

Restructuring Rights:

Exploring the implications of privatization for minority-rights based initiatives

Fiona MacDonald

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Introduction

Mirroring shifts in contemporary Western society, much recent political and legal theory has focused on ‘identity,’ ‘culture’ and ‘recognition.’ As Charles Taylor notes:

A number of strands in contemporary politics turn on the need, sometimes the demand for recognition. The need, it can be argued, is one of the driving forces behind nationalist movements in politics. And the demand comes to the fore in a number of ways in today’s politics, on behalf of minority or ‘subaltern’ groups, in some forms of feminism, and in what is called *the politics of multiculturalism*. (Emphasis added. Taylor 1995, 225)

As indicated in Taylor’s discussion, identity politics is often manifest in demands for group autonomy through what has now come to be known as group-differentiated or *minority rights*.¹ In fact, in recent decades, this approach to recognition has found increasing legitimization amongst liberal democracies and is often viewed as an essential ‘step’ in the pursuit of the measures required to obtain a state of stability and justice. In response to this trend, I suggest that the legal strategies and practices of some forms of minority rights, often ‘empowering’ for minority groups on one level, may simultaneously bring about unintended negative consequences on another level. More specifically, I contend that minority rights, generally viewed as ‘concessions’ made by the state to meet the demands of minority groups, must be also evaluated as part of a broader governmental strategy of neo-liberalism. This strategy is not simply about meeting the particular demands of minority groups but also about meeting the

¹ In this work the term ‘minority rights’ refers to Kymlicka’s definition of minority rights which states, “a wide range of public policies, legal rights, and constitutional provisions sought by ethnic groups for the accommodation of their cultural differences. Groups claiming minority rights include immigrant groups, indigenous peoples, national minorities, racial groups, and ethnoreligious sects; and their claims range from multicultural policies to language rights to respecting treaties with indigenous peoples.” (Kymlicka and Norman 2000, 2)

requirements of the contemporary governmental shift towards privatization within liberal democratic states. As such, particular manifestations of group rights are vulnerable to criticisms launched against practices of privatization which include a variety of policies designed to promote a stealth shifting of contentious issues out of the public sphere thereby limiting public debate and collective (i.e. state) responsibility (Brodie 1995, Kline 1997, Fudge and Cossman 2002).

While the positive effects of minority rights based initiatives must not be discounted, it is equally important to examine such initiatives for any potentially harmful implications. The overall objective of such an endeavor is not to provide argumentation that supports jettisoning rights-based initiatives. Rather, it is to recognize, and subsequently begin to address, some of the shortcomings and implications of minority rights-based approaches as a positive legal strategy for contemporary social movements. I contend that there may be unforeseen and unintended implications and limitations to such an approach. These risks must be addressed if these hard-won rights-based initiatives are to meet the variant needs and objectives of the groups and individuals whom have advocated such recognition. As Ayelet Shachar notes, this is an area within the multicultural debate that, until very recently, has been significantly overlooked. She observes:

Little attention has been paid [...] to the actual effects that multicultural policies are leaving on the lives of members of accommodated groups. Still less consideration has been given to the complex, subtle, and often injurious impact that state accommodation policies can exert on individuals within minority groups (Shachar 2001, 17).

This paper explores some of these ‘actual effects’ by critically examining the case of First Nations groups in Canada and their ‘right’ to autonomous child welfare services.²

While changes in child welfare policy for First Nations peoples are occurring in various provinces to varying degrees, this paper focuses mainly on the case of Manitoba. Unlike provinces such as Alberta and British Columbia, which have also been restructuring recently, the majority of Manitoba’s child welfare services have not typically been government services. Instead, services in Winnipeg and Southern Manitoba developed as Children’s Aid societies and have remained private in this sense. The restructuring currently underway in Manitoba, then, does not involve an all-encompassing shift from government to private but rather focuses exclusively on restructuring centred specifically around the growing First Nations population in the region.³ The changes involved are unique to date in that they include the development of First Nations agencies that will have jurisdiction for First Nations clients *regardless of where they live* instead of only for those First Nations people living on a reserve. These changes are unprecedented nation-wide and are being observed by other provinces as a potential template for reform.

² While the issue of First Nations claims to self-government is often characterized as part of the broader multiculturalism debate it must also be acknowledged that First Nations people are a distinct “group” in many ways due to their particular histories and past interactions with the state. Including the First Nations case in a discussion of “group rights” does not suggest that their claims are not unique. Rather, the inclusion of First Nations claims within the broad multiculturalism assists in revealing that group rights are differentiated not only between the “majority” and “minorities” but between different minority groups as well. Thus, recognizing First Nations claims as part of the movement to group rights is congruent with recognizing this group as a nation. For a discussion on the potential use of categorical distinctions between minority groups see Will Kymlicka’s (1995) discussion of “national minorities” and polyethnic groups in *Multicultural Citizenship* as well as criticism of these distinctions in Parekh (2000) *Rethinking Multiculturalism*.

Multiculturalism Reviewed

Over the last few decades the relationship between multiculturalism and liberalism has dominated much of the recent debate in political and legal theory. Theorists like Will Kymlicka⁴ sought a way to reconcile liberal democratic notions of equality and individual autonomy with recognition and accommodation of collective difference and disadvantage. The general argument for the incorporation of minority rights stems from a reaction to the inadequacies of “difference-blind” institutions. Once purported to be neutral, there is now a growing acknowledgement that institutions claiming impartiality are biased in favor of the majority or “dominant” group. Minorities are left faced with a “range of burdens, barriers, stigmatizations and exclusions” (Kymlicka and Norman 2000, 4). From this perspective, “Minority rights do not constitute unfair privileges or invidious forms of discrimination, but rather compensate for unfair disadvantages, and so are consistent with, and may be required by, justice” (Kymlicka and Norman 2000, 4). Perspectives like Kymlicka’s that focus on justice *between* groups dominated the multicultural debate throughout the 1990s and remain central to current debates.

In addition to these works, further important contributions have been made to this debate by numerous feminist critics who have noted the significance of intra-group power differentials. These critics argue that justice between groups must also include a

³ Although recently the Winnipeg region was taken over by the Manitoba government—ostensibly for “fiscal reasons”—with no explicit link made to current restructuring changes related to services for the First Nations population.

discussion of justice *within* groups. The impetus for such claims stems from a recognition that collective gains may come at individual costs.⁵ Overall, these critiques have revealed new levels of complexity in the multiculturalism debate. Despite the significance of this work, however, much work remains to be done. More specifically, as Ayelet Shachar points out, few multicultural scholars have addressed questions of authority and jurisdiction in relation to minority rights in any comprehensive meaningful way. She observes:

Surprisingly, proponents of multiculturalism have given little consideration to a thorough exploration of the legal-institutional dimension of accommodation. Significantly more attention in the ongoing debate has been devoted to the theoretical question of differentiated citizenship. Yet, relatively little thought has been given to the key issue of authority: how it might be differently divided in the multinational state, and what the implications of this change might be for those who experience this new system of authority (Shachar 2001, 9).

In this respect, Shachar's analysis is an important contribution to the debate and her work, *Multicultural Jurisdictions*, attempts to address some of these gaps. Specifically, Shachar highlights potential dangers in granting group autonomy over certain areas of the law. Her work demonstrates that granting autonomy to groups in areas such as family law may "impose a systemic, sanctioned, and disproportionate burden upon some categories of groups members rather than others: primarily but not solely, women" (Shachar 2001, 47).

⁴ For a comprehensive critical overview of liberal perspectives on minority rights including Rawls, Habermas, Kymlicka, Kukathas, Raz, Taylor and Walzer see Andrea Baumeister's (2000) publication, *Liberalism and the Politics of Difference*.

⁵ For a comprehensive overview of such critiques see *Is Multiculturalism Bad for Women* (1999) edited by Joshua Cohen, Matthew Howard, and Martha C. Nussbaum, Princeton University Press.

The acknowledgment that group autonomy may result in unequal yet legally sanctioned burdens and obligations for vulnerable group members is an important one and Shachar's analysis of family law provides a useful concrete example. She illustrates why cultural group autonomy over this legal domain may be particularly problematic for "vulnerable" group members. She explains:

[Minority] groups view control over marriage and divorce as crucial to their survival, they tend to urge the state to accommodate their differences by awarding the jurisdiction in matters of membership demarcation, including family law. Such allocation of legal powers can certainly lend assistance to the group's struggle for self-preservation. But accommodated family law traditions do not simply define membership boundaries they also regulate the distribution of rights, duties, and ultimately power between men and women within the community (Shachar 2001, 57).

Still, Shachar's work takes us only part of the way in fleshing out the potential negative implications of some minority rights initiatives. Like so many other feminist critics of multiculturalism literature, the core of Shachar's work is focused on the potential dangers of *tradition*, particularly for minority women.⁶ As she observes:

Practices and traditions pertaining to the family are central to the self-conception of many minority groups that seek to preserve their differences under a common citizenship regime. However, these very same practices and traditions often impose disproportionate costs on women to such an extent that when group practices are accommodated by the state, their rights as citizens are systematically put at risk [...] Thus, well-meaning policies designed to accommodate the practices of different minority cultures [...] can actually serve to *sanction* the maltreatment of women (Shachar 2001, 11).

Investigating the potential negative implications and unequal burdens that may arise out of tradition in light of minority group autonomy over legal domains is an important analysis. Equally important, however, is the need to develop an understanding of how

⁶ For the most trenchant criticism of this nature see Susan Miller Okin's contribution titled "Is Multiculturalism Bad for Women?" In *Is Multiculturalism Bad for Women* (1999).

granting group autonomy over particular legal domains may not only bring *new* dangers but re-inscribe and re-structure *old* ones. This paper is an attempt to explore the latter under-investigated element of some forms of minority rights.

What is Privatization?

In the last two decades political and legal scholars have observed a set of practices and policies centered on notions of economic restructuring often broadly referred to as *privatization*. While in its original use the concept of privatization referred to the sale of government assets to the private sector, it has now come to refer to a “tectonic shift” in public policy and a movement within liberal democracies towards a particular political orientation (Fudge and Cossman 2002, 1). Janine Brodie explains:

The politics of restructuring revolve around a multi-faceted contraction and re-regulation of the public and the political realms as they were constituted by the postwar welfare state, and the simultaneous expansion of the private whether defined as markets or the domestic sphere (Brodie 1995, 11).

Thus, “[a] whole new set of assumptions about the role of government and the rights of citizens is emerging” (Fudge and Cossman 2002, 16). Restructuring involves a variety of practices that have come to dominate liberal democratic politics since the 1980s and which redraw the public-private boundaries in order to shrink some aspects of the public by granting autonomy to the market and the family. As Brodie and others have argued, this shift alters the political identities and public spaces of postwar Canadian politics and results in new forms of domination as well as the reshaping of more familiar ones rooted in gender, race and class (Brodie 1995, 14).

The range of practices implicated in this overall shift include, “the sale of government assets, the transfer of government functions to the private sector (contracting

out), and the restructuring of government activities to more clearly emulate market norms” (Fudge and Cossman 2002, 4). These changes are largely implemented through changes in the legal policy and the administration of law. The fact that law is most often the site of this shift has significant implications. Fudge and Cossman note that within liberal democracies, “[l]aw is a important site for the production of discourses that play a powerful role in shaping human consciousness and behavior. At the same time, its coercive force distinguishes its form from other discourses” (2002, 5). Further, “[law] provides a justificatory framework, defining and redefining values such as equality, liberty, and the rule of law, for the invocation of state power” (5). New social and cultural forms are legitimated through the law thereby making the law both a powerful tool for coercion and exclusion and a discursive site for contestation around recognition and inclusion. As will be discussed, both elements of the law are at work in the example of minority rights.

Key Concepts

Shifts towards privatization and restructuring include a number of trends that work together to produce an overall privatizing effect. In order to fully explore and appreciate the applicability of privatization analysis to the example of minority rights it is first necessary to begin by clarifying key concepts. Firstly, the practice of *re-regulation* is often invoked in privatization literature (Brodie 1995, Kline 1997, Fudge and Cossman 2002). This reference is used to highlight the fact that while restructuring is often described as de-regulation by the state, the actual outcome in terms of distribution of authority is much more akin to a kind of re-regulation. In other words, despite claims of change, very little modification occurs at the level of ultimate authority. Rather, changes

occur in the administration of this authority as the state steps back from direct forms of management by distributing certain roles and functions to new 'private' bodies. This gives the impression of devolution of state power and yet the state maintains its ultimate position of authority. Thus, the state is not giving up control (i.e. de-regulating) but is instead exercising its control in new and often less overt forms (i.e. re-regulating). The illusion of giving up control benefits the state as it is able to distance itself from responsibility while incurring no substantial costs regarding its power as final decision-maker.

Re-regulation is often combined with a discourse of *re-privatization*. Re-privatization refers to the transference of particular issues and responsibilities from the public sphere into a more private sphere. As Anne Phillips (1991) explains:

Liberal democracy designates certain areas as outside of governmental control, sometimes by formally establishing individual rights and freedoms in a written constitution but more commonly through historically shifting conventions over what can be considered a public concern (Phillips, 15).

While the public-private divide is largely recognized as a construction, the effects of invoking the discourse of re-privatization are very real. For as Brodie notes, when issues are identified as private they are not simply identified or addressed, they are, "configured, administered and produced" (Brodie 1995, 30). By suggesting that certain issues be 'returned' to the private sphere the state draws on a sense of naturalness and inevitability. This 'return' is often accompanied by a discourse of autonomy and self-sufficiency. As Fudge and Cossman observe, "In the new political order, governments are no longer responsible for the social welfare of their citizens but only for helping those citizens to help themselves" (Fudge and Cossman 2002, 16). This shift is evident in various policy

areas, especially policy regarding health care, elder care, and childcare (Cossman 2002, 173).

The perceptual shift incumbent in re-privatization is often made possible through the *co-optation* of progressive discourses. Brodie explains the motivation behind the process of co-opting progressive discourses: “The success of a new order often depends on its ability to incorporate criticisms of the old order, even if the outcomes are qualitatively different” (Brodie 1995, 56). Examples abound of the state’s ability to incorporate oppositional criticisms into new state strategies that often run counter, if not directly oppositional, to the movements that launched the original critique. One example is the policy of new mothers being sent home within hours of delivering their babies in Canadian hospitals. Brodie notes that this shift appears to respond to demands from women’s health organizations that childbirth be de-medicalized and that women be given more autonomy over the birthing process. “At the same time, however, these women are being sent home often without sufficient instruction for the care of their newborns and without a support system within the home” (Brodie 1995, 55-56).

The combination of re-privatization and co-optation leads to another, interrelated trend within restructuring—that is, *de-politicization*. “A crucial question to be addressed in the current era of privatization is the relocation of political debate and protest (Fudge and Cossman 2002, 23). De-politicization refers to a process by which contentious issues are removed from spaces traditionally associated with the public and/or political. The result is that the issue is moved out of a space in which it can be politically contested and into a de-politicized space. This coincides with a shift from the public to the private. As Fudge and Cossman explain, “Encoding a particular good as ‘naturally’ located within

the market or the family removes it from the realm of politics (Fudge and Cossman 2002, 22).

Finally, a process of *individualization* is also at work in contemporary manifestations of restructuring. Individualization, “refers to the process whereby a broad range of social issues is being reconstituted, both with respect to causes and solutions, in highly individualized terms” (Fudge and Cossman 2002, 21). As privatization scholars observe, this shift can result in ‘individual pathology’ explanations for social problems. This process of individualization has largely been the case with the neo-liberal’s ‘crackdown’ on child poverty in their targeting of ‘deadbeat dads’ and ‘welfare mothers.’ This focus allows the state to construct child poverty as a problem reducible to incapable, malfunctioning individuals instead of an incapable, malfunctioning state. Thus, the state sidesteps direct responsibility for negative social conditions and posits itself as proactively working towards ending these systemic problems through individualized means. In other words, the state’s role becomes largely focused on coercing these mal-fitting individuals to ‘fall into line’ in order to ‘look after their own’ (Brodie 1995, 53). Not only is this an ineffective strategy for eradicating systemic causes of problems such as child poverty, this kind of portrayal of the issue serves to further perpetuate negative stereotypes for disadvantaged children and families. For example, crackdowns on ‘deadbeat dads’ and ‘welfare mothers’ reinforce the notion that poverty results from individual weakness and not broader economic, social forces at work within the state (Fudge and Cossman 2002, 21).

Overlapping Omissions

While much work has been done to highlight the many different areas of Canadian law and policy that have been impacted by the privatization trend,⁷ there has been little to no attempt made to consider the potential interplay this form of restructuring may have with the simultaneous trend of the state granting certain forms of minority rights. This is a serious omission within both literatures as there is significant overlap between their areas of central concern. For example, family law is both a central concern within minority rights literature and privatization literature. As Brenda Cossman (2002) notes, “Recent developments in family law and social welfare have all the hallmarks of the privatization project” (Cossman, 169). Similarly, scholars such as Shachar (2001), Benhabib (2002) and Okin (1999) have argued that there is a unique relationship between family law and the accommodation of cultural differences through minority rights particularly in relation to women.

Thus, the interconnection between family law and feminism is central to both privatization and multiculturalism literatures as both point to women as particularly vulnerable to potentially negative fallout arising out of governmental policy change. Still, despite these convergences, most discussion of family law and privatization focuses on the restructuring of child support, social assistance, and the changing relationship and allocation of responsibilities between the federal and provincial governments. There is little discussion of multicultural politics. Further, when multiculturalism is mentioned in

⁷ For a comprehensive overview of some of the existing literature on privatization and contemporary law see *Privatization, Law and the Challenge to Feminism* (2002) edited by Brenda Cossman and Judy Fudge, University of Toronto Press.

privatization literature, the emphasis is an oppositional one—that is, privatization scholars appear to assume that trends towards multiculturalism and privatization are not only mutually exclusive but, in fact, are constitutive of two contrary, if not contradictory, movements. Privatization scholars including Brodie and Cossman suggest that privatization turns away from acknowledging difference—that is, tolerance of special claims based on difference and systemic disadvantage (Cossman 2002, Brodie 1995).

Multiculturalism literature fares no better in this regard. Little to no work has been done by dominant multicultural theorists on the potential privatizing effects of minority rights. When the welfare state and multiculturalism are considered in the same analysis it is most often in the form of an argument against differentiated rights based on the assumption that differentiated rights will lead to the narrowing of the welfare state (Kymlicka and Banting 2003).⁸ In other words, for these critics, the state's pursuit of multicultural policies eventually leads to a reconfigured, contracted, welfare state. They do not consider the possibility that the pursuit of a reconfigured (i.e. privatized) welfare state may in fact lead to multicultural policies and the appearance of accommodation.

How do we account for these omissions? The failure to consider the potential relationship between the simultaneous trends in minority rights and privatization is most likely due to the fact that minority groups, including First Nations groups in Canada, have quite visibly demanded group rights over areas such as family law. Thus, *prima facie* the changes appear as a progressive response to contemporary demands instead of regressive

⁸ Keith Banting and Will Kymlicka give a concise overview of these arguments in their article, "Multiculturalism and Welfare" *Dissent* Fall 2003. According to Banting and Kymlicka the three main arguments that make up this criticism of multiculturalism are: "the crowding out effect," "the corroding effect," and "the misdiagnosis effect."

policies based on shifting social responsibility. As will become clear, however, while granting group autonomy over areas of family law, including child welfare, *does* respond to First Nations' demands in many significant ways, it may also be a powerfully effective form of co-optation and de-politicization regarding First Nations demands.

First Nations and 'Autonomous' Child Welfare: A Case Example

One of the most pressing issues of multicultural politics today is First Nations self-determination. First Nations scholars, activists, and various multiculturalism theorists have made arguments advocating some form of self-government⁹ or 'independence' (Royal Commission on Aboriginal Peoples 1996). Many of these arguments focus on achieving self-determination for First Nations peoples in Canada across a range of legal and social arenas including family law. Family law, more specifically child welfare, has been an area in which the Canadian state has appeared most willing to make concessions of autonomy to First Nations groups. In various provinces across Canada steps have been taken towards granting First Nations groups some autonomy over the provision of child welfare services for First Nations families. This trend is consistent with broader trends in minority rights accommodation. As Shachar notes, "In the growing age of diversity, the state is relatively receptive to minority culture's requests for greater degrees of legal control over their [minority groups] own family affairs" (Shachar 2001, 46-47).

Given that First Nations groups have lobbied for this and other forms of jurisdictional autonomy these changes appear to be positive and progressive changes in

the policies of the Canadian state. Indeed, as will be discussed, this is in many ways a valid perspective. Nevertheless, certain manifestations of minority rights, such as the right to autonomous child welfare services for First Nations peoples in Canada, may not be the concessions they are often thought to be. When informed by recent works in privatization literature the motivation, implications and limitations of such progressive developments become much more complex. As Marlee Kline notes in her critical analysis of the 1994 decision by the Alberta government to privatize the delivery of child welfare services in Alberta, the movement to “community-based” child welfare services may not be the progressive change they are often made out to be (Kline 2000).¹⁰ In fact, these kinds of jurisdictional changes must be considered as part of a broader shift in Canadian politics towards neo-liberal political practice. As such, many of the negative and potentially dangerous trends highlighted by privatization scholars including re-regulation, re-privatization, co-optation, de-politicization and individualization are also visible in this trend towards group ‘autonomy.’ While these trends have serious implications for all group members, they hold particular significance for First Nations women as the process of neo-liberal restructuring is inherently gendered.¹¹ (Brodie 1995) and often results in these women and their children “falling through the cracks” (Cossman 2002, 170).

⁹ In this paper the concepts of First Nations ‘independence’ and ‘self-determination’ are emphasized over ‘self-government’ as the meaning and implications of self-government are increasingly contested within First Nations communities.

¹⁰This paper follows in the same critical vein as Kline’s work, however Kline does not engage with multiculturalism discourse and her analysis of First Nations groups remains largely at the level of “communities.”

¹¹ The argument that privatization is inherently gendered is related to gender inequalities within the labour market and the realization that changes to the welfare state impact women in disproportionate ways.

What do First Nations Groups Want?

For many First Nation communities, demands for autonomous child welfare services have been of central importance in the move towards independence. This is largely due to the historically volatile, injurious, and colonial relationship between child welfare, education systems, and First Nations peoples in Canada. In fact, the overrepresentation of First Nations children in mainstream child welfare is well documented across Canada. For example, the Manitoba vision document, *Promise of Hope: Commitment to Change* (2001), acknowledges that despite significant reforms that have been introduced in recent years, high numbers of First Nations children and families continue to be involved in the provincial child and family services system. According to their statistics, “Currently, Aboriginal children make up about 21% of Manitoba’s population under the age of 15, but they account for 78% of children currently in care of the overall child and family services system” (Government of Manitoba 2001, 7).¹² There is also evidence to suggest that First Nations clients may present some of the most complex child welfare cases in certain regions where social problems including suicide, substance abuse, domestic abuse, and sexual abuse are strikingly more prevalent than in other areas (Timpson 1995, 7). These trends help to explain two simultaneous realities regarding First Nations communities and Canadian child welfare. First, First Nations

¹² While Manitoba may present one of the most glaring examples of overrepresentation of First Nations children in Child Welfare the problem of overrepresentation exists throughout Canada. For example, British Columbia also reports high numbers of First Nations children in care in the publication, *Liberating Our Children* (1992). According to their statistics: Aboriginal people make up less than 4% of the population of British Columbia, but of the 3393 children-in-care as a result of court orders under the *Family and Child Services Act*, 1751 of those children (51.6%) are Aboriginal. The number of children-in-care is not static. Children move through the system, being returned to their families, adopted by strangers, or reaching the age of majority. The rate of new admissions remains constant. In 1991-92, 952 Aboriginal children became wards of the Superintendent. Over a single generation, an average of more than one out of every five Aboriginal children are becoming wards of the Superintendent (White and Jacobs 1992, 2)

children clearly present some of the statistically ‘hardest cases’ for current child welfare practices. Second, when combined with the volatile historical record of state intervention experienced by First Nations peoples, these numbers shed light on why so many First Nations communities have demanded autonomous control over child welfare services.

Self-determination in child welfare provision is often articulated as not only central to the move towards political independence but also central to establishing better services that can meet the needs of First Nation families that are so significantly over-represented within the existing system. This overrepresentation is often seen as directly linked to past state intervention—particularly in the form of residential schools.¹³ In the report written for the British Columbia Government by Lavina White (Haida Nation) and Eva Jacobs (Kwakiutl Nation), they state:

Regardless of the reasons for the present problems we face, the solutions can only be found by our Nations and communities accepting these problems as theirs, and your government recognizing that the methods of resolving these problems must be ours. Your government must relinquish responsibly for resolving our problems, and support our Nations and communities as they identify and implement their solutions (White and Jacobs 1992, v).

The demand for autonomous child welfare services for First Nations peoples cannot be understood outside of the particular historical context of colonialism and oppression First Nations peoples have experienced at the hands of the Canadian state—often via legal regulation. This history has included the rejection of traditional ways of

¹³ The Aboriginal Healing Foundation (2002) estimates the number of residential school attendees still living at about 90,000 Aboriginal People. According to Statistics Canada’s Aboriginal People’s survey (2001) one-third of Aboriginal People aged fifteen and over living off reserve had family members who attended residential schools (Statistics Canada 2001).

child-rearing and family life within First Nations cultures by the Canadian state and has been manifested in a number of legalistic interventions since the time of European settlement. A large part of this process was the era of residential schooling in which First Nations children were forcibly removed from their families and communities¹⁴ and an ongoing period of overrepresentation within provincial child and family services agencies.¹⁵ This experience of intense intervention, forced assimilation, and community fragmentation has left many scars on First Nations groups including a deep mistrust and resentment towards governmental child welfare services. This history has also contributed to a deep commitment to cultural distinction and preservation amongst First Nations communities. It is not surprising then that autonomous child welfare service has become such a central concern in current debates. As White and Jacobs state, “In the long run, recognition of our inherent right to self-government and the paramountcy of our family law provide the only framework for dealing with the protection and strengthening of our families and children (White and Jacobs 1992, 35). From this perspective, child welfare services must be community centered because only the community has the cultural knowledge and capabilities required to work with First Nations children.

In the past decade, this perspective appears to have gained increasing legitimacy. Indeed, steps have already been taken in many provinces towards the delegation of authority over child welfare matters from the provincial government to agencies

¹⁴ As stated in the report of the Aboriginal Justice Inquiry, the main goal of residential schools and their assimilation policy was not to further education but, rather “to remove Aboriginal children from the influences of their parents and communities, and to rid them of their languages and cultures” (Government of Manitoba, 1991, 7)

¹⁵ While the overrepresentation of First Nations children in child welfare continues today, the 1960s are often referred to as the beginning and most culturally offensive period of this type of intervention. During this time period First

established by First Nations communities. Over the last two decades a number of incremental changes have been made regarding First Nations communities and child welfare authority. The province of Manitoba serves as a forerunner in this regard. As was noted by the Manitoba *Aboriginal Justice Inquiry*¹⁶ conducted in 1988:

‘[T]remendous advances’ had been made in the delivery of child and family services for Aboriginal families living in on-reserve communities. These advances were initiated by First Nations in the early 1980s through the establishment of their own child and family service agencies. These agencies, however, only had jurisdiction on-reserve. Aboriginal children and families living off-reserve continued to be served by mainstream child and family service agencies (Government of Manitoba 2001, 8).

Thus, in its 1991 report, the *Aboriginal Justice Inquiry* concluded that a number of changes were still required to serve First Nations families well. These recommendations included:

- Amend Principle 11 of the *Child and Family Services Act* to read: ‘Aboriginal people are entitled to the provision of child and family services in a manner which respects their unique status, and their cultural and linguistic heritage;
- Expand the authority of existing Indian agencies to enable them to offer services to band members living off reserve; and
- Establish an Aboriginal child and family services agency in the city of Winnipeg to handle all Aboriginal cases (Government of Manitoba 2001, 8).

Nations children were not only removed from their First Nations communities but were often placed in homes outside the country. As such, this period is often referred to as the ‘60s scoop.’

¹⁶ The Aboriginal Justice Inquiry was established in the spring of 1988 to investigate the condition of Aboriginal people in the justice system. The scope of the AJI included all aspects of the system including policing, courts and correctional services. The findings and recommendations of the AJI were released in a wide ranging report in 1991 (Aboriginal Justice Inquiry-Child Welfare Initiative 2000).

In 1999, the Province of Manitoba committed to respond to these recommendations. By August of 2000, the Province, the Manitoba Metis Federation, the Assembly of Manitoba Chiefs, and Manitoba Keewatinowi Okimakanak¹⁷ had signed agreements establishing a ‘joint initiative’ to develop a plan to:

- Recognize a province-wide First Nations right and authority by extending and expanding off-reserve jurisdiction to First Nations;
- Recognize a province-wide Metis right and authority; and
- Restructure the existing child and family services system through legislation and other changes (Government of Manitoba 2001, 8).

These commitments culminated in the establishment of the Aboriginal Justice Inquiry-Child Welfare Initiative and the subsequent establishment of several committees to oversee the development of these changes. The vision statement and mission statement of the initiative reaffirm the espoused commitment to First Nations by focusing on recognizing the “distinct rights” and “unique authority” of First Nations and Metis populations as well as including repeated references to “child and family services that are “community based” (Government of Manitoba 2001, 10).

Currently in the “implementation phase,” the process of child welfare service delegation in Manitoba centers on the creation of new authorities. These are:

- A First Nations of Northern Manitoba Child and Family Services Authority;
- A First Nations of Southern Manitoba Child and Family Services Authority;

¹⁷ The Northern Manitoba organization of First Nations Chiefs.

- A Metis Child and Family Services Authority; and
- A General Child and Family Services Authority (Government of Manitoba 2001, 13).

Caseloads, resources, and assets are currently being transferred to the most “culturally appropriate authority” and their respective agencies. “These transfers are being done on a region to region basis and are expected to be completed in late 2004.” The magnitude of these transfers is revealed by the fact that of the 15,000 Manitoba families receiving child welfare services in Manitoba in 2003, it has been estimated that 5,000 will *choose*¹⁸ to transfer to one of the new Aboriginal agencies (Aboriginal Justice Inquiry-Child Welfare Initiative 2003).

Despite the fact that demands for autonomous child welfare have come from First Nations communities themselves, when the overrepresentation of First Nations children in care is examined in combination with the particular *forms* of autonomy being offered by the state, a perspective informed by privatization analysis suggests the motivation of the state to meet these demands through decentralization may be much more complex and potentially harmful than a direct response to First Nations communities demands for justice granted through group autonomy. In fact, the shift to ‘autonomous’ child welfare includes all the hallmarks of a privatization project including: re-regulation, re-privatization, co-optation, de-politicization and individualization.

Assessing the Risks of Autonomy

Re-regulation

The first question that must be asked when assessing the shift in child welfare service provision is what does this new form of ‘autonomy’ actually translate into when put into practice. As has been demonstrated in the above overview of Manitoba’s child welfare reform, the shift to autonomy includes the creation of new authoritative bodies and multiple increased ‘rights’ and ‘responsibilities’ and high profile First Nations organizations have endorsed it as ensuring Aboriginal children are cared for in a manner consistent with Aboriginal culture and philosophy (Aboriginal Justice Inquiry-Child Welfare Initiative 2004). Upon close examination, however, the actual increase in autonomy appears suspect. This is most obvious when the hierarchical structure of the new system is examined. For as White and Jacobs aptly note, in many cases involving the creation of First Nations autonomy, the state remains as the true center of power. As they observe:

Even in situations where a full delegation of decision-making has been made to the Aboriginal agency [...] ministerial policies, based on Anglo-Canadian cultural values and assumptions, continue to play a major role in the provision of services to our children and families (White and Jacobs 1992, 35)

This type of continued ministerial power is the case in Manitoba. Despite their claim of fundamental change, the province will remain as the ultimate authority for the safety and

¹⁸ While beyond the scope of this paper this notion of “choice also deserves attention as the “Authority determination process” is intended to “encourage” certain choices and unavoidably constrains others (Aboriginal Justice Inquiry-Child Welfare Initiative 2003).

protection of First Nations children.¹⁹ The continuation of ministerial power limits the kinds of change that can take place and is a significant step away from the kinds of holistic fundamental change First Nations scholars like Taiaike Alfred and Patricia Monture –Angus have advocated. Both Alfred (1999) and Monture-Angus (1998) argue that a meaningful change is not so much a change in who administers services but in overhauling the value systems that lie beneath existing practices. For Alfred, this kind of independence includes the complete rejection of ‘western’ assumptions including western notions of the state, executive authority, sovereignty, and citizenship. Instead, he argues: “In a very real sense, to remain Native—to reflect the essence of indigenous North Americans—our politics must shift to give primacy to concepts grounded in our own cultures (Alfred 1999, xiv).

Alfred observes that a failure to address the fundamental aspects of service provision risks re-inscribing old values and hence, old problems into the ‘new’ system. He argues:

In this ‘new’ relationship, [of ‘self-government’] indigenous people are still bound to another’s power order. The rusty cage may be broken, but a new chain has been strung around the indigenous neck; it offers more room to move, but it still ties our people to white men pulling on the strong end (Alfred 1999, xiii).

Alfred’s words only carry more significance when the question of funding is added to the analysis. For, in the case of child welfare, funding will also continue to be approved by the province under the new system. As explained in the vision document

¹⁹ As explained in a conference on “inter-provincial lessons” held in British Columbia, “the province of Manitoba will oversee the system and maintain executive authority” (Aboriginal Justice Inquiry-Child Welfare Initiative 2002). Thus, for Manitoba, the restructuring currently underway does not exclude government more than its predecessor. Instead, developing the new authorities creates a new “middle-man” between agencies and government.

Promise of Hope: Commitment to Change, “The existing funds and resources will be transferred to the new Authorities. In turn, the Authorities will give funding and resources to the agencies” (Government of Manitoba 2001, 27). This leaves First Nations communities dependent on the amount of funds the province sees fit but with the increased responsibility of deciding how these fixed funds will be spent. What we see in this example then, is not so much a fundamental de-regulation as it first appears—that is, the withdrawing of the state from positions of power—but rather, a kind of re-regulation—that is, the state’s power will now be wielded in new and, more importantly, less transparent and more indirect ways. Such change gives the impression of vastly increased autonomy or ‘empowerment’ for First Nations communities while actually maintaining the existing power order to a significant degree. Thus, the state not only appears to make fundamental concessions to First Nations demands but also distances itself from some of the ‘hardest’ child welfare cases in the eyes of the broader Canadian citizenry.

What then of these increased rights? One example of a new right granted to First Nations authorities in Manitoba is the change in policy that each authority now has the right to define for itself the criteria on which its workforce is hired. According to the province’s strategic design principles, “[e]ach CFS Authority requires a skilled and appropriate workforce; and each has the right to define ‘skilled,’ ‘appropriate,’ and the criteria through which the workforce is hired” (Aboriginal Justice Inquiry-Child Welfare Initiative 2004). At first glance this may appear to grant more autonomy, but when this change is considered in light of the fact that the province determines overall funding, the practical space in which to use this new found autonomy is significantly restricted.

Again, as White and Jacobs observe, this kind of shift may actually result in further inequalities between First Nations and non-First Nations peoples in child welfare (White and Jacobs 1992, 45). Mainstream child welfare across Canada is notoriously underfunded and understaffed and these ‘old’ difficulties will be transported to the new system. Additionally, however, new inequalities may be created due to the creation of differential employment criteria between First Nations and mainstream agencies. First Nations communities will have to try to make the most use of the funding granted by the province while simultaneously dealing with the some of the most difficult and extensive caseloads. When the financial pressures are combined with increasing First Nations case loads due to changing demographics,²⁰ the results are likely to include the necessity of less staff, heavier caseloads and/or lower hiring standards for First Nations agencies when compared to non-First Nations agencies.

Old problems of inadequate service provision and insufficient human resources will also continue to plague the new system. Further, the transfer of existing funds does nothing to address the already substantial levels of material inequality between First Nations and non-First Nations communities in Canada. In fact, this shift allows the state to off-load the responsibility of staffing agencies with inadequate funding to First Nations communities thus opening the possibility of having them participate in the maintenance, and potential increase, of their own disadvantage. This sets the stage for a later ‘blame

²⁰ The Aboriginal population in Manitoba, as well as other parts of the country is increasingly “young, growing and increasingly urbanized.” The 2001 Census showed that nearly half of the non-reserve Aboriginal population was under the age of twenty-five compared to thirty-two percent of the non-Aboriginal population (Statistics Canada 2004).

the victim' mentality when First Nations groups are predictably unable to successfully manage the issues within their autonomous administrative sphere.

Re-privatization and Individualization

The re-regulation of child welfare culminates in both a re-privatization and individualization of First Nations child welfare issues as First Nations demands become subject to state manipulation. While the shift is not directly from the public to the market or family (although these trends are also detectable) it is a movement away from the public domain to the private or 'domestic' domain of a particular minority group. Minority rights claims are often couched in the language of privacy and this discourse has largely been successfully co-opted by the state in the area of child welfare. As Shachar argues:

This binary opposition [between public and private] leads us astray, however, not only because it ignores the web of relations between inside and outside, as well as the fragility of these categorizations, but also because it obscures the fact that what constitutes a 'private affair' is in itself defined by the state's regime of law (Shachar 2001, 41).

Co-optation of First Nations discourses facilitates removing First Nations concerns regarding the safety and protection of their children out of the realm of the public and into the private under the pretenses of *returning* the issue of First Nations child welfare to its rightful, natural place in First Nations communities.²¹ This move at first seems to

²¹ The notion of "return" has been particularly prominent in the Manitoba case, and is often invoked in various new releases and public documents. For example, statements such as, "The proposed restructuring plan recognizes and respects Manitoba's cultural diversity and returns to Métis and First Nations peoples the right to develop and control the delivery of their own child and family services" can be found throughout the Aboriginal Justice Inquiry-Child Welfare Initiative website (Aboriginal justice Inquiry-Child Welfare Initiative 2004).

respond directly to First Nations groups' demands. As Brodie notes, however, this move is far from simple. The public-private divide is not a natural static division between the apolitical and the political but is instead a shifting and contested political mechanism for organizing relations between groups and individuals and systems of power (Brodie 1995, 28). "The idea of the separation of the public and the private sphere, then, is both true and false" (Brodie 1995, 30). In this case, the state successfully fragments the statistically "hardest" child welfare case from mainstream child welfare and in so doing distances itself and its mainstream practices from the situation of First Nations children. As the responsibility of child welfare has now been 'returned' to its 'natural' place in First Nations communities, the state forces First Nations groups to accept responsibility for a set of issues that extend far beyond the actual jurisdiction and decision-making power they have been granted. As White and Jacobs note:

[A] central consideration of dysfunctional problems in families has been the family's ability to resolve problems on its own. Often the resolution of these problems is related to the family's financial ability to change aspects of family life. Poverty, therefore, plays a major role in defining families in need. Poverty also lies at the heart of the inability of families to resolve problems within the context of their extended families. It is often financial barriers that prevent other members of the extended family from stepping in and providing care [...] when the nuclear family is unable to do so. The colonial usurping of our resources and the systematic exclusion of our people from contemporary economic life have ensured that Aboriginal people do not have financial resources to address these

problems. If issues of income security, housing, health care, and employment are not addressed, our families will continue to require substantial support in order to maintain the integrity of the family (White and Jacobs 1992, 46).

In a similar vein, the piecemeal strategy of the state and its incumbent practices of individualization also risks perpetuating the negative images that have historically been attached to individual First Nations communities. Throughout the history of colonialism and paternalism in Canada First Nations communities are often portrayed as malfunctioning societies that are incapable of making their own decisions. The difference at this historical moment is, however, that this image is perpetuated under the guise of transcending such antiquated, colonial perspectives and with the high-profile support of certain First Nations organizations. As Kline noted in regards to the shift to privatization in Alberta, this kind of ‘community’ endorsement can obfuscate state motivations. As she states:

[T]his recognition of the importance of Aboriginal child welfare matters appears to be driven more by legitimacy that such association accords to the Alberta Government’s own child welfare agenda, then by a genuine change in approach and attitude towards First Nations (Kline 1997, 339).

De-politicization

The systemic concerns regarding the safety and development of First Nations children and families are largely disregarded by current reforms. In fact, current reforms which fragment child welfare may actually make it more difficult to address these issues within the public/political sphere due to de-politicization. Once child welfare administration is relegated to the private jurisdiction of First Nations groups the state distances itself from responsibility and closes opportunities for political contestation. Conflict about resources, funding, and service provision are shifted out of the state’s

jurisdiction and into the hands of First Nations communities— they are individualized. At the same time, however, the state continues to hold ultimate authority over funding and scope making it difficult to address inherently linked issues of poverty, unemployment, health and housing. The opportunity for systemically addressing First Nations issues is further reduced by the fact that the state is choosing to deal with each issue in an artificially fragmented fashion. As has been discussed, issues of child welfare cannot be separated from other issues of social concern. Nevertheless, the state's strategy of dealing with each concern separately makes it extremely difficult for First Nations groups to achieve any holistic response. This is a clever strategy to reduce fundamental holistic change by making small, controlled, segmented modifications that include enough of the old system to maintain current power balances while giving the illusion of flexibility and progress.

Co-optation

The processes of privatization, including de-politicization and individualization, are facilitated by the co-optation of progressive discourses. In this case, the state has successfully co-opted many dominant First Nations discourses, including that of self-government, thus enabling them to make regressive policy changes under the auspices of 'progressively' returning the care of First Nations children to the natural location of First Nations communities thereby facilitating an inevitable turn towards self-government.

First Nations groups have increasingly demanded various forms of self-determination following decades of colonial intervention by the Canadian state. Instead of self-determination in any meaningful sense, however, the state has offered, and has

now significantly implemented, a kind of ‘middle-man’ role for First Nations communities. As First Nations scholars such as Alfred have noted, this kind of concession is not only insufficient for First Nations goals of self-determination but may actually threaten any future attempt to achieve this goal.

Implications

While this paper is largely an exploratory analysis of the potential implications of changes that are, at present, still being defined and implemented, applying the theories of privatization to the case of autonomous First Nations child welfare helps to illuminate numerous potential dangers and negative implications for both First Nations individuals and First Nations goals for meaningful independence. As the privatization literature suggests, restructuring reconstitutes political spaces and identities, thereby reconfiguring the opportunities for future directions. Discourse plays a primary role in this shift as language both facilitates current change through processes of co-optation and constrains future change through processes of de-politicization and individualization. Once an issue is privatized through law in forms such as “rights,” it becomes increasingly more difficult to get these same issues back into the public, political domain. This is because the demands appear to be met (i.e. autonomy granted) and, therefore, groups no longer appear to have a legitimate differentiated position from which to contest the position of the state. Thus, privatization reveals new difficulties for First Nations communities as it suggests that First Nations groups must constantly re-position themselves in response to the state’s ‘concessions’ in order to bring their unresolved concerns out of the private, domestic sphere of the group and into the political space of the public.

While the bulk of this paper has focused on First Nations as a group it must be noted that First Nations women may be particularly vulnerable to the negative effects of privatization regarding minority rights. As has been mentioned, re-structuring tends to negatively affect women in disproportionate ways. The same can be expected for First Nations women; however, they will encounter these gender related burdens on top of the burdens related to their situatedness as minority group members. It appears First Nations women are, at times, left choosing between two less than ideal options—that is, they are left choosing between supporting First Nations autonomy and risk inadvertently supporting the above identified dangers or arguing against autonomy thus appearing to support continued state domination of colonial communities. This dilemma reveals potential divergences of interest between group members within First Nations communities and presents challenges regarding the merits of group solidarity for vulnerable members at certain moments.

Future Possibilities

Despite the pessimistic nature of this analysis room may still exist to challenge the existing, shifting order. In order to be successful, however, social movements may need to rethink both their political strategies and alliances. This includes considering how some of the contradictions inherent in current privatization discourse might be successfully revealed in order to challenge the “economic, political and normative agendas of privatization” (Cossman 2002, 213). For example, while members of First Nations groups are often hesitant to argue against First Nations leaders due to legitimate fears about silencing their already marginalized public voice, the risk of co-optation suggests that the cost incurred in airing certain divisions within the group in public spaces

may nevertheless remain less than the costs in not doing so. Further, the especially vulnerable position of First Nations women may suggest the need for temporary alliances with other vulnerable groups that may exist outside the First Nations community. This may include building coalitions with other minority women on an issue by issue basis.²² While recently feminism has focused much of its attention on differences amongst women, the privatization literature suggests that uncovering and politically utilizing the realities of convergences may be an essential part of strategizing for new social movements in certain contexts. The crux of the challenge in these cases then lies in finding ways to utilize points of commonality without homogenizing experiences or silencing voices. Recognizing coalitions as necessarily limited, perpetually shifting, and, at times, even contradictory is a necessary part of this kind of approach.

This kind of coalition building will also allow various social groups to politically strategize how to deal with the difficulties of discourse revealed by privatization analysis. As the case of First Nations child welfare has demonstrated, the power of privatization comes largely from the power of language. Processes of de-politicization and individualization in particular hang on the use of discourse. The manipulation of discourse often facilitates the dual role of law in acting as both a tool in the demand for inclusion while simultaneously, yet covertly, acting to work against some of the fundamental changes minority groups are ultimately working towards. In other words, while the law entrenches new freedoms in the language of autonomy and rights, this

²² For example, Fudge and Cossman note, “Visible minority women, women who are recent immigrants to Canada, First Nations’ women and disabled women are more likely to be persistently poor than other women (Fudge and Cossman 2002, 409).”

discourse can simultaneously constrain future strategies and developments. Legal action pursued by social groups must be pursued from this viewpoint.

There is a common challenge to various social movements including both some feminists and some First Nations activists to develop “a new political language through which we can illustrate the devastating impact of privatization” (Fudge and Cossman 2002, 419) This challenge, however, must be met without losing sight of the profoundly negative role colonialism continues to play in the life of indigenous peoples. While recognizing the limits of legal strategies such as minority rights is an essential part of this project it does not translate into an absolute rejection of rights-based initiatives. Instead, this analysis reveals the need for social movements to constantly re-evaluate their political positions not only based on their own group membership demands but also in response to the re-positioning of the state and other social/political groups.

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