with Japanese commercial society’s basic belief that supervision and management must be integrated to coordinate long-term growth strategies,44 this normative agenda fostered a longstanding system of internal corporate monitoring and weak shareholder position that reinforced managerial discretion in firms’ operations.45 Here, the commercial norm was that monitoring was based on informal peer review and other internal social pressures.46 Whereas this ‘traditional’ corporate model was credited with Japan’s prior economic success,47 it was later seen as a serious flaw that concealed corporate misdemeanours and undermined the efficiency of corporate activity when the Japanese economy collapsed.48 Prompted also by the increasing proportion of institutional shareholders with profit motives and

42 John Buchanan and Simon Deakin, ‘In the Shadow of Corporate Governance Reform: Change and Continuity in Managerial Practice at Listed Companies in Japan’ in D. Hugh Whittaker and Simon Deakin (eds), Corporate Governance and Managerial Reform in Japan (Oxford University Press, 2009) 29, 32.
44 Buchanan and Deakin, above n 42, 32–33.
45 Ibid., 41–2; see e.g. Paul Sheard, ‘Interlocking Shareholdings and Corporate Governance’, in Masahiko Aoki and Ronald Dore (eds), The Japanese Firm: Sources of Competitive Strength (Oxford University Press, 1994) 310, 311; Buchanan and Deakin, above n 42, 49.
47 Buchanan and Deakin, above n 42, 32.
48 Ibid., 32–4.
mounting shareholder activism, reforms to reshape the ‘traditional’ normative agenda have since turned to US models of corporate governance and sought to prioritise current shareholder interests in corporate transparency and efficiency instead. To this extent, the Heisei corporate governance reforms have attempted to significantly transform the normative agenda that has previously guided Japanese commercial society.

However, the extent to which Japanese commercial society’s normative agenda has actually been reshaped through legal reform should not be overstated. Here, deliberations to strengthen external monitoring have confronted corporate Japan’s longstanding stakeholder interests and commercial norms. These include the expectation for corporations to offer job security and the tacit understanding that managers remain in the best position to run the firm. Far from framing laws to modify longstanding corporate structures, the new reforms were conceived in a way that suited pre-existing commercial norms. The introduction of an optional ‘companies with committees’ system as a measure to enhance corporate transparency is illustrative here. While this granted external directors a stronger role in reviewing corporate finances, several reprieves including its optional application impede the extent to which corporate transparency and efficiency may be improved. For instance, these external directors may also be officers of parent companies. Since these officers are linked to the firm through business interests and thus not truly independent, they may not provide an adequate check and balance on the firm’s managerial discretion. In granting corporations significant latitude to continue prioritising stakeholder interests, the legal reforms remain ill-equipped to conceive a normative shift towards prioritising shareholder interests. Accordingly, rather than wholly adopting US models of corporate governance, Japanese laws have only adopted aspects that are reconcilable with existing socioeconomic structures. Therefore, it would

49 See e.g. Takaya Seki, ‘Legal Reform and Shareholder Activism by Institutional Investors in Japan’ (2005) 13 Corporate Governance: An International Review 377; Buchanan and Deakin, above n 42, 47.
52 Buchanan and Deakin, above n 42, 60; see e.g. Ronald Dore, ‘Insider Management and Board Reform: For Whose Benefit?’ in Masahiko Aoki, Gregory Jackson and Hideaki Miyajima (eds), Corporate Governance in Japan: Institutional Change and Organizational Diversity (Oxford University Press, 2007) 370, 390.
53 See e.g. Buchanan and Deakin, above n 42, 36–8.
54 Buchanan and Deakin, above n 42, 37.
55 Ibid.
56 Ibid., 60.
be misguided to conclude that corporate governance reforms have significantly transformed the normative agenda of Japanese commercial society from its predominant stakeholder protection emphasis.

Whether or not the Heisei reforms reflect a significant normative shift, it remains the case that behavioural change in corporate Japan has fallen short of the aspirations set by legal reform. Due to persisting convictions in the need to exclude external influence and to preserve the ‘community firm’, 58 most of corporate Japan’s ‘traditional’ practices persist.59 As of 2008, for instance, the Tokyo Stock Exchange reported that only 4.6 per cent of listed companies have implemented the ‘company with committees’ system.60 Even where change has occurred, it has been as much a natural response to current economic and social circumstances as a reaction to the legal reforms. Here, Buchanan and Deakin argue that corporate behaviour had started to shift in this direction even prior to the Heisei reforms by responding quickly to globalisation and the need to enhance their efficiency.61 Companies like Sony and Toyota had, for example, already started modifying their business structures in the early 1990s to clarify managerial responsibilities and speed up decision-making.62 Rather than shaping corporate behaviour, these trends reflect how corporate governance reforms have at least in part mirrored existing corporate practices. Accordingly, legal reforms have driven behavioural change in Japan’s commercial society only to a minimal extent.

Nevertheless, by formalising a renewed normative agenda in a legal framework, Japan’s corporate governance reforms have provided another basis upon which firms can mediate competing economic and social imperatives in their corporate structure to adapt to changing circumstances. On the economic front, corporate managers have increasingly recognised the benefits of enhancing international competitiveness by improving corporate transparency and efficiency.63 However, this has confronted enduring expectations across Japanese commercial society that ‘managers should be left to manage’. 64 For example, despite the substantial returns that shareholders could expect if a takeover were permitted to proceed unimpeded, both shareholders and the Japanese courts have acquiesced in managerial decisions to establish anti-takeover defences

58 Buchanan and Deakin, above n 42, 60.
59 Ibid.; see also Inagami and Whittaker, above n 51, 109–10.
60 Buchanan and Deakin, above n 42, 38.
61 Ibid., 42–3.
62 Ibid., 35, 43.
64 Buchanan and Deakin, above n 42, 51.
and protect stakeholders. On the social front, despite marginal changes to corporate employment conditions and national attitudes about the viability of the ‘community firm’, deep-seated expectations that corporations will offer long-term employment have persisted. Accordingly, while there have been mounting pressures to radically change a firm’s formal structures to match ‘global standards’ of corporate transparency and efficiency, there has also been a need to preserve a large part of existing internal operations to fulﬁl other social and economic norms. Here, the optional ‘company with committees’ system and its several dispensations, for example, have allowed ﬁrms to alter corporate structures in a ﬂexible manner that allows them precisely to achieve these twin goals. Therefore, by providing a formal basis upon which ﬁrms can mediate the conﬂicting dynamics that exist in Japanese commercial society, legal reforms have been a facilitating, albeit not a necessary or predominant, condition of behavioural change in corporate Japan.

Gender equality reforms

As for gender equality issues, the Heisei reforms demonstrate a progressive yet incremental reworking of Japanese society’s social norms. Since feudal times, Confucian principles had been deeply imbued in Japan’s political and social norms as their endorsement of hierarchical power relationships was a useful tool for regulating societal relations. Accordingly, the Japanese conceived gender divisions according to Confucian precepts, where women were more suited to the caregiver role in the household while men worked outside and provided for the family. Despite subsequently being granted gender equality under the postwar Japanese Constitution, the imposition of foreign standards confronted this persistent inﬂuence of Confucian principles on social attitudes and thus failed to take on legal signiﬁcance. Courts also rejected the constitutional

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67 See e.g. Japan Corporate Governance Forum (JCGF), Corporate Governance Principles – A Japanese View (Interim Report) (1997); Ahmadjian, above n 50, 216, 222.
68 See e.g. Buchanan and Deakin, above n 42, 38–45.
69 Buchanan and Deakin, above n 42, 38–42.
norm of gender equality as ‘ahead of the times’.74 Following the Japanese economy’s ‘lost decade’, however, political actors were able to reframe existing gender inequality from a characteristic that was associated with the ‘virtues’ of Confucian social order to one that impeded Japan’s realisation of economic goals.75 Here, progressivist political actors were able to align their political agenda of increasing female participation in the workforce with the pressing economic imperative of enhancing the economy’s productivity in an ageing society.76 By ushering in a different understanding of gender roles within the government, these favourable economic circumstances and political opportunism triggered an ‘extension of unexpected rights to women … within a short period of time’.77 Reforms such as the Basic Law for a Gender-Equal Society have not only prescribed against stereotyped gender divisions but also required the state to create institutional mechanisms promoting equal gender participation at all levels of society.78 For example, while women were seen as the primary providers of elderly care under the patriarchal style of government policy before, the mandatory ‘Long-Term Care Insurance’ policy transferred a substantial part of these household responsibilities to the state by providing caregiving benefits to the aged.79 This demonstrates a conscious shift in Japan’s legal framework to remove structural impediments to female participation outside the home.80 To be sure, some pre-existing legal structures remain untouched. For example, Japan’s family tax policy continues to incentivise non-participation of females in the permanent workforce.81 Nevertheless, in seeking to weaken impediments to achieving gender equality in existing policy and social norms for the first time, the Heisei reforms have signalled an ambitious but gradual shift from one that curtails female participation outside the household to one that promotes it.

However, while the principles of gender equality have been endorsed by the new laws, their incorporation into practice has not been fully realised. Although gender equality policies have been driven by stronger political will and supported by ‘an unprecedented number of policy changes and [legislative] reforms at the national level’,82 their development has merely demonstrated the capacity of sectional interests to achieve specific policy outputs through strategic political manoeuvring. Indeed, while then Prime Minister Hashimoto Ryutaro was able

74 Ibid., 98.
76 Ibid.
77 Takao, above n 72, 144.
78 See e.g. Takao, above n 72, 142–3.
79 Ibid., 141.
80 See e.g. Takao, above n 72, 141–2.
82 Takao, above n 72, 135.
to position gender equality among the top priorities of Japan’s political agenda by justifying it as an economic necessity, there was no indication at the time that this progressive orientation represented the views of the LDP government or of Japanese society as a whole.83 While there had been increasing activism by women’s political groups that challenged male-dominated hierarchies of power,84 there remained a need for these separate clusters of sectional interests to engage with wider social attitudes in Japan.85 Moreover, a combination of longstanding inclinations to preserve male supremacy among top-level officers in a wide variety of Japanese organisations86 and existing disincentives for women to participate outside the household have contributed to inertia in behavioural change.87 On the political front, despite recognising the need for increased female participation across Japanese society, North highlights that current government deliberations about breaking down gender stereotypes centre around ‘enabl[ing] women to work and care rather than helping men to care’.88 In the corporate sphere, company policies restricting women’s hours of employment and availability of parental leave for men continue to support the defined gender roles in family work under Confucian principles.89 Therefore, absent any indications of substantial change in other policies and practices following the Heisei reforms, to equate the effective capture of political decision-making by particular interest groups with wider behavioural change of Japanese society would be misguided.

Implications

By evaluating the processes of legal change with the aid of systems theory, it becomes evident that the transformative power of the Heisei reforms lies not in the achievement of outcomes but in expediting the processes of re-evaluating societal norms. To bring about successful legal change, the nature of legal reforms must be tailored to a society’s idiosyncrasies. In a society governed by informal norms rather than by the ‘rule of law’ such as Japan,90 legal reforms

83 Osawa, above n 75, 3–5.
85 See e.g. Elisabeth Porter, “‘Engendering the State: The International Diffusion of Women’s Human Rights’” – Book Review’ (2011) 17(1) Social Identities, 163, 163.
86 See e.g. Tompkins, above n 81, 5–10; North, above n 70, 25; Takao, above n 72, 142.
87 Osawa, above n 75, 18.
88 North, above n 70, 25.
90 Goodman, above n 73, 3; Tom Ginsburg, ‘Japanese Legal Reform in Historical Perspective’ (Draft, University of Illinois College of Law, 28 October 2002) 2.
must start by recognising the virtues of legal instruments as a symbolic tool for furthering discourse and thus re-evaluating existing societal norms rather than necessarily of themselves bringing about behavioural change.

As demonstrated in the three case studies above, by harnessing concepts of government transparency, shareholder interests and gender equality, the Heisei reform processes have provided a renewed site of negotiation between old and new interests. While this involved a rejuvenated compromise between pre-existing stakeholder and new shareholder interests through corporate governance reforms, it extended to reinvigorated citizen-state and gender relations in the cases of information disclosure and gender equality policies respectively. In this way, the Heisei reforms have effectively captured the nature of law and society’s interaction in Japan, where legal devices must go through the process of influencing societal discourse and, by extension, their underlying norms in order to establish the foundations of structural change. Despite the fitful and ambiguous pathways that normative and behavioural change have taken in all these instances of reform, they merely reflect Japanese society’s process of mediating tensions underlying political, economic and social norms in reaching a new equilibrium. Therefore, by strategically employing legal devices not merely for their instrumental value in achieving specific reform objectives in the short term but as a means to frame political, economic and social discourse and gradually influence their underlying norms, the Heisei reforms have sought to squarely engage with the relationship between Japanese law and society and thus have effectively established the foundations for longer-term transformative change.

Conclusion

By applying a systems theory approach to the case studies of information disclosure, corporate governance and gender equality, this paper argues that the Heisei reforms have reshaped political, economic and social dimensions of Japanese society in ways that other approaches may have overlooked. While the Heisei reforms have not instigated significant societal transformation in Japan as an instrumental device, they have nevertheless fulfilled an important symbolic purpose by starting to reshape societal discourse and its underlying norms in achieving long-term change. Altogether, an evaluation of the Heisei reforms presents a cautionary tale which calls into question how scholars understand the relationship between law and society across different contexts, and which rejects the simplistic assumption that law is purely an instrumental device to achieve societal reform in every circumstance.
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Towards a ‘broadened narrow’: Revaluing the change of position defence in Australian restitution law

DEREK M. BAYLEY

Abstract

Where a person is enriched by a mistaken payment, under the law of restitution, that person must repay the amount mistakenly provided. Yet if the payer fails to realise their mistake, and an enriched recipient, acting in good faith, beneficially relies on the payment to change his/her position, by the principles articulated in the landmark by the House of Lords decision in Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 A.C. 548, the recipient may resist repayment under the ‘change of position’ defence. In Australia, one year later, David Securities v Commonwealth Bank of Australia (1992) 127 CLR 353 introduced a similar, but subtly different version of the change of position defence into Australian law. Whereas the UK defence undertakes broad examination of the equities of the defendant’s situation in considering whether retention of the mistaken payment is justified, Australian law instead examines whether the recipient detrimentally relied upon payment. The Australian change of position defence is perhaps a narrow version, it will succeed in fewer circumstances, and will not protect a defendant who spontaneously loses payment before expending it, as no reliance on the payment would occur. Nevertheless, Australia’s narrow defence is slowly broadening. This is due to indecisive treatment and unintentional ambiguity by Australia’s High Court, and unconsidered application of imported legal analysis from the UK and the US, particularly of principles steeped in the language of ‘inequitably’ characterising the broad defence. This ‘broadened narrow’ change of position defence must now itself be changed, to rescue Australia’s narrow defence from the brink of doctrinal obscurity.
Introduction

In the modern history of restitution law, both the Australian and English legal systems have laboured to keep pace with other forums, due to the ‘belated discovery’ of the change of position defence to cases of unjust enrichment.1 Whereas the German and US legal systems have applied variants of the change of position defence for over 75 years,2 in England it was not until the landmark 1990 decision of Lipkin Gorman when the UK House of Lords finally conceded ‘[t]he principle is widely recognised throughout the common law world ... [and] its recognition ... is long overdue’.3 One year later, Australia’s High Court also recognised the existence of the change of position defence in David Securities.4 Whereas the change of position defence in the Anglo-Australian law of restitution remains very much ‘under construction’,5 its comparatively recent discovery has, encouragingly, sparked a ‘much fuller examination’ of its definition and basic principles than ever received in many other forums, including the US Courts.6

This analysis has been a mixed blessing. Robust debate around Australia’s current understanding of the change of position defence has generated disjointed academic analysis and confused application in Australian courts. This paper examines the roots of this confusion surrounding the change of position defence, offering a definition of the defence, before exploring its generally accepted bifurcation into broad and narrow conceptions. It is then argued that US and English models have permeated Australian interpretations of the defence by our courts and academics, leading to an undesirable crossbred version (the ‘broadened narrow’ conception). Finally, this paper concludes that the future of the change of position defence in Australia might reside in an Australian restatement delimiting the defence more concisely, similar in form, though not in substance, to the US and English restatement models.

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1 American Law Institute, Restatement Third: Restitution and Unjust Enrichment (St Paul, MN American Law Institute Publishers 2011), § 65 Reporter’s Note, Comment A (hereinafter ‘R3RUE’).
5 Mächtel, above n 2, 24.
6 R3RUE, above n 1, § 65 Reporter’s Note Comment A.
Towards a ‘broadened narrow’

Defining the change of position defence

An elementary definition

The law of restitution allows any payment causing a person to become enriched to be retained, provided there is no ground rendering the retention unjust.7 Where it is unjust, a defendant must make restitution of that enrichment.8

Such a defendant can resist repayment of the enriching sum where he/she establishes a change of position defence.9 Though the level of conceptual disagreement surrounding the defence's operation makes it difficult to establish a simple working definition, Bant’s analysis suggests the following essential elements constitute a valid defence:10

- a claimant pays a defendant an amount of money under a spontaneous mistake; and
- the claimant then pursues his/her personal rights to restitution (not tortious/contractual rights) to recover the payment; whereas
- the defendant, acting in good faith and in reliance on the security of receipt of the payment, has changed his/her position by applying the payment to their benefit.

The roots of the change of position defence

An early hint at the change of position defence appears in the 18th-century case of Moses v Macferlan.11 The UK House of Lords held that a person resisting a restitutionary claim ‘may defend himself by everything which [shows] that the claimant, ex aequo et bono [“from equity and conscience”] is not entitled to the whole … demand’.12 Despite this formulation, the House of Lords expressly found against the existence of an explicit change of position defence in the 1913 case of Baylis v Bishop of London.13 Hamilton LJ asserted a transparent legal system did not allow resisting a claim on grounds of vague, discretionary and unprincipled justice.14 This case proved a long-running stumbling block to the legitimisation of the defence in English law.

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8 Ibid., 673, see also Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, [61]–[62] (Lord Wright).
10 Ibid., 1010 (Lord Mansfield).
11 Baylis v Bishop of London [1913] 1 Ch. 12 (hereinafter ‘Baylis’).
12 Ibid., 140 (Hamilton LJ).
In the seminal case of *Lipkin Gorman*, the House of Lords overruled the *Baylis* prohibition, and articulated the modern starting point for examination of the primary elements of the change of position defence.\(^{15}\) Lord Goff’s *Lipkin Gorman* reasoning explains ‘the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full’,\(^{16}\) noting also ‘nothing should … inhibit development … on a case by case basis’.\(^{17}\)

### Broad and narrow approaches to the defence

One might note that under the *Lipkin Gorman* formulation, the primary element of the change of position defence is *inequitability*, inviting a court to examine the equities of a defendant’s situation, and therefore his/her liability to make restitution to the claimant on a case by case basis. This is to be contrasted with the Australian formulation in *David Securities*, in which the High Court identified as central to the Australian change of position defence, that ‘… the defendant act[s] to his/her detriment on the faith of the receipt’.

Although it is argued the judgments of *Lipkin Gorman* and *David Securities* envisaged a unified defence,\(^{18}\) those cases instead form what are now conventionally considered to be two strands of ‘analytically distinct’ reasoning,\(^{19}\) respectively, the broad and narrow approaches to change of position.

The divergence between the broad *Lipkin Gorman* approach and the narrow *David Securities* approach is recognised with differing emphases. Bant focuses on a reliance factor,\(^{20}\) claiming the broad version of the defence does not necessitate reliance on the payment, whereas the narrow version does. Birks and Barker, however, explain the split focuses upon a denial of enrichment; the broad defence does not deny enrichment, but the narrow approach does.\(^{21}\) These nuances are discussed further below.

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15 Bant, above n 10, 125.
17 Ibid.
20 Bant, above n 10, 4.
Towards a ‘broadened narrow’

The broad approach to the defence

England’s broad change of position defence, as adopted in *Lipkin Gorman*, would not deny a defendant becomes enriched by a mistaken payment.22 Instead, the defendant’s expenditure of the mistaken payment, without notice of the claim, shifts the balance of justice between the parties, rendering it unfair or unjust for the defendant to render restitution.

The broad defence therefore prompts examination of unjust factors which outweigh the justice of allowing the claimant restitution.23 Such unjust factors have seemingly focused on the defendant’s bad faith, including undue influence, duress, and exploitation of weakness.24 The factors which the Court may consider are, however, not limitless.25 In *Scottish Equitable plc v Derby*,26 the English Court of Appeal explained even a broad approach to the defence ‘must proceed on the basis of principle, not sympathy’ so as to avoid ‘disintegration’ into a case by case discretionary analysis of the justice of individual facts’.27 Bant also considers restraining the judicial approach to be appropriate, warning against ‘the threat of unbridled judicial discretion’.28

Certain decisions of the broad approach, including the much discussed New Zealand Court of Appeal judgment in *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* appear to adjudicate proceedings on a worryingly purely subjective basis, under the guise of ‘weighing the equities’.29 It is not clear whether even the broad defence allows the Court licence to delve into analysis of the relative fault of the parties to discretionarily apportion loss.

A perhaps more nebulous example appears in the case of *Philip Collins v Davis*,30 where Parker J adopted a relaxed approach to the standard of proof required to be met by two musician defendants periodically overpaid. This decision is on the hand supported by Justice Edelman of the Western Australian Supreme Court, writing extrajudicially, as validly within the limits of a judge’s ‘idiosyncratic discretion’,31 whereas the same decision is simultaneously criticised by Barker as a decision potentially undermining the ‘conceptual stability of the defence’ due to over-exercise of discretion.32

22 Barker and Grantham, above n 18, 439.
27 Ibid., 828.
28 Bant, above n 10, 1 (footnote 3).
30 [2000] 3 All ER 806, [827].
31 Edelman, above n 25, 1011.
32 Barker and Grantham, above n 18, 439.
Clearly, in England’s developmental phase of the broad defence, the tension between mere extension of the defence’s fundamental principles and straying into discretionary analysis must be respected, balancing ‘the requirement to accommodate both certainty and flexibility … [in] novel situations’.

The narrow approach to the defence

When understanding the narrow approach to the defence, it must be first conceived of as very analytically distinct from the broad defence. The narrow defence requires either detrimental reliance (per Bant), or denial of enrichment of a mistaken payment (per Birks), as the foundational element of the defence’s availability to a person resisting restitution. This, in turn, makes the narrow view to some commentators the same as estoppel without the representation.

Consonant with the Australian High Court’s approach in David Securities, Bant contends the narrow approach requires a defendant’s detrimental reliance on a mistaken payment in order to establish the defence. Reliance would hence extend liability to defendants in cases of theft or destruction of mistaken payment before the defendant could expend the money, as they have not actively relied on the payment.

Yet Birks considers the narrow defence operates upon a denial of enrichment, proposing that the narrow defence would not consider the defendant enriched, because the defendant’s expenditure of mistakenly conferred money to their detriment causes ‘subjective devaluation’. Subjective devaluation is caused by the vitiation of the defendant’s consent in his/her choice to expend the money, without knowledge of the claimant’s impending claim against him/her. This subjective devaluation causes disenrichment.

This author suggests the two approaches are generally reconcilable: both contemplate the defendant’s detriment. Bant argues detriment occurs upon the irreversibility of reliance upon the payment, whereas Birks considers detriment as the devaluation experienced by the defendant after his/her uninformed entry into expenditure.

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34 Birks, above n 19, 209.
35 Bant, above n 10, 4.
37 Bant, above n 10, 4.
38 Ibid.
39 Birks, above n 21, 413–414.
40 Ibid.
Towards a ‘broadened narrow’

It is unnecessary to resolve this tension, as Australian courts in *David Securities*, *Alpha Wealth* and most recently in *Citigroup* appear to recognise the broad and narrow approaches as being split along the issue of reliance, favouring application of Bant’s taxonomy.\(^{41}\)

Thus, under the narrow approach, as requiring reliance upon the receipt of the payment, factual causation must be established by the defendant linking the reliance on payment and the defendant’s subsequent expenditure.\(^{42}\) This is a matter of context, determined by the circumstances of both payment and receipt.\(^{43}\)

The modern Australian approach: Broadening the narrow

This section examines the result when the broad and the narrow conceptions of the defence converge. As explored above, the narrow reliance (or disenrichment) version of the change of position defence has become strongly ingrained in Australian law, by virtue of *David Securities*, which focuses on detrimental reliance as the cornerstone of the defence.\(^{44}\) This paper submits imprecision in the subsequent reception and application of the defence has inadvertently led to a broadening of the narrow version, which has resulted in what Justice Edelman, writing academically, describes as ‘lingering uncertainty’ in relation to the fundamental principles of the narrow defence.\(^{45}\)

This doctrinal uncertainty is clearly undesirable, and the fault is twofold. It lies firstly in divergences of academic opinion in unjust enrichment law, which, particularly regarding the blurred line between broad and narrow defences, contains ideas ‘as mutually exclusive as they are forceful’.\(^{46}\) But, more importantly, it appears academic conflict regarding the limits of broad and narrow conceptions has spilled over into the Australian judiciary’s application of narrow principles, which means that the state of the law as it has been declared is also somewhat chaotic.

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\(^{41}\) *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* [2008] WASCA 119, 203; *Citigroup Pty Limited v National Australia Bank Limited* [2012] NSWCA 381 (4 December 2012).

\(^{42}\) *David Securities* (1992) 127 CLR 353, [385].


\(^{44}\) *David Securities* (1992) 127 CLR 353, [385].


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The High Court’s unintentional ambiguity

In *ANZ v Westpac*, which predates *David Securities*, Australia’s High Court signposted its willingness to recognise the change of position defence, referring to as acceptable ‘an adverse change of position by the recipient in good faith and in reliance on the payment … which the law recognises would make … restitution unjust’. This approach clearly foreshadowed the narrow reliance test later favoured in *David Securities*.

Despite the Australian judiciary’s obvious divergence from the English broad approach in *David Securities*, it appears that case did not deal compellingly with *Lipkin Gorman*. In *EA Negri*, Ross AJA reviews *Lipkin Gorman*’s treatment by the High Court. He concludes that although *Lipkin Gorman* appears the reason for the defence’s inception under Australian law, where it is considered ‘a controversial statement’, perhaps unintentionally, there remains inherent ambiguity as to its status; explaining, somewhat cryptically, ‘whether *Lipkin Gorman* will be followed in this country remains to be seen’.

The High Court’s confusion continues. As Barrett AJA notes in *Citigroup*, the High Court cited *Lipkin Gorman* in *Roxborough* without apparent disapproval; and in *Farah Constructions* distinguished *Lipkin Gorman* without suggesting its reasoning was incorrect.

*Lipkin Gorman*’s broad approach has, therefore, never been fully rejected in Australian law, which has allowed speculation surrounding its applicability to thrive.

Preserving the narrow defence

It is this author’s contention that the narrow defence must prevail. In *David Securities*, in adopting a detrimental reliance approach to the change of position defence, it is clear the High Court intended to distinguish the Australian test from its English counterpart. The reasoning of *ANZ v Westpac* and the High Court’s wording of the change of position defence in *David Securities*, which focuses on reliance and relies explicitly on Peter Birks’ narrow scholarship, indicates the High Court intended what Allsop P describes in *Hills Industries* as ‘a narrower

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48 Ibid.
49 *EA Negri Pty Ltd v Technip Oceania Pty Ltd* [2010] VSCA 44.
53 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, [66].
or at least differently structured approach in Australia [to] England’. This is supported by Barrett AJA in *Citigroup*, who concludes *Lipkin Gorman, Dextra Bank* and *Waitaki* indicate ‘a broader change of position defence than the High Court has … recognised’.

Ironically, it appears the High Court, in declining to comprehensively dismiss the *Lipkin Gorman* formulation of the change of position defence, and by the outright endorsement of *Lipkin Gorman* in subsequent cases, has left the door to a broader *Lipkin Gorman* conception ajar. This author suggests that in *David Securities*, the High Court was perhaps not explicit enough in rejecting the form of the English change of position formulation, in part due its zealousness to accept and receive the defence at large in Australian law.

The High Court’s clear establishment in *David Securities* of a different, narrower formulation to the English test must be respected, not undermined. The narrow approach was clearly envisaged by *ANZ v Westpac*, and the broad unjust factors approach, as considered above in discussion of the broad defence, might be more susceptible to conceptual instability than the narrow defence, under continuous expansion and contraction due to the idiosyncratic exercise of judicial power. The narrow version, requiring objectively provable detrimental reliance, inserts a factual bulwark against a judge applying discretionary notions of what is fair and just to found acceptance of a defendant’s circumstances as falling within the realms of a change of position, preventing what Edelman considers broad notions of ‘palm-tree justice’. Australia’s trend towards broadening the narrow conception of the change of position defence should be halted.

Legal scholarship subverting the narrow defence

The conflation of broad and narrow has also occurred as prominent legal scholars, including the Honourable Justice William Gummow, have rallied against Australia’s narrow conception of the defence. Justice Gummow postulates that our jurists engage in ‘over-definition and dissection’ of the defence, which ‘divert[s] attention’ from what he considers ‘the central question; whether it would be inequitable for the claimant to require repayment’. With respect, it appears Justice Gummow’s comments place inequity in the centre of the inquiry, contradicting the true central element of the Australian defence: the *David Securities* test of whether there has been ‘detrimental reliance’ by the defendant upon the payment.

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56 Ibid., [61] (Barrett AJA).
57 Barker and Grantham, above n 18, 439.
58 Edelman, above n 25, 1011.
59 Gummow, above n 33, 887.
The learned trial judge in *Citigroup*, Hammerschlag J, provides a contemporary example of the judiciary straying into dangerous territory applying Justice Gummow’s comments. Hammerschlag J reasoned in that case that ‘[b]oth parties were duped … it would lead to an inequitable result were Citibank to be made whole at the expense of NAB’.\(^{60}\) This result, upheld by the Court of Appeal (though, importantly, readjusted within the *David Securities* test) appears to apply a *Lipkin Gorman*-style examination of the equities of the case, rather than considering relevant detrimental reliance. Such reasoning evidences a propensity towards the broadening of Australia’s narrow conception.

**Reliance on substantive United States law**

Kremer notes many Australian cases cite the American Restatements with unelaborated approval.\(^ {61}\) Even Australia’s most contemporary restitution cases of *Equuscorp* and *Hills Industries* directly cite the R3RUE in support of legal propositions,\(^ {62}\) and extrajudicially, Justice Gummow appears to endorse R3RUE’s substantive application in Australia.\(^ {63}\)

The unfettered endorsement of R3RUE threatens to broaden Australia’s narrow conception on several grounds in ways repugnant to *David Securities*.

**Examination of equities, not reliance**

At § 65, R3RUE provides:

> The right … to restitution … because of a benefit received is … diminished if, after receipt of the benefit, circumstances have changed that it would be inequitable to require … restitution.

Although Kremer considers R3RUE § 65’s change of position defence consistent with High Court authority, but of broader scope,\(^ {64}\) that position appears paradoxical. Australia’s narrow change of position defence seems irreconcilable with a broader scope.

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\(^{62}\) *Equuscop Pty Ltd v Haxton; Equuscop Pty Ltd v Bassat; Equuscop Pty Ltd v Cunningham’s Warehouse Sales Pty Ltd* [2012] HCA 7 (8 March 2012), [38]; *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* [2012] NSWCA 380.

\(^{63}\) Kremer, above n 46, 1215 citing Gummow, above n 33, 884–889.

\(^{64}\) Ibid., 1214.
Fundamentally, § 65 encourages US Courts to weigh the inequities of the claimant’s and defendant’s positions, focusing upon an ‘abstract level of inequitability’,
65 more aligned to the UK version than Australia’s version of detrimental reliance. The commentary to § 65 condones idiosyncratic judicial analysis: ‘if restitution would result in manifest hardship, some courts will conclud expenditure … on ordinary living expenses makes it inequitable to require restitution’,
66 before citing with apparent approval such an instance in State ex rel Steger v Garber.
67 Firstly, Australia’s defence is not construed widely enough to cover living expenses,
68 and secondly, as considered above, even the breadth of the UK version does not consider inequitability an open category for discretionary analysis.
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Fault

Under R3RUE, it is recognised that the plaintiff’s negligence may be relevant when the defendant has changed position. Comment A to § 65 explains ‘… restitution, like the law of torts, assigns losses on … fault’.
70 Though fault has been accepted under the broad conception of the defence in Waitaki, where the Court sought to do ‘justice as between the parties’ such a principle overstretches the conventional broad doctrine, and any attempt to apportion loss based on relative fault criticised in the UK’s case of Dextra Bank as ‘hopelessly unstable’,
71 due perhaps to the potential undesirability of policy of allowing a defendant to keep a mistaken payment given by a claimant who may only be at fault due to their own carelessness.

For this reason, and by reason that the narrow approach does not allow an examination of relative fault, the R3RUE’s certainly has no place to be substantively applied in developing Australia’s change of position defence.

65  Edelman, above n 25, 1010.
66  R3RUE, above n 1, § 65 Reporter’s Note Comment C.
67  1979 WL 207282 (Ohio App. 6 Dist.).
69  Edelman, above n 25, 1009.
70  R3RUE, above n 1, § 65 Reporter’s Note Comment A.
71  National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd [1999] 2 NZLR 21, [228]–[229] (Thomas J); Dextra Bank & Trust Co. v Bank of Jamaica [2002] 1 All E.R. (Comm.) 19, [40].
‘Value received’ or ‘value surviving’ models

*R3RUE*’s § 65 defence adopts the ‘value received’ model to enrichment, calculating the defendant’s onus to disgorge with respect to the value mistakenly received, whereas Australia’s approach requires restitution on the equivalent of a ‘value surviving’ model, calculating the restitution amount as all that remains not spent on qualifying purchases.72

The above principles demonstrate that two defences fundamentally do not correlate, and the *R3RUE* model has no substantive place in Australian law.

Reform of the change of position defence: The case for Australia’s own restatement

The above discussion suggests serious doctrinal uncertainties in the current state of Australian scholarship, and proves ambiguity has allowed the narrow starting point in *David Securities* of Australian change of position defence to slowly broaden.

Though this paper cannot traverse in entirety the nature of the response needed to rectify Australia’s doctrinal issues, it advances the in-principle argument that we must review the law surrounding the change of position defence with considered illustration and commentary, providing a persuasive, paramount precedent; Australia needs a restatement mechanism similar to the *R3RUE*.

In 2012, Andrew Burrows attempted to restate the English Law of Restitution,73 which has been endorsed by Australian academic Barker as providing ‘concise, collaborative, personal, modernising and stabilising statement of the common law’.74 In this way, Barker argues the *ROEUE* has become ‘an important public platform for intellectual debate and a powerful centripetal force addressing legal fragmentation and uncertainty’.75 As this paper proves, such uncertainty exists under the Australian system, arguably on an even greater scale than in England, building a strong case for development of an Australian version.

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75 Ibid., 1.
Towards a ‘broadened narrow’

Additionally, the most important historical roadblock to the imposition of any such restatement, either binding as statute or otherwise has been the fear of stifling the development of the common law change of position defence.\(^{76}\) Such a concern is no longer valid. Our common law position has matured so far as to now be in disarray. Further, as Burrows suggests, an American-style restatement is not a legislative statement, not binding on courts, merely persuasive, so its function is educative and expressive, not overriding.\(^{77}\)

To this end, the Australian Restatement here proposed would not be a statutory encapsulation of the change of position (although it could be used as a precursor to one) in the style of New Zealand’s \textit{Judicature Act 1908} or Western Australia’s \textit{Property Law Act 1969}.\(^{78}\) That said, as Bant correctly suggests, these legislative change of position defences continue to exist alongside their common law counterparts, with minimal disturbance,\(^{79}\) as they are interpreted cumulatively rather than consecutively with common law principles.\(^{80}\)

**Conclusion**

The Australian conception of the change of position defence has received an extensive though confused examination at common law, proving a mixed blessing for practitioners and academics. In \textit{David Securities}, the High Court advanced detrimental reliance as the change of position defence’s central element, indicating Australia’s acceptance of the narrow branch of the defence, contra to \textit{Lipkin Gorman}’s broad approach. Yet the narrow defence’s treatment by an indecisive High Court and unconsidered application of imported legal analysis had seen the narrow defence slowly broaden, punctuated by unwelcome elements of the inequitable analysis of the broad defence. It is this trend which requires decisive correction. Drawing on the form, not substance, of existing restatement models, Australia must draft its own clear and paramount restatement framework to end confusion. Like Lord Goff’s concession in \textit{Lipkin Gorman} that English law had fallen behind other legal systems in the law of unjust enrichment it is now Australia’s turn to accept,\(^{81}\) with commensurate humility, that our position is equally untenable: the time to reform the change of position defence is long overdue.


\(^{77}\) Barker, above n 74, 15.

\(^{78}\) Judicature Act 1908 (NZ) s 94B; Property Law Act 1969 (WA) s 125.

\(^{79}\) Bant, above n 10, 251.

\(^{80}\) Ibid.

Acknowledgments

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Criminal minds: The influence of the monoamine oxidase A genotype and environmental stressors on aggressive behaviour

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This article was published in December 2013 in Issue 2 of the Burgmann Journal (Taylor, 2013). A synopsis of the article follows.

The notion that genes play an important role in disease susceptibility has been widely accepted, though many people find it difficult to acknowledge a similar link between genetics and predispositions to particular behaviour. Despite this scepticism, current behavioural models suggest that genetic variants influence neurotransmitter pathways in brain regions associated with cognitive function and the encoding of emotional intent (Caspi et al., 2002; Foley et al., 2004; Widom & Brzustowicz, 2006). Biological studies of families of convicted criminals have found that there is a higher rate of criminal behaviour among the relatives of criminals, suggesting a genetic constituent to certain criminal behavioural tendencies (Widom, 1989; Brunner et al., 1993).

Monoamine oxidase A (MAOA) is a gene located on the X chromosome that regulates the release and degradation of dopamine, serotonin and norepinephrine – the neurotransmitters linked to aggressive and impulsive behaviour. Due to the vital role MAOA plays in the inactivation of neurotransmitters, MAOA dysfunction (too much or too little MAOA activity) was proposed as a potential genetic predictor of aggressive behaviour. A series of studies have shown a significant correlation between a deficiency in the MAOA gene and an increased risk of aggressive behaviour (Garpenstrand et al., 2002). However, correlation does not equal causation and thus other mutations or polymorphisms in the gene may alter the expression of a gene or its structure and function. In addition, genes do not operate independently; rather they function against a background in which other factors are crucial.

Further research therefore focused on examining gene by environmental interactions to understand the contributions of individual loci to aggressive criminal behaviour. Childhood maltreatment was an environmental factor which strongly correlated with aggressive criminal behaviour and was therefore suggested as a potential environment trigger. It was hypothesised that at
sensitive stages during development, changes in MAOA balance triggered by severe environmental factors could disrupt MAOA-mediated brain development (Caspi et al., 2002).

Based on molecular genetic findings, Caspi’s and colleagues’ (2002) pioneering gene by environment MAOA study suggested that differences in MAOA genotype moderate the relationship between childhood maltreatment and later aggressive behaviour. While many subsequent studies replicated these findings, some studies did not find a gene (MAOA) by environment (maltreatment) interaction (Huizinga et al., 2006; Haberstick et al., 2005). These inconsistencies between studies have resulted in particular gaps in the literature pertaining to levels of brain MAOA activity and its potential influence on individual differences in aggressive behaviour. Further studies have aimed at resolving these discrepancies by focusing on a multiple-risk environmental factor hypothesis and determining the sensitive stages in which MAOA affects brain development (Fergusson et al., 2012). Recent studies have also challenged the applicability of earlier studies on the wider, more diverse populations (Widom & Brzustowicz, 2006; McCord et al., 2001).

‘Criminal Minds’ focuses on these epigenetic studies of MAOA and aggressive behaviour. The paper discusses the strengths and limitations of each study, and the impacts their findings will have on society and the field of neuroscience.

Bibliography


Evaluation of headphone effects on performance in the LiSN & Learn auditory training software

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Abstract

Spatial processing is the ability to use binaural cues to separate and group sounds that are important for everyday listening. Spatial processing disorder (SPD) is the reduced ability to utilise binaural cues to segregate sounds. LiSN & Learn is auditory training software designed to remediate SPD, and in its current form can only be administered with a specific type of headphone (Sennheiser HD 215). The purpose of this study was to evaluate the effect that various headphones had on spatial processing ability in LiSN & Learn, with the aim of allowing flexibility of choice and increasing access to the program. Fourteen participants played training games across a counterbalanced test-retest design that measured speech reception thresholds (SRTs) across seven headphones. The results indicate the effect of the headphone was relatively minor, and performance in spatial processing had a strong correlation with the ability of the headphone to reproduce high frequencies. As such, it is recommended that any commercially available headphone with a high-frequency response broadly similar to a Sennheiser HD 215 is suitable for use with LiSN & Learn.

Introduction

Cherry (1957) first proposed the ‘Cocktail Party Problem’ to illustrate the capacity to listen to one speaker in the company of many competing voices. This ability to selectively attend to a target speaker and simultaneously suppress extraneous
noises requires the integration of spatial cues, and is known as spatial processing (Glyde et al., 2011). Two ears allow for binaural hearing, and any sound that arrives from outside the median plane (i.e. off-centre) will reach the ear closer to the sound source first, resulting in an interaural time difference (Palomäki et al., 2005). Interaural level differences will manifest due to the head itself acting as a masking barrier, attenuating high frequencies above about 1.5 kHz (Carlyon, 2004). An illustration of these two interaural differences is shown in Figure 1. Interaural time and level differences provide the basic mechanisms for sound localisation, but the primary benefit of binaural hearing in modern industrial society is more effective listening in noisy conditions (Moore, 1991). Binaural hearing allows sound to be segregated into streams – abstract cognitive percepts that are conducive to the organisation of sound, such as the separation between a target speaker and noise (Bregman, 1994).

Grouping and streaming sounds is fundamental for acoustic cohesion and contextual understanding, and is particularly important in the context of the classroom, where children spend 60 per cent to 75 per cent of their time engaged in listening tasks (Rosenberg, 2010). It is crucial that the students listen to their teacher and classmates when required, while ignoring background noise such as non-relevant student discussion or acoustic reverberation. Without this ability, the detrimental effect on educational performance may result in poorer psychological, emotional, and social outcomes (Musiek & Chermak, 2007).

Figure 1. Illustration of interaural differences.
In the left diagram, the sound source will reach the left ear first as it is closer than the right ear, resulting in an interaural time difference. In the right diagram, the sound source will reach the left ear directly, but the head itself will act as a barrier and attenuate the sound source before it reaches the right ear, resulting in an interaural level difference.
Source: Chi Yhun Lo.
Spatial processing disorder (SPD) is the reduced ability to use interaural time and level differences to segregate sounds on the basis of direction, particularly in noisy environments, and falls under the umbrella term of ‘central auditory processing disorder’ (CAPD) (Cameron & Dillon, 2011). CAPD can be viewed as a heterogeneous disorder that refers to difficulty with auditory processes in the central auditory nervous system (CANS) not resulting from disorders of attention, cognition, language or peripheral hearing loss; though these may be (and commonly are) comorbid factors (ASHA, 2005; Dillon et al., 2012). The development of the CANS is critical until around 12 years of age, at which point it is mostly developed (Sanes & Woolley, 2011). Additionally, findings by Moore (2007) showed that children with previously impaired binaural abilities could learn those abilities at a later age than normal, underscoring our capacity for brain plasticity, and the importance of early diagnosis and remediation.

To overcome deficits from SPD, some forms of intervention include the use of assistive listening devices, improvement of room acoustics, or placement of the child towards the front of the class, closer to the teacher – all of which have the purpose of improving the signal-to-noise ratio (Miller et al., 2005). Cameron and Dillon (2008) developed the Listening in Spatialized Noise-Sentences Test (LiSN-S) as a diagnosis tool for SPD, and found that children with SPD required a far greater signal-to-noise ratio than their normal hearing counterparts (Cameron & Dillon, 2011).

Cameron and Dillon (2011) developed formal auditory training software designed to remediate SPD by improving binaural processing abilities in children. Designed for use in the home environment, LiSN & Learn requires the child to engage with training games through a pair of headphones on a personal computer. The speech recordings were convolved with head-related transfer functions (HRTFs, the sum of acoustic filtering effects that the pinna, head, and torso form), to create a virtual spatial environment. Even though the child is wearing headphones, the listener will perceive an externalised sound, equivalent to a free-field, three-dimensional environment (Cameron et al., 2012). For each game, the child must identify a target word nested within a sentence that is perceptually located directly in front (0° azimuth), while ignoring competing distractors from both left and right presentations (± 90° azimuth); only spatial cues can be used as both target and distractor sentences are presented by the same female speaker (Cameron & Dillon, 2011). An illustration of this spatial presentation can be seen in Figure 2. After the completion of 120 games, children with SPD showed an average improvement of 10.9 decibels (dB) for speech reception thresholds (SRTs, defined as the signal-to-noise ratio at which 50 per cent of words were correctly perceived), improving from -10.4 dB to -21.3 dB (Cameron et al., 2012); a lower score indicates better performance. Responses from parents, teachers, and self-reported questionnaires showed
positive outcomes with tangible, lasting benefits that are ecologically valid (Cameron et al., 2012). For a comprehensive review of the LiSN & Learn auditory training software see Cameron and Dillon (2013).

![Illustration of spatial presentation](image)

**Figure 2. Illustration of spatial presentation.**
For each game, the target speech is presented directly in front (0° azimuth) while the distractor speech is presented at left and right positions (±90° azimuth).
Source: Chi Yhun Lo.

LiSN & Learn was specifically configured for use with Sennheiser HD 215 headphones that are currently included with the software package. The speech recordings were convolved with the inverse headphone-to-ear drum transfer function (HpTFs, the sum of acoustic filtering effects of the headphone) from a Sennheiser HD 215, as measured on a Knowles Electronics Manikin for Acoustic Research (KEMAR) manikin. The aim of this was to correct for the response of the headphone, removing additional spectral coloration, at least for people who have the same earphone-to-ear drum transfer function as that of KEMAR. However, this limits the test to being conducted with the Sennheiser HD 215 as the sole headphone for use with LiSN & Learn. This is problematic as headphones have a finite product life and production cycle, and even individual headphones within the same production run will have slightly different characteristics. Additionally, the limitation on choice is made more apparent when considering headphones are available in a myriad of types and styles, with differences in quality, design, application, and price ranges.
The requirement to use a particular headphone may be unnecessary. There is evidence that spatial processing with a front talker and two symmetrical distractors is primarily obtained through a process termed better-ear glimpsing, in which the brain extracts, at each moment in time and in each frequency range, signal components from whichever ear has the better signal-to-noise ratio (Brungart and Iyer, 2012; Glyde et al., 2013a), with these differences being caused by the target and distractors having different interaural level differences (Glyde et al., 2013b). If this were the only mechanism, the introduction of spectral coloration by headphones would have no effect, as at every frequency it would affect the target and distractors by exactly the same amount, and so leave the signal-to-noise ratio in each ear unaffected. But as the signal-to-noise ratio differences between the ears arise from head diffraction effects, and because head diffraction effects are much stronger for high frequencies than for low frequencies, achieving normal spatial processing is likely to rely on the headphones adequately reproducing the high-frequency components of speech.

This study examined seven headphone conditions to determine their efficacy in enabling speech intelligibility when the target and distractors come from different directions, as measured with the LiSN & Learn software, with the aim of allowing for flexibility of choice, potentially reducing economic barriers, and improving access to the program. It is hypothesised that headphone selection should not have an effect on LiSN & Learn SRTs provided the headphones adequately present the full audio bandwidth to the listener.

Method

Approval for this study was granted by the Macquarie University Faculty of Human Sciences Human Research Ethics Sub-Committee (reference: 5201300623), as well as the Australian Hearing Human Research Ethics Committee.

Headphone pilot study

Headphone classification is determined by their construction, and the IEC-Standard 60268-7 provides two broad distinctions (IEC, 1996). Earphone (EP): an electroacoustic transducer intended to be closely coupled acoustically to the ear; and headphone (HP): assembly of one or two earphones on a head/chin band. From these, our selection of headphones consisted of three sub-types. Intra-concha EP: a small earphone that fits in the concha cavity; supra-aural HP: a headphone applied externally to the outer ear and intended to rest on the pinna; circumaural HP: a headphone with a cavity large enough to enclose the entire ear.
Initially, 14 headphones were selected based on commercial and consumer availability, affordability, and across a wide range of common types (circumaural, supra-aural, and intra-concha). Headphones with active technology such as equalisation or noise-cancelling capability were excluded. Headphones were placed on (or in) the artificial ears of a Brüel & Kjær Head and Torso Simulator Type 4128C, with left and right output levels measured using two Brüel & Kjær Measuring Amplifiers Type 2610. Transfer functions were measured twice for reliability, using swept sine waves from 30 to 20,000 Hz with a Stanford Research Systems Model SR785 2-Channel Dynamic Signal Analyzer. Amplification to the headphones was provided by a Yamaha AX-350 set at a constant output of approximately 35 mV rms that provided peak output levels between approximately 85 and 95 dB across all headphones.

In addition to the Sennheiser HD 215 (circumaural HP) that is currently included with LiSN & Learn, five additional headphones were selected from the original pool of 14 headphones, with an emphasis on minimising cost to consumer, testing a wide range of characteristics, and with the following considerations: Apple EarPods (intra-concha EP) were selected based on their ubiquity and strong high-frequency response; the Koss KPH7 (supra-aural HP) is a low-cost headphone that had a similar transfer function to a more expensive and comparable supra-aural headphone; the Sennheiser HD 201 (circumaural HP) is a low-cost headphone with a similar transfer function to the higher cost Sennheiser HD 215; the Sony MDR-E9LP (intra-concha HP) has a low cost and relatively flat high-frequency response; and the Sony MDR-MA100 (circumaural HP) was selected as it had a sharp dip in response at 4 kHz, and strong fluctuating response (peaks and valleys) above 2,000 Hz. The headphones are characterised by their transfer functions from 30 to 20,000 Hz, and are presented in Figure 3.

Participants

Fourteen undergraduate students from Macquarie University volunteered for this study and were compensated for their time and participation. The students (eight female and six male) ranged in age from 19 to 24 ($M = 21$ years) with Australian English as their first language. On each day of testing, all participants showed normal hearing ($\leq 20$ dB Hearing Level) from 500 to 8,000 Hz.
Materials

For each session, pure-tone audiometric screening was performed with a Maico MA 53 clinical audiometer using Sennheiser HAD 200 audiometric headphones. Two copies of LiSN & Learn software version 3.1.0 were used as test materials. One was a normal version (with the speech materials convolved with inverse Sennheiser HD 215 HpTF) installed on a Hewlett Packard Z200 Workstation desktop computer with only the Sennheiser HD 215 being used. The other was modified with the removal of the inverse HpTF (i.e. not designed specifically for use with the Sennheiser HD 215) and installed on a Lenovo T420s laptop computer, using the Apple EarPods, Koss KPH7, Sennheiser HD 201, Sennheiser HD 215, Sony MDRE9LP, and Sony MDR-MA100. LiSN & Learn consists of four games that differ only in graphical presentation but not in task: Answer Alley, Goal Game, Listening House, and Listening Ladder. An additional game called Space Maze was omitted from testing as it differs greatly in graphical user interface, test material, and instruction to the other four games. Participants were provided a copy of the icons and their corresponding word meaning prior to their session for the purpose of familiarisation. A copy was provided at each session and participants were permitted to refer to it at any time.
Procedures

Testing occurred in an acoustically treated test booth at the National Acoustic Laboratories. Participants played a practice game, followed by six LiSN & Learn training games, using a different set of headphones for each game. As each headphone had a different transfer function and output level, presentation levels were adjusted prior to each game. Participants were asked to adjust a slider until they could just perceive a whooshing sound (speech-shaped random noise); the distracting sounds were presented 40 dB above this level. Participants completed two sessions (session 1 and session 2) that occurred at the same time of day separated by a week, to achieve high test-retest reliability. The order of the headphone conditions was counterbalanced while each game was randomly allocated.

For each game, the participant was required to identify a target word nested within a sentence that was perceptually located directly in front (0° azimuth), while ignoring competing distractors from both left and right presentations (± 90° azimuth). An example target sentence would be ‘The turtle played in the street’, whereby the participant would be marked correct if they selected the corresponding turtle icon. The LiSN & Learn interface can be seen in Figure 4.

Figure 4. LiSN & Learn interface for Goal Game.
Source: Sharon Cameron and Harvey Dillon.
Results

Analysis was performed with SPSS Statistics version 22. Bar graphs of the seven headphones for both session 1 and session 2 are shown in Figure 5. Headphones have been organised according to SRTs averaged across both sessions, ranked from best to worst. The best-performing headphone was the Sennheiser HD 215 (with inverse HpTF) with SRTs of -23.3 dB for session 1 and -23.8 dB for session 2, while the worst-performing headphone was the Koss KPH7 with SRTs of -20.6 dB for session 1 and -20.8 dB for session 2.

A repeated-measures general linear model showed a small but non-significant improvement in SRT scores across sessions of 0.5 dB [$F(1,6) = 3.3, p = 0.092$], and a significant effect for the headphones [$F(1,6) = 5.7, p < 0.0001$]. Pairwise contrasts with a Bonferroni adjustment for multiple comparisons between each headphone indicated significance was isolated between the Koss KPH7 and three other headphones (Sennheiser HD 215 (with inverse HpTF), $p = 0.009$; Sennheiser HD 215, $p = 0.036$; and Sennheiser HD 201, $p = 0.017$).

Figure 5. Bar graph of speech reception threshold (SRTs) for each headphone condition across session 1 and session 2.

Headphone conditions are ordered according to mean SRTs averaged across both sessions, from best to worst. Error bars represent 95 per cent confidence intervals. A lower SRT indicates better performance.

Source: Chi Yhun Lo.
An analysis of the headphone transfer functions was initiated on the premise that high frequencies may be a contributing factor for the Koss KPH7’s low SRTs. The assumption was made that headphone transfer functions with a greater relative proportion of high frequencies would benefit spatial processing. Each headphone’s relative high-frequency response was measured as the ratio of the average transfer function (in dB) between the frequencies from 8,000 to 20,000 Hz relative to its peak response. This particular frequency range was determined after visual examination of the differences between the measured responses of the headphones. Figure 6 shows a scatterplot of relative high-frequency response against mean SRTs. A one-tailed analysis showed a significant correlation with a strong positive linear association ($p = 0.044$, $r = 0.75$). The high correlation coefficient is, however, largely caused by the Koss KPH7 headphones, which had the weakest high-frequency response and the poorest SRT.

![Figure 6](image)

**Figure 6.** Correlation between headphone relative high-frequency response and spatial processing ability.

Mean speech reception thresholds (SRTs) across session 1 and 2 were plotted as a function of their relative high-frequency response, showing a significant correlation with a strong positive linear association ($p = 0.044$, $r = 0.75$).

Source: Chi Yhun Lo.

**Discussion**

The main aim of this study was to determine the effect of headphones on LiSN & Learn performance. If any headphone can be used, it allows for the flexibility of choice and improves access to LiSN & Learn. Overall, the choice of headphone did not have a significant effect on spatial processing performance, with the exception of the Koss KPH7. Each headphone’s transfer function was
characterised as the ratio of its response from 8,000 to 20,000 Hz relative to its peak response. In an experiment on the influence of high frequencies on speech localisation, Best et al. (2005) found evidence that these frequencies were beneficial, and a potentially optimising feature for accurate spatial perception. This characterisation of the transfer functions showed three distinct groups: the Sennheiser HD 215 and Sennheiser HD 201 were the best performers with relative high-frequency responses at -14.1 dB and -15.7 dB respectively; the Apple EarPods, Sony MDR-MA100 and Sony MDR-E9LP were middle-range performers with relative high-frequency responses clustered around -18 dB; while the Koss KPH7 had the least relative high-frequency response at -22 dB. Figure 6 shows these results, providing an indication that the significant difference found in performance between the Koss KPH7 compared against the Sennheiser HD 201, Sennheiser HD 215, and Sennheiser HD 215 (with inverse HpTF) can be attributed to the relative reduction of high-frequency response in the Koss KPH7. The speech materials used in LiSN & Learn were digitally recorded in 16-bit and sampled at 44.1 kHz, so any lack of high frequencies can be attributed solely to the headphone response.

The strong positive linear association between relative high-frequency response and SRTs as shown in Figure 6 suggests that the high-frequency reproduction of a headphone has a significant effect on spatial processing performance, but this finding would need to be replicated across a wider range of headphones, and with a larger sample size, before it could be regarded as a reliable generalisation. The results in the present study support findings by Best et al. (2005), suggesting that high frequencies are an important feature of spatial processing. The results also provide further evidence that high frequencies from 8,000 to 20,000 Hz may be an important component of interaural level differences, and of the resulting interaural differences in SNR, and consequently the understanding of speech in spatially separated conditions.

Interestingly, the best-performing headphone condition was the Sennheiser HD 215 used in conjunction with speech materials convolved with the inverse HpTF, though the differences between this and most of the other headphones were small. The original decision to convolve the LiSN & Learn speech materials with the inverse HpTF was based on the assumption that it would minimise spectral coloration caused by the headphone, thus providing the listener with the most natural spectral cues. This appears to be the case, but the disadvantage of using the inverse HpTF is the limitation of the Sennheiser HD 215 as the sole headphone for use with LiSN & Learn. This study indicates that the effect on SRT when not correcting for the individual headphone transfer function is relatively minor (less than 2 dB when based on mean value and less than 1 dB when based on median values) for five out of the six earphones evaluated. Based on the results from this study, we conclude that any commercially available headphone
with relative high-frequency response broadly similar to the Sennheiser HD 215 is suitable for use with the LiSN & Learn auditory training software when the inverse HpTF is not present. Future iterations of the software will not convolve speech materials with an inverse HpTF.

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Bibliography


PyScholarGraph: A graph-based framework for indexing, searching and visualising relationships between academic papers

NICHOLAS CROUCH¹ AND DAVID M.W. POWERS²

Abstract

Although they have been studied for over 25 years, Graph Databases – which model data as a set of nodes and relationships – have been unfashionable for some time. This has led to a large development gap between Graph Database systems and more traditional Relational Database systems, such as SQL Server, Oracle and MySQL. However, the recent rise of social networking sites such as Facebook and Twitter, where data easily maps to a set of nodes with relationships between them, has led to resurgent interest and development in these systems and the unique visualisations and algorithms that they enable. This paper presents PyScholarGraph, a software package that builds upon existing Graph Database tools to provide an easily modified framework for indexing, searching and visualising academic papers and the relationships between them. The paper also presents two example ranking algorithms, which demonstrate how a traditional textual search can be augmented by graph-based algorithms, and the visualisation system, which provides an exceptionally intuitive way of finding interesting papers within the result set. Finally, the paper includes a short discussion of possible future expansions of PyScholarGraph, and concludes that while representing academic papers in the graph format shows excellent promise as a concept, much work remains in order to realise that promise.

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Introduction

In the 25 years since research on Graph Databases began, there have been multiple phases of development on these systems (Wood, 2012). While relational databases remain the largest market for enterprise data storage (Emison, 2014), it is also obvious that graph data structures map well to both traditional and emerging data and problem domains.

In the current database landscape, particularly in enterprise data applications, relational database technologies remain the dominant market leaders (Emison, 2014). However, the emergence of large structured and unstructured datasets with non-relational characteristics has forced large organisations and researchers to find new and performant ways of handling that data. In particular, NoSQL (Not only SQL) (Tudorica & Bucur, 2011) databases have become relatively prevalent. In describing the hierarchy of NoSQL databases, Tudorica and Bucur (2011) edit the taxonomy suggested by the NoSQL Wikipedia article (‘NoSQL’, 2014) only slightly, suggesting that such databases can be divided into three categories:

- Document Stores;
- Graph Stores; and
- Key-Value Stores.

Of these categories, probably the least explored is Graph Stores (Angles & Gutierrez, 2008). Although researched extensively (Wood, 2012), Graph Stores have until recently been of little practical interest. However, they lend themselves to any data where the structure of relationships between data points is of as much – or more – interest than the data points themselves. The almost clichéd example of this is the social network, in which people are linked to each other by friendships. There are, however, other examples of data which have both obvious and non-obvious relationships of significance.

This paper presents a system, PyScholarGraph, that first retrieves data from the public-access CiteSeerX repository of academic paper metadata (‘CiteSeerX’, n.d.), indexes it to a Neo4j (‘Neo4j, The World’s Leading Graph Database’, n.d.) Graph Database, and presents a small number of both traditional text search and graph-based search algorithms to retrieve and rank that data. It is the intention that this forms a framework for further research and experimentation in both graph-based retrieval and visualisation mechanisms, as well as (eventually) being useful for user adoption. In that vein, a number of future development and research directions are presented, which would answer interesting questions and/or raise the utility of the system itself.
Program architecture

The system is written in the Python programming language (van Rossum & de Boer, 1991), and is divided broadly into three sections. The first section focuses on retrieving, storing and indexing the metadata, which also requires scraping the CiteSeerX web interface for information not provided through the Open Archive Initiative 2 protocol. The second section focuses on providing appropriate search algorithms with an appropriate mix of established good information retrieval practice and graph-based strategies. The final section is focused on visualising the data in a way that provides both structural understanding, and the ability to navigate through subgraphs intuitively.

Python language

The selection of the Python language for use in this project was largely based on personal preference. However, it is important to recognise the way that this selection influences the design of the project. For instance, there are a number of libraries (including those used to access the initial metadata, and parse the scraped data) that are readily available for Python that make certain tasks easier. Conversely, the Neo4j system is built in Java, and this necessitates the use of an intermediary library rather than the library that the Neo4j developers provide, or that much of the community is focused on.

Bulbs, or BulbFlow, is a library for the Python language developed mostly by James Thornton that aims to provide vendor-independent mapping to the graph domain (Thornton, n.d.), and serves to bridge this gap. In theory, the library allows connection to any Graph Database that implements the Blueprints framework, ‘a collection of interfaces, implementations, ouplementations [sic], and test suites for the property graph data model’ (‘tinkerpop/blueprints’, n.d.). In practice, the implementation can be somewhat difficult for various Graph Databases, and in fact the simplest method of using Bulbs can be to use it with version 1.9.4 of Neo4j (the current version is 2.0.3). There are numerous reasons for this, most of which revolve around breaking changes made to the graph model in version 2.0 of the software (and incompatibilities with other software).

Indexing

There are two separate conceptual parts of the indexing performed by PyScholarGraph: seed retrieval and citation following. In the actual implementation, there are several other indexing steps. These include the addition of titles to full-text indices and the generation of a term frequency list.
All such indexing steps should be included in the node-creation process but are omitted here as they represent little of interest past the vagaries of the software creation process.

Seed retrieval – OAI2

The seed retrieval stage consists of retrieving records from the Open Archive Initiative Protocol for Metadata Harvesting 2 (Lagoze et al., 2002) (OAI2) compatible database maintained at the CiteSeerX project (‘CiteSeerX Data | CiteSeerX’, n.d.). In Python, the simplest way to achieve this is to use the Sickle library (Loesch, 2013). Using Sickle and OAI2, it is simple to iterate over the collection sequentially. It is also, therefore, quite simple to build a small (or large) database of records in that library. This constitutes the seed for the larger index to follow.

It would normally be said that this process is embarrassingly parallel (Foster, 1995, Section 1.4.4). However, the iterative process implemented by the OAI2 protocol uses a resumptionToken, which cannot be relied upon to refer to a specific location in the record set (Lagoze et al., 2002). As such, the only way to divide this part of the task would be via date, which was determined to be inelegant and out of scope for this project. For this reason, it is quickest to use a small seed selection, and then expand it using the parallelised citation following stage. However, this presents a risk of under-seeding the index, as citation following will not seek out additional papers past the graph built from the seed. Conversely, over-seeding the index will be inefficient, and depending on the application may also result in a dataset too large to be managed.

Citation following

The second stage of the indexing process is to build the citation graph. Given the initial seed set of papers, $S$, the final set of papers, $V$, and citations, $E$, can be obtained via the following algorithm.\footnote{Note that similar code samples in this text are not valid Python. They been simplified for ease of publication and for reading by those not familiar with the language.}

```python
V = list(S)
E = list([])
for each_paper in V:
    #ecp = each citing paper
    for ecp in each_paper:
        if ecp not in V:
            V.append(ecp)
            E.append(Edge(each_paper, ecp))
```

$V = \text{list}(S)$
$E = \text{list}([])$

for each_paper in $V$:
    #ecp = each citing paper
    for ecp in each_paper:
        if ecp not in $V$:
            $V$.append(ecp)
            $E$.append(Edge(each_paper, ecp))
In PyScholarGraph, this method depends on the ‘cited by’ page provided by CiteSeerX. As this page is presumably generated by a templating system, the data is particularly easy to obtain using the BeautifulSoup HTML parsing system.

Unlike the first stage of the indexing process, this is embarrassingly parallel, as it does not rely on the OAI2 access method except for singleton paper retrieval. As such, the process can be parallelised, using either the Python multiprocessing or threading library. In either case, it is essential if using the Bulbs and/or Sickle library to ensure that new Graph handles or Sickle instances are created for each thread or process, as they will block execution.

Retrieval

PyScholarGraph has three levels of retrieval mechanism. The first, similar to the seeding stage of the indexing process, serves to seed the user’s searching process. The second is similar in mechanism to the first, but seeks to expand upon the original search rather than a new process. The final, and most interesting, are the graph-based stacking search mechanisms, which take advantage of the unique features of the Graph Database.

Initial text search

The first searching mechanism is based on a free text search query provided by the user. This query, \( Q \), is considered a set of words. Each of these words is then compared to a term frequency list, and ranked according to their inverse frequency over the entire corpus. Each word in the list is then scored on a normalised scale, again according to inverse term frequency. Words that are extremely popular throughout the corpus (‘the’, ‘or’, etc.) are removed from the list by specifying a cut-off on the normalised scale. Each paper containing any of the words in the query is then retrieved using the Lucene full-text index of titles provided by Neo4j. Each of these papers is then scored by adding up the scores of words in the initial query, and the sorted list is displayed to the user. This process can otherwise be expressed as follows:

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4 For the purpose of this project, document titles were used as they were the most reliably available property in the dataset.
The secondary search, the *comparison search*, is similar to the initial search. However, instead of using a user supplied query string, the comparison search uses the title of the node currently being viewed by the user.

**Advanced graph algorithms**

The final search method uses the graph structure of the data to add several methods of ranking to the search results. Each of these ranking algorithms first requires the secondary search to be run using a seed paper. From there, they will change the ranking of each of the original results depending on the algorithm used. There are several rules that must be followed in order to ensure that compatibility is maintained when ranking algorithms are used together (or ‘stacked’):

1. Each ranking algorithm must accept and return a list of papers $P$, with a corresponding ranking score $P_s$. This ranking score is altered by some value $\Delta_p$ to reflect the relevance of that paper to the seed paper $Q$.
2. Papers must not be *added* to $P$ by a ranking algorithm. However, they may be removed.
3. Each paper $P_p$ must be compared independently of other papers in $P$. That is, $\Delta_p$ must be constant given constant $P_p$ and $Q$.
4. $\Delta_p$ must be between zero and one, where a higher score indicates higher relevance.
These rules ensure the order of rankings algorithms is unimportant, and that each of the ranking algorithms produces comparable results. There are two graph algorithms that are currently implemented by PyScholarGraph.

The Advanced Citation Score iterates through each paper in the result set and attempts to find the topic of each paper using the papers citing or cited by that paper. The detected topic is then compared to the detected topic of the seed paper, and the comparison paper is ranked accordingly. Topic detection on a single paper is performed by first retrieving the normalised inverse proportional word count for each word in the title, similar to the method used in the simple search. However, these inverse proportional word counts are then aggregated and again normalised, and the most common words in the aggregation will be scored highly. These words are thought to represent the most common topic matter around the paper, and hopefully therefore the paper itself. The same process is performed on the seed paper, and thus by comparing the two aggregations commonality in topic matter can be determined. A simple sample run of this process is visualised in Figure 1.

The Tree Support Score similarly iterates through each paper in the result set, but instead assigns a score based on how well cited a paper is compared to how many papers it cites. In theory, a paper that cites few papers but is cited by many papers represents a seminal paper – one which introduces new ideas and spawns a new field of research. In contrast, a paper that cites many papers and is also cited by many papers might represent a survey paper. Both of these classes will be ranked reasonably highly by this algorithm, which looks not only at each paper in the result set, but also a configurable number of ‘levels’ away to determine the weight of both the tree and the support. A third desirable class – papers that are new, but also relevant – will be penalised by this algorithm until they reach their appropriate number of incoming citations. This could be compensated for by weighting the date of the paper.
Figure 1. A visualisation of the Advanced Citation Score ranking algorithm using sample numbers.
Source: Authors’ figure.

Visualisation

The final interesting aspect of graph structures is their intuitive and rich visualisations. PyScholarGraph provides a simple, but quite interesting, visualisation of search results. Each of the first 10 results, and up to three layers of citation from those results, are displayed as a graph using colour and spatial orientation to separate them.
Retrieval

The primary issue with this visualisation is defining a suitable subgraph such that the visualisation is legible and can be processed, while also maintaining enough information to be interesting. This is particularly difficult given that some papers will have many citations that ‘clog’ the graph, and some will have very few, leaving the graph too sparse. In fact, some result sets can exhibit both sets of behaviour. After limited experimentation, the following method seems to deliver an aesthetically pleasing subgraph most of the time:

1. List the first 10 results of the query. These are the root papers.
2. For each root paper, add the papers that are cited or cite that paper to the list of rendered nodes. Add the relationships to the list of vertices.
3. For each of those results, add the papers that are cited or cite the result to the lists of nodes and vertices.
4. Repeat twice more. At any time if the number of nodes added as the result of a single root paper is 1,000 or more, finish the current node and move on to the next root paper.

This generates a list of nodes and vertices, which can then be passed to the display part of the software.

Display

For our purposes, the display of the visualisation is handled in the web browser, using the JavaScript library Sigma.js (Jacomy, n.d.). This library, with some small amount of work, is able to take a JSON dictionary containing both a list of nodes and a list of vertices, and create the display. This directs to the client machine the task of determining the optimal position of each node, and rendering the nodes in this position. PyScholarGraph currently makes use of the ForceAtlas2 placement algorithm supplied by Sigma.js to do this, leaving the majority of processing code to the Sigma.js tools. Sigma.js requires only that the server specify the original position and properties of each node in the graph. PyScholarGraph makes use of some directed randomisation to present a reasonable set of original positions. First, each root paper is randomly located on the X and Y axes where $0 < x_i < 2000$ and $0 < y_i < 2000$. Then, while each other paper is being added, it is placed on the axes such that $-500 < x_n - x_i < 500$ and $-500 < y_n - y_i < 500$. As this uses Python's `random.randint()` function, which is uniformly distributed, this creates a square pattern when nodes are dense. Sigma.js' ForceAtlas2 will generally then form a circle of nodes around densely cited papers, with notable deformities where two root nodes share citations.
Future work

This paper essentially presents an indexing system, two graph-based ranking algorithms, a method of subgraph determination for visualisation and the framework to tie each of them together. Given that this is a first foray into the field, a large number of questions remain unanswered. This section outlines some expansions, refinements and experiments that we believe would be valuable for any interested researcher to pursue.

Indexing and term weight improvements

Currently, only metadata provided by CiteSeerX’s OAI2 interface is indexed, and that in a full-text Lucene index. Further, each algorithm currently relies on the title of each paper to determine the topic and first relevancy. The most obvious way to improve this would be to index full-text versions of papers, or at least abstracts. Indeed, even the current term weightings could be improved by calculating n-tuples rather than 1-tuples. However, it is clear that there are far more interesting ways to represent academic papers in keeping with the graph theme of the PyScholarGraph system.

Blanco & Lioma (2007, 2012) suggest representing papers themselves as graphs, and present a reasonably comprehensive summary of methods to do so in Blanco & Lioma (2012). They also present a number of ways to calculate term weighting, based on these graphs. Each of these would make for an interesting drop-in replacement for the current method of calculating term weighting (inverse proportional term weighting).

Further, there must be other relationships between papers that are not currently used in the search algorithms. One such relationship currently being indexed, but not explored, is that of the author–paper relationship. Other relationships may have to be indexed or discovered based on existing metadata – could one, for example, find interesting patterns in keyword usage? Improving the amount of information indexed in the graph could be especially powerful if combined with improvements in the visualisation technique.

Visualisation improvements

There are a number of deficiencies in the currently implemented visualisation; and a large amount of experimentation left to do. It is outside of the scope of this paper to provide a full literature review of the topic of effective visualisation, but some specific improvements are evident. The most obvious revolve around the legibility of the visuals – nodes should be bordered, and experimentation is required around the best method of distributing nodes to maximise legibility. The second improvement is to increase the interactivity of the visualisation.
Currently, basic zooming and panning, as well as hovering to view the title of a node, are available. However, in our testing, it was often frustrating that the graph could not be expanded, contracted or traversed from the visualisation itself. Improving this functionality such that it was useful for spotting interesting relationships and topic clusters would be of particular use. Finally, more methods of choosing a subset should be evaluated, particularly ones which show the different relationships obtained through indexing improvements. This includes showing how other users have traversed areas of the graph, and using other types of visualisation (such as heat maps) to aggregate large portions of the database.

**Personalisation**

The original principle behind Py Scholar Graph was the idea that the user could ‘explore the graph’ – using one paper they knew to be relevant in order to find other papers about the same topic. It follows that, much like Google customises search results based on previous searches and user-chosen search results, it would be valuable for the user to provide feedback on which papers returned are truly relevant to their search. This could then be used to provide more relevant results to users that follow them, and also prioritise different papers for the user themselves.

This could be implemented in a number of different ways. However, the following seems particularly in keeping with the graph methodology. First, it seems necessary for the user to provide feedback in some way. In a simple form, this would be a yes/no answer to ‘Was this question relevant?’ From there, storing this data could take the form of properties of the existing relations. However, it is important that the data be stored by session – that is, not only should it be stored by user, but also that user should be able to have multiple ‘lines of investigation’. This would indicate that a more advanced data structure, possibly one that consists of multiple separate graphs, would be appropriate. Given enough user input, the exploration of storing, indexing and visualising these lines of investigation would be promising.

**Conclusion**

This paper presents the early version of Py Scholar Graph, a Python-based software package that provides a framework for interesting research in to information retrieval and visualisation from graph data structures. This paper has also presented two algorithms which make use of Py Scholar Graph to provide alternate relevance measures, and a system that performs visualisation. However, Py Scholar Graph is a work in progress, and while it clears the way for some interesting research questions to be answered, it needs further work before
it could be considered a ‘release’ version. With this in mind, PyScholarGraph will be open-sourced at github.com/fphhotchips/PyScholarGraph, under an Apache 2.0 licence. This will be done so that any researcher with the interest may make changes and improve the PyScholarGraph tool.

Bibliography


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Abstract

The focus of this research was to investigate the significance of formal properties in the perception of sculpture. Throughout the project, I considered how qualities such as shape, scale, materiality and positioning could combine to create dynamic and compelling sculptures, when there was no overt content or narrative. Considering the work of artists such as Robert Morris, Anne Truitt and Anish Kapoor, and studying movements and art forms such as Formalism, Minimalism and Installation, led to experiments with several materials and forms before constructing sets of non-representational paper sculptures. The final body of work comprised multiple installations, each containing similar sculptures of various scales, in similar colours and shapes. The differences within, and between, each installation were intended to provide a space for the viewer to perceive, and re-perceive, similar objects in multiple ways.

Introduction

My focus during this research project was to investigate the significance of formal properties in the perception of sculpture. More specifically, I considered the degree to which qualities such as shape, scale, materiality and positioning could combine to create dynamic and compelling sculptures, when there was no overt content or narrative. My aim is captured in the following question: ‘To what degree do a sculpture’s formal qualities drive the way it is perceived, without reliance on narrative?’ This project has expanded upon a theme I began researching in 2011: selective perception – the unconscious act of seeing only what we choose to see in one another based on our preconceived ideas.¹ I have widened my investigation to include the perception of objects, specifically sculpture. My interest in the way formal qualities can affect the perception of

sculpture was piqued when I visited Anish Kapoor’s exhibition at the Museum of Contemporary Art.\(^2\) His use of scale and colour in particular led me toward an appreciation of the significance of formal properties and a desire to learn more.

My investigation is comprised of two intertwined parts: theoretical and practical. My theoretical investigation involved gaining an understanding of the way objects, in general, are perceived. This included enquiries into Merleau-Ponty’s views on phenomenology,\(^3\) as well as Ernst Gombrich\(^4\) and John Berger’s\(^5\) explanations of the way we view objects. To translate this to the way sculpture is perceived and the importance of formal attributes in driving that perception, I studied the theories of Formalism (that artists should avoid meaning in favour of engagement with formal qualities),\(^6\) and Minimalism (that work should not reference anything but itself).\(^7\) I also investigated the work of sculptors such as Robert Morris and Anne Truitt, relevant to my research because of the importance of the formal aspects of their work. Another area of research was an analysis of Installation art, to understand the significance of formal spatial qualities on the perception of sculpture – how a work’s positioning in a gallery space could affect the way it is perceived.

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\(^7\) Ibid., 16–17.
The work I produced during this project was informed by paper artist Paul Jackson’s book, *Folding Techniques for Designers from Sheet to Form*. I began by learning and following Jackson’s techniques, moving on to develop my own original designs. Another informative text was Stephen Luecking’s *Principles of Three-Dimensional Design* – a constant reference regarding the formal aspects of my work. I began my practical and material investigation by constructing many and varied sculptural objects from paper, porcelain, lead and aluminium. After seeking feedback on the objects, I settled on creating only folded paper sculptures, keeping them deliberately non-representational to minimise the chance of viewers perceiving them as recognisable ‘things’, and applying preconceptions about what each sculpture meant rather than purely considering what they saw in each form: for example, scale, colour or materiality. This approach, combined with the inclusion of obvious contrasts of formal qualities between sculptures, allowed more scope for formal qualities to drive perceptions.

![Figure 2. Paper folding experiments, 2013.](image)

*Photo: Jen Fullerton.*

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In this exegesis, I discuss some background to the perception of objects, my examination of some of the art movements that emphasise a reliance on formal aspects to drive perception, and my examination of the work of other artists to whom consideration of formal properties is of the utmost importance. This is followed by a discussion of my own work, including an explanation of my material investigation, the work this led me to create, and the decisions I made before settling upon my final body of work. Finally, I discuss the resulting body of work – my choice of materials, the formal characteristics of the work and my reasons for altering these qualities from one installation to the next.

Theoretical investigation

Expectation created illusion.¹⁰

During my theoretical investigation I studied phenomenology and the perception of objects in general, and examined Formalism, Minimalism and Installation art to explore the way art objects – sculptures – are perceived, specifically when considered in terms of their formal qualities. To directly relate this broader research to my project, I examined the work of several sculptors, paying particular attention to their use of formal qualities to drive perception.

Philosophers and art historians have, at great length, discussed the perception of ‘things’. In *The Phenomenology of Perception* (1945), philosopher Maurice Merleau-Ponty claimed ‘the thing is inseparable from a person perceiving it’. Because it sits within our gaze, it becomes ‘invested with humanity’, causing a relationship to form between viewer and thing. Merleau-Ponty goes on to suggest that we do not just develop an inter-relationship with that thing, but with the world – the world being full of things.¹¹ In *Ways of Seeing* (1972), John Berger posits more simply that we do not look at one thing in isolation – we consider what we see in relation to what else we see, what we already know, and ourselves.¹² For this research project, I wanted to explore not just how ‘things’ are perceived, but how ‘things created as works of art’ are perceived. When viewing a sculpture we do not consider it in isolation but compare it to everything else we see at the time and overlay it with our prior experience and knowledge. Ernst Gombrich referred to this as our mental set: ‘the attitudes and expectations which will influence our perception and make it ready to see … one thing rather than another’.¹³

A common expectation in our mental set seems to be that works of art should contain some meaning. In her essay *Against Interpretation* (1966), Susan Sontag stated that there is an assumption that a work of art ‘is its content’ – that because it is a work of art it must ‘say something’.¹⁴ She claimed, ‘Our task is not to find the maximum amount of content in a work of art … our task is to cut back content so that we can see the thing at all’.¹⁵ To follow Sontag’s line of thinking, works of art should be able to stand on their own without the need of a ‘back story’. Marshall McLuhan, in *Understanding Media: The Extensions of Man*,¹⁶ declared that people would often ask what a painting was about, but not what a house or a dress was about. McLuhan suggested this was because with objects other than art, the viewer has a sense of ‘the whole pattern of form and function as a unity’.¹⁷ The formal qualities of an artwork, then – the way it looks, what it is made of and how it sits in a space – should be able to work in unity to drive perception. My material investigations support this idea through my creation of deliberately non-representational sculptures, relying on formal aspects alone to direct perception – a Formalist approach.

Formalists believe context or meaning should be rejected in favour of direct engagement with the formal qualities of a work (for example, shape, material and scale).¹⁸ Many art historians, writers and critics have echoed this view – in fact, Formalism is as much a form of critique as a form of art itself. Henri Focillon (1881–1943), for example, saw art objects as ‘living entities that evolved and changed over time according to the nature of their materials and their spatial setting’.¹⁹ Clement Greenberg (1909–1994) stated that the subject of art was art itself,²⁰ and Rosalind Krauss (1941– ) contended that Picasso’s collages, in particular, rejected representation; they displayed, purely through their formal qualities, the ‘absence of actual presence’. She labelled this phenomenon ‘material philosophy’.²¹ Minimalists have a similar view: Minimalist art generally has no content, referring only to itself and the fact that it exists in the world, leaving the viewer to focus on the work’s formal characteristics.²² It often uses repeated forms presented in a way designed to activate the viewer through direct engagement; creating ‘environments’ that inspire the viewer to walk

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15 Ibid., 9.
17 Ibid., 21.
19 Ibid., 17–18.
20 Ibid., 18.
21 Ibid., 19.
around and examine objects from different viewpoints. According to Claire Bishop, this leaves the viewer contemplating not just the work itself, but the space in which the work is presented and the very act of perceiving the work.

Deliberate consideration of the gallery space and the viewer’s physical point of view is also important to Installation art. In an installation, the viewer shifts from the role of external observer to that of participant. They move through the work rather than around it, and experience the work and the space on a bodily level as well as a visual one. Bishop reiterates this view, suggesting that Installation art is experienced on a phenomenological level. It no longer considers the viewer as a pair of ‘disembodied eyes’, but as an ‘embodied viewer’ whose other senses are as important to the perception of the work as their vision. For the purposes of this research project, I considered space and placement – the installation of sculpture – to be formal properties as much as colour and shape. The formal properties I examined include:

- line and plane;
- shape, form and proportion;
- scale and volume;
- colour, texture and materiality;
- space (both that occupied by the sculpture and the negative space that surrounds it); and
- position and placement.

My interest in the formal qualities of sculpture was piqued when I visited Anish Kapoor’s exhibition at the Museum of Contemporary Art. While there is clearly a spiritual element to Kapoor’s work, I was drawn to his use of scale, colour and placement to challenge perceptions. Sky Mirror (2006), for example, is of a grandiose scale leading to a potentially disorienting experience, as we appear to view the sky on the ground. The work has no colour of its own as it is designed to mirror the sky. Placement, then, becomes an extremely important element in this work – if it were displayed inside a gallery, we would see a far less interesting reflection of the gallery’s ceiling.

Kapoor contrasts work such as this with densely coloured work of a smaller scale, for example The Oracle (1990–2002). In this work, the matt black interior of the space carved into the rock reflects no light at all, leaving the viewer

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23 Ibid., 20.
24 Bishop, Installation Art, 53.
25 Luecking, Principles of Three-Dimensional Design, 132–133.
26 Bishop, Installation Art, 6.
28 Ibid.
wondering if they see a hole or a flat black surface. I found Kapoor’s work extremely compelling and was inspired to discover whether I, too, could make work that was so engaging due to its formal qualities. But Kapoor took his work with perception further than I chose to for this project. Much of his work relies on optical illusion – is a work flat or deep, is it concave or convex? I wanted to create work that could be appreciated on a simpler level – work that, through formal properties alone, said, ‘I am what I am’, rather than creating an illusion. This realisation led me to look to other artists for inspiration.

I found a clear example of the way formal properties can affect the perception of sculpture in Robert Morris’ Untitled (L-Beams) (1965–67). The work comprised three identical L-Beams, each resting on the floor in a different way, each seen from a different angle, in different levels of light and shadow. Purely through the positioning of the three objects, the work became quite dynamic. Although the L-Beams were identical, viewers perceived each to be different to its counterparts.29 Rosalind Krauss commented in Passages in Modern Sculpture (1977) that no matter how surely the viewer knew the three L-Beams were the same, it was impossible to see them that way – logic was defeated by perception.30 This work is more overt than Kapoor’s; Morris has relied purely on placement, and on the negative space around the L-Beams, to drive the perception of the work.

Anne Truitt’s A Wall for Apricots (1968) is an example of many similar works she created – an installation of tall, regular columns painted with stripes of colour. Reviewers describe the works as ‘giving mass and volume to colour’,31 and being so human-scale that they ‘are sociable and keep you company’.32 The primary formal qualities responsible for the perception of these works are colour, proportion, repetition and scale. The colour defines them and gives them visual interest, the repetition of shape, proportion and equally spaced placement creates a sense of unity, while their scale accounts for the bodily response that makes them perhaps feel figurative. The use of repetition and scale has also been an important part of my material investigation – I have created sets of similar sculptures at different sizes, repeating colour, proportion and placement throughout the work.

In the 1980s, Gwyn Hanssen Pigott made an observation about the perception of art and craft – realising that people were making distinctions between functional pottery (considering it craft), and conceptual pottery (considered art).

29 Meyer, Minimalism, 82.
30 Bishop, Installation Art, 53–54.
In response to this, she began exhibiting groups of what she called ‘inseparable bowls’ to change the way people perceived her work. One bowl on its own had a domestic purpose. A group of bowls exhibited together belonged together as a work of art. The bowls now invited closer inspection, each slightly different in a way that may not have been noticed had they been exhibited separately.33 I considered the importance of ‘the group’ in my material investigations, creating groups of similar sculptures to enhance the differences between them, and I came to understand first-hand the notion of ‘inseparability’. While each of my sculptures created its own level of visual interest, that interest could conceivably be over as soon as the piece is viewed. That same sculpture as part of a group, however, maintained interest for longer, with the viewer comparing one piece to another, noting differences in size, colour and shape, and appreciating the way each sculpture in the group related to each of the others.

The work I developed throughout this research project has been in response to this theoretical investigation. As I created each sculpture, I compared it to other sculptures I was making to find the similarities and differences. I remade sculptures in different colours and at different scales to feel the effect of the qualities for myself. I also grouped the sculptures in various ways to determine the effect of placement. I considered the way the sculptures could be perceived placed vertically or horizontally, in large groups and small, in different positions and different levels of light, examining the way each sculpture ‘changed’ in relation to the others.

Practical investigation

They are only paper.34

To begin my practical, material investigation, I constructed various types of sculptures from assorted materials. My experimentation began with paper and expanded to include porcelain, lead and aluminium in an attempt to examine the effect of materiality on the perception of sculpture. Ultimately, I decided that paper on its own could achieve this with more subtlety than a side-by-side comparison of materials. I was also drawn to challenge preconceived ideas about paper. Throughout the year, lecturers and visiting artists have often seemed surprised that my final sculptures would be constructed of paper. I have repeatedly been asked, ‘Have you thought about making them out of something else?’ and, ‘Wouldn’t it be great if you could make them out of something more

34 Rudi Fuchs quoting Donald Judd’s explanation of a poor public reaction to his woodcut prints, in Donald Judd, ed. Nicholas Serota (London: Tate Publishing, 2004), 23.
permanent? We understand the concept of a sheet of paper – a blank page – as a ‘surface’ more than as a finished work. We see a sheet of paper as two-dimensional, yet it has an almost limitless potential for three-dimensionality. And we think of paper as disposable, opposing the anticipated permanence of the art object. By working only in paper, I lay down that challenge. I made a conscious decision to not trim overlapping edges or attempt to hide seams, to assert that the sculptures are made of sheets of paper, not just the material of paper. I felt that leaving obvious signs that a sculpture was once a sheet of paper provided a clearer reminder of its materiality.

Most of the sculptures I created are grey. As all colours come loaded with cultural and historical meaning, I chose the colour that was, to me, the quietest – a colour that seemed to exude calm and whose personality would not be so powerful as to overpower the sculptures with its own significance. White may seem to an obvious choice, however the ‘brightness’ of white, and the concept of white as ‘pure’ seemed likely to overshadow the objects themselves. I also appreciate the concept of ‘grey scale’ – the scale of values from light to dark. By scaling the colour of my sculptures in such a way, I could appear to have been applying a value to each of them, despite none of them being more or less valuable than any other.

The ideas that I have put forward about paper, and my use of grey, add a level of narrative to the work, however I believe it still ‘only references itself’, as any potential content is derived from the analysis of formal properties. This does, however, lead me to an interesting discovery I made during this project, reiterating Marshall McLuhan’s belief that ‘the medium is the message’ – that is, that every medium contains some form of content.35 My experimentation has led me to understand that wherever the hand of the artist is involved, content will exist on some level. No matter how clearly I set out to work only with formal qualities, I continually and unconsciously imagined meanings around each sculpture and installation – for example, why they were paper; why they were different scales. Also, wherever the eye of the viewer is involved, it appears that content will exist. On encountering my work, people invariably tell me what the sculptures remind them of, adding their own narrative layer to the work. These conflicting ideas added a level of tension to the work and reiterate the title, Grey areas – somewhere between black and white, right and wrong, expected and unexpected.

35 McLuhan, Understanding Media, 15.
Before I decided to make only installations of grey paper sculptures, I had several ‘false starts’. Unsure of how to advance my concepts materially, I considered methods I have found satisfying in the past. I developed ideas for books, but sewn-together pages containing text were far too ‘story-like’ when I wanted to make less narrative works. I then began folding paper, following instructions from various sources, but kept falling into the trap of trying to make something recognisable, against my intention to create non-representational art. Eventually, I decided to progress several types of work: grey folded sculptures, small white sculptures under glass domes, moulded watercolour pieces and self-portraits with collaged sections of folded paper. On reflection, the work under domes was quite static and feedback suggested the domes themselves introduced their own narrative around concepts such as the containment of specimens, adding an unwanted layer of meaning.

Figure 3. Work under domes, 2013.
Photo: Jen Fullerton.

Feedback around the moulded pieces of watercolour paper consistently suggested that they resembled porcelain, so I made some pieces from porcelain to compare the two materials, and created similar sculptures in aluminium and lead for further comparison. As mentioned earlier, however, I decided that paper on its own spoke about materiality with more subtlety.
I then became concerned that presenting groups of work that were so dissimilar – the grey sculptures, domes and moulded sculptures – would not allow formal qualities and presentation to drive perceptions to the same extent as comparing sets of similar sculptures. I continued with my last idea – self-portraits combined with collaged, folded paper – believing that although the collaged elements were similar to the grey sculptures, a tension was created because, in this instance, they disfigured rather than conveyed the beauty of the folded form. However, feedback suggested that the fact that they were quite painterly self-portraits imbued the works with a strong narrative, and that they perhaps did not fit with the other work when I was attempting to produce work that was narrative-free.
This feedback led me to re-evaluate the entire body of work, culminating in focusing on only the folded grey sculptures. I kept the sculptures deliberately non-representational to minimise the chance of the viewer perceiving them.
as recognisable ‘things’, therefore applying preconceptions about what each sculpture meant rather than purely considering what they saw in each form. This allowed more scope for formal qualities to drive perceptions.

Figure 7. Paper folding experiments, 2013. Photo: Jen Fullerton.

The sculptures were created from sheets of Canson Mi-Teintes paper which I selected for its material qualities – its texture and strength, the way it folded and held its form, and the way it changed colour in different angles of light. The work contained elements of both Minimalism and Formalism. I took from Minimalism the use of repeated forms and the creation of ‘environments’,\(^{36}\) and drew on Formalism with my lack of overt content – creating sculptures that ‘are what they are’, with formal qualities driving the work rather than representation or narrative.\(^{37}\) The sculptures appeared intensely geometric and may seem to have been based on a mathematical formula. In fact, I learnt from the ANU Applied Mathematics department that the sculptures contained ‘auxetics’, which can be found in nature and science and do, indeed, have their

\(^{36}\) Meyer, Minimalism, 20.

\(^{37}\) D’Alleva, Methods and Theories of Art History, 16–17.
own mathematical formula. I chose not to follow this line of enquiry, however, as I felt that applying such a typology to the sculptures removed some of their inherent mystery and poetry. In the words of Gwyn Hanssen Pigott (speaking about her own work), ‘[t]hey are only about themselves’. I actually applied very little mathematics to creating the sculptures. I developed the templates by folding each sheet of paper in half and half again until it was divided into 32 vertical sections – the maximum amount of folds each sheet could comfortably hold – maintaining a level of consistency and order throughout the sculptures. I then randomly added rows of diagonal folds to each template, adding an element of difference. (While repetition can create order, too much repetition can become stale. ‘Variety is needed to pique attention.’) By taking this approach, I felt that I was in control of the work I was creating, rather than being governed by an external system such as auxetics.

Figure 8. Testing a template, 2013.
Photo: Jen Fullerton.

On encountering the work, one would immediately notice the repetition of lines and angled planes. The angled folds defining the planes gave each of the four original sculptures its identity. More repetition was involved in the decisions I made about the amount of sculptures, folds and colours. I repeated sets of four sculptures in four shades of grey. The decision to work in multiples of four stems

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38 Vanessa Robins, Department of Applied Mathematics, Research School of Physics and Engineering, The Australian National University, email message to author, June 21, 2013.
39 Smith, Gwyn Hanssen Pigott, 32.
40 Luecking, Principles of Three-Dimensional Design, 41.
41 While there are multiples of each sculpture, they are all developed from the original set of four templates.
Grey areas

from the abovementioned process of folding a sheet of paper in half and half again. The different shapes, sizes and shades of grey used throughout the work were intended to stir the interest of the viewer, enticing them to appreciate what they saw, rather than seeking a deeper meaning. Pattern, shadow and repetition created a texture across the entire body of work, developing a rhythm for the viewer’s eye to follow as they moved from one sculpture, and one installation, to the next. The presentation of each sculpture within its group, as well as the overall design of each installation, was considered in an attempt to maximise the impact of each sculpture as well as the spaces between the sculptures. Spatial principles such as position, direction and scale determined the relationships between each sculpture in a group, as well as the relationship between the group and the space.

![Image: Templates and sculptures](Image)

Figure 9. The templates and the sculptures they became, 2013.

Photo: Jen Fullerton.

Outcome

Geometry tempered by poetry.42

The final body of work comprised multiple installations, each containing similar sculptures of various scales, in similar colours and shapes. Four original shapes were repeated several times, creating a repetition and consistency that brought

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unity to each group. The installations combined to create a single environment under the title *Grey areas*, as I felt that the formal qualities of each sculpture and installation were best appreciated when compared to each of the others.

The sculptures seemed almost architectural due to their columnar forms and evoked a bodily reaction when tested with colleagues, as their proportions could cause them to appear figurative. While each sculpture was interesting on its own, I believe that when combined with others in the group, they developed relationships that could change the way they were perceived. My intention in giving the viewer the opportunity to compare similar sculptures at different scales and in different shades of grey was that they would now consider these relationships – the play of large against small, light against dark – as well as the individual sculptures themselves. The materiality of the sculptures was on full display, as some of the sculptures were tall enough that the viewer could examine them in detail. The largest of the sculptures contained an interesting contradiction: being larger, they appeared more solid and grounded yet, at that size, the frailty of the material was more obvious, with the weight of the sculpture starting to bend and warp the paper. One set of sculptures was in miniature scale – vastly different to the others – perhaps drawing the viewer into a more intimate exploration. While the smaller scale may have created a perception of ‘safer’ or ‘friendlier’ objects that could be picked up and held by the viewer, this was contradicted by their installation on a plinth, which immediately distanced the sculptures from viewers by announcing them as works of art. The materiality of these sculptures may again have been perceived differently – they were small and delicate, possibly seeming more fragile than the larger sculptures.

The changes to spatial qualities within and between each installation were also very important, potentially raising more questions about relationships in the mind of the viewer, as well as providing a new point of view. While some sculptures sprawled across the gallery floor, others took up space vertically rather than horizontally. The viewer would interact differently with each – looking upwards to see some work, or wandering amongst individual sculptures at ground level. The differences in formal qualities within, and between, each sculpture and installation were intended to provide a space for the viewer to perceive, and re-perceive, similar objects in multiple ways.
Conclusion

In this project, I investigated the significance of formal properties in the perception of sculpture. My research combined an examination of the work of other artists with an interest in formal qualities, the development of a deeper understanding of Formalism, Minimalism and Installation, and the creation of a resolved body of work. My material investigation took me in many directions before I settled upon my final work, as I continually found myself creating work imbued with content – despite specifically setting out to determine the degree to which a sculpture’s formal qualities would drive the way it was perceived, with no reliance on content. The final body of work was intended to demonstrate the effect of a sculpture’s formal qualities through the presentation of similar, non-representational sculptures reliant upon elements such as shape, scale and materiality rather than overt content. It was also intended to highlight the impact of space and positioning, through the juxtaposition of similar sculptures in various methods of display. During this project, I discovered that wherever the hand of the artist is involved, a level of narrative seems almost unavoidable – I found myself unconsciously imagining meanings around each sculpture and installation that I made. Content also appears unavoidable wherever the eye of the viewer is involved, with most viewers telling me what my sculptures reminded them of, adding their own narrative layer to the work. While both artist and
viewer seemed to find it difficult not to add their own content to the work, any imagined meaning directly resulted from an analysis of formal qualities. My theoretical and practical investigations have led me to conclude that formal qualities are, indeed, highly significant in the perception of sculpture. Not only do they affect what we see, they also affect what we think we see.

Bibliography


