Chapter One – *An Introduction to the Study of Judicialization and Administrative Decision-Making Capacity*

I. Introduction

In 2009, concerns were raised regarding the dramatic decline of refugee acceptance rates within Canada's Immigration and Refugee Board (IRB). In demonstrating that the number of refugees gaining asylum in Canada has dramatically dropped, statistics released by the government have shown that the number of successful claims by refugees living in Canada fell to less than half of what it was when the Conservative Party came to office (Curry, 2009). Subsequent data acquired in 2012 further revealed significant inconsistency in approval rates among refugee adjudicators; augmenting apprehension, as the responsibility of refugee determination – and the fate of refugee claimants – is left to the administrative discretion exercised by board members. "Due to the changing circumstances of this century, legal authorities of states have come to rely on administrative machinery to control the exit and entry of people, seeking thereby to direct the size of the community and maintain its integrity" (Galloway, 2000, pg. 90).

Despite a relatively broad recognition rate and a teleological interpretation of the international refugee definition, there has been a rapidly growing dissatisfaction with the Canadian refugee decision-making process. One of the main concerns that have persisted in determination procedures is the unconstrained and unconstitutional exercise of administrative discretion. Operating within a legislative framework, administrative adjudicators are delegated the authority to interpret statutes with little guidance from external government bodies. While this allows board members to make well-informed decisions free from political interference, it also increases the risks of allowing personal biases and subjective opinions to influence outcomes with limited regulation.

Much of the difficulties associated with the recognition and determination of refugees are therefore predicated upon the limitations associated with the subjective perceptions of the use of

Western philosophical language (Lacroix, 2004). This philosophical language analysis provides the ontology for the entire Canadian legal and societal framework, influencing the perceptions of words, the specific terminology used, and the context that surrounds phrases. Because of the Eurocentric historical nature of this ontology, the ability for the Canadian legal system and individuals (including, but not limited to administrative adjudicators) to completely grasp the dilemmas associated with the concept of *otherness* is enhanced. This is therefore reflected in the aspect of discretion exhibited by the IRB, as these ontological notions constrict the individual ability to fully comprehend the 'other' – in this case, the refugee. The ability of refugee board members to subjectively interpret the definition of 'convention refugee' as set out in statutes, with a shortage of mandatory guidelines to follow, has increased the possibility of misinterpretation and wrongful determinations.[1]

The case of Gambino Zacarias, a citizen of Guatemala, is only one example of the many failed cases that have been exposed to misinterpretation of the convention definition due to subjective Western social norms. Mr. Zacarias applied for refugee protection in Canada after he and his family were extorted and targeted for death by the leader of a criminal street gang known as the Maras Salvatruchas. Though his claim was found to be credible, his application was denied because Zacarias was not believed to be a convention refugee as defined by the *United Nations Convention relating to the Status of Refugees, 1951* and the *Canadian Immigration and Refugee Protection Act* because the risks he feared were too generalized to meet the requirement for refugee status. In other words, the risks that Zacarias faced were not considered to be detrimental to his life as they are supposedly shared by the population of Guatemala in general. The decision

[1] Specifically in the case of North America, evolving from the Eurocentric conceptualizations, the process by which the 'other' has come to be understood is exclusively in reference to the conception of the self, creating an artificial dichotomy. While this is a controversial social constructivist perception of the nature of discretion in the IRB, it is a foundational lens as through which this process occurs. There have been many social factors that have contributed to the development and implementation of migration policies, and regulations of both immigrant receiving and sending countries. These factors have arguably shaped the way in which the politics of migration is observed as refugee policy not only speaks to the nation's vision of itself it also signals its position in the world and its relationship with other nation-states. See Ngai, Mae "Impossible Subjects: Impossible Subjects and the making of Modern America, pg. 9

was overturned on judicial review in 2011 by a Federal Court Judge who referred the case back to the IRB for a new hearing by a different board member.[2] Following a second refugee determination hearing, Zacarias's asylum claim was once again denied, yet this time concluding that his claim was not credible. Zacarias once again sought judicial review. In 2012, the Federal Court again overturned the IRB decision, concluding that the negative determinations on the credibility findings were erroneous and based on impermissible conclusions that contradict the evidence before the board.[3] As of October 2012, Zacarias has been awaiting a third hearing before a different member of the IRB.[4] Since appearing before the board in 2010, Mr. Zacarias has been living in Canada, away from his family and without the full benefits or status of Canadian citizenship or permanent residency. This case is only one of many that highlight the inherent complications in the current refugee determination process. Refugee determinations that have erred in law or in fact result in expensive, stressful and lengthy judicial review processes that situate asylum seekers like Zacarias in a state of 'legal limbo'. More importantly, failure to establish proper regulatory mechanisms that supervise the possible arbitrary nature of the practice of discretion in refugee determinations are likely to result in international human right violations and constitutional defilements. While the control of State borders and deterring unsolicited migration are valuable objectives, they should not come at the cost of denying asylum and basic human rights to those who seek it.

The purpose of this study is to examine whether the judicial branch of government via the courts, are important political actors in influencing refugee determinations and shaping the outcomes of asylum seekers in Canada. This study is about the relationship and intersection between law and politics regarding how they interact with one another when making important discretionary decisions that affect politically marginalized groups of people. Because the

[2] Aguilar Zacarias v. Canada (Citizenship and Immigration), 2011 FC 62 (CanLII).
[3] Aguilar Zacarias v. Canada (Citizenship and Immigration), 2011 FC 62 (CanLII).
[4] No news has surfaced regarding this matter since the story was published in the Ottawa citizen on October 9, 2012.

relationship amongst institutions has traditionally demonstrated a pivotal role in shaping the nature of policies central to citizens and non-citizens alike, this study explores the decision-making capacity of judicial and administrative institutions. Particularly, it explores the political influences of the judiciary through consideration of its interactions with a single administrative tribunal – the Immigration and Review Board of Canada.

The Immigration and Refugee Board of Canada is Canada's largest independent administrative tribunal established by Parliament that aims to resolve immigration and refugee cases.[5] It is responsible for making well-reasoned decisions on immigration and refugee matters, efficiently, fairly and in accordance with the law. The IRB decides, among other responsibilities, who needs refugee protection among the thousands of claimants who come to Canada annually. The lack of constraints, to abide by legal principles and norms, placed on administrative adjudicators, have brought into question the issue of installing legitimate regulatory mechanisms that ensure and preserve democratic values and practices that hold government agencies accountable. More so, this study examines the ability of the courts to regulate the statutory interpretive-powers of public officials in the Refugee Protection Division (RPD). By exploring the consideration of Supreme Court decisions by public officials in the RPD, this study will determine the extent to which judicial decisions are capable of compelling administrative discretionary decisions and behavior to remain and function within a legal framework.

(A) Research Question

With an accelerating reliance on the courts to address core moral predicaments, public policy questions and political controversies, the judiciary has assumed a significant role in the political and policy-making processes of democratic states through judicial review (Hirschl, 2006). Through this profound transfer of power and authority from democratically-elected representative institutions to the courts, both the legislative and executive branches of governments find themselves influenced by the spread of legal discourse, procedures and rules

[5] www.irb-cisr.gc.ca.

into the political sphere and policy making process. This is often referred to as judicialization (Hirschl, 2006). The role of the courts and their ability to influence and shape political decisions has been favored as an appropriate regulatory mechanism to direct, and to some extent control, executive and legislative authoritative powers (Bar-Siman-Tov 2011; Hirschl 2008; Russell, 1994). This increasing trend towards a greater use of the courts to contest political and policy disputes however, has brought into question the democratic nature and the ability of courts to influence the political outcomes of administrative discretionary decisions.

While the debate over the appropriate role and the capacity of the courts to influence legislative behavior has been widely discussed, the capacity to which courts influence administrative decisions and are able to regulate the exercise of discretion remains largely under-explored (Jacobs and Kuttner, 2002).[6] Are courts important decision-making actors when communicating with administrative agencies? Do courts have the capacity to influence administrative discretion in the same way they shape the legislative policymaking process? If courts are able to do so, how have judicial decisions shaped the political outcomes of administrative determinations and how have administrative agencies responded to these decisions? Do courts have the ability to influence the statutory interpretations of public officials? These are important questions concerning the administration and implementation of public policies when considering the mechanisms of accountability that are set in place in regulating political authority and control over administrative bodies.

More so, they provide nuanced explanations to the different interpretive powers that are exercised by administrative institutions. If tribunals are designed to link the constitutional divide between the judiciary and the executive, by fulfilling their mandates within a legal framework, then judicial decisions would likely play some significant role in the outcomes of administrative determinations. However, the ability to exercise a broad range of discretion in tribunals may

[6] The traditional view of judicial review in particular, has been understood as an ongoing dialogue between the courts and the legislature when considering the constitutionality of particular policies.

significantly control the level of judicial involvement in administrative decisions, ultimately leaving the determination of judicial decision-making capacity in the hands of publically appointed officials.[7] Echoing past efforts to sustain its constitutional authority and discretionary practice of power and control over its borders, recent decisions of the RPD have demonstrated similar approaches in the determination of *bona fide* refugees. The concern to filter out 'bogus' claims while providing asylum to legitimate applicants has increasingly politicized and re-conceptualized the definition of conventional refugees as interpretation and determination is left in the hands of administrative bodies that exercise a broad range of discretion, loosely guided by 'soft-laws' (Sossin, 2002).

II. The Rise of the Administrative State

The way institutions are structured to organize and legitimize political behavior in contemporary liberal democratic societies has created an environment where various political institutions – i.e. legislatures, bureaucracies, legal systems and political parties - have the capacity to direct, shape and influence policies. Undertaking various roles as mechanisms of social order that form the foundations that govern the conduct of individuals within society, institutions theoretically function together to ensure the continuity of democratic practices in the policy making process.[8] However, this is not always the case. Policymaking is an intricate process that requires the cooperation of multi-government actors to make choices about which policies to pursue and how they are to be implemented (Howlett and Ramset, 2003, pg. 8). Depending on the nature of policies, the magnitude of their overall impact and how they are received by society (which groups or individuals will be affected), different political institutions have overtime,

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[7] Historical attempts, such as the inclusion of privative clauses in legislation, to control the role of judicial involvement in immigration policies is one example where the executive branch of government sought to limit access of the courts in the decision making process of citizenship determinations.

[8] I define institutions as "a set of rules, formal or informal, that actors generally follow, whether for normative, cognitive, or material reasons," and organizations as durable entities with formally recognized members, whose rules also contribute to the institutions of the political economy. – Markets and legal systems are institutions that support relationships of certain types. These are the main institutions of liberal economies. See Peter Hall and David Soskice, 2001. "An Introduction to Varieties of Capitalism," in Varieties of Capitalism (Oxford)

expressed various degrees of influence on political outcomes (Flynn, 2011). Consequently, there has been a profound transfer of power and authority between institutions that has allowed for particular actors to play a more prominent role in the policy making process and the overall governance of Western democratic states.

The increasing transformation from the traditional model of governance, in which the legislature passes, the executive implements and the courts interpret and apply laws, to a modern regulatory state, has given way to a more complex form of government. In this new model, governments began setting up administrative frameworks designed to effectively and efficiently govern particular areas of human activity, by establishing autonomous administrative institutions that carry out administrative, adjudicative and regulatory responsibilities (McLaughlin, 1998). This trend towards a greater use of administrative institutions, to undertake political and policy objectives, has shifted discretionary decision-making authority from the legislatures and the courts to administrative, jurisdictional and regulatory decision-making boards, commissions and tribunals.

The creation of tribunals in particular, has re-conceptualized the application of legal principles and the administration of justice by allowing public officials to decide on legal matters that formally fell under the jurisdiction of the judiciary. Areas of social concern that were once under the authority of the common law courts, such as human rights, mental health and labor became "administerized" (McLaughlin, 1998). Though the constitutional powers of the courts were not removed, the delegation of decision-making authority to tribunals has reshaped the legal boundaries by which institutions and government bodies are regulated, checked and balanced. Although tribunals, in theory, function within the framework of the law, the discretionary authority conferred upon them is loosely guided by 'soft-laws'. The increasing concentration of decision-making authority in centralized agencies, such as administrative tribunals, has therefore undermined the capacity of elected legislatures to maintain reasonable measures of control over the executive (Smith, 2007). In conjunction with the absence of legitimate remedial mechanisms

to regulate administrative behavior, maintaining procedural fairness and accurate legal application and "ensuring accountability in parliamentary systems of government appears to have reached a paradoxical crossroad" (Banfield and Flynn, 2013).

The reason for this is because elected legislatures are entrusted to make democratic decisions when developing policies through political debate.[9] The traditional view in Western parliamentary systems is that administrative agencies are held to different standards of accountability through the doctrine of Ministerial accountability (Savoie, 2003). Members belonging to specific administrative departments are held accountable for their decisions differently as they are answerable to the Chairperson of the department. The Chairperson is then held accountable to the Deputy Minister or Governor in Council and therefore by association to the Minister. This long hierarchal line has diluted and complicated administrative responsibilities by failing to provide proper regulatory mechanisms that hold public servants accountable for their actions.

III. A Dialogue with the Courts – *The Study of Judicial Decision-Making Capacity and the Practice of Discretion*

The scope of judicial decision-making capacity has been broadly categorized as public policy-making through judicial review and the consideration of "pure or mega" questions that include issues that are inherently political in nature and not necessarily amenable to judicial consideration or resolution (Hirschl, 2006; Hogg and Bushell, 2007). Within a rights based context, legal theorists and political scientists have conventionally debated the democratic nature of the relationship between the judiciary and the legislative branch of government (Waluchow, 2007). Often challenged as an illegitimate source of authority and improper regulatory mechanism when considering political questions, the role of judicial review of legislative outcomes has depicted representative institutions as compliant actors subjected to judicial

[9] Examples of criticisms of electoral democracy in Canada include, but not limited to: voter ignorance, and apathy. The policy-making capacity of the courts has also brought into question the democratic legitimacy of appointed judges as final decision makers, raising apprehension of judicial activism.

supremacy. The degree of influence the judiciary has in the political arena has placed a significant amount of consideration on the democratic nature of the behavior and role of judges and how they influence political outcomes.

(A) The Study of Courts

Departing from the conventional notion as being simple adjudicative bodies that resolve disputes on a case-by-case basis, the decision-making authority of the judiciary has been re-conceptualized as possessing the potential to significantly impact overall political and policy directions (Hausegger, Hennigaz and Riddell, 2009). The ability of appellate courts to contest policy and political disputes demonstrates the potential to influence decisions on four different grounds: (1) the general public, (2) lower court decisions, (3) legislative and executive branches of government and (4) quasi-judicial/independent actions of state-based administrative agencies, boards, and tribunals. The first three of these sites of conflict have been well explored through investigating the developments under the Charter and its influence on political debates. Particularly, the way in which Canadians have come to understand and treat rights (MacFarlane, 2008) and how general public policy actors have responded to political outcomes that have been persuaded by judicial decisions (Cairns 1992, Glendon 1993)[10].

How judicial decisions have shaped policy and informed political conflict has been prominently observed in the legislative-judicial relationship, particularly in relation to the debate surrounding the appropriateness of judicial oversight and/or usurpation of democratically elected bodies. The discourse on what is known as 'Dialogue theory', has called into question the authority of the courts as a policy-making institution (Hogg and Thornton, 2007), the democratic legitimacy as final decision makers (Abella 2000, Lever 2009, Waldron 2006,) and the apprehension of judicial activism (Morton and Knopff, 2000).

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[10] See: R. v. Morgentaler 1993 CanLII 74, [1993] 3 SCR 463 for example case on charter interpretation and legislative outcomes in policy development. Demonstrated in this case, the Supreme Court's interpretation of the Charter has made it difficult for the Canadian government to legislate or develop policies surrounding the issue of abortion. This is the apparent criticism that has been highlighted throughout – the democratic legitimacy of judicial review and hindering parliamentary supremacy.

The concern for the legalization of politics and the recent interest in the dialogue between judges and legislators have overshadowed the fourth site of potential impact and the crucial role that judges play in reviewing administrative action in democratic states (Sossin, 2002). As many members of minority and disadvantaged groups have asserted, "discrimination comes often in how laws are applied and enforced as opposed to how they are drafted and enacted" (Sossin, 2002, 467). Traditionally, judicial review of administrative discretion was governed by the *ultra vires* (beyond one's legal power) doctrine. Under this common law doctrine, judicial intervention in the exercise of discretionary authority was warranted where the decision-maker had exceeded the scope of the delegated authority by acting for improper purposes, arbitrarily or in bad faith, breaching the duty of fairness, failing to consider relevant evidence, considering irrelevant factors or reaching a patently unreasonable conclusion. This was simply viewed from a procedural perspective. It was not until the enactment of the Charter that the substance of discretionary decision making itself became the much greater subject of judicial scrutiny.

(B) Theoretical Contribution

The extent to which judicial involvement is shaped, limited and employed by legislative and executive actors has become an area of concern as institutions continue to rationalize the use of power and authority over constitutional interpretation, policy implementation and operationalizing decision making procedures. Subject to criticism by opponents of judicial review, broadening the scope of the judiciary's involvement in shaping public policy and the decision making process of political issues – primarily ones that involve the exercise of political discretion – has been condemned as un-democratic (Cowper and Sossin, 2002; Waldron, 2006). In turn, the extension of the court's jurisdiction to consider political issues has become problematic for both public administrators and legal theorists. Whereby the issue of how, when and why the courts may remedy administrative discretion has captivated political scientists, the democratic nature and legitimacy of judicial authority has been prominently disputed by legal scholars (Roach, 2001).

Though the discourse of the judiciary's role in shaping legislative policies has been widely discussed, the capacity to control the spread of legal principles in administrative decisions has been overlooked. While the judicial impact on administrative agencies has been briefly considered, the unconstitutional exercise of administrative discretion has remained largely under-explored (Morton and Knopff, 2002; Sossin, 2002). Furthermore, existing literature on employing the courts as a regulatory mechanism to ensure accountable, transparent practices in the executive have been outdated. Though recent scholars have begun to revisit the debate, there is much research to be conducted in order to better understand the institutional-influence and policy-outcome/decision-making dichotomy (Baker, 2010; Soennecken, 2013). Therefore, the questions and methods employed in this study serve only as the preliminary steps to a much larger research project – one that seeks to better understand the intersection of law and politics.

IV. Summary of Main Argument

There are a number of implications that can be drawn by studying how administrative members treat judicial decisions in their determinations. The extent to which judicial decisions are used in administrative procedures highlights their importance in carrying out political goals. Administrative board members have the capacity to decide the strength of judicial decisions by ultimately choosing how to interpret and apply them in certain circumstances. The ability of administrators to determine this suggests that, unlike the relationship between courts and legislatures, administrative boards and agencies are less constrained by obligations to follow judicial interpretations of the constitution and statues. Rather, they are afforded a broad range of discretion in order to carry out their duties and responsibilities by making and following their own policies. Though they receive their powers from statues, administrative bodies provide themselves with their own policies, rules and procedures. The capacity to limit and control judicial influence in administrative agencies suggests that these public servants may exercise a considerable amount of power, more so than judges, in shaping and directing future political outcomes.

The focus regarding judicial interpretations of the Convention Refugee definition has changed the nature, scope and outcome of asylum claims and the overall meaning of *refugees* as understood by administrative board members, politicians and judges. There are a number of factors that can shape the outcome and future for refugee claimants[11]. This particular study investigates the capacity of judicial decisions as one of those factors by examining whether following legal interpretations results in better outcomes for asylum seekers. If courts do in fact provide structure to political definitions, then it would logically follow that such interpretations would be consistently understood and applied in most, if not all of their decisions. In the case of the IRB, refugee determinations that correctly follow the rules (precedents) established by judicial decisions would therefore result in the most legitimate outcome for refugee claimants. This study demonstrates that courts do not have a strong degree of influence in shaping the outcomes of refugee determinations. Though there is a positively weak association between following judicial precedents and successful refugee claims, this study suggests that there are other factors that contribute more to the outcome of asylum claims. Whether these factors can be democratically and legitimately justified, contrary to judicial decisions remains an open question.

V. Concepts and Methods of Analysis

(A) Measuring Judicial Decision-Making Capacity

The strength of judicial decisions has traditionally been measured by the precedent they establish for future cases. With the ability to provide direction to particular decisions and outcomes in the judicial hierarchy, precedents demonstrate various degrees of influence. "The resource that is most under judicial control is the formal rule undergirding a court decision" (Spriggs, 1996: 1127). The presence of formal rules – conventionally articulated and outlined in legislation – obliges those who are confined by its boundaries to obey particular commands and

[11] Some of these factors include the types of policies, rules and procedures that are followed by board members (such as changing the number of board members on a panel and using guidelines) while others include proper completion of forms and acquisition of quality council. Several cases have demonstrated that poorly completed Basis of Claim forms (BOCs) result in negative outcomes.

follow certain policies. When formal rules are broken where they are clearly articulated, the scope of judicial interpretation becomes more narrow. Precedents that are derived from such cases arguably hold stronger value because room for further interpretation is limited.

The strength of these rules is measured by the legal obligations they have on political actors. Confined by the law, there is limited access to exercise discretion in decision-making procedures. Comparatively, where legislation is silent on certain issues – and rules are less formal – there is greater room for government agencies to function with greater discretion. The scope for judicial decisions to interpret issues when rules are more vague or ambiguous also broadens, as legislation may be (deliberately) silent on particular issues.[12] Precedents in this respect, may hold less influential weight than those derived from cases that follow more formal rules.

The value of precedents however, function differently when attempting to regulate or influence administrative bureaucracies.

> Judicial opinions differ in their ability to formulate referents for behavior and instruct bureaucracies about the consequences of their policy choices" … These opinion attributes signal to agencies the judiciary's (and potential litigants') likely behavior in the future and they therefore influence agencies' beliefs about the costs and benefits of alternative responses to the Court (Spriggs, 1996: 1127).

The legal rules established and interpreted by courts vary in terms of how specifically they detail the substantive outcome of agency implementations. Unclear rules that do not furnish agencies with precise information, leave administrative adjudicators uncertain about the court's intent of future direction of particular issues (Spriggs, 1996). In other words, less explicit opinions provide flexibility for bureaucracies to interpret and use opinions to rationalize or justify their determinations. Explicit opinions however, offer agencies and administrative tribunals more detailed legal rules, and therefore allow bureaucracies to easily anticipate the future consequences

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[12] It is held by legal scholars and constitutionalists that legislation in Western liberal democracies have functioned more as structures and frameworks that is given greater substance and meaning when judicial decisions are made. Language in legislation is often believed to be left vague and open for interpretation, allowing judges – through judicial decisions to provide meaning to it.
This notion has been a point of contention for judicial activist and judicial review critics such as Jeremy Waldron.

of their decisions. Though the extent to which precedents are persuasive depends on a number of factors (i.e. the basis and specificity of opinions and the presence – lack thereof – formal/binding rules and obligations), the means by which they are employed (or not) in administrative decision-making procedures depends on the constitutional powers conferred upon agencies. This allows them to manipulate the strength (influential power) of judicial decisions – at least within the context of administrative tribunals (Sossin and Houle, 2006).

The ability for board members of the RPD to control the way in which judicial decisions are employed, suggests that the complexity of deciding refugee determinations cannot be [legally] confined to judicial interpretations. However, the position that this study takes is that if board members are obliged to follow judicial interpretations of constitutional conventions then refugee determinations would be made with higher level of consistency and therefore more democratically. Notwithstanding other relevant factors that are considered in refugee determinations (i.e. security threats and criminal convictions), the proper application of judicial guidance offers higher level of consistency of statutory interpretations with the intentions expressed in the legislation and the overall purpose of the refugee convention.

(B) Overall Methodological Approach

In examining the overall decision-making capacity of the courts, this study utilizes and combines both qualitative and quantitative methodological approaches in developing a clearer understanding of the relationship between judicial bodies and administrative agencies. It begins with combining the standard legal technique of precedent tracing and the qualitative method of content analysis inspired by the works of Banfield and Flynn (Banfield and Flynn, 2013 pg. 9). Particularly, it traces the impact of the Supreme Court decisions in *Canada v. Ward* and *Chan v. Canada* by exploring the consideration given by administrative board members when determining refugee cases. The scope of the impact of these decisions is therefore determined by the extent to which the judicial decision affects the outcomes of asylum claims. This is done by utilizing

descriptive statistics to test levels of association between judicial decisions and refugee outcomes in the RPD. The study further tests the confidence of the findings to better quantify the association. Overall, the study considers the decision-making capacity of the courts by analyzing administrative responses to their expanded scope of review of refugee cases by exploring the weight that administrative adjudicators place on judicial decisions in interpreting statutory definitions. The ability for public officials to exercise their own interpretive powers through the use of administrative discretion indicates a reconceptualization of legal principles in determining political outcomes.

VI. Dissertation Outline

The concept of judicialization has more recently become a point of interest in public policy and administration. In this regard, waves of public administration, both in theory and in practice have started to reconsider the role of judicial practices and the spread of legal discourse into the overall policy-making process. Though the judiciary has always been a central component to the governance of Western democracies, unresolved issues in public administration such as an accountable government and the balance between effective and efficient delivery of goods and services has brought into question the connection between law and politics. This study seeks to examine this relationship by examining how administrative and judicial bodies interact with each other in the determination and overall administration of public policies. Chapter two provides a comprehensive examination of the transitions of public administration as understood within the context of Western liberal democracies. While much of its theories and practices have been predicated on economic schools of thought, approaches of public administration of bureaucracies appears to have been disconnected from fundamental legal frameworks. Sections of the chapter highlights the failure to address reoccurring problems, such as accountability, has arguably been a result of disregarding and limiting the capacity of judicial influence in the policy making process.

Until very recently, the influence of power and authority of the courts has been investigated within the context of the relationship it has with the legislature. In addition, the intention of this is to outline the gap in the literature by demonstrating where the capacity of the courts to influence decisions has been most prominently studied. Chapter three introduces and explains the use of novel methodological approaches to the study of judicialization. It sets out the methodological approaches to better examine associations between influences established by judicial precedents and outcomes of administrative discretionary practices. Chapters four and five examine in detail the specific decision-making capacity of the Supreme Court by reporting the findings of the designed research. These chapters consider the relevant factors that are likely to change the outcome of refugee determinations. In particular, they examine the ability of both unanimous and non-unanimous judicial decisions to shape future outcomes. Chapter five further compares the differences of the decision-making capacity by exploring whether the strength of precedents play any role in compelling administrative adjudicators to place substantial weight on judicial decisions. Finally, chapter six draws some conclusions on the ability of the courts to provide some sort of guidance to administrative tribunals when interpreting statutory definitions. Further, it offers insight regarding whether the guidance provided is compelling enough to regulate the practice of administrative discretion. This chapter also offers additional considerations for future research on the underexplored relationship between judicial bodies and administrative agencies.

Chapter Two - The Politics of Public Administration – To Bureaucratization and Beyond

"Our public service has been shaped to the environment in which it has had to operate and that changes in the environment bring about alterations in the public service…While the public service bears the marks of environmental factors that press upon it, society also bears the imprint of the activities and enhanced authority of public servants" – J.E Hodgetts

"The important task facing public administration is to discover better approaches to creating rational/legal order; approaches which address popular dissatisfaction in practical, contextually-prescient ways, using the structural tools that are the stock in trade of the legislators…If it is the spread of Democracy and not of Capitalism that is the story of the late 20th C. then we should not expect to see bureaucracy shrivel and weaken so much as we should expect to see it come into its own as an indispensible adjunct to competitive nationalism" – Laurence E. Lynn

"When law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or unreasonableness" – Philip Anizman,

I. Arresting Legal Development

The increasing influences of Public Choice theories and Managerialism have reshaped the traditional view and organization of public administration within Western Liberal democracies (Aucoin, 1990; Nagel, 1997; Self, 1993).[13] Management reform movements such as the New Public Management (NPM) in particular, have placed greater emphasis on the use of private-sector practices in public administration. The managing-principles derived from the private sector have resulted in paradigm-shifting transformations that have reformulated the structure of bureaucracy and the organization of political control and authority in the public service (Savoie, 2003). This domination of economic theories in politics, particularly in the theory and practice of public policy, has displaced significant consideration for legal principles in (re) shaping the organizational structures of public institutions such as administrative agencies, boards, and tribunals. The requirement to restructure and reorganize the public service, to address and resolve matters of efficiency, accountability and transparency, has therefore changed the dynamics of the politics/administration dichotomy by redrawing the boundaries of authority and

[13] "The first set of ideas, emanating from the school of thought known as public choice theory, focuses on the need to reestablish the primacy of representative government over bureaucracy. The second set of ideas, now generally referred to as the 'managerialist' school of though, focuses on the need to reestablish the primacy of managerial principles over bureaucracy.

control [of administrative decisions] between political and public officials[14]. In other words, the decentralization of authority and reallocation of responsibility, to carry out the delivery of public goods and services efficiently, has fundamentally re-conceptualized the political relationship that exists between the elected representatives and appointed public officials. With economic theories dominating the public sphere, legal principles have been somewhat disconnected from major theories of public administration in Westminster Parliamentary systems like Canada.[15]

Insignificant consideration for the capacity of judicial norms to contribute to public service reforms has left political scientists, public practitioners and elected representatives with an incomplete understanding of the relationship between the judiciary and the executive branches of government – particularly the role of the courts and administrative tribunals. As the traditional model of public administration has become obsolete and been replaced by the NPM, the focus of government organization has shifted from administration to management and from theories of bureaucracy to theories of the market. This change in focus has resulted in a retreat from organizing political control that is informed and regulated by the fundamental principles and basic tenets of the law. The desire to reform the public service to enhance and ensure the efficiency of the delivery of public goods and services has come at the cost of effective administrative decision-making.

Rather than ensuring that these political or discretionary decisions, made outside an inherently political framework, i.e. the legislature, are made correctly in accordance with the law, both procedurally and substantively, the reflection of private sector methods have led to the *marketization* of the public sector (Hughes, 2003). What was once known to be central to public administration, process, procedure and propriety, has been displaced by result-driven, market-like

[14] I use the term authority and control as indicators of 'power'

[15] Unlike presidential systems, notably the United States, whereby bureaucracies are supposedly accountable – separately – to the chief executive, the legislature and the courts, the role of the courts as regulatory mechanism are not perceived to be of great importance (or as important) in holding Westminster administrative departments accountable for their actions. This may arguably be attributed to the lack of consideration give to the role of the courts as regulators bodies that hold public officials accountable in Westminster democracies such as Canada and the U.K. See: Owen, E Hughes 2003, page 244

measures. Echoing the values of global capitalism, the shift towards NPM has further complicated the relationship between democracy (democratic accountability) and bureaucracy by evading the fundamental requirement of the rule of law (Lynn, 1998). Democracy "requires the rule of law that is understood as legally sanctioned regulation of markets and competent bureaucracies subject to control by judicial institutions" (Lynn, 1998, pg. 113). Yet the influence of capitalistic ideologies, propelled by economic schools of thought, have substantially weakened and dismantled the oversight and regulation of the bureaucracy; therefore leading to a departure between democratic theory and practice in Canadian public administration.

Since democracy requires the rule of law, and the rule of law is best understood by the inclusion of legal principles (Waluchow, 2007) and regulation by judicial institutions (Lynn, 1998), it logically follows that theories and practices of public administration that discount or transcend beyond legal principles are in tension with traditional understandings of what is entailed as *democratic.*[16] This tension raises the question: what is the nature of the relationship between broadly understood concepts of legal principles and public administration, and how have theories of NPM changed the dynamics of this relationship? For example, recent legislative changes to Canadian migration policies have led to criticisms suggesting that values of NPM have not only failed to address these problems but have further challenged the constitutionality of administrative behavior (Crepeau and Nakache, 2008; Rehaag, 2007, Soennecken, 2013).

Constitutionally questionable behavior of democratic governments and their agencies has traditionally been rationalized in the best interest of and concern for State security. Most notably demonstrated in the treatment of migrants and refugees, significant changes in policies – of Western democracies such as Canada and the United States – have substantially challenged and complicated access to citizenship and asylum. While issues of security have often been justified,

[16] Democracy in this case is considered in the same it is understood by classical liberal democratic theorists such as John Stuart Mill, and John Locke, those who take power to be vested in the collective body.

questionable political decisions such as the lack of sufficient control of administrative behavior (i.e. regulating administrative discretion) in the implementation, application and outcomes of political determinations (i.e. refugee adjudication) has yet to be explained. Theories of NPM have exacerbated and further exposed issues of the practical accountability mechanisms and have increased institutional and policy complexity (Barberis, 1998 Dunleavy, 1994, Tinkler, 2005). The relationship between legal principles and public administration appears to have been interrupted by the focus of NPM of efficiency and results. The requirement for a stronger connection between law and public administration is not only imperative for the maintenance of democratic practices, but also central for the preservation of fundamental human rights that citizens and non-citizens alike are rightfully entitled to.

A comprehensive review of the public administration literature demonstrates that, notwithstanding a limited and outdated number of scholarship, the rule of law – as a requirement of democracy and central component to public administration – has been overlooked in the context of public sector reform. As the "most fundamental distinction between public and private organizations is the rule of law" (Kettle, 1996, pg. 9), the reflection of market-driven policies in the public sector seems to discount legal theories as being dysfunctional/implausible regulatory mechanisms that hold public officials accountable when necessary. Rather, a great deal of faith is situated in theories of NPM to [adequately/constitutionally] address the generic structural problems of modern democratic governments – responsiveness, accountability and political control. This chapter demonstrates that contemporary theories of public administration reform have failed to reconcile the structural issues that continue to face the Canadian public sector because market-driven concepts are incompatible with maintaining the rule of law in administrative decision-making departments[17]. The relative disconnection between law and public administration is therefore attributed to the extent to which the public service and governments

[17] Later chapters will explicitly demonstrate this by carefully examining the dynamics of the refuge determination process in the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB).

have allowed the spread of economic theories to influence, shape, and in some circumstances, control the conduct, mandates and policies of the executive.

The practice of universalistic principles of management has resulted in what Lynn has argued to be "tensions between legal and political traditions within the public sphere of Western democracies" (Lynn, 1998). Today these tensions are clearly manifested in the relationship between administrative tribunals and judicial courts. Particularly, within the context of the Immigration and Refugee Board of Canada (IRB), recent legislative amendments, questionable administrative practices and a growing body of criticism has provided persuasive reason to re-examine Canadian public administration from *legal* rather than *economic* perspectives. Failure to regulate and prevent the abuse of discretion and confine public conduct and administrative decisions to legal norms and standards has been one of the major downfalls of contemporary theories of public management. This has resulted in failure to reconcile tensions between legal and political traditions and has perpetuated the separation and departure between democratic theory and practice in public administration (Dahl, 1989). "To the extent that the problem of modern public administration is democratic accountability, then we must once again focus attention on politics and the role of public law. For it is through public law that the citizens of democratic states collectively express their specific wishes for the role of government to fulfill" (Lynn, 1998 pg. 120).

II. Understanding Public Administration

Public administration deals with the implementation of policy. It is a process by which public administrators, who operate in the public sector and are involved in all of those activities that are necessary for the smooth operation of departments, direct the programs and activities that are the outcomes of political and policy decisions made by elected representatives (Prentice, 1984).

> As it is currently practiced, public administration can be defined by the following functions: (1) establishing objectives and priorities, (2) developing and operating plans, (3) organizing and staffing (4) directing (5) controlling, (6) dealing with external units of

> the organization, (7) dealing with independent organization and (8) dealing with the press and the public (Prentice, 1984: 495-97).

Though many of these activities are still central to current public administration initiatives in Western democracies (Barberis, 2012), how they have been operationalized has changed under the theoretical framework in which they function. Public administration is *prima facia* argued to be "the use of managerial, political and legal theories and process to as to fulfill legislative, executive and judicial governmental mandates for the provisions of regulatory and service functions for the society as a whole or for some segments of it (Rosenbloom, 1986). However transitions and paradigmatic changes from traditional models of administration to new models of management has drastically reshaped the debates, practices and theories of the organizational design of bureaucracies. Such changes have been broadly attributed to and driven by "the requirement for governments to respond to the fiscal stresses brought about by changes in the international economic system on the one hand and by the unrelenting demands for government services and regulations in national political systems on the other" (Aucoin, 1990, 115). Major changes – resulting from the requirement to address economic concerns – to the structural organization of bureaucracies has significantly reshaped our understanding of institutional relationships – particularly between the executive and the legislature (between 'non-partisan' appointed officials and the politically elected representatives).

Cognizant of the important changes made to the public sector of Western democracies, "and even more so the way administration is portrayed" (Olsen, 2005, pg. 2), contemporary approaches to public administration has emphatically challenged democratic practices beyond its limits (Peters, 2010; Farazmand, 2010; Roy, 2008, March and Olsen, 1995). Issues of accountability and challenges to establishing functional regulatory mechanism that are not contradictory to democratic practices, have been central in the public policy and administration discourse (see: Bovens et. al, 2008; Jackson 2009, Mulgan, 2000; Stone, 1995; Strom 2000). The strong requirement for establishing mechanisms of accountability in the public sector and the

absence of achieving practical solutions has directed much of the literature to reexamine the nature of and relationship between bureaucratic organizational structures and theories and practice of democracy (Peters, 2010; Argyriades, 2010, Farazmand, 2010) While the normative purpose of public administration is generally agreed upon (what public administration *ought* to do and fulfill), how administration is instrumentally practiced and applied is largely dependent on and situated in the schools of thought that exert their capacity to influence and shape the definition of public administration (Hood, 1995).

Understanding public administration is therefore contingent upon (a) the extent to which different schools of thought are capable of directing the public sector and (b) the priority and strength of environmental trends that are categorically shaped by political agendas.[18] The importance of understanding the nuances underlying the definitions of public administration is grounded in the organizational behavior and structure of bureaucracies as such contingencies carry the possibility of re-shaping institutional relationships. In order to better understand how contemporary public administration is organized, functions and changes, it is "worthwhile to reconsider and rediscover bureaucracy as an administrative form, an analytical concept, and a set of ideas and observations about public administration and formally organized institution" (Olsen, 2005 pg. 2).

The universal administrative reform movement towards public management over the past two decades has been illustrated in many of the world's democracies. Highlighted in the administrative reform literature in Britain, Australia and New Zealand, the NPM paradigm has been conceptualized as a dominant mode of organization (Ferlie and Fitzgerald, 2002; Guthrie, Parker and English 2003; Carroll and Steane, 2002; Johnston, 2000; Halligan, 2007; Newberry

[18] Governments are likely to respond to issues placed on the top of their agendas prior to addressing other concerns. However, how their agendas may more likely than not be depended on changing environmental trends and exogenous shocks. Transformed by trends such as globalization/economic rationalization, innovative administrative techniques and technological advancements, instrumental changes to the public sector have broadened the nuances of defining public administration. Each of these trends - like most shifts in public administration- is a reaction against the negative aspects of its opposite. Thus globalization can be seen as a reaction against claims of 'national exceptionalism'.

and Pallot, 2004.) Yet with the constant remodeling of the political environment and ongoing changes to government responsibilities, the continuity of the new paradigm has been brought into question (Oliver, 1992). Public administration, both in theory and in practice, has therefore continued to experience substantial change.[19] The anticipation of its direction in the future however, has shifted the focus to some degree, "from descriptive mapping and *a priori* critiques to the analyses of paradoxes associated with recent and contemporary public service reforms" (Hood and Peters, 2004, pg. 267).

III. Paradigm Shifts – *New Approaches, Same Problems*

The historical evolution of public administration – as both an intellectual enterprise (Henry, 1975) and a field of government practice (Hughes, 2003) – has transformed the theoretical and practical functions of governance in contemporary Western democracies. The transition between major paradigm shifts has re-conceptualized the intellectual development and the underlying ethos of the public sector by redirecting the *locus* and the *focus* of government action.[20] Where the *locus* refers to the "institutional *where"* of the field, the *focus* is the "specialized *what"* of the discipline (Henry, 1975, p. 378). *What* governments do, and *where* they do it have become central questions to the study of public policy and administration – as both an independent discipline and sub-discipline of political science.[21] However, with recent transitions from traditional models of progressive public administration to New Public Management, *how* governments do what they do has further transformed the dynamics of the public sector. (Dunleavy and Hood, 1994; Gruening, 2001; Kaboolian, 1998). The proliferation of major changes to particular subfields of public administration has fashioned prescriptive, prognostic and

[19] Predicated not on law but rather constitutional conventions, administrative decisions legitimized by their adherence to and compliance with conventional standards. Where laws does not predict or dictate the actions of such actors, executive actors are guided only as far as legislation dictates beyond that is the exercise of discretion granted once more by convention and adherence to the orders established by the authority of public minsters.

[20] For a full overview of the major paradigm shifts see: Henry, Nicholas (1975) Paradigms of Public Administration. *Public Administration Review* 35(4), 378-386

[21] The subfields into which the study of public administration is commonly divided are: comparative administration, the study of 'policy', the public service, administrative technique, and administrative law.

analytical issues that have continued to broaden the dimensions of the political/administrative dichotomy (Hood, 1995).[22] With the expansion of the contexts in which public administration has been examined, shifts to globalization, the spread of economic rationalism, waves of 'managerialism', the transformation of 'informatization' and the rise of legal formalization have significantly reshaped the overall ontology of public administration.[23]

Public Administration has become an acknowledged, legitimate enterprise in the academy and the real world of governance; it is knowable and in, the judgment of many, essential to good governance (Menzel and White, 2011). Despite an expansion of the locations whereby much of public administration appears to have experienced some degree of change, the rise of legal formalization has not entirely been explored. Connected to "the ideas of social limits of regulation and the (over) extension of law as a medium of control to achieve desired policy results…legal theories are, in principle, alternatives to managerialization" (Hood, 1995, pg. 178).

As mentioned earlier, the domination of managerial principles in public administration has not allowed for substantial consideration of legal formalization in Canadian public policy and administration. It is therefore imperative to explore the relationship between law and administration not only as an alternative to economically driven theories, but also as a requirement for preserving democratic practices in the implementation and administration of public policies. Investigation of judicial concepts provide better explanations of the nuances that exists between mechanisms of accountability and the State, the relationship between the executive and the legislature and redirects the legal/philosophical discourse on institutional dialogue theories. Should legal authority have greater capacity to check administrative

[22] Prescriptive issues involve the norms and values of particular fields of study and pose normative questions such as 'what should be done'? Prognostic issues are concerned with predicting future outcomes and hypothesizing about the future outcomes of current actions by questioning 'what is more likely to happen'. Analytic issues deals with the various perspectives by which a particular issue is viewed. Mainly concerned with the epistemology of an area of interest, analytical issues ask 'how should a subject be analyzed or interpreted'.

[23] In addition to the contemporary debates surrounding public administration, disagreement on the validity of a paradigm shift (in theory and in practice) confounded much of the public administration literature.

discretion? Are judicially structured organizations *democratically* suitable as mechanisms of accountability? If so, does the capacity to regulate administrative actions dictate the nature of political decisions/outcomes? More generally, should public administration continue to be regulated by 'soft-laws' and remain nearly a law-free environment? These are only a few questions that have been missed in the broader scope of the public administration literature in the context of Western liberal democracies.

Much of the public administration literature has focused on the change from good government to good governance (Flynn, 2011). Often described as social institutions, "government (and government systems) serve to produce and regulate rules that govern aspects of social activity" (Mintrom, 1997, pg. 28). Representing a binding form of collective action, government policy-making and activities are characterized by centralized public decision-making. While Government is the institution where political decisions are created – dictating the actions of society – governance is then the broader concept that describes the forms of governing which are not necessarily in the hands of the formal government (Hughes, 2003). The paradigmatic transition to NPM concepts in public administration has offered a number of suggestions that have redefined the forms of governing. From public-private partnerships (Forrer et. al, 2010; Hodge and Grave, 2007) to complete privatization and outsourcing, the role and expectation of government has undoubtedly changed. The requirement for better governance – i.e. exploring new and more efficient ways to exercise authority over the governed – has raised conceptual and practical issues in the administration and implementation of public policies. Good governance has often been considered to be a broad reform strategy to strengthen the institutions of civil society, and make government more open responsive, accountable and democratic (Minogue, Poliadano and Hulme, 1998, p. 6) Commonly analogized as "steering rather than rowing" the normatively changed dynamics of government functions have sought to (re) address and reconcile the issues of accountability and responsibility in the public service, as the traditional model appears to have

failed in doing so (Denhardt and Denhartd, 2000; Dunlevy and Hood, 1994; Osborne and Gaebler's, 1992).

Changed initiatives to the outcomes of public administration echoes the values of NPM; mainly that the identification and increase of organizational efficiency will result in establishing better *democratic* accountability mechanisms (Coram and Burnes 2001; Weissert and Goggin 2002; Hendriks and Tops 2003; Reichard 2003; Vann 2004; Hoque and Kirkpatrick 2008). Where traditional public sector values sought to increase legitimacy, equality, fairness, reliability and due process, NPM values have been primarily concerned with enhancing, efficiency, client value, transparency and effectiveness (as in clear results) (Kuipers et.al, 2013). Though the conservation of democratic practices appear to be at the apex of the reform agenda, contemporary dissatisfaction and distrust in today's government and public offices (Savoie, 2006) have indicated the shortcomings of NPM values. "The need for significantly re-thinking public administration in the Westminster doctrine has become altogether more apparent… more and more Canadians are less and less inclined to trust, much less feel inspired by, Parliament and the Federal public service" (Roy, 2008 pg. 543). The initiatives of NPM, though honorable, have failed to substantially construct mechanisms of accountability and successfully restrain the abuse of discretion in administrative agencies and tribunals such as the Immigration and Refugee Board of Canada.

IV. Who is Accountable?

The accountability mechanisms established by theories of NPM have attempted to reconcile the issues of ministerial responsibilities by delegating authority to non-elected, public officials. This however, has exacerbated the accountability problem by creating greater potential for discretionary abuse through a weakening of ministerial control over administrative behavior. This delegation of authority from democratically elected representatives to public officials appears to deflect liability on to those who are not directly held accountable to the public. Therefore, public officials are held accountable in different ways. Administrative accountability

in particular, focuses on the satisfaction of legitimate expectations of the use of administrative discretion (Schillemans, and Hart, 2008). The concept of administrative accountability refers to,

> Officials who are responsible within the system to some institution or to some person for the discharge of their responsibilities, which they have been allocated. This means that they act in the context of a relationship with an institution or person which or who is in a position to enforce their responsibility by calling them to account for what they (and/or their subordinates) have or have not done. Thus . . . responsibility requires that officials be accountable for the performance of their official tasks and, therefore, be subject to an institution's or person's oversight, direction or request that they provide information on their action or justify it before a review authority (Thynne and Goldring, 1987, pg.8).

There are several issues however, attributed to the traditional concept of administrative accountability. First, it is loosely associated with the notion of giving account for public actions. As public officials are not obliged to explain or justify actions in formal terms as in the case of ministerial responsibility (Romzek and Dubnik, 1987). Therefore, public officials do not have to be answerable for their actions in the same way ministers must answer questions raised in parliament. Furthermore administrative accountability reflects and is linked with the idea of top down control in an administrative hierarchy. As public officials are therefore not controlled by constitutional restraints, it disregards the level of discretion that some public officials exercise.[24] More so, while the Minister is theoretically responsible for the actions of the public servants in their ministry, they are no longer in direct control of the operation and procedures of their ministry and associated administrative agencies. In this regard, ensuring proper conduct in carrying out fiduciary responsibilities has been complicated by the limitations associated with regulating administrative discretion.

Further perpetuating these problems is the convention that public officials are to carry out their mandates free from political interference and influences. While this is meant to ensure that administrative decisions are not swayed by hidden political agendas, it creates greater potential

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[24] Discretion is defined as the ability to adjust programs or policies to suit circumstances. It is the process by which administrators are able to use judgmental decision making strategies to change or alter programs to suit the client or in some cases the administrator. <u>See: Anna Pratt, Dunking the Doughnut: discretionary power, law and the Administration of the Canadian Immigration Act", 1999 pg. 202.</u>

for the abuse of discretionary powers. Theoretically, this would suggest that decisions made by unelected members of the executive are made entirely free from political persuasion and almost entirely professionally, based on qualifications and levels of expertise. However, as it is the responsibility of the minster to determine re/appointments to these public positions, the connection between political prerogatives and administrative responses is not entirely disassociated. Political allegiance and concern for reappointment for example, are potential factors that reflect indirect influences that have affected administrative outcomes.[25] The complex relationship between elected representatives and un-elected public officials within the framework of the NPM has stalled procedural and substantive fairness in administrative determinations by failing to establish, employ and abide by legal principles. Rather than ensuring administrative outcomes are in accordance with the purpose of statutes, the focus of NPM is concerned with regulating particular outputs such as meeting quotas for example. So long as output goals are met, the mandates of public officials are theoretically fulfilled.

The unregulated practice of administrative discretion in tribunals such as the IRB, has called into question the capacity of other political institutions, i.e. the courts, and constitutional conventions to confine administrative practices to the rule of law. The role of the courts in relation to judicial review of government action has theoretically provided a means of ensuring accountability and adherence to legal principles that limits the exercise of popular sovereignty of the legislative branch.

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[25] The general negative attitude towards refugee claimants in the RPD in general has been broadly attributed to the appointment process. Speculation within the agency about the intention of the Conservative agenda in regards to refugee acceptance rates, as allegedly been linked with some of the board members outcomes statistics, resulting in more negative than positive determinations. "The Appointment Process [in the RPD] seems to have been a key factor of this [horrible working climate that prevailed] as it has prevented the build up of a common institutional culture that would include some consensus on the core objectives and methods of the IRB and that would be fostered by a management with some kind of institutional authority". See: Crepeau, F., & Nakache, D. (2008). Critical Spaces in the Canadian Refugee Determination System: 1989-2002. *International Journal of Refugee Law,* 50-122.

IV. Chapter Summary

The purpose of this chapter was to highlight the complications of management reform theories, such as NPM, that have stalled the development of proper regulatory mechanisms that hold public officials accountable for their actions. The complex power dynamics and relationship between elected representatives and appointed public officials have further raised democratic problems in the administration of public policies. While the practice of administrative discretion remains important to prevent political influences from determining outcomes, failure to establish constitutional or legislative regulatory schemes appear to have disconnected any sort of supervision of administrative bodies. The increased delegation of authority to under-regulated bodies poses serious democratic and constitutional problems in Western liberal societies like Canada. The following chapters turns their attention to the courts in determining whether judicial bodies are capable of regulating the administrative decision-making capacity.

Chapter Three – Methodology

"Few studies offer comprehensive explanations of judicial impact and none attempts to reconcile alternative hypotheses. Most studies fail to explicitly conceptualize and operationalize judicial impact, and the absence of reliable measures of judicial measures of judicial influence represents a significant problem" – James Spriggs

"The content of an opinion is its essence. It establishes the doctrine that becomes stare decisis and governs future decisions. The content of this doctrine, though it is vital to the law, has been woefully understudied both theoretically and empirically" – Frank Cross

I. (Re) Conceptualizing Judicial Impact – A Novel Methodological Approach

Though the study of judicial roles in politics is fairly explored, many have overlooked the significance of judicial decision-making capacity of political outcomes by focusing their attention mainly on the ideology and legal obligations of judges (Macfarlane, Pritchett and Pritchett, 2013). Judicial policies however are not self-implementing, thereby requiring government institutions, such as legislatures and administrative agencies, to interpret and apply the courts' judicial opinions into policies. The ability to employ judicial opinions by different institutions can therefore result in inconsistent translations of judicial decisions (Baum 1976; Johnson 1979; Johnson and Canon 1984; Katzmann 1980, Shapiro 1968).

> The judicial influence on public policies is therefore, "an important theoretical and empirical matter…as it addresses enduring issues in the study of the courts, regulation, bureaucracy and in regarding the interdependencies among government organizations...It is therefore crucial for political scientists to comprehend how and why the court impacts executive branch policies (Spriggs, 1996:1123).

The relationship between judicial and legislative bodies in Western liberal democracies is traditionally examined within the theoretical framework of the *Dialogue Theory* (Hennigar, 2004). The dialogue metaphor is often used to describe the extent to which judicial decisions influence and shape polices by examining the capacity of courts to reverse, or modify legislation and statutes and observe how elected members respond to these decisions (Hogg and Bushell,

1997).[26] Disagreement concerning the operationalization of the dialectic concept however, has often complicated research on judicial policy-making capacity and questioned the legitimacy of a working dialogue between government bodies (Baum, 1997; Perry, 1991; Segal, 1997; Hirschl, 2006, Waldron, 2006;). The dialogue theory has been conventionally observed by exploring the relationship between the courts and the legislature, thereby overlooking the dynamics of judicial influence in executive agencies.

This study aims to examine the policy-making capacity of the judiciary from a different perspective. It offers novel methodological approaches to the study of the judicialization of public policy by examining the relationship between judicial decisions and the determinations/outcomes of quasi-judicial tribunals in relation to refugee policies in Canada. Particularly, it explores the specific issues raised in selected Supreme Court (SCC) decisions and undertakes a comparative analysis of outcomes by examining decisions in the Refugee Protection Division (RPD) based mainly on claimants' country of origin, basis of claim and basis of outcome. Do Supreme Court decisions influence in any way shape or form the outcomes of administrative tribunals? Do judicial decisions have the capacity to inform and direct the practice of administrative discretion? How does the relationship between the courts and tribunals affect major political outcomes? These questions are addressed by particularly examining the judicial-decision-making capacity through the use and examination of the precedents that judicial decisions establish. Moreover, this study compares how public officials use these judicial decisions to justify refugee determinations between similar cases.

The overall purpose of this study is to determine whether guidance provided by judicial decisions to administrative agencies results in substantively and procedurally fair outcomes; as adhering to and abiding by legal rules and principles in quasi-judicial determinations is mandatory to the overall integrity of democratic regimes. The ability for administrative

[26] This is conventionally observed by examining how legislatures respond to judicial decisions – typically regarding Charter issues.

adjudicators to control judicial influence *vis-à-vis* the practice of administrative discretion is therefore investigated by exploring the levels of association between judicial decisions and refugee determinations. Testing levels of association between judicial decisions and administrative outcomes allows for a better understanding of the practice of administrative discretion in refugee hearings by providing insight into the factors that are more likely to influence adjudicators' decisions.

This is done through combining a number of qualitative and quantitative research methods that expose a diverse range of refugee cases that have utilized SCC decisions to rationalize and justify their outcomes. This provides an opportunity to examine the ways in which administrative board members conduct hearings, consider facts, interpret definitions, and evaluate contrasting determinative issues of asylum claims in Canada. Examining cases that have utilized SCC decisions while analyzing particular content also permits an exploration of the extent to which board members operate judicial direction, thereby highlighting the issues that executive adjudicators consider to be the most important when faced with an asylum claim.

Cases in which tribunals and administrative bodies are subjected to judicial review often occur where relief being sought is usually in effect against a tribunal that has allegedly been procedurally and/or substantively undemocratic or unconstitutional. As a result, individuals have sought a more democratic procedure in determining claims. These changes usually do not take place through legislative or public deliberative processes, and as a result other venues are sought, as they are considered more favorable of the protection of rights and freedoms. In this regard, an examination of the relationship between the Immigration and Refugee Board and the Supreme Court reveals whether ongoing substantive issues, such as errors of statutory definitions, are actually resolved.

II. The Mixed Methods Approach

This research utilizes and combines both qualitative and quantitative methodological approaches in developing a clearer understanding of the relationship between judicial bodies and

administrative agencies. An insufficient investigation of the relationship between tribunals and courts has left much room for the consideration of various research methods to be explored. In light of this, this study employs a mixed methods approach in order to provide a more elaborate understanding of the phenomenon of influence and power that democratic institutions constitutionally wield over one another (Johnson et. al, 2007). It begins with combining the standard legal technique of precedent tracing and the qualitative method of content analysis. The precedent tracing approach "begins with an initial decision by the courts, usually the final appellate court, on an issue at the beginning point in a series of subsequent decisions that rely on that initial case" (Banfield and Flynn, 2013 pg. 9). Traditionally, this approach is utilized in determining how lower courts make decisions based on the precedents established by appellate courts in Common law systems. For the purpose of this study, precedents that are established by the Supreme Court of Canada in relevant refugee cases are examined in the context of how they are employed by administrative tribunals - the Refugee Protection Division of the IRB.

The judicial decisions that are explored are *Canada (Attorney General v. Ward), 1993* and *Chan v. Canada (Minister of Employment and Immigration), 1995* for their significant contributions in defining legitimate asylum seekers. Combing a comprehensive analysis of the content of these cases allows for a substantial determination of the scope of the range and impact of the initial decision.[27] The degree of influence is therefore measured by observing how much weight (emphasis) adjudicators place on utilizing judicial decisions in their determinations. The capacity of precedents established in refugee cases by the SCC to shape future RPD outcomes expands the dialogue theory to consider the role of administrative discretion in shaping public policy – particularly the determination of refugee claimants.

The research proceeds by quantitatively measuring degrees of association between precedents set out in *Ward* and *Chan* and outcomes of asylum claims by refugee board members.

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[27] For advantages of the precedent tracing approach see Banfield and Flynn, 2013 at page 9.

Using descriptive statistics and confidence testing influence of judicial decisions are explored. This allows for a better understanding of how board members arrive at their conclusions and whether judicial decisions play a significant role in the overall determination process of refugees by comparing similar cases that utilize the same judicial decisions. Given that administrative adjudicators are guided by soft-laws, administrative board members are not strictly obliged to utilize judicial decisions in their determinations. However, where judicial decisions are applied, it is expected that the determination of similar asylum claims would result in consistent outcomes except for cases that demonstrate considerable differences (i.e. claims that pose security threats or have been convicted of criminal offences). Contradictory results may therefore be indicative of other significant factors that are more likely to modify administrative decisions, therefore requiring further examination of the refugee determination process.

The mixed method approach provides insight to the grant rate variations that are present amongst similar asylum claims in Canada. It qualitatively identifies the factors that contribute to the success and failure of asylum claims and quantitatively measures the extent to which they affect determinations. By focusing primarily on judicial decisions as a contributing element to refugee determinations, this study investigates the extent to which courts shape the actions of the RPD by employing their expanded scope of review. The impact of judicial decisions on procedural and substantive refugee policies therefore demonstrates how far tribunals are willing to allow legal rules established by courts to regulate and control their administrative discretionary powers.

The methodological rigidity of utilizing quantitative methods alone to test theories of judicial influence has been criticized [particularly in American judicial politics literature] as limiting because of the tendency to accept evidence of judicial impact only in the form of quantitative proof (Herbert, Kritzer and Richards, 2010). Political science approaches to the study of judicial behavior based solely on statistical modeling may therefore not have the ability to capture qualitative variables and nuances of judicial decision-making capacity. By qualitatively

comparing how administrative board members use judicial decisions in their determinations, clearer conclusions can be drawn about the practice and possible requirement for discretionary decision-making in administrative tribunals. For this reason this study examines the strength of legal rules, through mixed methods, as they are framed in judicial decisions, established by precedents, and in response how they are crafted into the administrative outcomes of refugee determinations.

III. Justification of Case Selection

(A) Institutional Consideration – Judicial Bodies and Administrative Tribunals

Deciding legal issues of pubic importance and contributing to the development of all branches of law where applicable, the Supreme Court of Canada, in particular, has contributed as the principle judicial body in shaping political outcomes. Departing from the conventional notion as being simple adjudicative bodies that resolve disputes on a case-by-case basis, the decision-making authority of the appellate courts has been re-conceptualized as possessing the potential to significantly impact overall political and policy directions (Hausegger, Hennigaz and Riddell, 2009). The independence of the SCC, the quality of its work and the esteem in which it is held both in Canada and abroad, contribute significantly to the influential role it plays in Canadian public policy (www.scc-csc.gc.ca).

Administrative tribunals are autonomous agencies that are established under federal or provincial legislation that are responsible for the administration and implementation of public policy (Sossin, 2005). They are comprised of a body of people appointed by the government on a permanent, semi-permanent or ad-hoc basis to decide issues usually arising between citizens and the State (McLaughlin, 1998). By providing specialized and technical resolutions flexibility and efficiency in the delivery of governmental programs and providing informal and rapid forums for public hearings, administrative tribunals minimize time and costs related to litigation before ordinary courts. While receiving their authority from legislation, administrative agencies and

tribunals practice a wide range of discretion.[28] Often encouraged to follow guidelines, decision makers are provided with information to justify their determinations and how various factors should be considered in reaching those outcomes (Sossin, 2005). Because they are developed and applied by the executive and not the legislative branch, guidelines are not binding nor are they enforced by law. Therefore, guidelines cannot be considered law and would be *ultra vires* if they were imposed on decision makers in administrative agencies.

With the exception of the Charter of rights and freedoms, there is generally no constitutional constrain on roles and practices of tribunals. The standard of and degree to which independence and impartiality is required varies with the nature and function of tribunals, its practices and its context, the framework in which it operates and the overall legislative schemes and objectives. Though the use of guidelines as a regulatory scheme to control the actions of bureaucratic conducted is a legitimate mechanism, it is limited within its capacity to bind and regulate public officials.

The ability to exercise a broad range of discretion in administrative agencies and tribunals has delegated a considerable amount of authority to public officials to ultimately control the spread of legal discourse and norms into the field of public administration. Though a considerable amount of this power has remained unchecked, judicial review of administrative decisions has to some extent regulated the arbitrary outcomes of discretionary practice. However,

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[28] There are three main types of admin tribunals that essentially exercise different ranges of discretion. The first type of tribunal is comprised of those performing an "administrative decision-making function. Tribunals (such as parole boards) exercise a broad range of discretionary power – such as decisions to ensure the safety of the public, or decisions to further the public interest. This type of discretionary power is given for the very purpose of ensuring that each case will be treated in and of itself regardless of similarities to other cases. The particular form of discretion exercised in these boards is known as 'open discretionary powers' and are usually guided by self-limiting guidelines. The second type of tribunal is one that performs jurisdictional decision making functions as the legislator confers upon its public officials the competence to make individual decisions that are based on strict legislative criteria The third type of tribunal performs regulatory decision-making functions as the legislature provides them with the competence to set general norms to be applied in particular cases. The Canadian Radio Telecommunications Commission (CRTC) and the National Energy Board (NEB) are primary examples of this. Operating on instrumental discretionary powers, such tribunals and agencies are often guided by quasi-regulatory guidelines.

the unique relationship between judicial bodies and administrative tribunals remains largely underexplored (Sossin, 2002). The under-investigated nature of judicial influence offers a nuanced explanation to inconsistent outcomes amongst board members and the absence of and requirement for legitimate remedial mechanisms. For this reason, this study particularly examines the relationship between the Supreme Court of Canada and the Refugee Protection Division in order to test whether judicial decisions have the capacity to maintain legal principles in administrative outcomes without violating constitutional conventions.

(B) Precedents and Legal Rules

Judicial decisions are important because they contain legal rules that organize social, economic and political interactions by providing frameworks for future policy goals that are established by government institutions (McIntosh, 1990; Spriggs, 1996; Wahlbeck, 1994). Significant legal rules established by courts take the form of precedents. Yet the influence that the judiciary has on these institutions depends on the strength of the judicial decision and the willingness of agencies to allow the decision to shape political outcomes. Precedents established by judicial decisions therefore highlight the legal rules by which similar cases are to follow in the future. The information provided by courts facilitates and inform policy directions by providing government agencies with critical information about the possible consequences of their actions and encourage them to remain within a framework of legal principles (Knight, 1993).

There are four main characteristics/attributes of judicial decisions/opinions. They include the specificity of the opinion, the basis of the opinion, remands and consensus/dissents. Each plays a specific role in determining the capacity of judicial decisions and the strength of precedents to influence and shape policy and political outcomes. Though executive and legislative branches of government are capable to some extent to control the spread of legal discourse in shaping policies, the capacity of judicial decisions vary in terms of how specific they detail substantive outcomes of policy implementations (Spriggs, 1996). Courts can therefore reduce institutional discretionary powers by writing very explicit formal rules.

> Less explicit opinions also provide leeway for bureaucracies to interpret opinions to minimize change to their policies. Explicit opinions however, offer agencies more detailed legal rules, and they therefore allow bureaucracies to more easily anticipate the consequences of their policy choices. Opinion clarity also facilitates litigants' ability to take recalcitrant agencies back to court, which increases the cost of certain bureaucratic policy choices (Spriggs, 1996: 1128)

Very few theoretical frameworks have been established for understanding judicial impact of administrative behavior and the ones that do, have lacked comprehensive explanations and systematic empirical analyses; thereby resulting in limited research on the relative ideological significance of precedents (Canon, 1991; Cross, 2011, Spriggs 1996). This study takes into consideration the specificity of explicit rules portrayed in SCC cases and factors in the significance of remands and consensus in determining the strength of precedents established in the decisions of *Ward* and *Chan.*

(C) Policy Consideration – The Refugee Determination Process

The decision of the Supreme Court of Canada in *Singh v. Canada (Minister of Employment and Immigration)* established a high-water mark for judicial involvement in the practices of immigration and refugee policy in Canada, by influencing significant legislative changes to the refugee determination process.[29] Through its decision, the court ultimately reconstructed the refugee determination and integration process by ensuring that all asylum claims made on Canadian soil were given a fair procedural hearing – one in accordance with Canadian democratic values. The court ruled that the interests at stake of refugee determination (and Canada's previous approach) were in direct violation of s.7 of the *Canadian Charter of Rights and Freedoms* – the Right to Life liberty and Security of the person[30] – as, "where issues of credibility are being determined, fundamental justice requires that determinations be made on the basis of an oral hearing."[31] The principal issue in *Singh* was whether or not Charter rights were extended to non-citizens, as the assumption was conferred upon the fact that rights found in

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[29] *Singh v. Canada (M.E.I)* 1985 SCC 65, [1985] 1 SCR 177.
[30] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, s.7
[31] *Singh v. Canada (M.E.I)* 1985 SCC 65, [1985] 1 SCR 177.

the Charter strictly applied only to Canadian citizens and landed immigrants. However, the use of the term "everyone" in s.7 broadened its scope to include not only those residing in Canada, yet everyone in the broadest sense of the word, every living breathing human being who finds him or herself subject to Canadian law in some form or another. The Court asserted, "that the term *everyone,* includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law".[32] Moreover, it held that all refugee claimants had the right to one full oral hearing before an executive board. This right was further extended beyond the concept of physical presence in Canada to those seeking admission at any port of entry.[33]

Following the outcome in *Singh v. Canada,* Canada developed an institutional field that encompassed the formation and implementation of policies and practices that relate to the rights of individuals who claim asylum and the procedures whereby the determination process was established (Hardy, 1999). As a result of the Supreme Court ruling, the Canadian government tabled Bill C-35 – *The Refugee Reform Bill, 1987* that sought to create a refugee determination process with mandatory hearings carried out by an independent, quasi-judicial adjudicative tribunal – as it has been made officially necessary by the Supreme Court of Canada to ensure and protect the procedural rights of asylum seekers.

IV. The Immigration and Refugee Board of Canada

The Immigration and Refugee Board became Canada's largest independent administrative tribunal aiming to resolve immigration and refugee cases in 1989 following the Supreme Court decision in *Singh v. Canada.*[34] It is responsible for making well-reasoned decisions on immigration and refugee matters, efficiently, fairly and in accordance with the law. The scope and scale of the task the IRB has in adjudicating a diverse range of immigration and refugee matters means that the Board cannot rely solely on the guidance that legislation provides. Therefore, in instances where judicial intervention is required the courts are sought to remedy

[32] *Singh v. Canada (M.E.I)* 1985 SCC 65, [1985] 1 SCR 177.
[33] [1985] 1 S.C.R Singh v. Canada, 456-463
[34] ww.irb-cisr.gc.ca.

substantive or procedural issues.[35] As the IRB provides general guidance, it leaves much latitude for legislative interpretation. As a result, IRB decisions are subject to judicial review by the Federal Court and the Supreme Court of Canada where leave is granted. As the Supreme Court of Canada determined in *Canada v Khasa*, (2009) deference may be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context".[36] However, the degree of deference is constrained in the occasion of unconstitutional or arbitrary actions in failing at fulfilling their democratic mandate.

(A) The Refugee Protection Division

The IRB is divided into four divisions (Immigration Division, Refugee Protection Division, Immigration Appeal Division and Refugee Appeal Division[37] each responsible for adjudicating over matters pertaining to its mandate. Operating less formally and more expeditiously than courts of law, the Refugee Protection Division (RPD) processes and determines refugee applicants by Board members who follow a strict – yet non-obligatory set of guidelines. The RPD's decision depends on the reasons for which a person is asking for Canada's protection. The credibility of claimants can be a determining factor as cases that appear to be very similar or identical at first glance may in fact be very different. [38]

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[35]See *R. v. Baker),*

[36] *Canada v. Khasa* 2009 SCC, 1 S.C.R

[37] The Refugee Appeal Division only recently came into full effect as of 2013.

[38] Refugee claims are heard by the RPD, which has offices in five major cities: Toronto, Montreal, Ottawa, Vancouver and Calgary. Each claim is adjudicated by one board member. IRB members are appointed by the Governor in Council based on the recommendation of the Minister of Citizenship and Immigration Canada (Public Service Commission of Canada 2009). Once a claim is made (either at a port of entry or at an office of Citizenship and Immigration Canada) a claimant's eligibility is then determined by an immigration officer. If found eligible, the claimant then proceeds with their claim for protection by being referred to the IRB for determination and the claimant it issued an order of conditional removal which takes effect if the claim is rejected. Once a board member hears a case, he or she can accept the claim upon the conclusion of the hearing or in a written decisions mailed to the claimant at a latter date. In this case of a positive decision, no written reasons are required from the board members. Negative decisions are always sent by mail, and must be accompanied by written explanation. See: Hardy, C. (2003). Refugee Determination: Power and Resistance in Systems of Foucauldian Power . *Administration and Society , 35* (4), 462-488 And Hathaway , J., & Hicks, W. (2005). Is There A Subjective Element In The Refugee Convetion's Requirement of "Well-Founded Fear"? *Michigan Journal of International Law , 26*, 510-560.

There are many factors that are taken into consideration when making a decision on a claimant's application. These include: the claimants country of origin, the region or city where the claimant lived, the claimant's ethnicity/nationality, gender and age, whether the claimant spent time in another country before coming to Canada without claiming refugee status in that country and the evidence presented (or not presented) by the claimant.[39] Today, - under s.159 (1)(h) of the *IRPA,* - statutory authority is provided to the IRB allowing the development and use of guidelines as guiding principles for adjudicating and managing cases.[40] Issued by the Chairperson, guidelines serve primarily as a source of guidance for decision-makers, but also for supporting personal adjudicative functions. While they are not mandatory, decision makers are expected to apply guidelines or provide a reasonable justification for not doing so. Within the IRB, guidelines have generally been employed to achieve strategic objectives[41], as opposed to simply managing daily operations (www.irb-cisr.gc.ca). Corresponding with the use of guidelines, adjudicators also have the ability to make use of jurisprudential guides – which are policy instruments that support consistency in adjudicating cases that share essential similarities. Like guidelines, the applications of jurisprudential guides are not mandatory, yet decisions makers are expected to provide justifications for not doing so.

The option provided to adjudicators regarding the use of non-obligatory policy instruments suggests that the use of discretionary authority is highly valued in the determination of refugees. However, the unguided nature of administrative discretion in refugee determination has resulted in a departure of democratic legitimacy, questionable accountability, and a lack of

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[39] According to the United Nations High Commission for Refugees (UNHCR) and the *IRPA, 2011* a Convention refugee is a person who (a) by reason of a well-founded fear of persecution for reasons of race, religion nationality, membership in particular social group or political opinion (i) is outside the country of the person's nationality and is unable to, by reason of such fear, unwilling to avail themselves of the protection of that country, or (ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable, or, by reason of such fear unwilling to return to that country, and (b) has not ceased to be a convention refugee.

[40] *Immigration and Refugee Protection Act, 2001 S. 159. (1)(h)*

[41] Guidelines set out certain criteria for adjudicating over matters relating to civilian, non Combatants fearing persecution (*Guidelines1),* Protecting woman and children (*Guideline 4),* concerning preparation and conduct of hearings, (*Guideline 7), and* concerning procedures with respect to Vulnerable persons appearing before the board (*Guideline 8).*

transparency. Specific administrative changes to increase efficiency such as decreasing the number of presiding board members per claim from two adjudicators to one has made it more difficult for asylum seekers to receive successful refugee status.[42] Recent legislative changes to refugee policies have attempted to direct certain outcomes by increasing ministerial authority. Legislative changes such as Bill C-11, *Balanced Refugee Reform Act* and Bill C-31, *Protecting Canada's Immigration System Act* have complicated and limited asylum seekers access to justice. Increased ministerial authority has allowed the Minster of Immigration to create a designated Country of Origin List (DCOs)[43] thereby allowing the designation of certain countries as being less/unlikely of producing refugees. Claimants applying from these countries are consequentially expedited through the process and given less consideration as being legitimate asylum seekers. Claimants from these countries are also denied the right to appeal and have the decision judicially reviewed by a court of law. Though changes have been positively framed by the government – as a means of clearing the backlog of applicants – recent amendments have arguably contradicted the democratic values that Canada is founded upon and impedes on the preservation of fundamental human rights.

Ongoing issues such as inconsistent trends and declining acceptance rates have also perpetuated the concerns regarding current determination procedures.[44] While the decline in acceptance rates have been frequently attributed to security threats following the events of

[42] Prior to 1999,a panel of two to three members heard refugee claims. Though the onus is on the claimant to prove that they require refugee status, the claimant only had to convince one. Making it easier for claims to be accepted.

[43] According to s.12 of Bill-C-11, the amendment authorizes the Minister to designate, in accordance with the process and criteria established by the regulations, certain countries and parts of countries and certain foreign nationals as unlikely to fit the definition of a conventional refugee. The Aim of the DCO policy is to deter abuse of the refugee system by people who come from countries generally considered safe" (Government of Canada)

[44] The discourse on refugee interpretation and determination has demonstrated a wide discrepancy between decision makers and a rapid decline in acceptance rates over the last twenty-four years. . Since the establishment of the IRB, Canada has observed a significant decline in refugee acceptance rates with a drop from 84% in 1989 to 38% in 2011. 2001 experienced the largest number of referrals to the IRB with a total of 43,996 applicants. With a 47% acceptance rate, Canada has rejected more applicants during this time than it ever has through out the 1989-2011 time frame. See: Rehaag, S. (2007). Troubling patterns in Canadian refugee adjudication. See Appendix A.

September 11 and the deterrence of fraudulent entry of "bogus refugee claims" (Kruger, 2004; Pratt, 1999, Joppke 2010; Gallaway, 2000), there has been inadequate explanations regarding the variation in grant rates amongst board members.[45]

The IRB suggests that some of the variation in grant rates can be attributed to the fact that board members frequently specialize in certain types of cases, as certain members specialize in certain regions where claimants are likely to be successful due to arriving from 'war-torn' countries with low democratic rankings where others do not (Rehaag, 2007). The uncertainty of the re-appointment process, and other political ties to the Minister, however is believed to play a significant role in shaping how adjudicators make their decisions (Creapeau and Nakache, 2008). In the absence of a nuanced understanding of the legal status of guidelines, the relationship between administrative practice and the rule of law has remained uncertain and unstable (Sossin and Houle, 2006). As the determination of asylum seekers is one complicated by subjective interpretations of objective definitions situated in international conventions and domestic legislation, unexplained inconsistencies merits comprehensive examination of the Canadian refugee determination process.

V. Organization of Research

Based on the mixed methods approach, the research for this study was conducted in three stages. The first stage focuses on the collection of primary data of refugee determination cases while the second observed and illustrated the grant variation between and within claimants' country of origin. This stage compares how different board members employ the precedents established by judicial decisions in similar claims to justify their determinations. The third stage measures levels of association in determining the capacity of judicial decisions to influence administrative outcomes. In doing so, in quantifies the strength and capacity of judicial decisions to shape administrative behavior. Furthermore it provides a closer look into the factors that impede precedents from playing significant roles in determination procedures.

[45] See Appendix A for inconsistencies and decline of grant rates

(A) Stage 1 – Tracing and Following Precedent (Data Collection)

Stage one of the research collected primary data by using the precedent tracing technique explained earlier. The first stage of the research traced and followed the precedents established in two Supreme Court decisions: *Canada v. Ward* and *Chan v. Canada* using the legal search engine, the Canadian Legal Information Institute (Canlii.org).[46] Following a comprehensive exploration of the facts, issues and judgments of the judicial decisions, the research proceeded by examining refugee protection determinations that cited or referenced the Supreme Court cases. In doing so, this stage identified claimants' country of origin, the year they made an application for refuge, the basis of claim (BOC), the determinative issues, the outcome of the decision, the frequency of citations and the administrative treatment of the established precedent.

The purpose of this stage was to collect, catalogue and organize relevant data to investigate how refugee protection board members use and treat judicial decisions. As of October 2014 there have been a total of 1100 asylum claims from thirty-two countries that cited the *Ward* decision and 85 claims from 19 countries that cited *Chan* at the Refugee protection division between 2001 and 2013.[47] Using a systematic-random sampling method, a sample of 109 cases was examined by picking every 10th case from the determinations citing *Ward*.[48] All 85 determinations citing *Chan* were examined resulting in a total of 194 refugee determination cases.

(B) Stage 2

The second stage provides an examination into the grant rate variation amongst the collected refugee determination cases. This was done by using descriptive statistics to investigate discrepancies and variation of decisions between and within claimant's country of origin. The purpose of examining the variance of determinative outcomes *between* countries of origin in

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[46] These cases were carefully selected because they serve as the most significant cases that provide substantive guidance to the interpretation of Convention refugees See Chapter 4 and 5 for detailed explanation of precedents established in Judicial Decisions.
[47] No information on cases following the decision in *Ward* gathered after October 30th 2014.
[48] 109 cases were used because one of the cases was not relevant as it was a matter pertaining to the Immigration Division and not the Refugee Protection Division.

refugee claims is to observe whether or not there is consistency in the determination of claimants that come from countries that are more or less likely to face persecution,

Claimants arriving from countries that are presumably more democratic are unlikely to be found *bona fide refugees.* Comparatively, successful claimants would presumably come from countries that are considered to be undemocratic or face a state of complete breakdown.[49] The variables that are examined include: the country of origin and their democratic ranking (as of 2012-2013), the number of positive decisions and the total number of claims. Cases where refugee status has been conferred on some claimants coming from these countries while others have failed raises concern in the way determinations were conducted. This requires a closer examination of the variation of outcomes *within* countries.

Examining claim/outcome variation *within* countries allows for a closer look at the variables that result in inconsistent outcomes within claims coming from the same country of origin. Similarly, the expectation is that all claims within a given country of origin would be more or less likely to result in similar outcomes. For this reason, closer attention is given to cases that have produced both positive and negative decisions. Looking at discrepancies in basis of claims and outcomes within countries allows for a better understanding of how and why particular claimants were accepted while others were not. It provides for an opportunity to examine the determinative issues (credibility, state protection, viable flight alternatives, exclusion, no nexus, or a combination) that board members have used to rationalize their decisions.

Global Democracy Ranking Explained

According to the *Global Democracy Ranking,* countries are ranked based on their democratic indictors (political rights, and civil liberties) and degrees of freedom (free, partly free

[49] According to the Freedom House definition of democracy, this paper takes "democratic" to mean countries that have a) an electoral process, b) political pluralism and participation, c) function government, d) civil liberties, e) rule of law and f) personal autonomy/individual rights (www.freedomhouse.org)

or not free) as categorized by Freedom House.[50] For the purpose of this study, the country of origin (from which claimants came from) were ranked in an ordinal fashion from Least democratic to Most Democratic based on their democratic score/position in relation to other countries. Countries that scored within the average democratic rank were considered to be within the medium third of all countries. These countries were labeled as Moderately Democratic and were given an ordinal score of 2. Countries labeled as Most democratic fell within the highest third of the ranking system and were given a score of 3. Countries that fell within the lowest third of all countries were given a score of 1. Countries that were coded as Most Democratic included: Czech Republic, Hungary, Israel, and Poland, whereas the countries that were categorized as Least Democratic were Bangladesh, Guatemala, Russia, Sri Lanka, Tanzania and Venezuela. All other countries (such as Brazil, Colombia, Croatia and Mexico) filled the Moderately Democratic category.[51]

Presumably, there is a higher expectation that most (if not all) claims would be arriving from countries that fall bellow the average democratic rank. Following the logic of the Canadian government – outside of countries that suffer from civil war or are in a complete state of instability/breakdown – least democratic countries are more likely to produce asylum seekers, as they have been known to violate fundamental human rights and fail to provide adequate State protection.

(C) Stage 3

The third stage of the research was divided into three sub-stages in order to quantify and measure levels of association between judicial influence and refugee determination outcomes.

[50] The *Freedom in the World* survey provides an annual evaluation of the progress and decline of freedom in 195 countries and 14 related and disputed territories. The survey, which includes both analytical reports and numerical ratings, measures freedom according to two broad categories: political rights and civil liberties. Political rights ratings are based on an evaluation of three subcategories: electoral process, political pluralism and participation, and functioning of government. Civil liberties ratings are based on an evaluation of four subcategories: freedom of expression and belief, associational and organizational rights, rule of law, and personal autonomy and individual rights.
[51] See Table 1.1 and 1.2 in Appendix B for full table of the democratic ranking of all countries included in this study.

This further allowed for an investigation into other significant variables that contribute to the outcomes of asylum claims. Following a content analysis of Supreme Court cases, the first phase of this stage determined the significance of the precedents established by observing the explicit rules set out by the courts for the tribunal to follow. After identifying the legal rule that was determined by the judicial decision, the research proceeded by operationalizing the treatment of precedents. By analyzing the content of refugee determination cases, the strength of precedents were examined by categorizing how they were used into one of four categories (limits, mentions, explains, follows) by adopting the categorizations of the American legal coding system known as "The Shepard's coding system" (Hansford and Spriggs, 2000). "The *Shepard's* coding system is widely used by lawyers and has passed a market test for its reliability" (Hansford and Spriggs, 1993). Political Science studies have also examined the coding system and found it to be quite reliable, especially for negative characterizations (Spriggs, 2008).

The way a precedent could be treated ranged from decisions that were followed to decisions that were limited in refugee determination hearings. The treatment of precedents were ordered ranking from 1 (being the lowest degree of influence) to 4 being the highest degree of influence). Scores that are closer to 1 are conceptualized as negative treatments and scores that are closer to 4 are perceived to be positive treatments. Outcomes that tend to treat judicial decisions as positive are ones that are relied more upon as decisive in determinations. Outcomes where decisions are more likely to be treated as negative are ones that demonstrate little to no decisive power over a determination.

For the sake of clarity, I will refer to the outcomes in the refugee determinations (i.e. the positive or negative decisions) as outcomes and the judicial decision in the Supreme Court cases as judicial decision/When I make reference to *cases,* they are made in regards to the claims heard at the refugee protection division. Therefore, what is being determined is the *treatment* of judicial decisions and the association between treatment and outcomes. In other words, are there associations between how precedents are treated and the outcome of refugee decisions?

Refugee outcomes citing judicial decisions that restrict the application of the judicial guidance established are coded as Limits and given a score of 1. Cases that cite the judicial decision but provide little to no more information about the cited case what is already available in the decision itself are coded as Mentions and given a score of 2. Cases that cite the decision and expand or interpret the citation are labeled as Explains and given a score of 3. This type of treatment is does not necessarily take the judicial decision to be persuasive, yet it gives it considerable consideration in determining outcomes. The 'explains' treatment has a positive connotation in reflecting the importance of the precedent, but it represents an elaboration of the precedent that may be more or less faithful to the original opinion. Finally, cases citing judicial decisions, and relying on the decision as controlling or persuasive authority are coded as Follows and given the highest score of 4. In summary, 1= limits (negative treatment), meaning less likely to influence refugee outcome, 2 = mentions (moderately negative treatment) meaning not necessarily likely or unlikely to influence decision, 3= explains (moderately positive treatment) meaning more likely than not to be influential in determinations, 4= follows (positive treatment) meaning very likely to influence outcome. A confidence test was then conducted to determine the significance of the relationship between precedents (independent variable) and refugee outcomes (dependent variable). To do so, the research used Spearman's rho in order to measure the statistical dependence between the two variables. The second phase of this stage then examined other variables including grant rates based on refugees' basis of claim, and the use of administrative guidelines to develop a better understanding of how refugee board members make their decisions.

Table 1 - Summary of Characterizations of Judicial Precedents

Precedent Treatment	Judicial Consideration of Treatment	Capacity to Influence Decisions	Treatment Characterization
Limits	Negative	Low	Citing case restricts the application of legal principles established in cited case. This is also known as distinguishing cases. Citing cases are believed to have restricted the rules established by the cited case when they are under the impression that there are other relevant factors to be considered.
Mentions	Moderately Negative	Moderate	Citing case does not provide any more information about the cited case that what is already available in the cited case itself.
Explains	Moderately Positive	Medium	The citing case, adds to, expands upon or interprets the cited case. Though not completely decisive, the cited case is given moderately high level of consideration in the determination.
Follows	Positive	High	The citing case applies a principles of law from the cited case and expressly relies on it on which to base a decision

Source: Spriggs, J. F., & Hansford, T. G. (2000). Measuring Legal Change The Reliability and Validity of Shepard's Citations. *Political Research Quarterly*, *53* (2), 327-341.

<u>*Basis of claim*</u>

In accordance with the *Immigration and Refugee Protection Act,* an individual can make a claim for refugee status on the grounds of Section 96 of which outlines the convention grounds for which applicants can demonstrate their well-founded fear of persecution. According to this section an individual can make a claim by establishing that their fear of persecution is subjectively feared for reasons of race, religion, nationality, membership in a particular social group or political opinion. Asylum seekers also have the option of making a claim based on section 97 of the *IRPA,* which states:

97. A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) To a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) To a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) The person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) The risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) The risk is not inherent or incidental to lawful sanctions, unless imposed in dis- regard of accepted international standards, and

(iv) The risk is not caused by the inability of that country to provide adequate health or medical care.

Since the burden of proof remains with the asylum applicant the study considered whether the basis of claim was associated with the grant variation. This was done by testing whether there was a difference in grant outcomes of claims made under S.96 verses 97 of the *IRPA*.

Further insight into the *Membership of Particular Social Group* Nexus allowed for investigation of the use of guidelines in determinations. The results were then compared to the application rate of the legal principles established by judicial decisions. The significance of the levels of association between the independent, basis of claim variable and the dependent, refugee outcome variable was also tested using Spearman's rho. The third and final phase of this stage compared the capacity of the different judicial decisions in shaping refugee determination outcomes examining whether board members are more likely to follow unanimous decisions (*Ward)* versus non-unanimous decisions (*Chan).*

VI. Summary

The purpose of this chapter was to outline the methodological approaches used in this study to address the questions regarding the decision-making capacity of judicial decisions in shaping refugee determination outcomes and the challenges they face. The study pursues the research questions by employing a mixed methods approach in order to better understand the impact and weight given by administrative adjudicators to judicial decisions in their determination procedures. The following chapters puts into practice the methods outlined in this

chapter by examining the different application of judicial decisions in the Canadian refugee determination process.

Chapter Four - The Capacity of Unanimous Judicial Decisions
The Case of Canada (Attorney General) v. Ward

"Refugeeness emerges as a way of understanding the particular subjective experience in relation to existing refugee policies" – LH. Malkki

"Understanding refugeeness starts with definitions and moves beyond to consider the individual's subjective experience of having to flee one's country" – Marie Lacroix

I. Introduction

Though the Supreme Court of Canada rarely hears issues involving immigrants and refugees (Soennecken, 2013), it has crafted a number of decisions that have been imperative to refugee determination procedures. These judicial decisions have become central to better understanding the judicialization of political decisions by providing administrative adjudicators with guidance to appropriately interpret legislative definitions – as intended by its framers.[52] The regulatory parameters that are established by judicial decisions are, however, alleviated by several factors that can be attributed to the capacity of, and degree to which, administrative discretion is [constitutionally] exercised. Consequently, the extent to which basic principles that have been articulated in judicial decisions are regarded as significant in refugee determinations is contingent upon the predisposition and individual discretion of administrative adjudicators.[53] Nonetheless, "drawing on the common law tradition of precedent and the tribunal tradition of policy-making through adjudication, jurisprudential guides articulate policy through the application of the law set out in a decision to the specific facts of another individual case before a decision-maker" (irb-cisr.gc.ca). [54] Section 1 of the Policy on the use of Jurisprudential guides[55] establishes "a

[52] Legislative definitions that are *appropriately* interpreted are ones that have been considered in accordance with the rule of law in such cases, appropriately interpreting legislative definition results in the "most correct" application of the law, thus maintaining the democratic integrity of political decisions and consistent with transparent, effective and accountable public administration of policies.
[53] According to the Mandate of the Immigration and Refugee Board of Canada, the application of jurisprudential guidance is not mandatory See: http://www.irb-cisr.gc.ca.
[54] Jurisprudential guides are policy instruments that support consistency in adjudicating cases that share essential similarities. Jurisprudential guides serves to build a Division's jurisprudence upon well-reasoned decisions.
[55] This policy governs the exercise of the Chairperson's authority to identify a decision as a jurisprudential guide in the Immigration Division, the Immigration Appeal Division and Refugee Protection Division of the Immigration and Refugee Board

framework that guides in which cases the exercise of that authority may be carried out, and the process for deciding to identify a decision as a jurisprudential guide". (irb-cisr.gc.ca). While a decision of any division of the IRB is not binding on a subsequent panel of that division, the IRB is explicitly ordered to follow decisions of the Federal and Supreme Court of Canada (irb-cisr.gc.ca). Though the policy explicitly commands the board to follow judicial decisions, it fails to clearly define the meaning of *following* decisions. The policy on treating judicial decisions is therefore vague and ambiguous, failing to provide clear and concise direction.

Cases such as *Ward* have been important to refuge determinations because of their ability to clarify and interpret key components in refugee law. The Supreme Court of Canada issued its unanimous interpretation of the definition of *Convention Refugee*, which in turn, set a relatively strong precedent for refugee adjudicators to follow. Though it does not deal with every aspect of the definition, it establishes the general framework of interpretation of the major components of inclusion of convention refugees. The Court comments extensively on the context in which refugee determination takes place and on the nature of Canada's international obligation to provide refuge to asylum seekers. The administrative treatment of judicial decisions find that, despite its relatively strong precedential authority, the decision was not enough to completely guide adjudicators' discretion in interpreting definitions and crafting decisions.[56] Cases that arose following the outcome in *Ward,* have also played a significant role in the judicialization of refugee determination procedures because they have reinforced or elaborated on procedural and substantive standards that were previously articulated. Contrary to the unanimous decisions in *Ward* – which has established a strong precedent – the case of *Chan v. Canada (Minister of*

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[56] As was briefly discussed in previous chapters and will be further examined, a weak association between judicial decisions and refugee determinations does not necessarily mean that courts do not have power to better guide administrative decisions and outcomes. Weak associations could be attributed to a number of factors that are arguably more significant in the determination of refugees or could be attributed to a lack of expertise, training or adjudicator bias. See Colaiacovo, I. (2013). Not Just the Facts: Adjudicator Bias and Decisions of the Immigration and Refugee Board of Canada (2006-2011). *Journal on Migration and Human Security , 1* (4), 122-147.

Employment and Immigration, 1995) (which will be discussed in the following chapter) adds a different layer and a new component to the judicialization of refugee determination procedures.

The outcomes in *Chan* resulted in a majority decision, whereby the strength of the established precedent, independently varies from unanimous decisions. The following sections evaluates whether majority judicial decisions have the same effect as unanimous decisions on refugee determinations. By comparing the treatment of precedents, and the source by which they came from, the relationship between administrative tribunals and the judiciary becomes clearer as trends and patterns become more apparent.

II. Canada (Attorney General v. Ward

(A) Facts

Motivated by a perceived need to protect his family from the Irish Republican Army (IRA), Patrick Francis Ward became a member of the Irish National Liberation Army (INLA) in 1993. The court described the INLA as a ruthless para-military terrorist organization that was more violent than the IRA. Ward's role in the INLA was to guard innocent hostages. However, after learning about their impending execution, he helped them escape. When Ward's role in the escape was discovered by the INLA, he was detained, tortured and sentenced to death. Though he eventually escaped and sought protection from the Irish police, he was in turn charged for his role in the initial hostage taking. He pleaded guilty to forcible confinement and was sentenced to three years in prison. At the expiration of his prison term, he obtained the assistance of a prison chaplain in arranging his flight to Canada. Ward eventually claimed refugee status in 1986, fearing persecution on the grounds of his membership in a particular social group (the INLA). The Minister of Employment and Immigration determined that the appellant was not however a 'convention refugee'. Ward then filed an application for redetermination of his claim before the Immigration Appeal Board. The Board allowed the redetermination and found the appellant to be a convention refugee due to a connection with his affiliation to a particular social group. The Federal Court of Appeal granted the Attorney General of Canada's application under s. 28 of the

Federal Court Act to set aside the decision and referred the matter back to the Board for reconsideration.

According to the 1951 *Convention Relating to the Status of Refugees* and the *Immigration and Refugee Protection Act* of Canada, a convention refugee is defined as a person who,

(a) By reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
(i.) Is outside the country of the person's nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or
(ii.) Not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of such fear is unwilling to return to that country, and
(b) Has not ceased to be a Convention refugee [57]

Prior to the court's decision in *Ward,* the definition of persecution in the statute remained unclear. Inherent to this problem was the condition that States must be associated with the persecution feared in order to grant positive asylum determinations. However, the court's interpretation of this perception of persecution was found to be too narrow. As will be further discussed, the court ruled that the direct involvement of State action was not a necessary condition for justifying fear of persecution.

(B) Issue

The issues that were brought into question at the Supreme Court were: (1) the involvement of State complicity in persecution (2) the grounds of persecution (3) the criteria of a social group by which claimants are membership to and (4) whether Mr. Ward had met the criteria of fearing persecution based on his membership in a particular group. On the first two issues, the court held that state complicity in persecution is not a pre-requisite to a valid refugee claim. In particular, the court held that, "serious violations of human rights by non-state actors can ground a finding of persecution under the refugee definition if the state cannot or will not protect nationals from such mistreatments"[58] Following this, the court determined that acts by

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[57] *Immigration and Refugee Protection Act, 2001*
[58][1993] 1.S.C.R *Canada v. Ward,*

state or non-state actors, when combined with the State's *inability* to protect constitutes "persecution".[59] If a State is able to protect the claimant, then his or her fear is not objectively well founded.[60] However, the court found that the necessary condition that a claimant *must* prove, that he or she unsuccessfully sought State protection in order to justify an unwillingness to avail him or herself, "seems to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.[61] The court then concluded that once a claimant has established that he or she fears persecution and the state cannot provide protection, a decision maker may presume that the fear is "well-founded" for the purpose of satisfying the objective component of the refugee determination. Through satisfying the objective component, the court purportedly created a presumption in favor of the claimant.

Despite finding it somewhat contrary for a claimant to seek protection from what may presumably be the source of that persecution (i.e. the State), the court found that, "absent clear and convincing proof to the contrary, it should be presumed that the state is capable of protecting a claimant".[62] In cases where such an admission is not forthcoming, clear and convincing confirmation of a states inability to protect must be provided.

> "Suitable evidence would consist of testimony by "similarly situated individuals" who were let down by the state protection arrangements or the claimants testimony of past personal incidents in which state protection did not materialize. Without evidence of this nature the claim *should* fail, as nations should be presumed capable of protecting their citizens.[63]

On the third issue, the court considered a number of factors in its interpretation of the definition. Citing Goodwin-Gill, who draws a correlation between the refugee definition and the underlying principles of non-discrimination and relying on Hathaway's argument, "anti

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[59][1993] 1.S.C.R *Canada v. Ward,* 722
[60]*ibid.*
[61][1993] 1.S.C.R *Canada v. Ward,* 724
[62][1993] 1.S.C.R *Canada v. Ward,* 725. The presumption will not operate in a situation of complete breakdown of state apparatus (for example civil war).
[63] *ibid.*

discrimination influence in refugee law is justified on the basis of those sought to be protected thereby, the court outlined three possible categories of social group ascription. Groups were first defined by an innate or unchangeable nature. Second, legitimate groups were one whose members voluntarily associate with for reasons so fundamental to their human dignity that they should not be forced to forsake the association. Finally, "particular social groups" were characterized by individuals' association with their former voluntary status as they were unalterable due to their historic permanence.[64] Operating within the boundaries of s.15 of the charter, the court's interpretation of the membership criteria ensured that particular groups were not arbitrarily discriminated against.

III. Summary of Established Precedent

The court's decision found that Ward was not a convention refugee based on his membership in a particular social group (INLA), but rather found his claim to be justified by virtue of his political opinion.[65] In interpreting the scope of persecution on account of the 'membership in a particular social group' nexus, the court asserted that the persecution feared is directed towards individuals who belong to one of three possible categories:

> (1) Groups defined by an innate or unchangeable characteristic, (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

In assessing Ward's claim based on this nexus, the application of the judicial test determined that his fear was not based on his membership in a group nor did he meet one of the three categories. The claim for refugee based on the nexus of 'social group' therefore crafted a legal test that was applied in determining the whether the persecution feared was justified.

The *Ward* decision moved on to adopt an expansive interpretation of political opinion that implicitly acknowledges the multiple ways in which political opinion as a statement about

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[64][1993] 1.S.C.R *Canada v. Ward*

[65] Mr. Ward's political opinion was demonstrated through a refusal to carry out execution of hostages and was therefore sentenced to be killed for his disobedience

power can manifest or be attributed to a claimant. The decision in *Ward* recognizes that the obligations owed by a state to its nationals in exchange for obedience encompass not only a duty to respect their human rights, but also a responsibility to protect them from having those rights violated by others. In doing so, the court rejected liberation conceptions of perceiving State power to be exclusively in relation to what the State does directly (Macklin 1994). In other words, State power is not only perceived by the ability it has to act but also its ability of inaction, which in this case can result in the facilitation of systematic abuses of some individuals by others.

The decision asserted that, the fear of persecution has to be well founded, but for the individual to be protected under international law that fear need not be of the state directly; "it can be of subordinate state authorities or of persons not attached to the state if the state is unable or unwilling to protect the individual from persecution" (Soennecken, 2013, pg.297). In other words, it was determined that the State, through its actions, did not have to be explicitly involved in human right violations in order to justify the fear of persecution.

The decision in Ward established a bipartite test in determining the level of persecution feared by claimants in order to qualify as a 'convention refugee'. In order for a claimant to establish fear of persecution, claimants must subjectively demonstrate a fear of persecution that is well founded in an objective sense".[66] In other words, in order to determine fear of persecution a claimant must subjectively fear persecution and this fear must be objectively well founded. The subjective component relates to the existence of the fear of persecution in the mind of the refugee, while the objective component requires that the refugee's fear to be evaluated objectively to determine if there is a valid basis for that fear. In other words, a claimant must prove that there is some fear of persecution based on making a rational connection to either one of the five grounds previously mentioned or section 97 of the *IRPA*. The second component requires the claimant to demonstrate that the persecution feared is one that is objectively founded by demonstrating the shortcomings of the ability of the State to protection its nationals from persecution.

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[66] 1993] 1.S.C.R *Canada v. Ward,* 723

Where the subjective component can be demonstrated by establishing a nexus (making a claim on the grounds of s.96 of the *IRPA)* or fearing persecution for one of the reasons listed in s.97, the objective component adds another complex layer to the equation. To test the objectivity of claims, the court determined that adjudicators must examine the objective situation and the relevant factors and conditions in the applicant's country of origin and the law in that country together with the manner in which they are applied. In order for the objective component to be fulfilled, claimants must demonstrate on a balance of probability that they were either unable or unwilling to avail themselves of state protection. The court clarified that only in situations in which state protection "might reasonably have been forthcoming" will the claimants failure to approach the state for protection defeat the claim. The claimant will therefore not satisfy the definition of convention refugee where it is objectively unreasonable for the claimant not to have sought the protection of state authorities. In order for a claimant to do so the decision in *Ward* very broadly highlighted what claimants *ought* to do.

Claimants must provide clear and convincing evidence to confirm a state's inability to protect its nationals. An individual might advance testimony of past personal incidences of similarly situated individuals that were let down by state protection arrangements or can provide testimony of past personal incidences and experiences in which state protection did no materialize. Absent a situation of complete breakdown of a state's apparatus such as civil war or some convincing evidence that protection did not materialize, the court determined that claims should fail as States are presumed capable of providing protection.

In its examination of the "membership in a particular social group" nexus, the court clarified that the protection of basic human rights informed the interpretation of the elements of the definition of convention refugee. Tribunals can no longer properly deny that women, for example, are a particular social group or private persecution (e.g. women fleeing domestic violence) from the scope of the definition of convention refugee. The advantage of this non-discrimination approach to 'particular social group' is that it obviates the need to prove that

putative members of the social group have consciously affiliated to promote some common cause. The Court's inclination to define 'particular social group' by linking it to notions of anti-discrimination potentially has the advantage of de- emphasizing the requirement to show that the group comprises individuals who have 'united in a stable association with common purposes.

The Supreme Court's decision outlined very clearly the direction that RPD board members should take when considering the claims of those who fear persecution on the grounds of their membership in a particular social group and political opinion. The decision also highlighted the intention of the convention definition framers by explicitly noting the presumption of the ability of protection by a foreign national's country of origin. The court further added the nature of the evidence that should be taken into consideration when assessing the presumption of a State's (in) ability to protect. Despite the direction that has been provided, decisions that have cited *Ward,* appear to have overlooked particular aspects of the overall outcome.

> The *Ward* decision not only advances the level of sophistication in refugee jurisprudence, it also brings refugee law more explicitly into a discursive relationship with other developing loci of domestic and international human rights, particularly anti-discrimination principles. Much of the judgment can be used to facilitate a humane, reasoned approach to refugee determination, although some aspects are less salutary. The direction taken by subsequent tribunals and courts in elaborating, applying and interpreting the decision in *Ward* obviously determine its ultimate impact. Notwithstanding claims to the contrary by those who maintain that law is an apolitical enterprise, the fate of Ward is as much a question of political will as of legal determinism. (Macklin, 1994:380)

In short, there are two main legal principle established in the *Ward* decision that provide guidance, in theory, for refugee adjudicators. First is the judicial test for determining the nexus to 'social groups'. The court determined whether Ward's presumed fear of persecution was justified on this convention ground by closely interpreting and defining what it means to be a member in a particular social group. The legal construction of this definition allows for clearer and more consistent interpretation of the convention ground as was intended by its framers. Second, the court clarified the test by which asylum claims are determined. Though the onus is on the

claimant to demonstrate that persecution is objectively well founded, the court provided some grounds by claimants can successfully rebut the presumption of State protection. The decision in *Ward* highlighted that evidence where protection did not materialize or the considerations of similarly situated individuals are some examples of how claimants can meet the objective component of the test. The ability to rebut the presumption of state protection is done so on a balance of probabilities. This provides a broader scope of interpretation to determine the legitimacy of asylum claims. The significance of the precedents set in Ward is integral to the overall refugee determination process because it provides adjudicators with legally constructed guidelines for defining the convention refugee. Though it does not interpret the definition of all convention grounds, it has the capacity to bring the entire practice one step closer to more consistent determinations.

IV. Statistical Analysis of Refugee Outcomes Following *Ward v. Canada*

Following the decision in *Ward,* the Refugee Protection Division adjudicated 1,100 cases between 2001 and 2014 that cited the decision. Based on the design of this research, a sample of 109 cases are examined using a systematic random sampling technique, every tenth case was picked starting from the first case. Only cases heard in the RPD were chosen.

(A) Grant Rate Variations – Between and Within Countries

Table 1.1 in Appendix A. sets out the list of all refugee claimants' country of origin that is included in the sample following the decision in *Ward*.[67] Of the 109 cases, only six resulted in positive outcomes and of the thirty-two countries of origin, five (Colombia, Hungary, Poland, South Africa, Sri Lanka) produced legitimate claims. Despite being within the average range of the democratic ranking scale, a small percentage of claims resulted in positive outcomes from these countries. The grant rates from each of these countries are as follows: Colombia – 14.3%, Hungary – 7.1%, Poland – 25%, South Africa – 100%, Sri Lanka – 28.6 %. Claims coming from all other countries resulted in 0.0% grant rate for a number of reasons. The grant rate variation

[67] Included in the list are the democratic ranking of each country and the range by which they have shifted.

between and within countries is the starting point in investing the reasons for unsuccessful grant rates.

Variation Between Countries

Table 1.1 illustrates the frequency of claims made based on the democratic rank of asylum seekers' country of origin.[68] From the sample taken of refugee determinations following *Ward,* 11.9 percent of claims were made from least democratic countries (LDCs), 66.1 percent from moderately democratic countries and 22 percent from most democratic countries.

Table 1.1 – Number of Claims by Country's Democratic Rank

	Frequency	Percent	Valid Percent	Cumulative Percent
Least Democratic	13	11.9	11.9	11.9
Moderately Democratic	72	66.1	66.1	66.1
Most Democratic	24	22.0	22.0	22.0
Total	109	100.0	100.0	100.0

Least democratic countries are presumed to be more likely to produce refugee claimants because of their inabilities to regulate and resolve human right violations by failing to provide adequate State protection. Contrary to the hypothesis that there is a higher expectation that most claims are made from countries that fall below the average democratic rank, the data demonstrates the opposite as a higher percentage of claims are made from countries that are considered moderately and highly democratic. Though this may suggest that some asylum claims made form moderate and highly democratic countries seek to circumvent proper immigration protocol, it does not demonstrate that these countries are entirely incapable from producing legitimate refugees.

Table 1.2 sets out the grant rate variation between the democratic ranks of claimants' country of origin. It shows no variation positive determinations amongst the three levels of democracy of the countries where claims are made from. Though the total number of positive

[68] See chapter three and Appendix A for an explanation on how democracy was ranked.

determinations is not considerably a large number by any means, a lack of variation in positive outcomes suggest that, not only are claims being made from countries that are unexpected to produce refugees, but claims from these countries are also being accepted – when it is anticipated that such countries would be able to provide protection to its citizens.

Table 1.2 - Grant Rate by Country of Origin's Democratic Rank

Refugee Claim Determination (RPD Decision)	Country of Origin's Dem. Ranking			Total
	Least Democratic	Moderately Democratic	Most Democratic	
Negative	11	70	22	103
Positive	2	2	2	6
Total	13	72	24	109

With a correlation coefficient of .034, a confidence test further reveals that there is no significant correlation between a country's democratic rank and the outcome of refugee determinations as set out in table 1.3.

Table 1.3 – Correlation between Democratic Level and Refugee Determination

			Country of Origin's Democratic Rank	Refugee Claim Determination
Spearman's rho	Country of Origin's Democratic Rank	Correlation Coefficient	1.000	.034
		Sig. (2-tailed)	.	.728
		N	109	109
	Refugee Claim Determination	Correlation Coefficient	.034	1.000
		Sig. (2-tailed)	.728	.
		N	109	109

Countries that are considered to fall below, within and above the average democratic rank have all demonstrated some capability to produce legitimate refugee claims. Claims coming from countries in this sample that were considered to be moderately and highly democratic are as

follows; moderate: Colombia and South Africa; high: Poland and Hungary. Claims made from least democratic countries were made from Sri Lanka.

Variation Within Countries

Grant rate variation however, goes beyond the democratic differences between countries. Further data reveals that despite similar claims made within claimants' county of origin, determinations of these similarly situated individuals results in different outcomes. Despite making similar claims, the outcomes for Hungarian, Colombian, Sri Lankan, and Polish asylum seekers varied. Table 1-4 in Appendix C demonstrates the outcome variation within these countries by comparing each clam made by similarly situated individuals.

Hungary

Table 1.1 in Appendix C shows that of the fourteen total claims made by Hungarian asylum seekers, 93% establish a well-founded dear due to their racial ethnicity. However, only 7.7 % of those claims resulted in positive outcomes. Table 1.2 shows that 92.3% were denied due to the failure to rebut the presumption of state protection.[69] A content analysis reveals that the difference between the positive and negative outcomes is present in finding that the successful applicants successfully rebutted the presumption of state protection.[70] However, it does not reveal why or how the successful claimant rebutted the presumption of state protection or what factors compelled the board members to decide the way they did.

Sri Lanka

There were a total of seven claims made by asylum seekers arriving from Sri Lanka. Where 71.4% asylum claims made from applicants arriving from Sri Lanka were based on fear of persecution due to political opinion, 40% resulted in positive outcomes. The remainder (31.4%) resulted in negative determinations because of failure to provide credible evidence, failure to

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[69] See table 1.1 and 1.2 in Appendix C

[70] See table 1.1 in Appendix C

rebut the presumption of state protection and because of security issues. [71] Once again, claims that resulted in successful outcomes, demonstrated a successful rebuttal of the presumption that their states are capable of protecting them. However, unlike the claims made from claimants arriving from Hungary, unsuccessful claims were based on other factors such as credibility and security issues.

Colombia

Of the seven total claims made by Colombian asylum seekers, 71.1% were on the grounds of political opinion, 14.2% on the grounds of their membership in a particular social group and 14.2% not connected to a convention ground (no nexus). Though all claims that established a well-founded fear due to political opinion satisfied the subjective component of the convention refugee test, 66.6% failed due to not rebutting the presumption of state protection.[72]

Poland

There were a total of four claims made by Polish asylum seekers. 75% feared persecution because of their racial ethnicity and 25% due to their membership in a particular social group. [73] Only those who made claims based on their connection to a group resulted in successful determinations. The remainder resulted in negative determinations all because of their inability to rebut the presumption of state protection. One of the three negative determinations however, also was perceived to be non-credible.

While some asylum applications have resulted in positive determinations between similarly situated claims, such as those arriving from Hungary, applicants' inability to satisfy the objective component of the refugee determination has resulted in many negative outcomes. Largely, this is due to their inability to successfully present evidence that rebuts the presumption of their state to provide protection. Yet variation between county's democratic levels and similar claims within, have not entirely been explained. Though the originality of each asylum claim is

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[71] See table 2.1 and 2.2 in Appendix C
[72] See table 3.1 and 3.2 in Appendix C
[73] See table 4.1 and 4.2 in Appendix C

appreciated, it does not provide compelling evidence regarding the inconsistencies of determinations of claims that are indistinguishable. The following section explores how and whether the application (or lack thereof) of judicial decisions affects the outcomes of refugee determinations.

(B) Grant Rate by Precedent Treatment

As mentioned in earlier chapters, the capacity of judicial decisions to influence political outcomes is measured by the strength of the precedents they establish. The strength of precedents is therefore observed by how other government bodies and institutions utilize them in the determination and implementation of policies and directives. While the sample of refugee determinations have cited the decision in *Ward,* each has done so in a different manner. Table 2.1 illustrates how refugee board members treated the precedents established in *Ward.*

Table 2.1 - Precedent Treatment

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Limits	20	18.3	18.3	18.3
	Mentions	60	55.0	55.0	81.7
	Explains	22	20.2	20.2	26.6
	Follows	7	6.4	6.4	6.4
	Total	109	100.0	100.0	

The data shows that only 6.4% of determinations citing the judicial decision found it to be persuasive in determining the outcomes of refugee claims. In other words, this means that very few board members relied heavily on the legal principles set out in the judicial decision in guiding their adjudicative procedures. This however, does not suggest that the precedent established is not influential in shaping outcomes but rather, there may be other factors that are considered more significant in the adjudication process. The different use of the judicial decision in determinations that has resulted in outcome variation within claimant's county of origin provides the first step into this investigation. Table 2.2 demonstrates how the determinations of

claims resulting in outcome-variation within country of origin treated the precedents established in *Ward.*

Table 2.2 Precedent Treatment of Outcome variant countries

Determinations by Claimants' Country of Origin	Precedent Treatment				Total
	Limits	Mentions	Explains	Follows	
Colombia	2	3	1	0	6
Hungary	0	8	6	0	14
Poland	0	3	0	1	4
Sri Lanka	0	3	1	2	6
Total	2	17	8	3	30

While only 10% of these cases directly follow the legal principles set out in *Ward,* there appears to be an association between positive treatments of judicial decisions and successful outcomes for refugee applicants. The positive refugee determinations from these specific countries have demonstrated on some level, significant use of the judicial decision. For example, the determination of both positive outcomes for applicants from Sri Lanka directly follows judicial guidance by imitating the courts logic in the interpretation of the 'political opinion nexus'. Also, the successful determination of the one polish asylum seeker, strategically applies the 'membership test' in order to determine and correctly define whether the applicant's fear of persecution was rationally connected to their membership in a particular social group. Nevertheless these are only a few examples that may not be indicative of an association. Tables 2.3 and 2.4 illustrate the level of association between refugee determination outcomes and precedent treatment.

Table 2.3: Refugee Outcome and Precedent Treatment

Refugee Claim Determination (RPD Decision)	Precedent Treatment				Total
	Limits	Mentions	Explains	Follows	
Negative	18	60	21	4	103
Positive	1	1	1	3	6
Total	19	61	22	7	109

Table 2.3 illustrates the grant rate by the treatment of precedent of board members in the refugee protection division. The descriptive data suggest that the precedent established in *Ward* is less likely to be considered as persuasive and more likely to have a low to moderately low degree of influence in the outcomes of refugee determinations

Table 2.4 Correlations between Precedent Treatment and Refugee Determination

			Precedent Treatment	Refugee Claim Determination
Spearman's rho	Precedent Treatment	Correlation Coefficient	1.000	.198*
		Sig. (2-tailed)	.	.039
		N	109	109
	Refugee Claim Determination	Correlation Coefficient	.198*	1.000
		Sig. (2-tailed)	.039	.
		N	109	109

* Correlation is significant at the 0.05 level (2-tailed) – 95% Confidence level

This suggests that other factors might be more significant in the adjudication process of asylum seekers and that cases were judicial guidance is followed (perceived to be influential) may be a result of extraordinary cases where judicial decisions were employed as a 'last resort'. Further analysis illustrates the existence and degree of the association between precedent treatments and refugee determinations. Table 2.4 demonstrates the presence, strength and direction of the association. With a correlation coefficient of .198, the data reveals at the 95th percent confidence level that there is a statistically significant positive association between the way in which precedents are treated and the outcomes of refugee claims. Positive determinations are more likely to be made when judicial precedents are followed. However at 3.9 percent (falling between the 0 an 10 percentage range) demonstrates a very weak relationship. Though there is somewhat of an association between positive treatments of judicial decisions and refugee outcomes, the

circumstances where board members are likely to use them remains unclear. The remaining section examines other factors that may influence the use of legal principles.

(C) Grant Rate by Bass of Claim and Administrative Guidelines

The basis of claim (BOC) of asylum seekers has demonstrated to play a very significant role in the determination of successful claims. Based on the sample taken, 36.7 percent of claimants did not base their refugee claims on a convention ground articulated in the legislation, but have done so by virtue of section 97, claiming to be persons in need of protection. More than half of the total number of claims (63.3%) was made in connection to one of the five convention grounds (membership in particular social group, racial ethnicity, nationality, religion, political opinion). Table 3.1 reveals that all six positive determinations were produced from individuals who based their claims on section 96 of the *IRPA* and demonstrated a nexus to one of the five convention grounds. The data therefore suggests that claimants who base their refugee applications on a connection to one (or more) of the convention grounds articulated in section 96 are more likely to result in successful determinations and receive convention refugee status.

Table 3.1 Basis of Refugee Claim

	Frequency	Percent	Valid Percent	Cumulative Percent
No Nexus	40	36.7	36.7	36.7
Nexus	69	63.3	63.3	63.3
Total	109	100.0	100.0	

Contrary to the association (lack thereof) between claimants' country of origin and refugee determinations (outcomes), there is a positive correlation between the type of claims made and the success rate of outcomes. Table 3.2 shows a 90 percent confidence level that the association between asylum seekers basis of claim and outcomes is significant.

Table 3.2 – Correlation between Basis of Claim and Refugee Determination

			Refugee Claim Determination	Basis of Refugee Claim
Spearman's rho	Refugee Claim Determination	Correlation Coefficient	1.000	.184
		Sig. (2-tailed)	.	.056*
		N	109	109
	Basis of Refugee Claim	Correlation Coefficient	.184	1.000
		Sig. (2-tailed)	.056*	.
		N	109	109

* Correlation is significant at the 0.10 level (2-taled) – 90% confidence level

Table 3.3 provides a full breakdown of the frequency and success rates of each type of claim made by individuals. Of the five grounds that individuals based their claims on, only three grounds resulted in positive determinations. Successful determinations followed claims established on individual's well-founded fear of their membership in a particular social group (9.5%), political/perceived political opinion (11.8%) and their racial ethnicity (10%). The data suggests that despite an association between the basis of claim and refugee outcomes, successful grant rates are difficult to come by.

Table 3.3 – Breakdown of Basis of Claim

		Decision		Total
		Negative	Positive	
Basis of Claim	Criminal Violence	13	0	13
	Domestic/Sexual Violence	24	0	24
	Military Evasion	1	0	1
	MPSG*	19	2	21
	Multiple	7	0	7
	Nationality	1	0	1
	Political Opinion/PPO**	15	2	17
	Racial Ethnicity	18	2	20
	Religion	1	0	1
	State Violence	4	0	4
Total		103	6	109

** Membership in Particular Social Group, ** Perceived Political Opinion*

Grant variation, particularly among claimants coming from the same country and among similar claims, raised issue regarding the conduct of determination procedures. However, given that the variation appears to be small, variance in outcomes within countries and particular claims may be attributed to outliers or claims that fall within exceptional circumstances. Nevertheless, the size of positive determinations does not discourage the study of association between judicial decisions and administrative outcomes. Rather, the vast majority of cases that have resulted in negative outcomes merits further exploration of the extent to which administrative board members and refugee adjudicators have allowed or limited the spread of legal discourse to influence their decision making abilities.

Among the number of issues considered in *Ward,* the clarification of the convention ground "Membership in a particular social group" established a clear test by which board members were encouraged to follow. Moreover, other issues, more broadly defined such as the meaning persecution and the presumption of state protection were addressed. The remaining sections of this chapter provide a closer look into the influencing powers that judicial decisions have on shaping refugee determinations and comparatively the extent to which board members have found such decisions to be influential.

. Refugee board members were more likely to follow the legal principles when it came to claimants who based their claim on a membership in a particular social group.[74] This is illustrated in table 3.4 by showing the percentage of determinations, regarding the social group nexus that applied the judicial test.

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[74] See Table 1.1 in Appendix C. It illustrates how each determination on the basis of applicants' claims, treated the precedent established in *Ward.*

Table 3.4 Membership in particular Social group Breakdown

Nexus	Guideline Use Rate (%)	Judicial Test Application Rate (%)	Positive	Total (Claims)	Grant Rate (%)
MPSG					
Opposing interests of State Actors	33.3	66.7	1	3	33.3
Opposing interests of Non-State Actors	0.0	14.3%	0	7	0
Sexual Orientation	25	25.0	0	4	0
Gendered Related Violence (Women subject to domestic abuse)	100.0	75.0	0	4	0
Membership in minority tribes	0.0	0	0	1	0
Family	0.0	0	0	1	0
People with disabilities	100.0	100.0	1	1	100.0
MPSG total:	**33.3**	**38.1**	**2**	**21**	**9.5**

38% of outcomes followed and applied the three pronged test established in *Ward.* The claims that have resulted in positive determinations, though a very small number (9.5%) have demonstrated some application of the judicial test. This data also reveals that board members do not make much use of the guidelines provided by the Chairperson. Where guidelines were applicable, they were used in 33.3 percent of determinations.

V. Chapter Summary

The purpose of this chapter was to set out the findings of the research It did so by first illustrating the grant rate variations that are present in the determinations taken from the sample. This was split into two sections. The first section examined the grant rate variation between countries based on the democratic ranking of applicants' country of origin. It found that legitimate claims were being made and accepted from countries that were both likely (undemocratic) and unlikely (democratic) to produce refugees. The second section of the grant rate variation data set out the variation that was present within claimant's country of origin. This was done by examining the basis of claims and basis of outcomes for individual cases that were similar in their asylum applications.

The data proceeded to explore how board members treated the precedents established in the judicial decision. It found that board members were less likely to follow judicial principles.

However determinations that relied heavily or moderately on the judicial decisions resulted in positive outcomes for refugee claimants. A significance test of the association showed that there was weak, positive association between [positive] treatment of precedents and refugee outcomes.

The remaining data explored the role of particular basis of claims in influencing the use of judicial decisions in refugee determinations. It found that board members were more likely to apply the principles set out in *Ward* when determining the membership to particular social group nexus. However only a small percentage of determinations applied the test. Examining the use of guidelines also demonstrated that board members are less likely to use guidelines verses precedent in refugee adjudication procedures. The next chapter explores the strength of a different judicial decision in the same manner.

<u>Chapter Five - The Capacity of Non-Unanimous Judicial Decisions:</u>
<u>The Case of *Chan v. Canada*</u>

"The managerialization of law…powerfully affects which actions or policies appear proper and which are injurious; it promotes certain types of claims and certain framings of legal issues while discouraging others" - Lauren Edelman

1. Chan v. Canada

(A) Facts

Kwong Hung Chan, a citizen of the People's Republic of China from the city of Guangzhou, had continuously suffered persecution because of his father's background as a landowner. Following his donation (of food, drinks and some money) to pro-democracy students demonstrating in front of his restaurant, officers of the Public Security Bureau (PSB) accused Chan of having participated in the pro-democracy movement and of being a counter-revolutionary. After learning that his wife gave birth to their second child, violating China's publicized one-child birth policy, PSB officers and the local neighborhood community members accused Chan and his wife of deliberately neglecting the national policy. The PSB officers immediately informed his wife's work unit of the violation causing her to lose her job. Labeled as the "enemy of the class" and accused of purposely disobeying the government's policies, the PSB demanded that Chan pay a substantial fine and that either him or his wife be sterilized. If neither of them were willing to do so they would be forced to submit to the procedure. To prevent the continuous harassment by the PSB officers, Chan signed documents stating that he would agree to undergo sterilization within three months. Chan left China in 1990, before the expiration of the three-month period within which he had agreed to submit to sterilization, and sought refugee status in Canada on the grounds of being a membership in a particular social group – one that feared being forcibly sterilized.

The Immigration and Refugee Board of Canada found that the appellant was not a 'convention refugee', as forced sterilization did not constitute a form of persecution. The Federal Court of Appeal upheld the Board's decision. The appellant alleged that the Federal Court had

erred in the following respects: 1) In deciding that forced sterilization was not persecution as contemplated in the definition of Convention Refugee, 2) In deciding that the appellant did not face persecution on the basis of "political opinion" 3) In deciding that the appellant did not fall within a "particular group" because his affiliation with the social group was based not on what he was, but what he did 4) By making unnecessary and improper findings of fact and credibility in deciding whether the appellant faced a reasonable chance of persecution by sterilization , 5) In departing from its recent decision in *Cheung,* which held that person who faced sterilization for breach of China's one-child policy was a member of a particular social group.[75]

(B) Issues

The issues that were raised at the Supreme Court were: 1) whether forced sterilization is a form of persecution within the meaning of s. 2.1(a) of the *Immigration Act,* 2) whether persons facing forced sterilization are members of a "particular social group" 3) whether those refusing forced sterilization are expressing a "political opinion" and 4) whether assuming persons who have a well founded fear of sterilization for violating China's one-child policy are eligible to be considered Convention refugee. The primary issue that was dealt with was whether a well-founded fear of forced sterilization for failure to comply with China's birth control policy constituted a "well-founded fear of persecution" for reasons of being a "membership in a particular social group" and expressing a "political opinion".

The issues that were brought into question divided the court and led to a majority decision (4-3) ruling that the appeal (for a refugee rehearing) should be dismissed. Following the application of the bipartite test established in *Ward,* the court first examined the subjective element of the claim and then analyzed the objective component. According to the majority opinion, the appellant's subjective fear of forced sterilization was "equivocal" and "inconsistent" The appellant also did not meet the burden of proof on the objective aspect of the test.

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[75] [1995] 3. S.C.R. *Chan v. Canada*

> Evidence with respect to the enforcement procedures used within a claimant's particular region at the relevant time was not presented to the Board. Such Evidence if not available in documentary form, Can be established through testimony with respect to similarly situated individuals. The appellant provided neither. Nor did he produce any evidence that the forced sterilization is inflicted upon men in his area. Absent any evidence to establish that his alleged fear of forced sterilization was objectively well founded, the Board was unable to determine that the appellant had a well founded fear of persecution in the form of forced sterilization[76]

Based on failing both aspects of the test (lacking to demonstrate a credible claim and failing to meet the burden of proof on the objective test) the majority ruling was not in favor of the appellant and decided not to remit the matter back to the to the refugee protection division for redetermination.

In contrast to the majority opinion, the dissenting judges ruled in favor of the appellant, concluding that, "since the court could not safely decide whether or not there was evidence on which the Board could conclude that the appellant was a member of a particular social group, the matter should be remitted back to the board to be decided in accordance with the *United Nations High Commissioner for Refugee Handbook on Procedures and Criteria for Determining Refugee Status*. Using these guidelines for establishing the facts of a given case, the dissenting opinion believed that a determination could be made as to whether a Convention Refugee was entitled to any benefit of the doubt regarding their story. Accordingly the dissenting judges believed that,

> The appellant's account of events so closely mirrors the known facts concerning the implementation of China's population policy that, given the absence of any negative finding as to the credibility of the appellant or his evidence, his quite plausible account is entitled to the benefit of any doubt that may exist. Sections of his testimony should not be seized upon in isolation. Such a technique is antithetical to the guidelines of the UNHCR Handbook. In light of these explicit guidelines, Canada's refugee burden should not be thwarted by an unduly stringent application of exacting legal proof that fails to take account of the contextual obstacles customary to refugee hearings[77]

[76] [1995] 3. S.C.R. *Chan v. Canada*
[77] [1995] 3. S.C.R. *Chan v. Canada*

The dissenting opinion ruled that the implementation of China's one-child policy, through sterilization by local officials, could constitute a well-founded fear of persecution as "the alleged persecution, does not have to emanate from the state itself to trigger a convention obligation" [78]

II. Summary of Established Precedent

The majority opinion concluded that forced sterilization does not constitute a well-founded fear of persecution because those resisting a valid state policy such as population control cannot be *Convention Refugees* – as defined by the *Immigration and Refugee Protection Act.* However, "the importance of the decision in *Chan* lies in its clarification of *Ward,* in the strong dissenting judgment" – which is the strong central focus of refugee law is the protection of basic human rights (Shacter, 1997: 726). Though the precedent established in the *Chan* decision may be particularly fact specific, broader principles regarding the benefit of the doubt of applicants and the overall approach to the purpose of refugee law was clarified. The most significant principles highlighted in the disagreement between the majority and dissenting opinion were the degree of sternness when assessing credibility claims and the invocation of state authority in determining the well-founded fear of asylum seekers.

In addition to the bipartite test established in *Ward,* the outcome in *Chan* determined that it was essential to question whether or not the persecution alleged by the claimant, threatens his or her basic human rights in a fundamental way.[79] Though the majority opinion appreciates that some who breach state policies face a reasonable chance of forced sterilization, not all who

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[78] *ibid.*

[79] The definition of persecution was adopted from (Hathaway, 1991 and Goodwin-Gill, 1983). The Court endorsed an approach – to refugee law – in which the concern ought to be the denial of human dignity in any key way with the sustained or systemic denial of core human rights as the appropriate standard. The court noted that this theme sets the boundaries for many of the elements of the definition of "Convention Refugee". "Persecution. For example, undefined in the Convention has been ascribed the meaning of "sustained or systemic violation of basic human rights demonstrative of a failure of state protection" (Hathaway, 1991 pg. 104-5). The Comprehensive analysis requires the general notion (of persecution) to be related to developments within the broad field of human rights' (Goodwin-Gill 1983, pg. 38).

breach the policy share the same fear (objectively) and face a reasonable chance of the same consequences. [80] In this regard, the dissenting opinion, more broadly, argued that:

> When assessing the credibility of claimants' stories and/or evidence the assumption is that such evidence or documents must be taken as a whole, thus increasing the entitlement of the benefit of any doubt that may exist. There is no merit in the approach taken by many to seize upon sections of the claimant's testimony in isolation. Such a technique antithetical to the guidelines of the UNHCR handbook…which declares that it promotes Canada's domestic and international interests to recognize the need to fulfill its "international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted must be followed" (Para 56-57)

The direction that was taken by the dissenting opinion departs from the majority on the grounds of what *ought* to be considered as persecution. From the perspective of the majority, violating another county's policy and fearing consequences as a result of such action does not constitute a well-founded fear. However, the dissenting opinion believes that when the means [certain policies] employed place "broadly protected and well understood basic human rights under international law such as the security of the person in jeopardy, the boundary between acceptable means of achieving a legitimate policy and persecution is crossed". [81] According to Justice La Forest (writing on behalf of the dissenting opinion),

> Canadian judicial bodies may at that juncture pronounce on the validity of the means by which a social policy may be implemented in an individual case by either granting or denying Convention refugee status, assuming of course that the claimant's credibility is not in question and that his or her account confront with generally known facts… I am mindful that the possibility of a flood of refugees may be a legitimate political concern, but it is not an appropriate legal consideration. To incorporate such concerns implicitly within the Convention refugee determination process, however well meaning, unduly distorts the judicial-political relationship. To alter the focus of refugee law away from its paramount concern with basic human rights frustrates the possibility that foreign persecution may be eventually halted by international pressure. To accept at the judicial level that fundamental human right violations do not serve to grant Convention refugee status minimizes one of the principle incentives the international community has to

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[80] The standard by which this is determined is on a balance of probabilities. Applicants must demonstrate that it is more probable than not those basic human rights would be violated in a fundamental way as a result of the persecution feared. Though the consideration for basic human rights are not to be considered in place of the subjective component of the bipartite test, it provides a new layer to the overall determination of refugee claims. The balance of probability is usually tested in relation to similarly situated individuals who objectively fear similar human right violations.

[81] *ibid.*

denounce foreign persecution and attempt to affect change abroad: to avoid a flood of refugee claimants[82]

The decision in *Chan* overall, re-articulated the importance of examining whether or not the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way. Nonetheless, the scope by which this question is interpreted is left open for adjudicators, as refugee claims are fundamentally different from one another and unique in their own respects. The ambiguity of the definition of persecution further complicates this process. The majority in *Chan* ruled that forced sterilization did not constitute a well-founded fear of persecution based on a lack of credible evidence in subjectively demonstrating that fear. The dissenting opinion, however, placed greater importance on the act of human right violations by highlighting the intention and purpose of Canadian refugee law. The disagreement between the judicial opinions unconscientiously echoes the ongoing debate and growing concern for adequately discerning between bona fide and fraudulent asylum seekers.

III. Statistical Analysis of Refugee Outcomes Following *Chan v. Canada*

(A) Grant Rate Variations – Between and Within Countries

Table 1.2 in Appendix B sets out the list of asylums seekers' country of origin that were included in the analysis of cases citing the Supreme Court decisions in *Chan.* Contrary to the sample size taken from the pervious chapter, this data takes into consideration all 85 cases that referenced the decision in their determinations.[83] Also included in the list, is the democratic ranking of each country and the range by which they have shifted. Based on the *Global Democracy Ranking* the cases were characterized into one of three categories (Least Democratic, Moderately Democratic and Most Democratic). [84] Of the 85 cases, applicants coming from least democratic countries included claimants from China, Burundi, Haiti, Nigeria, Russia and

[82] [1995] 3. S.C.R. *Chan v. Canada Para. 57.*
[83] As of October 2014, when the data gather process ended, there were a total of 85 refugee determination cases that cited the decision) All were taken into consideration for the purpose of the study, as the number of cases was practical
[84] The standard for which each category was justified is explained in the previous chapter.

Yugoslavia. Claimants whose country of origin was considered to be moderately democratic made up most of the country's list and included: Colombia, Croatia, El-Salvador, Mexico, Romania, Singapore, Thailand, Turkey, and Ukraine. Applicants seeking asylum from most democratic countries arrived from Czech Republic, Germany, Hungry and Israel. With 38.8 percent of total claims being made from countries that fall under the "Most Democratic" category and 14.1 percent from countries labeled as moderately democratic, it would not be entirely unusual if these claims were to fail. In fact, asylum claims made from countries labeled as most democratic would arguably be expected to fail as most democratic countries are less likely to produce refugees. Nonetheless, the frequency of claims made from these parts of the world raises suspicion and requires further explanation regarding the reasons for the quantity of these claims.

Variation Between Countries

Though claims made from democratic countries would be likely to fail, the data shows that there is little to no variance between the acceptance rates of determinations based on claimant's country of origin. Of the 85 claims made from 19 countries, only five produced positive determinations. Four of the five positive determinations originated from moderately democratic countries (Singapore and Thailand) and most democratic countries (Czech Republic and Hungary). The remaining positive determination was granted to a claim made from one least democratic country (Yugoslavia).

Table 1.1 – Democratic Ranking of Country of Origin

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Least Democratic	40	47	47.0	47.0
	Moderately Democratic	12	14.1	14.1	14.1
	Most Democratic	33	38.8	38.8	100.0
	Total	85	100.0	100.0	

Table 1.1 illustrates the frequency of claims made based on the democratic rank of asylum seekers' country of origin. Unlike the data presented in the previous chapter, most refugee

determinations that have cited *Chan,* were claimants arriving from least democratic countries. Table 1.2 and 1.3 sets out the grant rate based on the country's democratic rank and tests the significance of the relationship between the two variables.

Table 1.2 – Grant Rate by Country of Origin's Democratic Rank

		Refugee Case (Country of Origin)			
		Least Democratic	Moderately Democratic	Most Democratic	Total
Refugee Claim Determination	Negative	39	10	31	80
	Positive	1	2	2	5
Total		40	12	33	85

When controlling for the *country of origin* variable, grant rates appear to not be affected. Table 1.3 shows no significant association between refugee determinations and an applicant's country of origin. This particular data reveals that it is not the case that claims made from countries categorized as less democratic are more likely to result in successful applications.

Table 1.3 – Correlation between Democratic Level and Refugee Determination

			Refugee Case (Country of Origin)	Refugee Claim Determination
Spearman's rho	Refugee Case (Country of Origin)	Correlation Coefficient	1.000	.194
		Sig. (2-tailed)	.	.075
		N	85	85
	Refugee Claim Determination	Correlation Coefficient	.194	1.000
		Sig. (2-tailed)	.075	.
		N	85	85

Applicants for refuge made from least democratic countries were made from China, Burundi, Haiti, Nigeria, Russia and Yugoslavia. However, only the applicant from Yugoslavia was successful. Table 1.2 in Appendix C shows that 70% of claims (28 out of the 40) made from

least democratic countries were made by applicants coming from China – which resulted in negative determinations on the grounds that claims were not credible. Similar to the outcome for the applicants from China, all claims coming Burundi, Nigeria and Russia, failed on the grounds of credibility. The determinative issues for the remaining claims from Haiti varied as 50% (2/4) of the claims failed because of a lack of credibility while the remaining 50% resulted in negative outcomes due to failing to successfully rebut the presumption of state protection. While the majority of claims, resulted in negative outcomes due to a lack of credibility, the applicants arriving from Yugoslavia resulted in a positive determination. If the democratic nature of countries has insignificant impact on grant rates, other factors such as the basis of claims might better explain the grant rate variations.

Variation Within Countries

The grant variation within countries was present in both claims from asylum seekers from Hungary and Czech Republic. Tables 5 and 6 in Appendix C demonstrates this by illustrating the similarity of applicants' basis of claims and differences in their outcomes. Though a considerable portion of applicants based their claims on similarly situated events few were successfully granted refugee status.

Hungary

Table 5.1 shows that 93% of Hungarian asylum seekers based their claim on their racial ethnicity – particularly because of their Roma background. Only 6.6% of the total claims (15) were granted refugee status. An analysis of each case demonstrated very few differences between the claims made from Hungary.[85] Out of a total of 14 claims fearing persecution due to their racial ethnicity 36% failed to rebut the presumption of state protection and 57% failed on multiple grounds including the failure to rebut protection and failing to demonstrate that the discrimination observed amounted to a significant level of persecution.

[85] See table 2 in Appendix C.

Czech Republic

100% of claims made by applicants from Czech republic were based on their racial ethnicity, fearing discrimination and persecution from the general public.[86] 7.6% of the total claims were granted refugee status as they were believed to be credible, successfully rebutted the presumption of state protection and demonstrated that the discrimination observed amounted to persecution. 69% of the unsuccessful claims failed because they could not rebut the presumption of state protection nor convince board members that the discrimination they faced amounted to persecution.

(B) Grant Rates by Precedent Treatment

Where the treatment of precedents ranged from 'limits' to 'follows' in observing the strength of unanimous judicial decisions, the treatment observed in determinations citing *Chan,* replaces the 'limits' treatment with 'distinguish'. Because the decision in *Chan* was one made by a majority rather than a unanimous determination, the legal principles established might differ in the way they are treated. This is because its significance, and the scope to which it is interpreted may remain unclear as a majority judicial decision indicates there is some disagreement about what the legal principles should be or how it should be applied/interpreted. Distinguishing a case means that the principles established in the cited case is held as inapplicable. The citing case therefore tends to contradict the majority opinion and follow the minority one instead. As it replaced the treatment of 'limits, the 'distinguish' operation also holds an ordinal value of 1. Therefore it is a negative treatment of a judicial decision. Table 2.1 below illustrates how refugee board members treated the precedents established in *Chan.*

[86] See table 2 in Appendix C.

Table 2.1 - Precedent Treatment

	Frequency	Percent	Valid Percent	Cumulative Percent
Distinguish	4	4.7	4.7	4.7
Mentions	58	68.2	68.2	68.2
Explains	22	25.9	25.9	25.9
Follows	1	1.2	1.2	1.2
Total	85	100.0	100.0	

The data shows that only 1.2% of determinations citing the judicial decision found it to be persuasive in determining the outcomes of refugee claims. In other words, this means that very few board members relied heavily on the legal principles set out in the judicial decision in guiding their adjudicative procedures. Table 2.2 demonstrates how the determinations of claims resulting in outcome-variation within country of origin treated the precedents established in *Chan.*

Table 2.2 - Refugee Outcome and Precedent Treatment

Refugee Claim Determination (RPD Decision)	Precedent Treatment				Total
	Distinguish	Mentions	Explains	Follows	
Negative	1	57	21	1	80
Positive	3	1	1	0	5
Total	4	58	22	1	85

The descriptive statistics suggests that unlike the determinations that cited *Ward,* refugee cases that cited *Chan* are more likely to result in positive outcomes when the judicial decision is distinguished. The majority decision in *Chan* ruled that arguably narrowed the scope of interpretation of the membership nexus by ruling forced sterilization did not constitute a well-founded fear of persecution. The dissenting opinion, however, placed greater importance on the act of human right violations by highlighting the intention and purpose of Canadian refugee law. The determinations that follow the logic of the dissenting opinion may therefore be in favor of a broader interpretation of convention refugees. Table 2.3 illustrates the significance of this association.

Table 2.3 Correlation between Precedent Treatment and refugee Determination

			Refugee Claim Determination	Precedent Treatment
	Refugee Claim Determination	Correlation Coefficient	1.000	-.251*
		Sig. (2-tailed)	.	.020
		N	85	85
	Precedent Treatment	Correlation Coefficient	-.251*	1.000
		Sig. (2-tailed)	.020	.
		N	85	85

* Correlation is significant at the 0.05 level (2-tailed) – 95% Confidence level

With a correlation coefficient of -.251, the data reveals at the 95th percent confidence level that there is a statistically significant negative association between the way in which precedents are treated and the outcomes of refugee claims. Table 2.3 reveals that there is a moderately negative correlation between the precedent treatment of *Chan* and refugee determination outcomes. The more closer refugee decisions come to taking the majority opinion as persuasive by following the legal principles set out by them, the less likely they are to result in positive outcomes.

(C) Grant Rate by Basis of Outcomes

Based on the number of cases that cited the *Chan,* 92.9 percent of claimants based their refugee claims on a convention ground articulated in section 96 of the *Immigration and Refugee protection Act.* The remaining 7.1 percent have proceeded with their applications on the grounds that they are persons in need of protection according to section 97 of the *Act.* Though more than half made claims demonstrating a nexus, only 3.9 percent were successful. Contrary to the sample of cases following the decision in *Ward,* there appears to be no association between the basis of basis of claim and the refugee determination.

Table 3.1 – Basis of Refugee Claim

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No Nexus	7	7.1	7.1	7.1
	Nexus	78	92.9	92.9	92.9
	Total	85	100.0	100.0	

Table 3.2 – Breakdown of Basis of Claim

		Decision		Total
		Negative	Positive	Frequency
Basis of Claim	Military Evasion	1	2	3
	MPSG*	7	1	8
	Multiple	8	0	8
	Nationality	3	0	3
	No Nexus	2	0	2
	Political Opinion	4	0	4
	Racial Ethnicity	28	2	30
	Religion	27	0	27
Total		80	5	85

* *Membership in Particular Social Group*

The decision in *Chan* clarified the 'membership test' set out in *Ward.* Some refugee determinations that have cited *Chan* have done so by applying the membership test where applicable. 13 out of the 85 determinations citing *Chan,* were applicants who based their claim on a membership to a particular social group. Only 15% applied the membership test to in these determinations. The use of guidelines appear to have been used more frequently. For example the Chairperson provides a guideline in determining claims of *Women Refugees fearing Gender-related Persecution.* 11.7% (10 out of 85) of claims made dealt with, on some level, issues of gender related persecution. Of the 10 claims, 70% used the guidelines provided by the Chairperson.

IV. Chapter Summary.

The purpose of this chapter was similar to the previous one. However, instead of examining the capacity of unanimous judicial decisions in shaping refugee outcomes, it examined

the influences of a majority decision. It found board members that opposed the majority opinion were more like to be in favor of asylum seekers claims thereby resulting in positive outcomes. This suggests that the ability for administrative agencies to interpret legal principles on their own merit may result in more favorable outcome for asylum seekers by allowing for a broader interpretation of the convention definition. This chapter also found that guidelines were more likely to be used in determination procedures as opposed to the application of judicial tests.

The primary concern with the capacity to which judicial involvement should *guide* refugee determination is not taking authority away from executive decision makers, but rather ensuring that decisions are made effectively and efficiently in accordance with the rule of law. With a rapid decline of acceptance rates and clear inconsistencies in the adjudication process, decisions made in the refugee protection division have somewhat mirrored an inability to "correctly" interpret the definition of a *refugee*. Much of the difficulties associated with the recognition and determination of refugee can be attributed to the limitations associated with the perpetuation of the use of Western philosophical language. The limitations of the inclusion of [Western] social and conventional norms have presumably shifted the concept of refugees from people with an identity, a past history and a cultural heritage, to a re-interpretation of a definition that has been reconstructed to fit the ontology of Canadian politics.

The limitation that inter-subjectivity has placed on the refugee determination process has arguably reflected a retreat from democratic practices – ones that remained within the framework of legal principles. Though they are in fact people who have been forced out of their countries by political turmoil, ethnic wars, religious, social and gendered persecutions, the impact of refugee policy on the universality of a socially constructed definition continues to be altered by executive actors' power to steer judicial decisions and directions in the way they want.

Chapter Six – Conclusion

"Central to Canada's early Immigration and Refugee policy was the completely discretionary nature of admission; a newcomer's chances at acceptance were almost entirely dependent on the country's overall approach to immigration" – Dagmar Soennecken

"When law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or unreasonableness" – Philip Anizman,

The judiciary has increasingly become a more integral part of western democracies' political systems. Transcending beyond adjudicative dispute-resolving bodies, the courts have exercised a considerable amount of influence on public policy and political outcomes through their decisions and interpretations on common law and legislation. This has reshaped the nature of judicial power and expanded the role of the judiciary, both in the public and academic perception, as an important political actor in the policy and decision making process. Courts have been able to keep governments from acting unconstitutionally and undemocratically by subjecting the legislature to the rule of law through the practice of judicial review. In this regard, government prerogatives have been checked to ensure that individual rights and freedoms are not violated by the development of particular policies.

Though this expanding role of the courts has come under substantial criticisms, the under-regulated exercise of discretionary power and authority of tribunals has demanded a more democratic way of ensuring accountable governance and consistent decision making procedures in administrative agencies. This study has demonstrated that although the courts play some role in determining refugee outcomes, the extent to which judicial decisions are capable of regulating the exercise of administrative discretion is considerably limited. The application of judicial interpretation of statutes is ultimately constrained by how individual board members employ them in their determinations. The capacity for the courts to shape asylum outcomes is therefore dependent on how individual board members treat the precedents established by judicial decisions. A positively weak association between the treatment of precedents and refugee outcomes suggest that determinations that have placed substantial weight on the statutory

interpretations of judges are more likely to result in successful outcomes. Rather than relying on their own subjective perceptions, board members that follow precedents rely on the legal expertise of judges to help them determine the credibility of asylum claims.

The ability to control the spread of legal principles in asylum claims however, has further demonstrated the unchecked powers of public servants in quasi-judicial tribunals. Though refugee determinations are subjected to judicial review, courts do not exercise the capacity to influence administrative outcomes in the same way they subject the legislature to the rule of law. Courts are able to hold legislatures accountable by exercising their powers to strike down laws passed by parliament when they are in conflict with the constitution. In this regard, elected representatives are given the opportunity to address any issues and proceed with actions that remain within the framework of the nation's constitution. The findings in this study are consistent with the notions that public servants are not held accountable by the same standards in the same way that legislatures are. Rather, their ability to facilitate and control the spread of legal principles in their determinations demonstrates that courts in fact have very little capacity to influence administrative outcomes.

The courts limited capacity to influence the outcomes of board members' determinations in the IRB further suggests that each asylum claim is treated differently as they are inherently unique from one another. Though some claims resemble others, each one is different in its own respect. The unique dynamics of each case requires board members to consider the grounds that each claim is based on when determining the subjective component of the refugee determination test, as applicants must demonstrate that the persecution feared is subjectively well founded. Accordingly, the study showed that claimants who demonstrated a fear of persecution based on one of the five convention grounds set out in the legislation (race, ethnicity, religion, political opinion, membership in particular social group) had a higher chance of successful outcomes. While judicial rules for interpreting the definition of the convention grounds was made available, a low percentage of board members made use of them in their determinations.

The lack of obligation to apply judicially created tests for better statutory interpretations of the convention definition implies that other factors are necessary to be considered in determination procedures. Yet similarly to the use and application of judicially created tests, the use of guidelines in asylum claims is also considerably low. Judicial decisions and administrative guidelines appear to not be important to some board members when making their final decisions.

I. Theoretical Implications

The exploration of the relationship between judicial decisions and administrative outcomes has provided a different perspective on traditional theories of dialogue when examining the role of the courts and their ability to exercise political power. Though courts have been able to strike down unconstitutional laws when dealing with the legislature and ensure political decisions are made within the framework of the rule of law, they have been unable to do the same when it comes to decisions made in administrative tribunals. While there appears to be more of a dialogue between judges and elected members of parliament due to the 'back and fourth conversation' regarding the constitutionality of bills, the relationship between judges and public servants/board members is significantly different. Though both demonstrate a similar 'dialogue' it appears as though the ability of individual board members to interpret statutory definitions differently disables the full extent to which courts can ensure decisions are made within constitutional and democratic boundaries.

When an act of Parliament that has been considered unconstitutional is brought before the courts through judicial review, conventionally, the outcome compels the elected representatives to amend the act so that it does not conflict with overall democratic principles. However, if a refugee determination is found to have erred substantively (incorrect application of the law) then the decision is remitted back to the board for a new hearing by a different board member. While written reasons are provided for reconsideration of the case, there are no mandatory mechanisms

set in place that ensure judicial decisions are followed.[87] Moreover, unlike the relationship between courts within a judicial hierarchy, quasi-judicial tribunals are not bound by the constitution or common law to explicitly follow the precedents established by higher courts. Once again, though they are subjected to judicial review, they are not required to respond in the same way as lower courts or the legislature does to judicial decisions. This study has demonstrated that courts have not been able to hold public officials accountable in the same way they do with the legislature because of the ability of board members in tribunals to shape and limit the use of judicial decisions in their determinations.

The ability for public servants to limit the spread of legal discourse has been made possible with the discretionary powers that have been conferred upon them by the statute under which they function. While the use of discretion is important in administrative procedures, this study shows that the unrestricted use of such powers may be one reason as to why acceptance trends have been so inconsistent. It does not seem to far off to think that different interpretations of statutory definitions would result (or at least play a role) in different outcomes of asylum claims as this study has demonstrated different applications of judicial principles have resulted in different outcomes.

II. Generalized Findings

Despite a strong immigration tradition – predicated on democratic, humanitarian and compassionate grounds – Canada has recently experienced significant problems in the administration of its immigration policies. At times where there has been public perceptions that foreigners have abused the immigration system; "Canada has seemed to have lost – on more than once occasion – control of its own admission process" (y Griego, 1999 pg. 120). The government of Canada appears to have acknowledged this problem as its current policies – resulting from a number of significant legislative changes – have presumably been linked with and geared towards

[87] See the example of Gambino Zacarias in chapter one.

greater restriction of Canadian borders and increased difficulty in the acquisition of Canadian citizenship and status.

What does this mean for Asylum Seekers in Canada?

Theories of acquiring citizenship have been widely based on the theoretical and practical permeability of a State's border. Whether or not newcomers are welcomed and integrated into a society is determined within and reflective of that State's policies and procedures. Yet many influential and historical factors have also been taken into consideration in the administration of refugee policies of states and the conceptualization of its borders. However, what has been considerably underexplored (yet arguably has had the most impact on migrants) is the practice of administrative discretion and the unchecked delegated authority of public servants in administrative agencies.

The determination of asylum seekers in Canada has experienced drastic declines and inconsistent trends in grant rates over the last two decades. While much of this has been generally associated with changing societal factors (such as responding to security threats), this study suggests that unsuccessful asylum claims is connected to misinterpreting legislative definitions. There have been many social factors that have contributed to the development and implementation of migration policies and regulations of both immigrant receiving and sending countries. These factors have arguably shaped the way in which the politics of migration is observed and practiced within western liberal democracies. In particular, these factors include, but are not limited to, refugee claimants' region or city from which they came from, gender, age, number of dependents, and the evidence provided (or not). While these factors have all played an important role in determining the credibility of asylum seekers, how refugees are perceived (and determined) in relation to international conventions and domestic statutes is contingent upon the subjective interpretation of independent public servants.

The findings in this study further highlighted some of the main concerns that board members expressed when adjudicating asylum claims. A large number of cases showed that

claimants were not found to be convention refugees because of their failure to rebut the presumption of state protection. This objective component of the test is arguably the most difficult for an applicant as they are required to convince the adjudicator on a balance of probability that the persecution they fear is objectively well founded. The Supreme Court has provided two avenues as examples in which a claimant can fulfill this component. This stage can be completed either by demonstrating that protection was sought and did not materialize or show that the persecution feared is one that is felt by similarly situated individuals. Though board members are provided with and use national documentation packages that provide them with information about the status of particular regions and countries, they do not take into consideration the similar claims made by others. This is because individual refugee determinations are not used as guidance to aid in the determinations of other claims. While this objective component is meant to demonstrate that the persecution feared is justified, successful outcomes appear to be based on how well they can rebut the presumption of state protection.

Through the use of lax non-obligatory guidelines, recent amendments increasing ministerial authority, and a progressive shift of powers to administrators, there appears to be a remodeling of the legal order by which refugees in Canada are determined. The social construction of asylum seekers from a Eurocentric lens, defined by and interpreted within the confines of Western philosophical language, has re-conceptualized and reconstructed the determination process of refugees. Failure to provide legitimate regulatory mechanisms that hold public servants accountable further complicates determination procedures the unconstitutional practice of administrative discretion remains unregulated.

III. Future Research

The purpose of this study was to shed new light onto an underexplored area of Political Science. Particularly, it examined the relationship between two institutions whose relationship plays a vital role in shaping the outcomes for citizens and non-citizens alike. The political role of the courts and its capacity to shape and influence policies has been widely discussed within the context of Charter rights and in relation to the legislature. The interaction between courts and administrative agencies in western democracies however, is an area that more recently, has demanded further research. With the rise of new management theories finding their way into the public sector and ultimately reshaping the organization of political power, as it is exercised by public officials, legal principles appear to have been displaced. What is at stake is the ability to hold government action and public servants democratically accountable as the unconstitutional exercise of administrative discretion has redefined the intersection between law and politics in the political decision-making process.

This research has attempted to highlight the importance of the role of legal principles in administrative decisions by demonstrating that a lack of mandatory rules to follow judicial decisions in refugee determinations result in different outcomes. While this research has arrived at some preliminary conclusions, its primary purpose was to provide novel questions that have either been overlooked or not considered. In order for a more comprehensive understanding of the relationship between administrative agencies and the judiciary, further research is required to better understand whether the role of the courts is a viable solution to the democratic accountability problem in the public sector.

Bibliography

Abella, Rosalie Silberman. (2000). The Judicial Role in a Democratic State. *Queen's LJ* 26 573.

Adelman, H. (2002). Canadian Borders and Immigration Post 9/11. *International Migration Review , 36*, 15-28.

Anderson, C. G. (2010). Restricting Rights, Losing Control: The Politics of Control over Asylum Seekers in LIberal-Democratic States - Lessons from the Canadian Case, 1951-1989. *Canadian Journal of Political Science* , 937-959.

Argyriades, D. (2010). From bureaucracy to debureaucratization? *Public Organization Review*, *10*(3), 275-297.

Aucoin, P. (2002). Paradigms, principles, paradoxes and pendulums. *Public Management: Reforming public management*, *3*(2), 26.

Baker, D. (2010). *Not quite supreme: the courts and coordinate constitutional interpretation*. McGill-Queen's Press-MQUP.

Banfield, A., & Flynn, G. (2015). Activism or Democracy? Judicial Review of Prerogative Powers and Executive Action. *Parliamentary Affairs*, *68*(1), 135-153.

Barberis, P. (1998). The new public management and a new accountability. *Public administration*, *76*(3), 451-470.

Barberis, P. (2012). Thinking about the state, talking bureaucracy, teaching public administration. *Teaching Public Administration*, *30*(2), 76-91.

Bar-Siman-Tov, I. (2011). The Puzzling Resistance to Judicial Review of the Legislative Process. *Boston University Law Review*, *91*.

Bovens, M., Schillemans, T., & Hart, P. T. (2008). Does public accountability work? An assessment tool. *Public Administration*, *86*(1), 225-242.

Cairns, A. (1992). Charter versus federalism: The dilemmas of constitutional reform. McGill-Queen's Press-MQUP.

Canon, Bradley C. (1991). Courts and Policy: Compliance, Implementation, and Impact in the American Courts: A Critical Assessment, ed. John B. Gates and Charles A. Johnson. Washington, DC: Congressional Quarterly Press.

Colaiacovo, I. (2013). Not Just the Facts: Adjudicator Bias and Decisions of the Immigration and Refugee Board of Canada (2006-2011). *Journal on Migration and Human Security , 1* (4), 122-147.

Coram, R. and B. Burnes. (2001). 'Managing Organizational Change in the Public Sector: Lessons from the Privatization of the Property Service Agency', *International Journal of Public Sector Management*, 14, 2, 94–110.

Cowper, G., & Sossin, L. (2002). Does Canada Need A Political Questions Doctrine?. *Supreme Court Law Review*, *16*, 343.

Crepeau, F., & Nakache, D. (2008). Critical Spaces in the Canadian Refugee Determination System: 1989-2002. *International Journal of Refugee Law* , 50-122.

Cross, F. B. (2011). The Ideology of Supreme Court Opinions and Citations. *Iowa L. Rev.*, *97*, 693.

Dahl, Robert A. (1957). Decision-making in a democracy: The Supreme Court as a national Policy- maker. *J. Pub. L.* 6: 279.

Dahl, Robert. (1991) "A Theory of The Democratic Process." *Democracy and Its Critics.* Yale U, 83-119. Print.

Denhardt, R. B., & Denhardt, J. V. (2000). The new public service: Serving rather than steering. *Public administration review*, 549-559.

Dunleavy, P. (1994). The globalization of public services production: can government be 'best in world'?. *Public Policy and Administration*, *9*(2), 36-64.

Dunleavy, P., & Hood, C. (1994). From old public administration to new public management. *Public money & management*, *14*(3), 9-16.

Farazmand, A. (2010). Bureaucracy and democracy: a theoretical analysis. *Public Organization Review*, *10*(3), 245-258.

Ferlie, E., & Fitzgerald, L. (2002). The sustainability of the New Public Management in the UK. *New Public Management: Current trends and future prospects*, 341-53.

Flynn, G. (2011). Rethinking policy capacity in Canada: The role of parties and election platforms in government policy‐making. *Canadian Public Administration*, *54*(2), 235-253.

Forrer, J., Kee, J. E., Newcomer, K. E., & Boyer, E. (2010). Public–private partnerships and the public accountability question. *Public Administration Review*, *70*(3), 475-484.

Galloway. Donald. (2000). The Dilemmas of Canadian Citizenship Law, in T. Alexander Aleinikoff and Douglas Klusmeyer (eds). *From Migrants to Citizens: Membership in a Changing World.* Washington: Brookings Institution Press; Ch. 3 (pp. 82-118).

Gibson, J. L. (1983). From simplicity to complexity: The development of theory in the study of judicial behavior. *Political Behavior*, *5*(1), 7-49.

Gruening, G. (2001). Origin and theoretical basis of New Public Management. *International public management journal*, *4*(1), 1-25.

Guthrie, J., Parker, L., & English, L. M. (2003). A review of new public financial management change in Australia. *Australian Accounting Review*, *13*(30), 3-9.

Hardy, Cynthia, and Nelson Phillips. (1999) No joking matter: Discursive struggle in the Canadian Refugee System. *Organization Studies* 20.1. 1-24.

Hathaway , J., & Hicks, W. (2005). Is There A Subjective Element In The Refugee Convetion's Requirement of "Well-Founded Fear"? *Michigan Journal of International Law , 26*, 510-560.

Hathaway, J. C. (2005). The Right of States to Repatriate Former Refugees . *Ohio State Journal on Dispute Resolution* , 175-216.

Hathaway, J. C. (2007). Why Refugee Law Still Matters . *Melbourne Journal of International Law* , 89-103.

Hausegger, L., Hennigar, M., & Riddell, T. (2009). Canadian courts: Law, politics, and process.

Hennigar, M. (2004) 'Expanding the 'Dialogue' Debate: Canadian Federal Government Responses to Lower Court Charter Decisions', Canadian Journal of Political Science, 37, 3–21.

Herbert M. Kritzer and Mark J. Richards, (2010). Taking and Testing Jurisprudential Regimes Seriously: A Response to Lax and Rader. *Journal of Politics* 72(2), 288.

Hirschl, Ron. (2006). The New Constitutionalism and the Judicialization of Pure Politics Worldwide, *Fordham L. Rev.* 75: 721.

Hirschl, Ron. (2008). The judicialization of mega-politics and the rise of political courts. *Annual Review of Political Science* 11

Hogg, Peter M., Allison A. Bushell Thornton, and Wade K. Wright. (2007). Charter Dialogue Revisited. *Osgoode Hall LJ* 45

Hood, C. (1995). Emerging issues in public administration. *Public administration*, *73*(1), 165-183.

Hood, C., & Peters, G. (2004). The middle aging of new public management: into the age of paradox? *Journal of Public Administration Research and Theory: J-PART*, 267-282.

Howlett, Michael. (1994). The Judicialization of Canadian Environmental Policy 1980-1990: A Test of the Canada-United States Convergence Thesis. *Canadian Journal of Political Science* 27.1

Jackson, M. (2009). Responsibility versus accountability in the Friedrich-Finer debate. *Journal of Management History*, *15*(1), 66-77.

James F. Spriggs II, and Paul J. Wahlbeck, (2000). Crafting Law on the Supreme Court: The Collegial Game. *New York: Cambridge University Press*, 25.

Jacobs, L. A., & Kuttner, T. S. (2002). Discovering What Tribunals Do: Tribunal Standing Before the Courts. *Canadian Bar Review*, *81*(3), 616-645.

Joppke, C. (2010). Citizenship and Immigration. Vol. 2. Print.

Kaboolian, L. (1998). The new public management: Challenging the boundaries of the management vs. administration debate. *Public Administration Review*, 189-193.

Kruger, Erin, Marlene Mulder, and Bojan Korenic. (2004). Canada after 11 September: Security Measures and" preferred" immigrants. *Mediterranean quarterly* 15.4 72-87.

Kuipers, B. S., Higgs, M., Kickert, W., Tummers, L., Grandia, J., & Van der Voet, J. (2014). The management of change in public organizations: A literature review. *Public Administration*, *92*(1), 1-20.

Lacroix, Marie. (2004). Canadian refugee policy and the social construction of the refugee claimant subjectivity: Understanding refugeeness. *Journal of refugee studies* 17.2 147-166.

Lawrence Baum. (1997). The Puzzle of Judicial Behavior. *Ann Arbor, MI: University of Michigan Press*, 26-27

Lever, Annabelle. (2009). Democracy and judicial review: are they really incompatible?. *Perspectives on politics* 7.4: 805.

Lynn, L. E. (1998). A critical analysis of the new public management. *International Public Management Journal*, *1*(1), 107-123.
Macfarlane, E. (2008). Terms of Entitlement: Is there a Distinctly Canadian "Rights Talk"?. *Canadian Journal of Political Science*, *41*(02), 303-328.

Macfarlane, E. (2013). *Governing from the bench: The Supreme Court of Canada and the judicial role*. UBC Press.

Macklin, A. (1994). Canada (Attorney-General) v. Ward: a review essay. *International Journal of Refugee Law*, *6*(3), 362-381.

MacLauchlan, H. W. (1986). Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?. *University of Toronto Law Journal*, 343-391.

Manfredi, Christopher, and Mark Rush. (2007). Electoral jurisprudence in the Canadian and US Supreme Courts: Evolution and convergence. *McGill LJ* 52 457.

Morton, F. L., & Knopff, R. (2000). *The charter revolution and the court party*. University of Toronto Press.

Mulgan, R. (2000a). 'Accountability': An Ever‐Expanding Concept?. *Public Administration*, *78*(3), 555-573.

Mulgan, R. (2000b). Comparing accountability in the public and private sectors. *Australian Journal of Public Administration*, *59*(1), 87-97.

Murphy, Michael. (2001). Culture and the courts: a new direction in Canadian jurisprudence on Aboriginal rights?. *Canadian Journal of Political Science* 34. 109-130.

Ngai, Mae M. (2004). Impossible subjects: Illegal aliens and the making of modern America. *Princeton University Press*. Chapter 1

Olsen, J. P. (2006). Maybe it is time to rediscover bureaucracy. *Journal of public administration research and theory*, *16*(1), 1-24.

Osborne, D. and T. Gaebler. 1992. *Reinventing government.* Reading, Mass: Addison-Wesley

Peters, B. G. (2010). Bureaucracy and democracy. *Public Organization Review*,*10*(3), 209-222.

Pratt, Anna C. (1999). Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act. *Social & Legal Studies* 8.2.199-226.

Pratt, A., & Sossin, L. (2009). A brief introduction of the puzzle of discretion. *Canadian Journal of Law and Society*, *24*(3), 301-312.

Prentice, A. (1984). Research in Public Administration. *Illinois* 495.

Rehaag, Sean. (2007). Troubling patterns in Canadian refugee adjudication. *Ottawa L. Rev.* 39 335.

Roach, K. (2001). Constitutional and common law dialogues between the Supreme Court and Canadian legislatures.

Romzek, B. S., & Dubnick, M. J. (1987). Accountability in the public sector: Lessons from the Challenger tragedy. *Public Administration Review*, 227-238.

Roy, J. (2008). Beyond Westminster governance: Bringing politics and public service into the networked era. *Canadian Public Administration*, *51*(4), 541-568.

Russell, Peter H. (1994). Canadian constraints on Judicialization from without. *International Political Science Review* 15.2: 165-175.

Savoie, D. J. (1999). The rise of court government in Canada. *Canadian Journal of Political Science*, *32*(04), 635-664.

Savoie, D. J. (2003). Breaking the bargain: Public servants, ministers, and parliament. *University of Toronto Press.*

Savoie, D. J. (2006). The Canadian public service has a personality. *Canadian Public Administration*, *49*(3), 261-281.

Soennecken, D. (2013a). Extending Hospitality: History, Courts and the Executive. *Studies in Law, Politics and Society*, *60*, 85-109.

Soennecken, D. (2013b). The Managerialization of Refugee Determinations in Canada. *Droit et société*, *84*(2), 291-311.

Sossin, Lorne. (2002). Discretion unbound: Reconciling the Charter and soft law. *Canadian Public Administration* 45.4. 465-489.

Sossin, L. (2005). Speaking truth to power? The search for bureaucratic independence in Canada. *University of Toronto Law Journal*, *55*(1), 1-59.

Sossin, Lorne, and France Houle. (2006). Tribunals and Guidelines: Exploring the Relationships between Fairness and Legitimacy in Administrative Decision-Making. *Canadian Public Administration* 46: 283-307.

Spriggs F. James (1996). The Supreme Court and Federal Administrative Agencies: A Resource-Based Theory and Analysis of Judicial Impact, *American Journal of Political Science* Vol.40, No.4. 1122-1151

Spriggs, J. F., & Hansford, T. G. (2000). Measuring Legal Change The Reliability and Validity of Shepard's Citations. *Political Research Quarterly*, *53* (2), 327-341.

Spriggs J.F., and Wahlbeck, Paul (2000). Crafting Law on the Supreme Court: The Collegial Game. *New York: Cambridge University Press*, 25.

Stone, B. (1995). Administrative accountability in the 'Westminster' democracies: Towards a new conceptual framework. *Governance*,*8*(4), 505-526.

Strøm, K. (2000). Delegation and accountability in parliamentary democracies. *European journal of political research*, *37*(3), 261-290.

Vallinder, Torbjörn. (1994). The Judicialization of Politics - A Worldwide Phenomenon: I Introduction." *International Political Science Review* 15.2: 91-99.

Vong, D. (2013). Binding precedent and English judicial law-making.

Waldron, Jeremy.(2006). The core of the case against judicial review. *The Yale Law Journal*. 1346-1406.

Waluchow, W. J. (2007). *A common law theory of judicial review: The living tree*(pp. 270-71). Cambridge: Cambridge University Press.

Willis, J. (1974). Canadian Administrative Law in Retrospect. *U. Toronto LJ*, *24*, 225.

y Griego, Manuel Garcia. (1994). Canada: Flexibility and control in immigration and refugee policy. *Controlling immigration: A global perspective*.119-42.

Cases Cited

Baker v. Canada (Minister of Citizenship and Immigration), 2 Supreme Court of Canada (1999). Retrieved from the Canadian Legal information Institute. Website: http://www.canlii.org

Canada (Attorney General) v. Ward, Supreme Court of Canada (1993). Retrieved from the Canadian Legal Information Institute. Website: http://www.canlii.org

Canada v. Khasa. 1 Supreme Court of Canada (2009). Retrieved from the Canadian Legal Information Institute. Website: http://www.canlii.org

Chan v. Canada (Minister of Employment and Immigration) Supreme Court of Canada (1995) Retrieved from the Canadian Legal information Institute. Website: http://www.canlii.org

Singh v. Canada (Minister of Employment and Immigration) Supreme Court of Canada (1985). Retrieved from the Canadian Legal Information Institute. Website: http://www.canlii.org