

Re-globalizing Consent: International Protocols, Public Policy and the Regulation of Young People's Sexuality in Canada

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Abstract

Expansion of the regulation of young people's sexuality in Canada has followed on the heels of the Optional Protocol to the Convention of the Rights of the Child (CRC) on the Sale of Children, Child Prostitution and Child Pornography activated in 2002. This paper considers the relationship of the CRC and the Optional Protocol to the national political process through two pieces of legislation: Liberal Bill C-2 (Protection of Children and Other Vulnerable Persons) of 2005; and, Conservative Bill C-22 (Age of Protection Act) 2006, later Bill C-2 (Tackling Violent Crime) of 2008. The former extends regulation through expanding definitions of child pornography and sexual exploitation, the latter through raising the age of consent from 14 to 16. In both cases, framing in relation to the Convention and Optional Protocol calls attention to the need for a multi-scalar analysis in order to understand the complex ways in which regulation of sexuality arises currently. The paper considers the ideational dimension of a multi-scalar analysis as it focuses on the multi-scalar use of idealized, normalized and gendered ideas of childhood in relation to adulthood in discourses leading to interscalar agreements and how they shape and are shaped by discourses in national policy debates. I contend that multi-scalar agreements take place within a complex set of ideas, attitudes and relationships that may be both constant and fluctuating and that are forged through political contention. What happens at each scale may exploit, reproduce or change the characterization of young people as having vulnerability or strength, needing protection or having the capacity for increasing autonomy, judgment and agency. In this case, evidence reveals that the interaction tends to enhance the extent of regulating sexuality, and moral regulation more generally, in each scale.

Introduction

This study arises from a curiousness about the international dimensions of what, at the time of the first study on raising the age of consent from 14 to 16 in 2008 (Dauda 2010), seemed a purely national, even parochial, issue, rooted in national social movements, national and regional parties and ideologies, Charter politics and minority government. In reviewing committee proceedings on raising the age of consent, now labelled the age of protection, it seemed fairly obvious that, after losing the battle of regulating adult sexuality, socially conservative groups, having finally found a vehicle in the Conservative Party of Canada, were intent on moral regulation through the regulation of young people's, particularly girls', sexuality. In the name of protection, with the scantiest of evidence of danger and ample proof that existing legislation addressed sexual exploitation, it was the acceptable to all political parties to raise the age of

consent. Throughout the proceedings the frame of protection evoked symbolic understandings of childhood in relation to adulthood within an idealized family. The depiction of young people as incompetent, incomplete, vulnerable and dependent in relation to adults who are competent, complete, autonomous and independent were very hard to argue against and won the day. Within the complex process of minority government, competing ideologies and political bullying, whether the decision was made because of political expediency or genuine concern, the acceptance of the manipulation of those symbolic identities of childhood in relation to adulthood, what I have called the politics of generation, was at the centre. Other levels of policy-making, or law-making, either sub- or supra-national, seemed only peripheral.

This paper analyses both the CRC and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography in relation to these symbolic identities of childhood in relation to adulthood and finds that the separation out of special children's rights, although compelling, creates the opportunity to privilege protection over rights bearing, evoking identities of childhood in relation to adulthood within the idealized family that favour incompetence, incompleteness and vulnerability rather than competence, judgement and agency. This is especially reinforced by the Optional Protocol as its depiction of sexual exploitation elicits even more strongly notions of innocence, extreme vulnerability and grave concern in face of global technology and the global danger it poses. When one undertakes a multi-scalar analysis with a particular focus on the global level complexities are introduced but, in a paradoxical way, things may also become clearer at the national level. First, as Rianne Mahon (2006) points out, in privileging one level you cannot abandon other levels if you want a fuller understanding. Second, you cannot assume that policy-making, or law-making, is either a top-down process that weakens

national power or that values and ideology at the national level will always prevail over global ones. Rather there is an interaction with no clear ‘winner’ yet the multi-scalar interaction, in this case, tends to demonstrate how the manipulation of symbolic notions of childhood in relation to adulthood, particularly when it comes to issues of sexuality, facilitates political goals at every level and tips the balance quite heavily in favour of protection over rights bearing. Such ‘distraction’ as Anne McGillivray (2007a) has described it, allows politicians to say that they are protecting children without facing the hard questions about inequality and neglect on the one hand and rights bearing, competency and agency on the other.

Multi-scalar Analysis and the Regulation of Young People’s Sexuality

Commenting on gender analysis in social policy, Rianne Mahon, argues that researchers have habitually maintained the nineteenth and twentieth century practice of privileging the national level of analysis but now are starting to recognize the challenge of the “new spatial imaginary” that ‘globalization’ has brought about (2006, 458). She cautions that in letting go of the national scale as the privileged one we must not abandon it altogether since “the contemporary restructuring of economic, social, and political relations [are] better grasped as the reconfiguration of scales and interscalar arrangements” (458). This politics of scale, she argues, “involves a complex, highly contested reconfiguration of interscalar arrangements, including the invention of new scales of action” (2006, 460). The debate over raising the age of consent in Canada lends itself well to this type of analysis. As I will argue below, when we set aside the privileging of the national level in analysing the politics of generation as it played out, the global connections come into focus and they, in turn, lead to sub-national connections from which we then can return to national concerns.

Still, we may also speak of re-globalizing consent since the regulation of sexual conduct through the of age of consent started out as an interscalar endeavour of the imperialist past, enveloped in racist fears of white slavery as well as nationalist drives for purity and reform. In fact, the complexity of interscalar influences rivals that of the current period as Philip Howell (2000) demonstrates. He refutes the assumption that the influence always moved from the metropole outward and demonstrates that it was the interplay of metropolitan-colonial relations that led to Britain's controversial and invasive 1864 Contagious Diseases Acts that targeted women prostitutes (Walkowitz 1982). Historically, age of consent has been multi- scalar as British legal precedents and British and American civil society organizations all had influence in Canada. Politicians, church leaders and other civil society groups, heavily influenced by Britain, infused with nation-building but also concerned with rapid urbanization and increasing immigration, drove the Purity Movement in Canada (Valverde 1991). Mariana Valverde argues that in the process the middle class constituted itself as the measure of decency by which all others were judged, particularly single, poor and immigrant women. In addition to this movement, class scandals in Britain that involved young working class women resulted in the deliberate raising of the age of consent to 16 in 1885 (see Gorham 1978). The movement also had its counterpart in the United States where a combination of fear over white slavery and feminist concerns for both the moral degradation and the emancipation of women resulted in statutory rape legislation that set the age of consent at 16, even 18 in some cases (Odem 1995; Larsen 1997; Cocca 2004). While Canada seems to be an outlier in raising the age of consent to only 14 in 1890 (formalized in the *Criminal Code* of 1892), authorities augmented it for almost a century through property and seduction laws that 'protected' women up to age eighteen (twenty-one until 1920) if they had

a ‘previously chaste character’ (Backhouse, 1986; Dubinsky 1993).¹ The interscalar interaction in the targeting of young people’s, particularly young women’s, sexuality in the midst of enormous change has a strong precedent.

Although the character of that targeting changed over the twentieth century in Canada common tensions have remained until the present day. The overall tensions are between the state’s responsibility for children and that of the parent or family and between the assumption of childhood vulnerability and need of protection on the one hand and recognition of competence and responsibility on the other. Anne McGillivray (2007b) notes the historical tradition of *parens patriae* (the responsibility of the governing body for the incapacitated) and *pater potestas* (the authority of the father) as they have evolved in Common Law and identifies three paradigms of childhood: as property of the father in Roman and common law, as vehicle of state interests in the nineteenth century and of rights bearer in the latter part of the twentieth century. In Canada, by the early twentieth century, the property interests of the father gave way to concerns for nationhood. Strong moralizing and targeting of girls and young women aimed at rooting out the ‘viciousness’ of the poor, the working class and racial minorities, particularly Aboriginals. (Dubinsky 1993; Chunn 1992; Sangster 1996; 2002). Special courts gave judges great discretion in decision evidence shows that parents used the courts to maintain authority over their daughters. While incarceration did sometimes protect girls and young women from violent families, more often judges were suspicious of their testimony and even when a judge suspected sexual impropriety within the family he often blamed it on the girl’s immoral behaviour (Sangster 1996,

¹ Feminist demands in the 1980s resulted in the removal of the seduction statute including the qualifying ‘previous chaste character’ in the 1988 reforms.

2002, 87-89).

These practices and attitudes continued well after WWII but under a changing paradigm of normalization. Both Mary Louise Adams (1997) and Elise Chenier (2008) characterize the period as one dominated by the medical, psychological and social sciences in which national well-being was measured by the ability of families to raise normal children and prevent pathological, abnormal or deviant behaviour. The period saw a deepening emphasis on the normal conjugal unit, the self-evaluation of and regulation of which was its own *responsibility* (Rose 1999 [1989]). Concern for youth grew as the large post-war baby boom matured and regulation broadened to encompass educational programs, health concerns and censorship of corrupting material (Adams, 1997, 136-165). Nikolas Rose argues that neither the critique of feminism nor the breakdown of the consensus over welfare in the late twentieth century abrogated the ideal form of the family. Thus the idealized, middle-class family and the symbolic relationship of parent to child and adulthood to childhood as it was powerfully solidified in the twentieth century has remained the centrepiece of policy.

As Chenier's study points out, in the post-war period there is a tension between the responsibility of the family and that of the state, a tension that was represented within and between activist groups and the experts from the disciplines, and interscalar influences persisted. As activist groups took a proactive stance they enlisted the support of experts and often called for state regulation. We see the tension in the activities of groups like the Parent's Action League (PAL) in Ontario, a group of concerned mothers who became involved in the issue of sexual psychopaths in the 1950s. Influenced by both the humanitarian approach of United Nations World Health Organization (WHO) and Education, Social and Cultural Organization (UNESCO), the

group sought the support of experts in advocating an ‘enlightened’ approach to the treatment of sexual deviants but also in demanding a public discussion about sex. They advocated both the responsibility for reporting deviance but also for including open and frank discussions of sexuality, both within families and in the schools. Influenced by American developments, including Alfred Kinsey’s work, groups like PAL and parent teachers associations pushed for sex education in the schools. However, parent opposition to this usurpation of their role assured that the programs were conservatively geared to the promotion of heterosexual monogamy and family life as the antidote to pregnancy and venereal disease (Adams, 1997).

The tension between the responsibility of the family and the intrusion into the family by experts or criminal justice statutes and the ambivalence about youth vulnerability and competencies is apparent in Chenier’s study of this period. Although we can see here the potential for assumptions of agency and responsibility on the part of youth and a more open discussion of relations in the family the evidence paints the opposite picture. Experts both blamed and idealized the family. Healthy sexual relations became a measure of normality in the public discourse of the family and mothers were often blamed as forensic sexologists argued that mothers, particularly overbearing mothers, were the cause of sex deviancy, especially homosexuality in boys (Chenier, 2008, 105). Although the absence of fathers’ participation in child rearing was also identified, concern for mothers, particularly sexually unresponsive mothers, dominated. Yet, in all cases during this period of intense official and public interest in sexual predators, particularly the ‘sexual psychopath’, the threat was characterized by police and psychiatrists as stranger danger and idealized assumptions about the family dominated. Police were reluctant to intervene in family matters and, at the same time, experts argued that the danger of sexual transgression in the family

was contained within the family, confined mostly to father/daughter relationships and so not a danger to the public. Moreover, they maintained that there was always complicity between the parent and the victim (Chenier 2008, 57). Joan Sangster notes that well into the 1960s psychologists and psychiatrists, as expert witnesses and basing their testimony on Freudian assumptions, warned the court to “guard against false accusations resulting from mental or moral delusion, frequently found especially in girls” (2002, 174). The tensions here are many as parents both reject and seek intervention by the state and authorities both blame and idealize the family. Meanwhile ambiguous identities of youth as incompetent yet knowing, as needing protection but also responsible emerge and are reproduced, leaving little room for young people’s active voice and participation.

Feminist attempts to contextualize sexual violence and harassment within systemic inequality of gender and power precipitated modernizing reforms to the Criminal Code in the 1980s but failed to resolve the tensions between the authority of the family, state regulation and the agency of women and girls. While the Badgeley Committee on Sexual Offences Against Children and Youths, a body jointly appointed by the Departments of Justice and National Health, amassed the most comprehensive data on child abuse to date, it failed to connect both wife battering and child abuse to gender inequality. Instead it took a child-centred approach and focused on remedies of medical, psychological and social services (Clark 1986; Appelford 1986). Yet critics pointed out that the statistics had been compiled by police and medical professionals, groups that were neither neutral nor objective about gender relations as they stood “in a particular relation to the social regulation of sex, gender and age relations in this society”(Kinsman and Brock, 1986, 25). Critics also argued that the committee’s generic use of terms and categories

(child, sexual abuse) diverted attention away from the overwhelming evidence that most victims were women and girls and its remedies created a climate for increased regulation and control (Clark 1986; Kinsman and Brock 1986). Nevertheless, new sexual offences, including 'sexual exploitation' of persons under the age of eighteen by those in authority or trust, 'sexual interference' of persons under the age of fourteen (s151) and 'invitation to sexual touching' of persons under the age of fourteen (s152) were welcomed. Although there was considerable pressure by conservative groups to raise it to 16 or 18, the age of consent was left at 14 (s150) with a two year close-in-age exemption. Anal sex 'in private' between consenting adults over the age of twenty-one legalized in 1968, was changed to and remains at 18 (s159).² This modernized code fits well into the current period dominated by the discourse of human rights and child rights as set out in the international Convention and Protocols in particular because it addresses exploitation under the age of 18 but excludes consideration of sexual rights.

Globalization, International Protocols and Regulation of Young People's Sexuality

The reconfiguration of scales and interscalar arrangements is an important component for understanding the regulation of young people's sexuality in Canada. The paradigm of childhood as rights bearer starts at the global level with the UN Convention on the Rights of the Child (CRC) adopted by the General Assembly in 1989 and coming into force in 1990. From all accounts this is the most successful convention ever as states signed at "unprecedented speed and

² The offence of "Buggery and bestiality" was split into two separate offences, "Anal Intercourse" and "Bestiality," by An Act to amend the Criminal Code and the Canada Evidence Act, S.C. 1987, c. 24, s. 3. <http://www.constancebackhouse.ca/fileadmin/website/buggery.htm> Section 159, previously "Seduction of female passengers on vessels," was repealed and replaced with the above by *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985 (3d Supp.), c. 19, s. 3. <http://www.constancebackhouse.ca/fileadmin/website/1988.htm>

number” (McGillivray 2007b, 60). Only two countries have not ratified it, Somalia because there is no internationally accepted government and the US (although the US has ratified the two optional protocols). The Optional Protocols, on the involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, were both adopted in 2000 and in force in 2002 (Doek 2009).

The CRC is an ambiguous document that provides for both the recognition of children as rights bearers but also for the protection of children as particularly vulnerable human beings. In this way, although it supplies a potential basis upon which to extend full citizenship rights to children, it also invokes understandings of childhood in relation to adulthood that reinforce symbolic assumptions of the child’s incapacity, incompetence, dependence and vulnerability in relation to adult capacity, competency, independence and autonomy that produce paternalistic responses of protection. For example, article 1 provides the definition of a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. Thus, the age seems to be qualified in order to take into consideration evolving capacities. Moreover, articles 5, 12 and 13 speak to the recognition and respect for evolving capacities in the declaration of the right of children of freedom of expression, to form their own views, express them freely and be heard. However, article 13 also limits that expression if protection is needed for reasons of national security, public order, public health or morals (with no qualification provided). The convention evokes idealized, essentialized views of the family in the preamble stating that the family should be protected so as to fulfill its obligations, “as the fundamental group of society and the *natural* environment for the growth and well-being of all its members and particularly children” (my emphasis). Articles 14 and 18 also emphasize respect for

the rights and duties of parents and recognition of parents as primary carers respectively and the state's responsibility to render assistance. Despite the intention to promote children as rights bearers, then, there is ample ambiguity that can bring that into question.

Expressing the role of the state as that of acting in the best interests of the child is also open to ambiguous interpretation and implementation. Article 3 states that "(I)n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". In considering this principle, Tom Campbell (1992) argues that both the contentions of conventional rights theory, that rights arise from autonomous, rational and independent individuals, and of interest theory, that they arise from interests the respect of which must be required and set down in law, bypass the intrinsic rights of children. The former denies rights to children because of their lack of capacity but allows for a proxy, usually the parent but also the state. The latter takes children's interests as the basis of rights but these tend to be instrumental rights where the power is still given to others, both to implement rules but also provide correctives when the rules are violated. As Campbell points out, this leaves open the question as to how interests are defined and who defines them. Without a clear sense of the intrinsic worthiness of children's ability to bear rights themselves, interests can be defined as the interests of the future of society or the future of the particular child and in both cases often put some future interest before the right of the actual child to express something different (Campbell 1992). McGillivray argues that children, the same as adults, should be regarded as rights bearers first and that "shared human standards about decent treatment of people must in the end govern the parameters of childhood" (1994, 249). She argues that when it comes to policy-making this

must be the starting point as “(R)ights discourse provides a tested ethical framework for assessing empirical study, choosing standards and limiting choice” (249). The Convention makes this more difficult and the interaction of actors at the national and sub-national scales with the Convention present a complex challenge for such recognition in practice.

Recent research into the globalization of law recognizes some of these complexities in the ‘reconfiguration of scales and interscalar arrangements’ in general (Halliday and Osinsky 2006; Faure and van der Walt 2010) . Even from an economic perspective where one might think that harmonization is prevalent, if not required within an ideology of globalism, not only is the evidence of harmonization lacking but there is no agreement on whether it is even beneficial. When it comes to more complex issues like the environment and human rights where harmonization is limited to shared interpretation, something that does not exist on a global level (Faure and van der Walt 2010). In their study of four domains, including construction and regulation of global markets, crimes against humanity and genocide, diffusion of political liberalism and constitutionalism and the liberalization of women’s rights, Terrence Halliday and Pavel Osinsky conclude that only when global legal norms and practices have some distance from core cultural institutions and beliefs are they likely to be accepted without contestation. On the other hand the closer they are “to transformations in core cultural values and practices at the local level—gender, ethnicity, religion, family, class, sovereignty—the greater the contestation is likely to be around those norms” (Halliday and Osinsky 2006). They note, on the other hand, that global norms themselves are often seen to reflect Western (sometimes Western European) values and I would add that these norms are not always uncontentious in the West. Canada’s commitment to the CRC seems to echo this assessment. From a range of studies on different aspects of

implementation of the CRC, R. Brian Howe and Katherine Covell (2009) conclude that, although it is more than just symbolic, Canada's commitment is 'wavering' as they see, "an overall pattern of vacillation, sporadic or halting efforts, and spotty and uneven policy and legal developments" (397). The most glaring is the inability to deal with corporal punishment, economic inequality, especially for Aboriginal children, participation and access to adequate childcare. In considering the evidence, Howe and Covell offer a number of reasons including restructuring and cutbacks, federalism and the complexity of two levels of government, preference for the idea of protection and suspicion of rights for children, the ambiguous depiction of, even demonization of youth, the competition between adult and child rights and lack of knowledge about the rights of the child. Yet several of these speak to the underlying symbolic assumptions about state, family and childhood in relation to adulthood, something that is often overlooked but that is clear when it comes to issues of children and sexuality.

The ambiguous nature of the CRC complicates the regulation of young people's sexuality as it demands state provision that often reproduces and reinforces protection and vulnerability rather than support and defence of rights; the Optional Protocol on the Sale of Children Child Prostitution and Child Pornography offers additional reinforcement. The Optional Protocol is repetitive of the CRC in that article 34 of the Convention states the right to protection from "sexual abuse and exploitation, prostitution, pornography" including three qualifying points: "(a) (T)he inducement or coercion of a child to engage in any unlawful sexual activity; (b) (T)he exploitative use of children in prostitution or other unlawful sexual practices; [and] (c) (T)he exploitative use of children in pornographic performances and materials". Article 35 of the Convention states that, "(S)tates Parties shall take all appropriate national, bilateral and

multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”. The preamble of the Optional Protocol recognizes this repetition but argues that it is appropriate “to extend the measures that States Parties should undertake in order to guarantee the protection of the child”. It also specifies that it is important to recognize that, “particularly vulnerable groups, including girl children, are at greater risk of sexual exploitation, and that girl children are disproportionately represented among the sexually exploited”. The preamble calls for a holistic approach addressing, among other things, “underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, [and] gender”. However, there is no reiteration of the CRC’s requirement of the state to address these issues beyond the requirement for states to take responsibility for rehabilitation and support for legal compensation for victims after the fact (article 9). Instead, criminal justice solutions are detailed, including making the offences punishable “by appropriate penalties that take into account their grave nature” (article 3), advising the use of the Protocol for the purposes of extradition (article 5) and seeking cooperation among states for purposes of investigation and extradition (article 6). What is new, as the preamble makes clear, is that a rapidly changing global environment presents mounting global dangers including: the “significant and increasing international traffic of children for the purpose of the sale of children, child prostitution and child pornography”; the “widespread and continuing practice of sex tourism”; and, “the growing availability of child pornography on the Internet and other evolving technologies”. The preamble also takes into consideration the findings of the Conference on Combating Child Pornography on the Internet (Vienna, 1999) including its call for, “the worldwide criminalization of the production, distribution, exportation, transmission, importation,

intentional possession and advertising of child pornography, and stressing the importance of closer cooperation and partnership between Governments and the Internet industry”. Thus, the emphasis is on protection, vulnerability and new global dangers that require global measures of policing.

Comparatively, the ‘rights’ portion of the Protocol is weak. There is no reiteration of evolving capacities from the CRC and nor is there any new declaration of right. This would seem to be a serious omission since the Convention has no provision for sexual rights beyond protection from exploitation (article 34) and the reference to the right to “the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice” (article 13) which is substantially qualified, as mentioned above. Unlike the Optional Protocol on the involvement of Children in Armed Conflict, which strictly forbids recruitment of children under eighteen, there is no reference to the definition of child with reference to age and a definite qualification of being “subject to the provisions of its national law” (article 1). Michael Dennis points out that during the negotiations of the Optional Protocol Italy, Canada and the United States, along with developing countries “took the position that the age of protection should be eighteen” (2000, 94). This would be in harmony with new offences created in Canada’s 1988 reforms, mentioned above, that differentiate between age of consent and protection from exploitation. However, since age of consent was variously set at anywhere from 14 to 16 this was rejected by state participants and left open. This indirectly addresses evolving capacity of young people in dealing with issues of sexuality but it also makes the age of consent a target in specific countries, as in the Canadian case. Finally, the Optional Protocol does expand rights in its

elaboration of the CRC's requirement that children "be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law" (article 12). Article 8 of the Optional Protocol reiterates the child's right to be heard and the state's responsibility to assist children in legal proceedings and adds a new requirement in "adapting procedures to recognize their special needs, including their special needs as witnesses". These are weak measures for rights bearers in the face of both the discourse and the recommended practices in the name of protection. Commenting on the age of consent debate taking place at the time of her writing, McGillivray argues that, "(T)he shift from consent, a question of rights, to the limiting language of protection requires justification" (2007a, 145). She points out that the focus on sex lets politicians (and society) say that children's rights are being protected "while we avoid the rights questions such as poverty, neglect, physical abuse, and correction of children by force" and argues that it functions as a distraction from those hard questions (2007a, 144). I would add that the distraction is made much easier because of the deeply embedded and morally laden symbolic ideas of childhood in relation to adulthood in the notion of 'protection' which allow for ready arguments for regulating young people's sexuality that bypass consideration of their evolving capacities.

Age of Consent on the National and Sub-national Scale

The Liberal government's Bill C-2 (Protection of Children and Other Vulnerable Persons) of 2005 was directly linked to meeting the requirements of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and manifested the same ambiguity that is evident at the global level. In fact, the pressure was multi-scalar, coming from sub-national,

national and international pressures at the same time. At the national level Liberal governments throughout the 1990s and early 2000s felt pressure from the alignment of socially conservative groups with MPs of the Reform, Alliance and finally Conservative Party of Canada, under the leadership of Stephen Harper by 2005, to raise the age of consent. Ostensibly this was based on the need to protect young people from adult predators, especially those on the Internet (Dauda, 2010). By 2001 the provincial ministers of justice had also called for measures to address the dangers of the internet for young people (MacKay 2004). In 2002 the Liberal government amended the criminal code to add the offence of luring and made it criminal to access, send, export or make child pornography (McGillivray 2007a). A national strategy to protect children from sexual exploitation on the Internet, had been launched by the Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness in May 2004 and Cybertip.ca, started in Manitoba in 2002, was launched as a national tipline for reporting internet abuse (Cotler 2005b). There was an interplay of sub-national, national and international concerns with regard to child pornography as the provinces and national parties were intent on redefining it since the *Sharpe* case³. The bill expanded definitions of child pornography to any material depicting persons under the age of eighteen for sexual purposes unless it is for a legitimate purpose (MacKay 2004). Audio recordings were included to respond to concerns about new technology and new offences of voyeurism were added, making it a criminal offence to observe or record surreptitiously or when there is a reasonable expectation of privacy. At the same time, the bill increased penalties and broadened considerably the offence of sexual exploitation of young people under the age of

³ (R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2). The defence of artistic merit that existed in Canada's law was used in this case and the Supreme Court ruled that artistic merit must be interpreted liberally (see McGillivray 2007, 139).

eighteen by authorizing judges to ‘infer exploitation’ based on the nature and circumstances of the relationship, including the simple criterion of age. In this legislation even the close-in-age exemption is waived if exploitation is ‘inferred’ and any person who permits such sexual activity or solicits it also commits an offence (MacKay, 2004). Thus the vulnerability of young people warranted further augmentation of the age of consent by giving special discretion on the part of authorities to interpret sexual exploitation (beyond a position of authority, trust or dependence) up until the age of 18.

However, there were indications that young people’s rights were being taken into consideration in this bill as well. Irwin Cotler, the Minister of Justice at the time, emphasized that there was no need to raise the age of consent, that young people were often sexually active and that the government had no wish to criminalize consensual activity (Cotler 2005a). Thus the principle of evolving capacity was taken into consideration, at least rhetorically. The bill also provided for special conditions for children testifying including exclusion of the public unless the judge concludes that it is necessary, accompaniment by a support person if under 14 and prevention of cross examination by the accused unless the judge concludes that it is necessary (McKay). There was no mention of removing Section 159, a glaring omission since courts of appeal in Ontario (1995), Quebec (1998) and British Columbia (2003)⁴ had found it unconstitutional on grounds of discrimination prohibited by the Charter. However, the multi-scalar demands for increasing child protection gave the political momentum to adding to, rather than taking away, regulation (Dauda 2010). That pressure was probably more powerful at the

⁴ Ontario, *R. v. M. (C.)* (1995), 23 O. R. (3d) 629; Quebec, *R. v. Roy* (1998), 101 D.L.R. (4th) 148; British Columbia, *R. v. Blake* (2003), 187 B.C.A.C. 255.

national level because of the government's minority status and the sponsorship scandal. Thus, the Liberal government managed to avoid targeting the age of consent in order to fulfill interscalar commitments by separating an 'age of protection' from one of consent and, thus, was able to take the evolving capacities of young people into consideration.

If the Liberal approach to newly arising global dangers was to strike a uneven balance between protection and recognition of children as rights bearers, the Conservative approach, in raising the age of consent to 16 through Bill C-22 (Age of Protection Act) 2006, later Bill C-2 (Tackling Violent Crime) of 2008, was to abandon rights for protection as they served a different constituency. The prevailing discourse of protection, epitomized in the ironic and symbolic renaming of the 'age of consent' the 'age of protection' and centred on incompetent, incomplete and vulnerable children, precluded consideration of evolving capacity and agency. While the close-in-age exemption of under five years for 14 and 15 year-olds and under two years for 12 and 13 year-olds might be seen as a respect for evolving capacities, it was not the wish of the Conservative government to include such measures and they were only included in order to get the cooperation of the Liberal opposition (Dauda 2010). For the most part the scalar level was national and sub-national and the hearings were dominated by conservative groups. Where the international did appear was in relation to Canada's international reputation as a 'pedophile haven' for Americans who came to Canada to have sex with children because of the lower age of consent (Dauda 2010).⁵ This was the testimony of rescue groups such as Mad Mothers Against

⁵ Graupner's (2000) survey of Europe and overseas demonstrates that, with a higher age (under eighteen) for sexual exploitation Canada is not so out of line with European countries. Nevertheless, compared to some Western Europe and Anglophone countries (UK, US for example) where the age of consent 16 is higher comparatively, Canada's age limit until 2008 was lower. In Denmark, Sweden and France it is 15. Nevertheless, Canada is quite out of step with

Pedophiles and the White Ribbon Campaign Against Pornography, yet little evidence of this could be produced. Whereas these groups were concerned with the danger of the Internet, other religious and family values groups that proposed 18 as the proper age of consent, such as the Salvation Army, R.E.A.L. (Realistic, Equal and Active for Life) Women and the Institute of Marriage and Family Canada, had another agenda of saving the family. The arguments, carefully articulated in secular arguments of protection, included the need to provide state support for parents' authority over children and to preserve the innocence of children for whom marriage was the only proper circumstance for having sex. Both homophobic and religious reference was carefully avoided although these are important underpinnings for R.E.A.L. Women (see below). With these testimonies came depictions of young people, girls in particular, as vulnerable and lacking capacity for judgement. During these proceedings the support for parental authority, especially over girls, was also overwhelmingly supported by Conservative as well as some Liberals MPs (Dauda 2010).

It is clear from the evidence of the proceedings that the emphasis on sexual exploitation and protection served as a distraction from the hard questions of child neglect, as McGillivray (2007a) has pointed out, but it also served as a diversion from any serious consideration for the actual experience of young people, let alone giving them a voice that was heard and defending their rights. The representative of the Child Welfare League of Canada made this very point during the hearings for the Liberal bill in 2005, arguing that child neglect was much more common than sexual exploitation and that the bill did nothing about that nor did it even guarantee

Europe in maintaining a higher age for anal sex. Also, according to Graupner's data, Canada is also much less liberal comparatively, now, in having both a higher age for sexual exploitation and consent.

resources for the aids to child witnesses it proposed (Phaneuf 2005). Cognizant of young people's evolving capacities and the challenges they face over sexuality and sexual identity, sociologists, health professionals and representatives from LGBT, sexual health groups and youth advocacy groups attending the hearings for the Conservative bills all argued that only good knowledge of sexuality and sexual health could protect young people (Dauda 2010). They also expressed concern about confidentiality since professionals are bound to report abuse and this would deter young people from seeking advice. The only youth-led group given standing and testifying against raising the age of consent felt marginalized, complaining about acceptance for the hearings only at the last minute. An evangelical-led youth group in support of the bill had no such complaint. During these sessions MPs from other parties did give some attention to these concerns but Conservative MPs simply reiterated the hyperbole of danger from past testimony, precluding any serious debate and consideration (Dauda 2010).

As in the Optional Protocol so in both Liberal and Conservative legislation it is clear that the only serious solution for the new, global dangers of sexual exploitation is policing. In the deliberations of both Liberal and Conservative bills participants, representing police at both national and sub-national levels, reiterated the concerns and requirements of the Optional Protocol although they did not refer directly to it. Although testimony was in relation to the Canadian context we get a glimpse of the international connections and cooperation required for policing in the era of Internet crime. Canadian Police, both provincial and national called for raising the age of consent to 16 at the Liberal hearings⁶ and supported the Conservative bills to do so

⁶ Proceedings of the Standing Committee Justice, Human Rights, Public Safety and Emergency Preparedness (JUST), 14/4/05, 19/4/05, 3/5/05.

(Dauda2010). Always in the name of protection, police spokespersons overwhelmingly believe that 14 and 15 year-olds are not only in danger but are not capable of understanding the dangers of the Internet or giving consent although no evidence is given beyond the anecdotal. A Toronto Police spokesperson asserts how important it is saying that,

I deal a lot with international law enforcement and government agencies in the work I do, certainly of late in the last two years. I'll be very honest. It's rather embarrassing when I go abroad and around the world and it's determined that our age of consent is 14 years old. (Gillespie 2005)

Yet it is the fact that consent hinders easy prosecution that is really the problem as a national spokesperson, speaking about the internet, points out that, “(I)f the young person consents, it makes it difficult for the older person to be prosecuted” (Griffin 2005). At the Liberal hearings a Conservative MP agrees with a participant that judges cannot determine exploitation well enough nor do they take the crime seriously enough commenting that “minimum mandatory sentences are the best education a judge can have” (Toews 2005). No consideration is made that the young person’s testimony is crucial. Anecdotal evidence often conflates offences and is never corroborated with hard evidence as in this exchange from the Toronto Police spokesperson:

We monitor news groups and chat rooms, and I have undercover officers in every darkest bowel of the Internet. Canada is thought of, and sought as--it's openly discussed--some place where you really aren't penalized if you get caught for child pornography or abusing children. At times it's advertised as a great spot to go to have sex with a child, that being a 14-year-old, because the majority of the world thinks a 14-year-old is a child. (Gillespie 2005)

Only minutes later the same spokesperson points out that it is overwhelmingly very young children who are the victims of abuse and pornography on the Internet. In the Conservative hearings the same hyperbole and ambiguity about offences is repeated even though the evidence from the well-documented (and globally famous) work of the Toronto unit is that it is younger children in known cases (Sher 2007). In addition, according to police reports cases of luring, and

particularly cross border luring, are few.⁷ It is clear that police have been asked to wage what McGillivray refers to as “a virtual arms race between law enforcement and digital technologies relating to Internet distribution, Web, spy, and digital cameras, chat rooms for child luring, distribution sites, and self-made and self-distributed child pornography” (2007a, 140). However, the lack of hard evidence and the exaggeration and manipulation of symbolic assumptions of childhood is troubling as it prevents the important debate about young people’s sexuality and how it should be regulated. Moreover, as Ronald Deibert and Rafal Rohozinski (2010) point out, there is a perception that the Internet is not, or cannot be, regulated when it is already highly regulated. Their concern is that the regulation takes place without public deliberation. In this case we see that even public deliberation in Commons’ committees is truncated and this has an impact not only on young people but the wider society.

The final interscalar concern directly connected to raising the age of consent in Canada we might categorize as a ‘new scale of action’ in Mahon’s sense and it is the international initiative of R.E.A.L. (Realistic, Equal and Active for Life) Women. An organization that comes from a Christian family values perspective and that is closely related to the American Christian right, R.E.A.L. Women has the goal of restoring authority to the family not only nationally but globally (Buss 2004; Buss and Herman 2003). The organization has been active since the 1980s but by the 1990s found a political home in Reform Party along with new evangelical groups such as the Canadian Family Action Coalition and Focus on the Family that by the early 2000s has set up office in Ottawa (Dubinsky 1985; Malloy 2009; Rayside 2008, 117). In the 1990s they had little

⁷ The number of luring cases *reported* between 2000 and 2008 was 33 (RCMP. 2009. Missing Children Reference Report: National Missing Children Services <http://www.rcmp-grc.gc.ca/pubs/omc-ned/an-ra/annrep-rappann-09-eng.htm>.)

influence with the government and the courts in trying to stop gay rights and expanded their interest to the UN. Prominent on the website and right under the logo is a banner that declares their special consultative status with the Economic and Social Council of the United Nations, a status they have had since 1998 (although attending conferences since 1994). Sympathetic with the Conservative Party of Canada and agreeing with Harper's withdrawing of funding for feminist organizations and the raising of the age of consent (they actively campaigned for it for over two decades), the group claims to be non-partisan. Indeed, the group's agenda is much more socially conservative than that of the current Conservative government. Although considered to be a 'values' Conservative, Harper, from the beginning, has restricted the more radical elements of the party in the interest of gaining power and has continued to do so in order to gain a majority (Behiels, 2010).⁸ Nevertheless, R.E.A.L. Women have been supportive of the Conservatives at the UN and blame the 'liberal' stance of any Canadian delegates, especially those at gender conferences, on bureaucrats at Foreign Affairs.⁹

There contradictory role of R.E.A.L. Women at the UN is a complex interrelation of members' national experience taken to the level of global fear. They believe that the UN has become the moral authority of the world that it is bent on undermining the family but they also see it as a vehicle for waging their national battle. The 'defeat' they have felt over abortion and over Charter decisions for gay rights in Canada, which they interpret as a monumental struggle

⁸ With the recent election of a majority, Harper, particularly given his victory speech, is expected to not move farther to the right on social issues but that remains to be seen.

⁹ Foreign affairs a law unto itself, REALity, Volume XXIX Issue No.2 March/April 2010 Accessed May 6, 2011. <http://www.realwomenca.com/page/newslma1002.html>

“between organized religion and the State” they have taken to the global level.¹⁰ Closely aligned with the American Christian Right and the Vatican at the UN, they consider the ‘feminist’ and ‘homosexual’ claim for rights at the international level a direct attack on the family and particularly on the child/parent relationship. (Buss and Herman 2003). Their goal is to create an international presence, to gain allies and to stop the perceived threat to families, reporting that, “We were very successful as we were knowledgeable, skilled, and smart enough to build alliances with sympathetic delegations, especially from Latin American and Muslim countries. Consequently, we prevented many, many anti-family, pro-abortion provisions from being included in UN documents.”¹¹

To this end they have criticized the monitoring committee of CEDAW (Committee on the Elimination of all Forms of Discrimination Against Women) for ‘reading in’ abortion rights when commenting on country reports. In the Beijing fifth anniversary review they supported pro-family country delegates who kept abortion and adolescent right to reproductive services without parent consent out of the wording of the report.¹² Member, Jill Cahoon describes the work of monitoring documents and agreements at the UN as,

checking the wording of the text for anti-life \ anti family expressions such as “women’s reproductive rights” or “responsible sexual relations”, which, at the UN level, refer to a woman’s

¹⁰ Religion and the State Locked in Mortal Combat, REALity, Volume XXVI Issue No.2 March/April 2007, Accessed April 19, 2011, <http://www.realwomenca.com/page/newsma0701.html>

¹¹ New UN Policy Excludes the Pro-life Voice, REALity, Volume XXIV Issue No.4 July/August 2005, accessed April 19, 2011, http://www.realwomenca.com/archives/newsletter/2005_july_aug/ja2005.html

¹² UN Continues to Corrupt Our Lives, REALity, Volume XXII Issue No.3 May/June 2003, Accessed April 19, 2011, http://www.realwomenca.com/archives/newsletter/2003_may_jun/mj2003.html; Pro-family Success at the UN REALity July August 2000 Volume XIX Issue No.4 July/August 2000 Accessed May 4, 2011. http://www.realwomenca.com/archives/newsletter/2000_July_August/ja2000.html

right to abortion or ready access to contraception by adolescents without their parents' knowledge or consent (Cahoon 2006).

Although they agree with the CRC's goal to combat child neglect they consider children's 'rights' an attack on the authority of parents and the family unit and were outraged when the tenth anniversary was celebrated in Canadian schools in 1999.¹³ They had standing in Supreme Court case Convention challenge to Canada's *Criminal Code*, Section 43 (use of corrective corporal punishment) and consider the 2004 decision to uphold it a victory. How effective they are as a group at the UN is hard to tell but Doris Buss and Didi Herman include them in the Christian Right at the UN and they are the only Canadian group mentioned (2003). Clearly they believe that they are not alone at the global level and find strength in that . What they epitomize is the attempt to gain national ground through activity at the international level and this adds another element of complexity to the multi-scalar aspects of raising the age of consent in Canada.

Conclusion

We may speak of re-globalizing consent since the regulation of sexual conduct through the of age of consent started out as an interscalar endeavour of the imperialist past, enveloped in racist fears of white slavery as well as nationalist drives for purity and reform. Throughout the twentieth century international policy has had its effects on Canadian discourse. For example, after WWII, groups concerned with sex deviancy found inspiration in new UN institutions in their attempts to bring issues of sex into public debate. Even though public discourse about sexuality

¹³ Questionable "Show and Tell" in Canada's Schools, REALity, Volume XVIII Issue No.5 September/October 1999 Accessed May 4, 2011. http://www.realwomenca.com/archives/newsletter/1999_Sept_Oct/so1999.html. They are not alone in criticizing Children's rights in Canada as Alberta was the only province that did not approve it in 1991 and did not do so until 1999 and a British Columbian school trustee also spoke out against the tenth anniversary celebrations (Howe and Covell 2007).

was more open, as the concept of the normal family based on the disciplines replaced the concept of immoral behaviour based on religious judgement. However, the symbolic importance of the ideal family was strengthened, evoking and reinforcing identities of childhood in relation to adulthood that opposed incompetent, incomplete, innocent and vulnerable children who are dependent to competent, independent, autonomous adults. A paternalistic approach to children remained as parents demanded support for their right and responsibility and judges and police continued to view children as incompetent and vulnerable but also unreliable. As I have argued there is a strong historical precedent of interscalar interaction in the targeting of young people's, particularly young women's, sexuality in the midst of enormous change.

The contemporary moral regulation of young people's sexuality in Canada is in many ways a multi-scalar event. On the global scale, while the CRC and its optional protocols establishes a rights framework it does so in an ambiguous manner and remains within the context of privileging the idealized and naturalized family and state responsibility for protection. At the same time it is believed to be a radical and dangerous document by socially conservative groups and politicians. When it comes to children and sexuality the content of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography points to an even more uneven balancing of the concern for children as rights bearers with concerns for protection as articulated in a discourse that privileges incapacity and vulnerability. This is reiterated at the national level in Canada in the proceedings for child protection and raising the age of consent. Liberal attempts to give a better balance of rights that recognizes the evolving capacities and the agency of young people through separating out the age of protection from the age of consent cannot counteract the trend.

The reconfiguration of scales and interscalar arrangements as a result of a globalizing

world that Mahon refers to is evident here. At the end of the twentieth and the beginning of the twenty-first century the CRC and its Optional Protocols have had wide acceptance and have established what is perceived as a strong paradigm of the child as rights bearer. Yet, the paradigm is ambiguous, as evidenced by the privileging of the right and responsibility of the ‘natural’ family and the state’s responsibility for maintaining it, as well as the separating out of children as needing special rights and protection. This perception of the child as vulnerable and in need of special rights and protection is reinforced and strengthened by the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography which clearly sets out the parameters of a growing, global threat of sexual exploitation. In privileging the concern for the global sale of children, including the widespread, globally and technologically driven proliferation of child prostitution and pornography, the Optional Protocol also sets out the parameters of a global solution: to combat these global dangers requires ever increasing regulation and control by means of national law and global cooperation in coordinating the investigation and apprehension of victims and perpetrators. The global concerns articulated by the CRC and the Optional Protocol affect Liberal and Conservative bills directly and indirectly and interact with national political movements and debates over the need to raise the age of consent in order to combat sexual exploitation, especially that which is facilitated by the Internet. Sub-national and national concerns of rescue groups, professional groups, police and politicians reflect the tension between privileging children as rights bearers or as in need of protection. Since the purpose of the socially conservative and religion-based family values groups is to rescue the family from the threat of rights discourse, the secular argument of protection and the identities of childhood in relation to adulthood that it evokes, serves their purpose.

Privileging sexual exploitation over other forms of child neglect and inequalities based on class, race and gender has several consequences. As McGillivray has argued, it distracts public attention from the hard questions of economic, social and cultural inequality while assuring authorities, as well as the public, that children are being protected. Second, it privileges protective, paternalistic responses over the defence of rights, evolving capacities and participation. Third, it diverts resources away from more holistic responses and towards policing. What permits such easy distraction and diversion are the morally laden symbolic meanings and identities of childhood in relation to adulthood that such responses evoke. These reified meanings and identities of childhood in relation to adulthood within a public discourse of the family, in turn, preclude rights bearing and participation on the part of young people. Finally new scales of action come into play. Quite ironically, proponents of the paradigm of the child as rights bearer undermine that very paradigm by privileging child sexual exploitation and reiterating and recreating the reified meanings and identities that critics of the paradigm are trying to preserve. Thus, groups like R.E.A.L. Women are empowered and well positioned to gain allies at both the national and international level to challenge an already ambiguous discourse.

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