ALTERNATIVE FACT? MORE DEMOCRATIC STATES ARE MORE LIKELY TO PROVIDE REFUGEE PROTECTION

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Democracy is explicitly engaged in two aspects of the Canadian refugee determination process: state protection findings and Designated Country of Origin determinations. Democracy is also implicitly engaged in the selection of countries as so-called "safe countries." This article reviews the literature on measuring the level of democracy in a given state, and the empirical evidence linking this level to a state's willingness and ability to provide adequate protection to its citizens. The article argues that the Federal Court of Appeal was misguided in taking judicial notice of a correlation between the level of democracy in a given state and its ability to provide state protection. The article also reviews and questions the use of "democratic governance" as a factor in Immigration, Refugees and Citizenship Canada's Designated Country of Origin regime, as well as the implicit use of democracy in designating the United States as a "safe" country under the Safe Third Country Agreement. The article contends that the time has come to reconsider how democracy measurements are used in Canada's refugee determination process, and advocates for an individualized approach to state protection determinations: one that eschews the alternative fact presumption of a connection between democracy and protection, and instead focuses on the protective mechanisms available to a refugee claimant based on their unique circumstances.

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I. INTRODUCTION

Canada is a party to the *1951 Convention Relating to the Status of Refugees*[1] as well as the *1967 Protocol Relating to the Status of Refugees*,[2] and has fully implemented both in its domestic law via the *Immigration and Refugee Protection Act*.[3] This ensures Canada's compliance with the principle of "nonrefoulement," which prohibits the return of a refugee to a country where they would be at risk of persecution.[4]

By definition, under both international law and Canadian law, a refugee is a person outside their country of nationality who has a well-founded fear of persecution based on an enumerated ground, and is unable or unwilling to obtain protection in their home country.[5] The unable or unwilling component of the refugee definition ensures that refugee protection is surrogate protection. Refugee protection is only engaged where state protection falters.

Unfortunately, this focus on surrogacy has resulted in jurisprudence, in Canada and elsewhere, that de-emphasizes the role of individual risk and instead emphasizes the protective capacity, actual or supposed, of a claimant's home country.[6] In Canada, democracy has emerged as a problematic component of this focus. The reliance on democracy is problematic because democracy is inherently difficult to measure and not necessarily connected to a state's ability and willingness to provide protection.

Nonetheless, democracy performs two important explicit roles in the Canadian refugee determination process, one substantive and one procedural. First, the level of democracy in a given country is used to determine the amount of evidence a refugee claimant must provide in order to rebut the presumption that their state is both able and willing to offer protection. Second, the existence of "democratic governance" is one factor that the Minister of Immigration, Refugees and Citizenship (Minister) may consider when determining that a particular country is one that does not normally produce refugees. Such a determination results in a substantially altered refugee determination procedure for refugee claimants from that country. Democracy also plays an implicit role in the selection and designation of countries as so-called "safe third countries" under a separate part of the *IRPA*.[7]

In her seminal paper on the role of democracy in Canadian refugee law, Jaime Liew "calls for the abolishment of the practice of using the 'democracy factor'" when analyzing a state's protective capacity.[8] Others have gone further and critiqued the Canadian approach to state

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1 28 July 1951, 189 UNTS 150, Can TS 1969 No 6 (entered into force 22 April 1954, accession by Canada 4 June 1969) [*Refugee Convention*].

2 31 January 1967, 606 UNTS 267, Can TS 1969 No 29 (entered into force 4 October 1967, accession by Canada 4 June 1969) [*Refugee Protocol*].

3 SC 2001, c 27 [*IRPA*].

4 *Ibid*, s 115.

5 *Ibid*, s 96 (the refugee definition also includes stateless persons who are outside their country of habitual residence. Additionally, Canadian law includes a category of "person[s] in need of protection" (*ibid*, s 97) who face a risk of torture, or a risk to life, or a risk of cruel and unusual treatment or punishment; in these instances, the risk does *not* have to be based on an enumerated ground).

6 Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed (New York: Oxford University Press, 2007) at 10.

7 See *supra* note 3, s 102.

8 Jamie Chai Yun Liew, "Creating Higher Burdens: The Presumption of State Protection in Democratic Countries" (2009) 26:2 Refuge 207 at 218.

protection analysis.[9] The Federal Court has responded by recognizing that "[d]emocracy alone does not ensure effective state protection,"[10] but has continued to operate under the presumption that a given state can be placed on a "democracy spectrum"[11] in a way that is relevant and probative for state protection determinations. The Federal Court, in some instances, has also employed a comparative approach that requires claimants to prove the protection available to them is significantly less adequate than what would be available in an established democracy.[12]

Recently, a constitutional application was brought challenging the mechanism the Minister uses to designate countries under the *IRPA*,[13] and more specifically, the bar that such a designation creates on appeals to the Refugee Appeal Division for unsuccessful refugee claimants. In *YZ v. Canada (Minister of Citizenship and Immigration)*, the Court struck down the prohibition on access to the Refugee Appeal Division for unsuccessful claimants from designated countries, but refused to address the designation mechanism more generally along with its reliance on democracy.[14] Given that the effects of designation are broader than simply appellate access,[15] it is likely that the constitutionality of the designation regime, along with its reliance on democracy, may be questioned in the future. Indeed, at least two cases have been brought related to other procedural consequences of designation; however, the analysis in each case was limited to examinations of the potential effects of designation, and not the reliance on democracy as part of the designation process.[16]

Even more recently, concerns have been raised about the *Safe Third Country Agreement* between Canada and the United States[17] and how Canada designates countries as presumptively safe under a separate section of the *IRPA*.[18] The *Safe Third Country*

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9 See Pia Zambelli, "Problematic Trends in the Analysis of State Protection and Article 1F(a) Exclusion in Canadian Refugee Law" (2011) 23:2 Intl J Refugee L 252 (arguing that Canadian courts have unjustifiably created an independent, unable and unwilling component, as part of jurisprudence on state protection); Penelope Mathew, James C Hathaway & Michelle Foster, "The Role of State Protection in Refugee Analysis" (2003) 15:3 Intl J Refugee L 444 at 451–53 (raising concerns about the Canadian approach that looks at the diligence of protective efforts taken by a given state, rather than the actual protective effects of those efforts); James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 319–23 (contending that a presumption of protection poses "an inappropriately high standard of proof" that lacks any empirical foundation at 321).

10 *Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646, 2011 FC 646 (CanLII) at para 11 [*Sow*].

11 *Ibid* at paras 10–11.

12 Donald Galloway & Tess Acton, "The Fear of Persecution and State Protection" (2015) 29:2 J Immigration Asylum & Nationality L 212 at 221 (discussing, in particular, the decision in *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400, 2010 FC 400 (CanLII)).

13 *Supra* note 3, s 109.1.

14 2015 FC 892, 387 DLR (4th) 676 [*YZ*].

15 See *ibid* at paras 7–9 (for a review of the many effects of designation on certain refugee claimants).

16 See *Al Atawnah v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 774, 483 FTR 174 [*Atawnah* FC], aff'd 2016 FCA 144, 397 DLR (4th) 177 [*Atawnah* FCA], leave to appeal to SCC refused, 37122 (1 December 2016) (affirmed by the Court of Appeal, but only on the narrow basis that a deferral of removal application could act as a "safety valve" to the consequences of the bar on making a pre-removal risk assessment application that extended from the designation process); *Peter v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1073, 467 FTR 169 [*Peter* FC], aff'd 2016 FCA 51, 395 DLR (4th) 758 [*Peter* FCA] (affirmed by the Court of Appeal, but only on the very narrow basis that there were insufficient facts to conduct a *Charter* analysis of the designation process and its effects).

17 *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims From Nationals of Third Countries*, 5 December 2002, Can TS 2004 No 2 (entered into force 29 December 2004) [*Safe Third Country Agreement*].

18 *Supra* note 3, s 102.

Agreement functions to bar refugee claims, with some exceptions, by claimants who arrived in Canada via the US and could have made a refugee claim in that country.[19] While "democracy" is not an explicit factor in this designation process and the Federal Court of Appeal recently upheld the constitutionality of the agreement,[20] it does appear that democracy was an implicit factor in the designation of the US. Given recent executive orders by US President Donald Trump concerning immigration, this implicit reliance on democracy is illuminating, especially in the context of calls for the repeal or suspension of the *Safe Third Country Agreement*.[21]

The primary purpose of this article is to provide an analysis of how democracy measurement is used in state protection analysis. The article also examines how notions of democracy are explicitly and implicitly used in designation processes that impact who can make a refugee claim and the procedure used to evaluate those claims. The article is intellectually indebted to, and builds on the work of, Liew, insofar as it reviews a number of cases discussed in her article and reaches similar conclusions with respect to the problem of relying so heavily on democratic status as part of the refugee determination process.[22] This article makes three novel contributions: (1) it updates relevant case law to the present date, showing that reliance on democracy continues to be an issue in Canadian refugee jurisprudence; (2) it provides a more comprehensive review of the empirical political science literature on how democracy is measured, and whether democracy is always connected with increased protective capacity in a given state; and (3) it applies this review to procedural designation processes that were not in existence or not discussed in Liew's article.

Though self-evident, it is important to note that this reliance on democracy is taking place in the context of refugee claims. Refugee claims, by their very nature, involve some of the most serious and grave consequences of any proceeding in the Canadian legal system. The human consequences of erroneously sending a person, who has a well-founded fear of persecution, back to their home country, can be further violence, loss of liberty, and possibly death. Legally, such a mistake violates Canada's international legal obligation of nonrefoulement.[23] It is for these reasons that the Supreme Court of Canada found it "unthinkable that the *Charter* would not apply to entitle [refugee claimants] to fundamental justice in the adjudication of their status."[24] As a result, there is now a *Charter*-protected right to a refugee determination process that is fair and consistent with the principles of fundamental justice.

Given these stakes and the requirement that the refugee adjudication process comply with principles of fundamental justice, it is alarming that the Canadian judiciary has permitted the

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19 *Ibid*, s 101(1)(e) (for a description of the exceptions to the bar on refugee claims, refer to sections 159.5–159.6 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPA Regulations*]).

20 *Canadian Council for Refugees v Canada (FCA)*, 2008 FCA 229, [2009] 3 FCR 136, leave to appeal to SCC refused, 32820 (5 February 2009) [*Canadian Council for Refugees*].

21 Stephen Smith, "Advocates Urge Protection for Refugees Who Enter Canada Via the U.S.," *CBC News* (28 January 2017), online: <www.cbc.ca/news/canada/montreal/refugee-ban-canada-safe-third-country-1.3956932>; Nicole Thompson, "Lawyers Urge Ottawa to Make Changes to Safe Third Country Agreement," *The Globe and Mail* (12 February 2017), online: <www.theglobeandmail.com/news/politics/lawyers-urge-canada-to-make-changes-to-safe-third-country-agreement/article33994208/>.

22 *Supra* note 8.

23 This is recognized in section 115 of the *IRPA*, *supra* note 3.

24 *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at 210 [*Singh*].

reliance on democracy in the foregoing aspects of the refugee determination process. It is alarming, firstly because the courts have done so without a sufficient factual basis to draw the connection between democracy and protection, and secondly because democracy cannot be empirically measured with the precision that is needed for the current ways it is used by the Minister and the courts.

By electing to use democracy as a proxy for protection, Parliament and the judiciary have relied on alternative facts in a way that calls into question the refugee determination process and may amount to violations of fundamental justice as well as Canada's international legal obligations. Part II of the article expands on the historical and current use of democracy in the refugee determination process. Part III explains how judicial notice, taken by the Federal Court of Appeal, of a connection between democracy and protection, led to a problematic precedent that the Court has continued to reaffirm. Part III also examines recent Federal Court jurisprudence that has attempted to provide a more nuanced application of this precedent in response to criticisms. Relying on an in-depth review of political science literature, Part IV examines whether democracy can be measured empirically in the way envisioned by the courts, and whether democracy is correlated with increased human rights protections. Part V advocates for a reconsideration of the reliance on democracy in the refugee determination process, and suggests ways that the refugee determination process could be reformulated.

II. THREE USES OF DEMOCRACY IN THE REFUGEE DETERMINATION PROCESS

A. DEMOCRACY AND STATE PROTECTION

Protection of the individual is at the core of refugee protection. "In contrast to earlier international refugee instruments, which applied to specific groups of refugees," the *Refugee Convention* and *Refugee Protocol* endorse "a single definition of the term 'refugee.'"[25] Other than recognizing that the basis of persecution may be membership in a particular social group,[26] neither the *Refugee Convention* nor the *Refugee Protocol* make reference to groups. Instead, the refugee determination process is supposed to be individualized, focusing on the particular risk facing a particular individual.

Consistent with this individualized focus, under the *Refugee Convention* and the *Refugee Protocol* a refugee is defined as a person who has a "well-founded fear of being persecuted … and is unable or, owing to such fear, is unwilling to avail [themselves] of the protection" of their home country.[27] The agent of persecution responsible for creating the well-founded fear can be either part of the state apparatus (such as the police or the military) or a non-state actor (such as an organized criminal entity or an intimate partner). But regardless of who the agent of persecution may be, refugee protection only arises where there is a breakdown in

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25 United Nations High Commissioner for Refugees, "Introductory Note by the Office of the United Nations High Commissioner for Refugees" in *Convention and Protocol Relating to the Status of Refugees* (Geneva: Office of the United Nations High Commissioner for Refugees, 2010) 2 at 3, online: <www.unhcr.org/en-us/3b66c2aa10>.

26 *Refugee Convention*, *supra* note 1, art 1(A).

27 *Ibid*.

state protection for the particular individual. This ensures refugee protection is surrogate protection. As James Hathaway and Michelle Foster explain:

> The Refugee Convention's reservation of refugee status for those who do not enjoy a protective relationship with a state is central to two aspects of the refugee inquiry…. First, a risk of serious harm is only a risk of "being persecuted" if it evinces a failure of state protection, in the sense that the country of origin either will not, or cannot, respond to that risk of harm. Only in such circumstances can it reasonably be said that there is a need for the surrogate or substitute protection of international refugee law, since only then will the state of origin not be a suitable guarantor of the individual's well-being. Second, it may be the case that a person, while at risk of being persecuted in her home region, can nonetheless secure the protection of her own country in some other region of that same state. Again, because a national protective relationship with her own country is viable, the surrogate protection of refugee status is not required in such circumstances.[28]

The breakdown in the protective relationship can be the result of a state being unable to provide protection because it lacks capacity to do so, or it can be the result of an unwillingness to provide protection because of who the claimant may be or because of a special relationship between the agent of persecution and those responsible for providing protection. Regardless of the reason for a breakdown in the protective relationship, proof of the absence of state protection is always an essential component of the refugee determination process.

In *Canada (Attorney General) v. Ward*, the Supreme Court of Canada held that all states are presumed to be able and willing to provide protection for their citizens.[29] Accordingly, each claimant must establish that their respective state is unable or unwilling to provide adequate protection.[30] While recognizing the burden this presumption places on individual refugee claimants, the Supreme Court held that it "serves to reinforce the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant."[31]

Unless there is an admission of inadequate state protection, there is a legal onus on every refugee claimant to rebut the presumption of state protection, on a balance of probabilities, by adducing "relevant, reliable and convincing evidence" to the contrary.[32] Such evidence can take the form of the claimant's own viva voce evidence of their unsuccessful efforts to obtain state protection, or it can take the form of documentary evidence showing that other similarly situated individuals had been unsuccessful in obtaining state protection.

The presumption of state protection is not a particularly controversial principle, but its application has become quite complicated in situations where an individual refugee claimant is fleeing persecution in a democratic state. Part of the reason for this difficulty is a decision

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28 Hathaway & Foster, *supra* note 9 at 289.
29 [1993] 2 SCR 689 at 724–25 [*Ward*].
30 See Zambelli, *supra* note 9 (critiquing the development of the unable and unwilling state protection criteria as a standalone component of the Canadian interpretation of the definition of "refugee" in the *Refugee Convention*, *supra* note 1).
31 *Ward*, *supra* note 29 at 726.
32 *Flores Carrillo v Canada (Minister of Citizenship and Immigration) (FCA)*, 2008 FCA 94, [2008] 4 FCR 636 at para 30 [*Carrillo*].

of the Federal Court of Appeal: *Kadenko v. Canada (Solicitor General)*.[33] There, the refugee claim was being made against Israel, a state the Court was prepared to assume had "political and judicial institutions capable of protecting its citizens."[34] The Court went on to hold, in a brief oral decision from the bench: "The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her."[35] The Court did not expand on what it meant by "level of democracy" nor how the words "in a way" modify the presumed directly proportional relationship between democracy and the presumption of state protection. What is clear from the Court's decision is that it was not only concerned with a given state's democratic status in the sense of how a state periodically conducts elections. The Court made specific reference to the democratic nature of the state's *institutions*, not its electoral system. However, it failed to provide any guidance on what institutions should be considered and how the democratic character of those institutions should be assessed.

The Court of Appeal has consistently reaffirmed the proposition in *Kadenko* in a number of cases over the past ten years. In *Hinzman v. Canada (Minister of Citizenship and Immigration)*, the claimant was a conscientious objector from the US who refused to serve in the Iraq war and instead sought refugee protection in Canada.[36] The Court did focus on the protective potential of the independent judiciary in the US, but the starting point for the Court's analysis remained the democratic status of the US.[37] In *Carrillo*, a case concerning Mexico, the Court again reaffirmed the presumptive connection between level of democracy and protection, but clarified that this connection impacts "the quality of the evidence" that must be presented to rebut the presumption of state protection, and not the applicable legal standard (which remains a balance of probabilities).[38] This means that claimants from democratic states must present evidence of a higher probative value to overcome the presumption of state protection on a balance of probabilities, not that they face an elevated legal standard that approaches proof beyond a reasonable doubt. Finally, in *Mudrak v. Canada (Minister of Citizenship and Immigration)*, a case concerning Hungary, the Court rejected a certified question, regarding the presumption of state protection, on the basis that the law in this area was so well settled that the question did not rise to the level of general importance required for proper certification.[39]

Each time the Federal Court of Appeal has been given an opportunity to reconsider *Kadenko*, it has chosen not to revisit its core focus on the correlation between democratic status and the presumption of state protection, though it has provided some very limited commentary on what aspects of democracy should be examined. Instead, it has left claimants in the invidious position of trying to determine what constitutes adequate evidence and how the democratic and institutional factors in their country will be linked to that adequacy.

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33 (1996), 143 DLR (4th) 532 (FCA), leave to appeal to SCC refused, 25689 (8 May 1997) [*Kadenko*].
34 *Ibid* at 533.
35 *Ibid* at 534.
36 2007 FCA 171, 282 DLR (4th) 413, leave to appeal to SCC refused, 32112 (15 November 2007) [*Hinzman*].
37 *Ibid* at paras 45–46.
38 *Supra* note 32 at para 38.
39 2016 FCA 178, 485 NR 186 at para 36 [*Mudrak*].

The Court's focus on democratic status, in *Kadenko* and the cases that have consistently reaffirmed its ratio, can be understood, in part, by examining the unique political and foreign policy issues at play in each case. The ratio in *Kadenko* has its genesis in a case involving an American Indian who claimed refugee status in Canada, rather than face criminal charges in the US: *Minister of Employment and Immigration v. Satiacum*.[40] There, the charges stemmed from the claimant's advocacy for the legal rights of Indians. The Federal Court of Appeal held the presumption of state protection also meant that the fairness and independence of a state's judicial system could be presumed. The Court recognized that such a presumption might be easily rebutted in a non-democratic state, but held that in a democracy like the US, the threshold would be much higher.[41] In the result, the Court sent an indigenous activist back to the US to face the criminal charges stemming from his advocacy. In *Kadenko*, the Court was prepared to assume that Israel — a beacon of democracy in an otherwise unstable region of the world that around that time was being bombarded by Iraqi Scud missiles during the first Gulf War — had political and judicial institutions capable of providing protection.[42] In *Hinzman*, the applicants' status as conscientious objectors to a contentious and arguably illegal invasion of Iraq by the US in the Second Gulf War was front and center in the case; the Court was seemingly well aware of the politically charged nature of their claims, and the condemnation of the US that would result from conferring refugee status on its fleeing military personnel.[43] The *Carrillo* decision was decided at the peak influx of refugee claims being made by Mexicans in Canada, and before a visa requirement was imposed against Mexican nationals that had the effect of drastically reducing the number of claims being made.[44] Similarly, the *Mudrak* decision was decided in the context of ongoing debates about the treatment of Roma people in Eastern European democracies and whether the influx of refugees from those countries warranted imposing an entry visa requirement similar to that which had been imposed on Mexico.[45]

The Federal Court of Appeal's focus on democratic status has also never been thoroughly reviewed by the Supreme Court of Canada. The *Satiacum* decision was referred to favourably by the Supreme Court of Canada in *Ward*.[46] However, since *Kadenko* was decided at a later date, it was not considered by the Supreme Court of Canada in *Ward*. The Supreme Court of Canada refused leave to hear an appeal in both *Kadenko* and *Hinzman*. Leave to appeal to the Supreme Court of Canada was not sought in either *Carrillo* or *Mudrak*. To date, the Supreme Court of Canada has never explicitly considered the ratio in *Kadenko*.[47]

The reliance on democracy in state protection determinations is problematic for reasons that will be expanded on more fully below. It may be the case that there are certain states where the Immigration and Refugee Board of Canada (IRB) or a reviewing court can safely

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40 (1989), 99 NR 171 (FCA), leave to appeal to SCC refused, 21627 (21 December 1989) [*Satiacum*].
41 *Ibid* at para 19.
42 *Kadenko*, *supra* note 33.
43 *Hinzman*, *supra* note 36.
44 *Carrillo*, *supra* note 32.
45 *Mudrak*, *supra* note 39.
46 *Ward*, *supra* note 29 at 725–26.
47 An application for leave to appeal was made to the Supreme Court of Canada in *Hinzman*. In rejecting the application for leave, it could be argued that the Supreme Court did consider the ratio in *Kadenko*. However, since no reasons are given for denying leave, we do not yet have an explicit treatment on the subject by the Supreme Court. Moreover, since *Hinzman* concerned refugee claimants from the US — an "advanced democracy" that makes for less challenging cases — we should not presume that the Supreme Court's denial is an implicit acceptance of the ratio in *Kadenko* for less democratic states.

presume effectiveness of protective institutions based on notorious and widely accepted information. For example, it may be reasonable to presume that courts in the US are at least as fair and independent as courts in Canada. In such cases, the application of the ratio in *Kadenko* is less problematic because democratic status and democratic institutions happen to be concurrent even if they are not correlated — democratic status may be referred to, but it is not the variable that is actually providing protection. When, however, a refugee claimant comes from a democratic country that has a weak history of democracy, tenuous democratic institutions, or low levels of economic development, the application of *Kadenko* becomes very problematic. The primary source countries for inland refugee claims in Canada tend to fall into this latter category.

For example, in 2010, the top five source countries (by refugee claimants present in Canada) were Mexico, Haiti, China, Colombia, and Hungary.[48] In the first half of 2015, the top five source countries (by finalized decisions) were China, Hungary, Pakistan, Nigeria, and Colombia.[49] None of these countries are classified as "very high" human development countries by the United Nations Development Programme.[50] China, Colombia, Hungary, and Mexico fall in the "high" human development category, and Haiti, Nigeria, and Pakistan fall in the "low" human development category.[51] Nonetheless, all of these seven countries have had recent elections. With the exception of China, all of these countries have some formal type of republic or democratic government.

Since many of the refugee source countries are considered democracies, it is unsurprising that *Kadenko* is often cited by the IRB in its decisions to reject claims from these countries on the grounds that the claimant failed to rebut the presumption of state protection. A Westlaw[52] KeyCite search of the *Kandenko* decision produces 234 reported IRB decisions and 258 Federal Court decisions. A similar search on CanLII[53] shows 731 tribunal decisions and 258 court decisions.[54] In 2015, according to CanLII, the *Kandenko* decision was cited 20 times by either a tribunal or court, and in 2016, it was cited five times by either a tribunal or court. In short, the *Kadenko* decision continues to be central to state protection reasoning in the refugee determination process. Even a cursory read of these cases shows that both the IRB and courts use *Kadenko* in a way that focuses on democratic status as a starting point. It may be that a more nuanced analysis of institutional effectiveness follows, but often this analysis is clouded by the dominant presumptions in *Kadenko*. In other words, the analysis extends rather than displaces the presumptions in *Kadenko*. For example, the nuance might

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48 Citizenship and Immigration Canada, *Immigration Overview: Permanent and Temporary Residents* (Ottawa: CIC, 2011), online: <www.publications.gc.ca/collections/collection_2011/cic/Ci1-8-2010-eng.pdf>.

49 Citizenship and Immigration Canada, "Facts & Figures 2015: Immigration Overview – Temporary Residents – Annual IRCC Updates" (Ottawa: CIC, 2015), online: <www.cic.gc.ca/english/resources/statistics/index.asp>.

50 United Nations Development Programme, *Human Development Report 2015* (New York: UNDP, 2015) at 208, online: <www.hdr.undp.org/sites/default/files/2015_human_development_report.pdf>.

51 *Ibid* at 208–11.

52 Thomson Reuters, "WestlawNext Canada," online: <www.westlawnextcanada.com>.

53 Canadian Legal Information Institute, "CanLII," online: <www.canlii.org>.

54 These results are current to 7 June 2017.

be to add an analysis of the effectiveness of particular protective institutions, but this is still done against the backdrop of the "level" or "nature" of a democracy in the state in question.[55]

In holding that "[t]he burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question," the decision in *Kadenko* makes a number of implicit presumptions.[56] Firstly, it is presumes that the "level of democracy in the state in question" can be measured and quantified, or at the very least qualified in a meaningful way. Secondly, it presumes that democracy is an effective check on persecution by state or non-state actors and that the level of democracy is a suitable proxy for the types of institutions and systems that are necessary to be willing and able to provide adequate state protection. These presumptions function to make the refugee determination process less focused on individualized risk and more focused on presumed protections in generalized cases. Of even greater concern, as this article will explain below, these presumptions are problematic because they are not sufficiently supported by the best available political science evidence, and in some cases are directly contradicted by it.

B. DEMOCRACY AND DESIGNATED COUNTRIES OF ORIGIN

More recently, Parliament passed legislation that makes the level of democracy in a refugee claimant's home state potentially relevant for determining what procedure will be used to assess a given claim, and what appellate review options are available in the event of a negative decision by the IRB. The *Balanced Refugee Reform Act*[57] and the *Protecting Canada's Immigration System Act*[58] work together to create a Designated Countries of Origin (DCO) regime. The purported rationale for the DCO regime is that Canada was "receiving a disproportionately high number of asylum claimants who come from countries that historically have very low acceptance [including] countries in Europe with strong recognition of democratic and human rights."[59] Implicit in this statement is a willingness to make the refugee determination process less individualized in circumstances where the claimant comes from a particular country. Even though an individual claimant's well-founded fear of persecution may be the same as, or more severe than, another claimant's, if they are from a designated country they are treated differently, not because of a difference in the particular risk they face, but because of how people are generally presumed to be treated in their country.

The method the government uses to designate countries is discussed in detail below. What is important to note at this juncture is that the designation process can be triggered in two ways, both of which are ultimately under the Minister's control. The first is a quantitative method that triggers a designation review where the percentage of unsuccessful, withdrawn, or abandoned claims from a particular country exceed a certain threshold set by the Minister,

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55 See e.g. *Sow*, *supra* note 10 at paras 10–13 (where the Court accepted that the presumption of state protection varies with the level of democracy, but went on to hold that this must be qualified by factors that affect the nature of democracy in a given state).

56 *Kadenko*, *supra* note 33 at 534.

57 SC 2010, c 8.

58 SC 2012, c 17.

59 Citizenship and Immigration Canada, "Backgrounder — Designated Countries of Origin" (Ottawa: CIC, 2012), online: <www.cic.gc.ca/english/department/media/backgrounders/2012/2012-11-30.asp> [CIC, "Backgrounder"].

and where there are a sufficient number of total cases (again as determined by ministerial order).[60] The second is a qualitative method that triggers the designation process where the total number of cases is insufficient to trigger the quantitative process, and the Minister is of the view that in the country in question:

> (i) there is an independent judicial system,
>
> (ii) basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedoms are infringed, and
>
> (iii) civil society organizations exist.[61]

As will be expanded on below, once the designation process is triggered, quantitatively or qualitatively, there are almost no barriers to designating a country; thus, the designation process is largely at the will of the Minister and the government.

To date, 42 countries have been designated, mostly from Europe. The US, Mexico, and a few Asian and Latin American countries have also been designated. What is troubling about the designation process so far is that there is substantial variation in the refugee recognition rate across the designated countries. For example, data from 2015 shows that for claims processed under the current system, recognition rates for designated countries with significant numbers of claims range from 0 percent (on 47 claims from the US) to 78.2 percent (on 247 claims from Hungary).[62] Recognition rates for non-designated countries, with significant numbers of claims, also fall within this range. For example, Nigeria had a recognition rate of 60.8 percent (on 431 claims) and Pakistan had a recognition rate of 79.9 percent (on 415 claims).[63] Studies of recognition rates also show substantial variation for a given country, that depends on the refugee adjudicator assigned to the case.[64] Given this data, it appears that the designation choice is not just about designating countries where the probability of a successful refugee claim is low, but also about dissuading refugee claims from particular countries.

The DCO regime functions to dissuade refugee claims from designated countries in four main ways. Firstly, the DCO regime makes it very difficult for refugee claimants from DCO countries to legally support themselves upon arrival. While regular claimants who cannot otherwise support themselves can apply for a work permit as soon as they have made a refugee claim, claimants from DCO countries cannot apply for a work permit until "at least 180 days have elapsed since their claim was referred to the Refugee Protection Division."[65] Since many refugee claimants arrive in Canada with limited resources, the bar on work permits for claimants from DCO countries means that such claimants will only be able to support themselves with the assistance of charity or illegal work.

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60 *IRPA*, *supra* note 3, s 109.1(2)(a).
61 *Ibid*, s 109.1(2)(b).
62 Sean Rehaag, "2015 Refugee Claim Data and IRB Member Recognition Rates" (30 March 2016), *Canadian Council for Refugees*, online: <www.ccrweb.ca/en/2015-refugee-claim-data>.
63 *Ibid*.
64 Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2007–2008) 39:2 Ottawa L Rev 335.
65 *IRPA Regulations*, *supra* note 19, s 206(2).

Secondly, the DCO regime expedites the refugee determination process. For regular claimants, the hearing date before the IRB must be no later than 60 days from when the application was made. But for claimants from DCO countries, the hearing date before the IRB must be no later than 30 days (if the claim is not made at a port of entry) or 45 days (if the claim is made at a port of entry).[66] This means that claimants from DCO countries have between 25 and 50 percent less time to prepare their claims.

Thirdly, the DCO regime, until very recently, limited a claimant's right of appeal, and it continues to diminish the ameliorative capacity of a judicial review application. When the DCO regime first came into force, it prohibited unsuccessful claimants from DCO countries from appealing to the Refugee Appeal Division, even if there had been a patently clear error of fact or law.[67] As previously discussed, this prohibition was recently struck down as unconstitutional.[68] As a result, unsuccessful claimants from DCO countries may now appeal to the Refugee Appeal Division. However, the altered and unfavourable implications of judicial review remain intact. For regular claimants, an application for judicial review to the Federal Court automatically stays removal of the individual until that application has been rejected and all available grounds for appeal of the Court's decision have been exhausted.[69] However, for claimants from DCO countries, an application to the Federal Court does not automatically stay removal, even if there has been a patently clear error of fact or law.[70] Claimants from DCO countries will be forced to seek a judicial stay of removal in the absence of a statutory stay of removal. This is troubling given the wide variance the Federal Court has exhibited in applying relevant procedural tests,[71] and in light of concerns that increased legal costs act as a barrier to accessing justice.

Lastly, rejected claimants from DCO countries will have limited rights to bring a Pre-Removal Risk Assessment (PRRA) application or a Humanitarian and Compassionate Considerations (H&C) application. Whereas regular claimants have to wait 12 months to bring a PRRA application following the rejection of their refugee claim, claimants from DCO countries will have to wait 36 months.[72] This is notable given that the truncated timeframe of the DCO regime may make it difficult for claimants to place all of the relevant evidence before the decision-maker. A PRRA application may consider evidence that "was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented"[73] to the Refugee Protection Division, but the 36 month bar will effectively prevent claimants from DCO countries from having a more thorough risk assessment before a PRRA officer, and will instead require them to make such arguments as part of the more abbreviated removals process. In the case of H&C applications for permanent residence, rejected claimants from DCO countries will be required to wait five

66 *Ibid*, s 159.9(1)(a).
67 *IRPA*, *supra* note 3, s 110(2).
68 *YZ*, *supra* note 14.
69 *IRPA Regulations*, *supra* note 19, s 231(1).
70 *Ibid*, s 231(2).
71 See Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's LJ 1 (discussing the significant variability in leave application grant rates depending on which judge decided the application).
72 *IRPA*, *supra* note 3, s 112(2).
73 *Ibid*, s 113(a).

years from the date of rejection before bringing such applications, whereas regular claimants will be required to wait only 12 months.[74]

When the DCO regime was created, serious concerns were raised that it may violate Canada's international human rights obligations (most notably the prohibition against nonrefoulement) as well as the *Canadian Charter of Rights and Freedoms*.[75] To date, three constitutional challenges have been brought that are relevant to the DCO regime, one challenging the bar on access to the Refugee Appeal Division for unsuccessful claimants, and two challenging the time restrictions on filing a PRRA.

In *YZ*, the applicants challenged the entire DCO regime on that grounds that it violated sections 7 and 15(1) of the *Charter*.[76] The Court held it would be inappropriate, based on the inadequate factual matrix and circumstances presented, to adjudicate reasonable hypotheticals extending from the DCO regime, and instead limited itself to the narrow issue of access to the Refugee Appeal Division for unsuccessful claimants.[77] In that respect, the Court was able to easily find that the DCO regime was "discriminatory on its face"[78] and that "[i]t also serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries which are generally considered safe and 'non-refugee producing.'"[79] In finding that this violation of section 15(1) of the *Charter* could not be justified, the Court noted that the IRB already had a statutory power — to find claims manifestly unfounded or of no credible basis — that could achieve its stated objective of deterring abusive claims; therefore, the broad prohibition on appellate access was not minimally impairing.[80] Moreover, the Court reasoned that barring appellate access was "not proportional to the government's objectives."[81] Having found a violation of section 15(1) of the *Charter*, the Court reasoned that it was unnecessary to consider the applicants' section 7 argument, firstly because the entire DCO regime was not appropriately at issue, and secondly because existing case law suggests that there is no section 7 *Charter* right to an appeal in the context of immigration proceedings.[82]

In *Peter*[83] and *Atawnah*,[84] the applicants challenged the constitutionality, on section 7 grounds, of the time bar for making a PRRA application for refugee claimants who had been rejected (as was the case in *Peter*) or abandoned their claims (as was the case in *Atawnah*). Additionally, in *Peter*, the applicants challenged the constitutionality of the removals process. While neither case dealt explicitly with the DCO regime or the increased restrictions for nationals from DCO countries, both dealt with an aspect of the protection and removal process that is closely linked to the DCO regime, thus making the analysis provided in each case of potential relevance to future DCO-related constitutional challenges.

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74 *Ibid*, ss 25(1.01)–(1.02).

75 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. See also Canadian Bar Association National Immigration Law Section, *Bill C-31: Protecting Canada's Immigration System Act* (Ottawa: CBA, 2012), online: <www.cba.org>.

76 *Supra* note 14.

77 *Ibid* at paras 18–23.

78 *Ibid* at para 124.

79 *Ibid*.

80 *Ibid* at para 164.

81 *Ibid* at para 170.

82 *Ibid* at paras 142–43.

83 *Supra* note 16.

84 *Supra* note 16.

The trial judge in *Peter* concluded that neither the time bar on making a PRRA application nor the removals process violated the applicants' section 7 *Charter* rights.[85] On appeal, the Federal Court of Appeal chastised the trial judge for embarking on a lengthy *Charter* analysis in the absence of a proper evidentiary record.[86] The Court held that the trial judge's finding of no evidence of risk was sufficient to dispose of the appeal. Nonetheless, the Court remarked in *obiter* that the boundaries of a refugee claimant's section 7 rights, in the context of the refugee determination and removals process, remained an open question, as the Supreme Court of Canada in the *Singh* decision "expressly left open the question of whether a more expansive approach to security of the person should be taken."[87]

In *Atawnah*, the trial judge also engaged in a section 7 *Charter* analysis of the time bar on making a PRRA application (which was 36 months in this case because the applicants were from a DCO), albeit without the benefit of the Court of Appeal's commentary in *Peter*.[88] The Court began its analysis by noting that "neither the *Refugee Convention* nor the section 7 Charter jurisprudence mandates a particular structure or process for the determination of risk-based claims,"[89] and that any *Charter* analysis "must have regard to the [immigration] system as a whole"[90] rather than parsing the constitutionality of particular sections. This wider context is a removals process that requires some assessment of risk, albeit with a more procedurally truncated process. While recognizing the significant interests at stake in refugee cases, the Court concluded that the applicants had not demonstrated "that enforcement officers are not competent to carry out" risk assessments in a way that adequately protects the important rights at stake.[91] Accordingly, the Court declined to deviate from the trial judge's reasoning in *Peter*, but did certify a question for appellate review.[92] In affirming the trial judge's reasoning, the Federal Court of Appeal held that the discretion of a removals officer to defer removal on the basis of risk acted as a "safety valve" that nullified any possible constitutional implications of the time bar on making a PRRA application.[93]

While the Federal Court and Federal Court of Appeal have so far largely avoided examining the constitutionality of the DCO regime in its entirety, the cases that have been decided offer some useful pieces of information for future cases about how the DCO regime operates. This is not an abstract consideration, and future litigation is likely given that the Minister, to date, has designated 42 countries as DCOs, two of which (Mexico and Hungary) are among the top inland source countries.[94]

Even though the Court in *YZ* refused to adjudicate the constitutionality of the DCO regime as a whole, the parties had operated on the basis that a complete adjudication of the system was at issue.[95] Accordingly, both sides filed extensive affidavit evidence about the DCO

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85 *Peter*, FC *supra* note 16 at 314–15, 322.
86 *Peter* FCA, *supra* note 16 at para 22.
87 *Ibid* at para 28.
88 *Atawnah* FC, *supra* note 16.
89 *Ibid* at para 66.
90 *Ibid* at para 67.
91 *Ibid* at para 99.
92 *Ibid* at para 109.
93 *Atawnah* FCA, *supra* note 16 at para 23.
94 Immigration, Refugees and Citizenship Canada, "Designated Countries of Origin," (Ottawa: IRCC, 2017), online: <www.cic.gc.ca/english/refugees/reform-safe.asp>.
95 *YZ*, *supra* note 14.

regime and some of its effects. The government's affidavits disclosed that once a country had been flagged (based on quantitative or qualitative measures) a division of Immigration, Refugees and Citizenship Canada (IRCC) used nine factors and consultations with other related departments to prepare a report recommending designation to the Minister.[96] Those nine designation factors are:

- democratic governance;
- protection of right to liberty and security of the person;
- freedom of opinion and expression;
- freedom of religion and association;
- freedom from discrimination and protection of rights for groups at risk;
- protection from non-state actors (which could include measures such as state protection from human trafficking);
- access to impartial investigations;
- access to an independent judiciary system; and
- access to redress (which could include constitutional and legal provisions).[97]

The final designation decision is then made by the Minister after consideration of the report.

The government's affidavits also disclosed that it chose to assign responsibility for analyzing these factors to a division of IRCC, rather than to a transparent and independent panel, so that classified information from Canadian diplomatic missions could be incorporated into the analysis.[98] While incorporation of classified information is presumably a relevant factor for designation, it is unclear why such information could not be provided to the Minister in conjunction with a more transparent and independent assessment process of whether a country should be designated. Indeed, one of the drawbacks of the non-transparent designation process selected by the government is that it is much more difficult to assess questions of fairness and constitutionality.

In *YZ*, the government explained that "[i]n developing the methodology for assessing country conditions, [Citizenship and Immigration Canada (as the IRCC was then called)] had regard to the practice of other countries and general country of origin research approaches."[99] Beyond this extremely vague explanation, there is no publicly available information about how the designation factors were selected and how they are applied. The Court noted in *YZ* that the process was "secret and entirely discretionary."[100]

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96 The quantitative measures trigger the designation process where the percentage of unsuccessful, withdrawn, or abandoned claims from a particular country exceed a certain threshold set by the Minister, and where there are a sufficient number of total cases (again as determined by ministerial order): *IRPA*, *supra* note 3, s 109.1(2)(a). The qualitative measures trigger the designation process where the total number of cases are insufficient to trigger the quantitative process, and the Minister is of the view that in the country in question (*ibid*, s 109.1(2)(b)):
(i) there is an independent judicial system,
(ii) basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedoms are infringed, and
(iii) civil society organizations exist.

97 CIC, "Backgrounder," *supra* note 59.

98 *YZ*, *supra* note 13 at para 72.

99 *Ibid* at para 74.

100 *Ibid* at para 137.

While the designation factors may presumptively "make sense," especially in the context of Canadian jurisprudence which presumes a connection between democracy and protection, the fact that other countries use the same factors in their designation regimes is of little relevance if the factors themselves, and the way they are applied, are not adequately correlated with the increased probability of protection that they are supposed to approximate. Of particular concern for the purposes of this article is the first factor, "democratic governance." Since we do not know how the factors are applied, all that can be said is that the "democratic governance" factor is one of the nine factors employed, but given that it is the first factor, there is some suggestion that it is at least of equal importance to the other factors listed. As this article will explain in greater depth below, the inclusion of "democratic governance" as a relevant factor in the DCO regime is problematic because it is not sufficiently correlated to the increased probability of protection.

What the inclusion of "democratic governance" in the designation process means in practice is that claimants with the most expedited refugee determination process will also be the ones who face the most challenging and contentious state protection hurdles. One of the key purposes of the DCO regime is to fast-track refugee claims from certain countries. If "democratic governance" plays a key role in designation, this means that DCO claimants will frequently be from countries possessing some level of "democratic governance." To the extent that "democratic governance" is correlated with "democracy," this means that such claimants will face the highest evidentiary burden of rebutting the presumption of state protection. They will face this burden in the context of the fastest determination process; that is to say, they will be required to marshal the highest amount of evidence in the shortest period of time. They will be expected to do so even though a connection between "democracy" or "democratic governance" is not robustly supported by available social science evidence. Disturbingly, in this context it is a real possibility that persons with a genuine refugee claim will have their claims rejected, because of inadequate evidence, and face refoulement.

C. DEMOCRACY AND THE SAFE THIRD COUNTRY AGREEMENT

Finally, the *Safe Third Country Agreement* between Canada and the US, which predates the DCO regime, is also an area where democracy is relevant to refugee determinations, albeit implicitly.[101] The agreement was signed in 2002 and entered into force in 2004. Its primary function is to render ineligible, with limited exceptions, refugee claims made by persons who arrived in Canada from the US and could have made a refugee claim in the US before coming to Canada. The agreement also functions to render ineligible claims in the US where the situation is reversed. Recently, following executive orders issued by President Trump concerning immigration, there have been renewed calls to suspend or repeal the agreement.[102]

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[101] *Supra* note 17.

[102] See Smith, *supra* note 21; Thompson, *supra* note 21; Simon Lewsen, "America Is Not a 'Safe Country' for Refugees," *The Walrus* (9 February 2017), online: <https://thewalrus.ca/america-is-not-a-safe-country-for-refugees/>.

The *Safe Third Country Agreement* is authorized by section 102 of the *IRPA*, which permits the Governor in Council to designate countries as presumptively safe.[103] To date, the US is the only country that has received such a designation. Subsection 102(2) outlines the following factors that are to be considered when designating a country in this manner:

> (a) whether the country is a party to the Refugee Convention and to the Convention Against Torture;
>
> (b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;
>
> (c) its human rights record; and
>
> (d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.[104]

Subsection 102(3) requires the Governor in Council to "ensure the continuing review of factors set out in subsection (2) with respect to each designated country."[105]

It is noteworthy that unlike the DCO regime, the designation of countries as presumptively safe does not make reference to democracy or democratic governance. Instead, the factors focus on formal and functional compliance with the *Refugee Convention* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[106] a state's human rights record, and whether there is a reciprocal arrangement between Canada and the state in question. Nonetheless, the status of the US as a democracy is at least implicitly part of the reason why it was so designated. As John Manley, who was the Deputy Prime Minister of Canada at the time the agreement was signed, recently opined:

> People have misgivings about Donald Trump … OK, but it's still the United States. It's not Homs, Syria, or Mosul in Iraq. To me, if you said you were a refugee today, where would you like to be, in Iraq or Syracuse? I'm picking Syracuse.[107]

The problem with this statement is that it ignores both the individualized nature of risk and the real question of how effective protective policies and practices must be in another country before they can be deemed adequate. It also ignores the fact that even for a democratic country, a history of human rights protection does not necessarily guarantee a future of human rights protection, at least not for all individuals.

In *Canadian Council for Refugees*, these questions were litigated shortly after the *Safe Third Country Agreement* entered into force.[108] Crucially, the application was brought by public interest litigants and John Doe, an unsuccessful refugee claimant in the US who stated

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103 *IRPA*, *supra* note 3, s 102.
104 *Ibid*, s 102(2).
105 *Ibid*, s 102(3).
106 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
107 Brennan MacDonald, "Scrapping Refugee Deal With U.S. Would Lead to Thousands More Heading North, Says John Manley," *CBC News* (1 March 2017), online: <www.cbc.ca/news/politics/manley-border-third-country-deal-1.4005895>.
108 *Canadian Council for Refugees*, *supra* note 20.

he would have claimed in Canada but for the agreement. The Federal Court of Appeal rejected the application and upheld the regulations implementing the agreement as intra vires the *IRPA*.[109] The Court also refused to adjudicate the constitutionality of the agreement because John Doe failed to present himself to the Court, and the Court was unwilling to conduct the analysis on the basis of a reasonably hypothetical factual scenario.[110]

In denying the application, a majority of the Federal Court of Appeal held the Governor in Council was only required to make a good faith assessment of compliance with the factors outlined in the *IRPA*, and not a finding that there was "'actual' compliance or compliance 'in absolute terms.'"[111] A similar holding was made with respect to the Governor in Council's obligation to periodically review the factors to ensure that a country continues to be properly designated as presumptively safe.[112] In a concurring opinion, Justice Evans appeared to acknowledge that such a broad determination of safety could leave open the possibility that the US might, in rare or unique circumstances, force refoulement upon a person who had been directed back to the US from Canada pursuant to the agreement. The answer to this situation according to Justice Evans was to prohibit the return of a claimant to the US, "unless the United States' authorities provided an assurance that the claimant would not be removed until the eligibility decision had been made."[113] But this solution itself assumes that eligibility determinations are the only problematic components of the refugee determination process in the US.

In fact, numerous studies have shown there are important differences in recognition rates, the treatment of gender-based claims, and the provision of state-funded legal counsel, which suggest that the refugee determination policies and practices of the two countries are not equivalent.[114] More recent studies demonstrate how the *Safe Third Country Agreement* functions to exclude refugee claimants in a way that can result in indirect refoulement.[115] Most importantly, all of these critiques were made *before* the recent presidential executive orders and revised executive orders concerning immigration.[116]

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109 *Ibid* at para 82.

110 *Ibid* at paras 102–104.

111 *Ibid* at para 78.

112 *Ibid* at para 92.

113 *Ibid* at para 125.

114 Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement" (2005) 36:2 Colum HRLR 365; Sonia Akibo-Betts, "The Canada-U.S. Safe Third Country Agreement: Why the U.S. Is Not a Safe Haven for Refugee Women Asserting Gender-Based Asylum Claims" (2005) 19 Windsor Rev Legal Soc Issues 105; Andrew F Moore, "Unsafe in America: A Review of the U.S.-Canada Safe Third Country Agreement" (2007) 47:2 Santa Clara L Rev 201.

115 Efrat Arbel, "Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement Between Canada and the United States" (2013) 25:1 Intl J Refugee L 65; Rachel Gonzalez Settlage, "Indirect Refoulement: Challenging Canada's Participation in the Canada-United States Safe Third Country Agreement" (2012) 30:1 Wis Intl LJ 142.

116 US, President, *Executive Order Protecting the Nation From Foreign Terrorist Entry Into the United States* (Washington, DC: Office of the Press Secretary, 2017), online: <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>; US, President, *Executive Order: Enhancing Public Safety in the Interior of the United States* (Washington, DC: Office of the Press Secretary, 2017), online: <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>; US, President, *Executive Order: Border Security and Immigration Enforcement Improvements* (Washington, DC: Office of the Press Secretary, 2017), online: <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>; US, President, *Executive Order Protecting the Nation From Foreign Terrorist Entry Into the United States* (Washington, DC: Office of the Press Secretary, 2017), online: <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states> [EO (6 March 2017)].

A thorough review of these executive orders is beyond the scope of this article. It is enough to note that the executive orders ban entry to the US because of a person's nationality and permit expedited removals processes, and that both of these actions have the possibility to result in the removal of a refugee before their claim can be properly adjudicated. Initial commentary by Hathaway and others suggests that the orders, particularly the "travel ban" or "Muslim ban," violate international law, specifically the *Refugee Convention* and *Refugee Protocol*.[117] Indeed, shortly after the travel ban was signed, a US District Court in Washington issued a temporary restraining order on a nationwide basis against parts of the travel ban.[118] But the other executive orders remain in force. Trump recently signed a revised travel ban that retained many of the same problematic aspects as the first.[119] A temporary restraining order was quickly granted,[120] and the US Court of Appeals for the Fourth Circuit, in a 10-3 ruling, recently upheld an indefinite block of the executive order.[121] The majority noted the executive order's "text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination."[122] The US Supreme Court has agreed to hear the government's appeal, and in an unanimous decision partially overturned the temporary injunctions put in place by lower courts pending appeal.[123]

Even if the travel ban, revised or otherwise, is ultimately struck down, the other executive orders persist. There is a strong possibility that some persons were removed from the US in the intervening periods before the judicial orders took effect. There is also the question of what signals these executive orders send to US Customs and Border Protection officers, or other lower level officials in the executive branch who are tasked with navigating tensions between superior instructions and judicial orders. In this context, the US Citizenship and Immigration Services Asylum Division recently issued a revised guideline for asylum officers who are tasked with determining whether a refugee claim is sufficiently credible to allow it to be forwarded to an immigration judge.[124] The revised guideline removes a presumption in favour of finding a credible basis for the claim and permits officers to rely on the demeanour, candour, or responsiveness of an asylum seeker.[125]

Given these recent changes in the US, it is unsurprising that a new challenge to the *Safe Third Country Agreement* was recently instigated.[126] While the pleadings are confidential, the challenge will likely proceed on both administrative and constitutional grounds. Administratively, the argument will be that the Governor in Council's ongoing review of the compliance factors was inadequate and unreasonable given the recent executive orders in the

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117 See e.g. James C Hathaway, "Executive (Dis)order and Refugees — The Trump Policy's Blindness to International Law" (1 February 2017), *Just Security* (blog), online: <https://www.justsecurity.org/37113/executive-disorder-refugees-the-trump-policys-blindness-international-law/>; Meg Satterthwaite & Alexandra Zetes, "Explainer on the Legal Obligation Not to Return Refugees and How Trump's Exec Order Breaks It" (4 February 2017), *Just Security* (blog), online: <www.justsecurity.org/37305/explainer-legal-obligation-return-refugees-trumps-executive-order-breaks/>.

118 *State of Washington v Trump*, 2017 WL 462040 (Wash Dist Ct).

119 EO (6 March 2017), *supra* note 116.

120 *Hawaii v Trump*, 2017 WL 1011673 (Hawaii Dist Ct).

121 *International Refugee Assistance Project v Trump*, 857 F (3d) 554 (4th Cir 2017).

122 *Ibid* at 572.

123 *Trump v International Refugee Assistance Project*, 582 US ___ (2017).

124 Tal Kopan, "Trump Admin Quietly Made Asylum More Difficult in the US," *CNN* (8 March 2017), online: <www.cnn.com/2017/03/08/politics/trump-immigration-crackdown-asylum/index.html>.

125 *Ibid*.

126 Canadian Council for Refugees, Media Release, "Legal Challenge of Safe Third Country Agreement Launched" (5 July 2017), online: CCR <ccrweb.ca/en/media/legal-challenge-safe-third-country>.

US. Constitutionally, the argument will be that directing a refugee claimant back to the US, given the current climate and possibility for removal without proper assessment of their claim, amounts to a violation of their section 7 *Charter* rights. Importantly, a constitutional challenge is less likely to suffer from the same prematurity deficit that occurred in *Canadian Council for Refugees*, because the influx of persons crossing the US-Canada border creates the possibility of a real claimant presenting at a port of entry where the *Safe Third Country Agreement* applies. Indeed, one of the applicants in the recently filed challenge is an asylum seeker who entered Canada at a border crossing and was detained by the Canada Border Services Agency, who then attempted to direct her back to the US.[127] Moreover, the practical consequences of maintaining the *Safe Third Country Agreement* have now been documented. Asylum seekers have suffered frostbite resulting in amputation while crossing the US-Canada border in the middle of winter.[128] Another asylum seeker died while attempting the journey.[129] This makes the real consequences of maintaining the *Safe Third Country Agreement* much less speculative than was the case in *Canadian Council for Refugees*.

For the purposes of this article, the important aspect of the *Safe Third Country Agreement* is not its alleged illegality, but rather what it exemplifies for how democracy is used in the Canadian refugee determination process. While the factors used to designate a country as safe do not include democracy or democratic governance, the reputation of the US does seem to have been a factor in its designation. It also appears to have played a role in the Federal Court of Appeal permitting a good faith compliance standard to be used in reviewing the designation, as opposed to an actual or likelihood of compliance standard. This represents another troubling example of a shift away from individualized assessments in the Canadian refugee determination process. Most importantly, in the context of the recent US executive orders on immigration, the *Safe Third Country Agreement* provides a stark qualitative example of the folly of using a state's democratic reputation and human rights record to presume that protection will always be provided to refugee claimants. The US is a constitutional democracy which Canadian courts have been willing to recognize as presumptively safe on numerous occasions. If such a country can so quickly slip into a political and legal environment that is overtly hostile to the *Refugee Convention* and *Refugee Protocol*, it begs the question of whether democracy can be a proxy for human rights protection.

III. JUDICIAL NOTICE, VERTICAL STARE DECISIS, AND THE "DEMOCRACY SPECTRUM"

A. FROM NOTICE TO PRECEDENT AND BEYOND

One of the most remarkable aspects of *Kadenko* and the DCO regime is the complete lack of evidence presented to support the proposition that willingness and ability to protect human rights is correlated with democracy. The Court of Appeal in *Kadenko* took judicial notice of

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127 *Ibid*.

128 Austin Grabish, "Frostbitten Refugee Will Lose Fingers, Toe After 7-Hour Trek to Cross U.S.-Canada Border," *CBC News* (11 January 2017), online: <www.cbc.ca/news/canada/manitoba/refugees-frostbite-manitoba-1.3930146>.

129 Karen Pauls & Kelly Malone, "'It's Just Too Dangerous': Death Near the Border Was Inevitable, U.S. Patrol Agent Says," *CBC News* (1 June 2017), online: <www.cbc.ca/news/canada/manitoba/us-border-patrol-on-asylum-seeker-death-1.4140685>.

the correlation.[130] The government in creating and defending the DCO regime has not provided anything more than the type of presumptive reliance employed by the Court. Similarly, there has been no public commentary about how the Governor in Council has analyzed the *Safe Third Country Agreement* designation factors in the context of executive orders that are arguably in non-compliance with the *Refugee Convention* and *Refugee Protocol*.

It should be recalled that *Kadenko* was a very brief oral decision from the bench. The Court of Appeal was responding to the following question that had been certified by the motions judge:

> Where there has not been a complete breakdown of the governmental apparatus and where a State has political and judicial institutions capable of protecting its citizens, does the refusal by certain police officers to take action suffice to establish that the State in question is unable or unwilling to protect its nationals?[131]

The Court could have limited itself to answering this question about the quality of evidence needed to rebut the presumption of state protection, but it instead embarked on a more expansive and insouciant treatment of the connection between democracy and protection. The Court ignored its own advice of making significant decisions in the absence of an appropriate factual record. This would be less problematic if subsequent decisions of the Court had clarified or read narrowly the *obiter* in *Kadenko*, but the opposite has transpired and *Kadenko* continues to be read on a more expansive basis. Given that the "social fact"[132] taken notice of in *Kadenko* — the purported link between level of democracy and a state's willingness and ability to protect its citizens — was dispositive of the case, it is unlikely such notice would be consistent with the Supreme Court of Canada's current jurisprudence on judicial notice.[133]

Once judicial notice is taken by an appellate court, however, it becomes a proposition of law and is binding on lower courts. In his work on judicial notice, Kenneth Culp Davis recognizes that "[c]ourts and agencies often resolve questions of fact by discovering or inventing propositions of law which answer the questions of fact."[134] This occurs through an iterative process of observation and ultimately becomes precedent, "so that questions of fact today are resolved by evidence or judicial notice in yesterday's cases."[135] *Kadenko* is an

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130 Liew, *supra* note 8 at 208–209.

131 *Kadenko*, *supra* note 33 at 533.

132 See John Monahan & Laurens Walker, "Judicial Use of Social Science Research" (1991) 15:6 L & Human Behavior 571; Laurens Walker & John Monahan, "Social Frameworks: A New Use of Social Science in Law" (1987) 73:3 Va L Rev 559; John Monahan & Laurens Walker, "Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law" (1986) 134:3 U Pa L Rev 477 (discussing the uses of social science in litigation, especially the distinction between social science as providing a framework for understanding the law, and social science as providing authority for a particular legal proposition).

133 Liew, *supra* note 8 at 213–15. For the Supreme Court of Canada's most recent commentary on judicial notice, see *R v Find*, 2001 SCC 32, [2001] 1 SCR 863 (holding that judicial notice may only be taken of "facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy" at para 48). See also *R v Spence*, 2005 SCC 71, [2005] 3 SCR 458 [*Spence*] (holding that a more stringent approach to judicial notice will be applied where the fact taken notice of is an "adjudicative fact" or a "legislative … or social fact" that is dispositive of the case at paras 61–63).

134 Kenneth Culp Davis, "Judicial Notice" (1955) 55:7 Colum L Rev 945 at 966.

135 *Ibid*.

example of this iterative process. Now, when the IRB and courts apply *Kadenko* they are following stare decisis, not taking judicial notice.[136] Moreover, it is not unreasonable for government to construct legislation based on binding judicial precedent; therefore, some legal justification can be found for the DCO regime within the *Kadenko* decision.

While precedent and stare decisis are the bedrock of the common law legal system, neither require that jurisprudence be etched in stone and unchanging. Lower courts may depart from a higher court's decision, either because the case at hand is distinguishable from that of the precedent or because the precedent itself is incomplete or needs to be changed. In *Canada (Attorney General) v. Bedford*, the Supreme Court of Canada made it clear that a lower court is not bound by precedent where a new legal issue is raised, or where there has been a significant "change in the circumstances or evidence that fundamentally shifts the parameters of the debate."[137]

Parts of the DCO regime have already been struck down by a lower court.[138] For the *Safe Third Country Agreement*, it is possible that a lower court might look to the recent events in the US, including the executive orders, and conclude there are significant changes that cast doubt on the faith that can be placed in presumed American compliance with the *Refugee Convention*. It is more likely, however, that future challenges to the DCO regime and the *Safe Third Country Agreement* will be based on *Charter* grounds. There has yet to be a challenge brought against either regime where the courts found the record adequate to undertake a constitutional analysis. Accordingly, precedent does not stand in the way of challenging either regime on a constitutional basis, were a party to be able to marshal a record that was more acceptable to the court.

In the case of *Kadenko*, recent jurisprudence suggests that some movement has been made toward a more nuanced application of the connection between democracy and protection. This amounts to a softening of the proposition the case stands for, rather than a reassessment based on a new legal issue being raised or a significant change of circumstances that shifts the parameters of the debate.

B. THE CHALLENGE OF THE "DEMOCRACY SPECTRUM"

Kadenko is frequently cited by the IRB in claims involving state protection issues and claimants from democratic states. This is especially the case with respect to claims from Mexico and other countries that are democratic but produce significant numbers of refugee claimants.

In 2008, the Deputy Chairperson of the Refugee Protection Division of the IRB identified a decision of the IRB, involving state protection issues in Mexico, as a "persuasive

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136 Liew, *supra* note 8 at 209 (referring to the "licence" given to the IRB and Federal Court by the Federal Court of Appeal's decision in *Kadenko*).

137 2013 SCC 72, [2013] 3 SCR 1101 at para 42 [*Bedford*].

138 See *supra* note 14.

decision."[139] This persuasive decision has now been withdrawn, but its state protection analysis remains relevant to this discussion. What is important about this particular persuasive decision is that it relied on *Kadenko* for the proposition that a willingness and ability to protect is connected with the level of democracy in the state in question. The IRB went on to conclude that Mexico is a democracy that is making "serious efforts" to combat corruption and to provide adequate protection to its citizens.[140] Accordingly, claimants from Mexico face a significant hurdle to overcome in rebutting the presumption of state protection. This has typified the reasoning in many IRB decisions on state protection that are reviewed by the Federal Court.

The treatment of *Kadenko* at the Federal Court is influenced by the fact that it is primarily a judicial review court and not a court of appeal; refugee decisions in Canada are subject to judicial review only, not an appeal *de novo*. Unless the applicable standard of review is correctness, a judicial review court is not permitted to substitute its opinion for that of the administrative decision-maker.[141] In refugee law, the question of whether a claimant has failed to rebut the presumption of state protection is a question of mixed fact and law reviewable on the reasonableness standard.[142] Therefore, the question before the Federal Court is not whether state protection exists for an individual refugee claimant, but whether the IRB reached its conclusion on this question in a reasonable manner.

However, a review of the Federal Court's jurisprudence on state protection, particularly in the context of Mexico, suggests that some judges have serious concerns with applying *Kadenko* in the unquestioning fashion normally applied by the IRB.[143] In *Avila v. Canada (Minister of Citizenship and Immigration)*, the Court held that state protection determinations were *sui generis*, meaning that the finding of state protection in one claim from Mexico cannot be applied unquestioningly to another claim from Mexico, no matter how persuasive the IRB's finding in the first case may be.[144] Nonetheless, in most applications for judicial review where state protection is at issue, each side marshals a series of cases where the Federal Court either upheld or overturned a state protection finding concerning Mexico (depending on the advocacy point the party wishes to make).

A number of decisions have reiterated that it is not enough to focus solely on the democratic nature of a state when assessing the availability of state protection, and that it is also necessary to focus on the specific facts and contextual circumstances in which an

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139 Immigration and Refugee Board of Canada, "Persuasive Decisions," online: <www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/Persuas/Pages/index.aspx>. According to the IRB, persuasive "decisions are well written, provide clear, complete and concise reasons with respect to the particular element that is considered to have persuasive value, and consider all of the relevant issues in a case" (*ibid*). While individual members of the IRB are not required to follow a persuasive decision, they are encouraged to do so on the basis that this will ensure consistency and efficiency in initial decisions.

140 *Persuasive Decision TA6-07453* (26 November 2007), online: IRB <www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/persuas/Pages/TA607453.aspx>.

141 See e.g. *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708.

142 *Hinzman*, *supra* note 36 at para 38.

143 In the review that follows, discussion of the pre-2010 cases is heavily indebted to Liew, *supra* note 8, whereas the post-2010 cases were identified by the author.

144 2006 FC 359, 295 FTR 35 at para 28. See also *Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 503, 2010 FC 503 (CanLII) at para 38.

individual refugee claim arises.[145] The Federal Court has recognized that "even in democratic countries, certain individuals can be above the law."[146] The Court has also made it clear that "[s]tate protection cannot be determined in a vacuum."[147] Until very recently, what the Court has not done is question the utility of beginning a state protection analysis with an assessment of a state's democratic credentials.

In *Sow*, a case dealing with the availability of state protection in Mauritania rather than Mexico, the Federal Court held that "[d]emocracy alone does not ensure effective state protection" and that the focus should be on the quality of the institutions available to provide protection.[148] The Court then proceeded to discuss what democracy means in the context of state protection analysis. The Court focused on aspects of advanced democracies that tend to provide state protection, such as an independent judiciary, the rule of law, and robust civil and political rights.[149] Notably, these aspects are now part of the DCO designation guidelines. The Court concluded that it was these institutions or rights, not necessarily the right to vote, "that mitigate against the very risks that lie at the core of the Convention on the Protection of Refugees."[150] The Court concluded:

> It is, therefore, insufficient to point to the existence of free and fair elections, conclude that a country is a new democracy, and then fully shift the onus to the applicant to displace the presumption. The presumption is stronger in states with strong democratic institutions and traditions. It is weaker in others. The equation is nuanced and it requires calibration.[151]

In effect, the Court seized on the words "in a way"[152] in the *Kadenko* decision to clarify that there is indeed a connection between democracy and protection, but the way that this connection transpires is far more complicated and nuanced than merely pointing to elections. Nonetheless, the Court in *Sow* maintained some reliance on the importance of democracy as a relevant factor or starting point.

The Federal Court has continued to build and elaborate upon *Sow*. In *Onodi v. Canada (Minister of Citizenship and Immigration)*, a claim arising from Hungary, the Court held that "the mere existence of free and fair elections does not indicate that state protection is present. The Board must consider in addition, the robustness of the institutions which constitute a democratic state, including the judiciary, defence bar and the professionalism of the police force."[153] The Court held that the IRB had reasonably placed Hungary as a "functioning democracy" on the democracy spectrum "not just because it has elections, but also because of strong government institutions."[154] In another Hungarian case, *Tar v. Canada (Minister of Citizenship and Immigration)*, the Court reached the opposite conclusion and found that

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145 See e.g. *Garcia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 79, [2007] 4 FCR 385; *Gonzalez Torres v Canada (Citizenship and Immigration)*, 2010 FC 234, [2011] 2 FCR 480 [*Torres*].

146 *Torres*, *ibid* at para 39.

147 *Avila Ortega v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1057, 2009 FC 1057 (CanLII) at para 24 [*Ortega*].

148 *Supra* note 10 at para 11.

149 *Ibid* at paras 12–13.

150 *Ibid* at para 13.

151 *Ibid* at para 20.

152 *Kadenko*, *supra* note 33 at 534.

153 2012 FC 1191, 2012 FC 1191 (CanLII) at para 10 [*Onodi*].

154 *Ibid* at para 11.

the IRB had relied "too heavily on the fact of Hungary's being a nominal 'democracy' instead of looking at what form democracy actually takes in Hungary and whether the assumptions it carries about state protection for minorities such as the Roma can be equated with the international norms that are applicable to refugee law."[155] In *Kotai v. Canada (Minister of Citizenship and Immigration)*, the Court found the IRB had appropriately acknowledged the "democracy spectrum" and conducted a reasonable state protection analysis in that context, but the Court did not comment on where the country in question (Hungary) fell on that spectrum.[156] In *Gao v. Canada (Minister of Citizenship and Immigration)*, the Court noted that the country in question (Panama) "is a democracy with a functioning police and judicial system."[157] In *Tkachuk v. Canada (Minister of Citizenship and Immigration)*, the Court observed that the IRB had failed to place the country in question (Ukraine) on the "democracy spectrum."[158] In *L.F. v. Canada (Minister of Citizenship and Immigration)*, the Court held that the Refugee Appeal Division had properly noted South Africa was a "functioning democracy," and had then proceeded to reasonably evaluate its protective institutions.[159]

By contrast, in *Alassouli v. Canada (Minister of Citizenship and Immigration)*, Justice de Montigny (as he then was) expressed serious misgivings with the use of democracy in state protection analysis.[160] There, the applicant attempted to rely on *Kadenko* to support the argument that there should be a reduced presumption of state protection where the country in question was a monarchy and therefore non-democratic. Justice de Montigny rejected this argument, noting that monarchies can also have functioning protective institutions, and went on to state:

> In other words, democracy should not be used as a proxy for state protection. There is obviously a strong relationship between the citizens' participation in the institutions of the state on the one hand, and the effectiveness and fairness of the state's apparatus to protect them. There is no automatic equation between the two, and an assessment of state protection must always rest on a more nuanced analysis, taking into account the particular circumstances of a claimant, as well as the state involved.[161]

But the Court did not call into question the use of the "democracy spectrum" as a presumptive starting point or as part of the state protection analysis. Thus, the decision in *Alassouli* appears to be somewhat anomalous, confined to its narrow facts, and not indicative of the Federal Court's jurisprudence on this issue.

The precise impact of this jurisprudence on the IRB is difficult to ascertain as only a small sample of its decisions are publicly available. But a review of available cases suggests that the IRB continues to rely on the existence of free and fair elections as part of its analysis, even if it also focuses on where a country falls on the "democracy spectrum" as well as

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155 2014 FC 767, 29 Imm LR (4th) 90 at para 78 [*Tar*].
156 2013 FC 693, 2013 FC 693 (CanLII) at para 37.
157 2014 FC 202, 2014 FC 202 (CanLII) at para 41.
158 2015 FC 672, 481 FTR 286 at para 56.
159 2016 FC 534, 2016 FC 534 (CanLII) at para 58.
160 2011 FC 998, 2011 FC 998 (CanLII) at paras 39–42 [*Alassouli*].
161 *Ibid* at para 42.

considerations of institutional effectiveness. The case of *X. (Re)* provides one representative example where the IRB states:

> A claimant's burden of proof is directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all courses of action open to them. In a *functioning democracy*, a claimant will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status. *The documentary evidence before the RAD indicates that Colombia is a democracy, and there are free and fair elections. There is a relatively independent and impartial judiciary.* Therefore, in countries such as Colombia, the claimant must do more than merely show that he went to see members of the police force and that those efforts were unsuccessful. A claimant must show that he has taken all reasonable steps in the circumstances to seek protection, taking into account the context of the country of origin, the steps taken and the claimant's interactions with the authorities.[162]

Moreover, noting up the *Kadenko* decision using the CanLII database shows that the IRB has a marked discrepancy in its engagement with the foregoing cases. In the past three years, the IRB cited *Sow* four times, *Onodi* zero times, and *Tar* zero times, whereas it cited *Kadenko* 69 times and *Hinzman* 43 times.[163] This suggests that the IRB is less influenced by the Federal Court's more nuanced approach to democracy than it is by the Federal Court of Appeal's focus on level of democracy at the state or institutional level.

Notwithstanding the IRB's uptake, the clarification provided by some justices of the Federal Court — that the focus in state protection analysis should be on democratic institutions rather than democratic elections — is a welcome change. What the Court failed to address in *Sow* and the cases that have followed is how the requisite nuance and calibration would be provided when placing a given country on the "democracy spectrum."

A review of the Federal Court's jurisprudence suggests that it can be quite difficult to place a country on the "democracy spectrum."[164] For example, in the context of Mexico, the Court has easily reached the conclusion that Mexico can be defined by what it is not. According to the Court, Mexico is not a developed democracy on the level of the US or Israel (the two countries at issue in *Satiacum* and *Kadenko*, respectively), though the Court has not defined what constitutes a "developed democracy."[165] The Court has been less able to state where Mexico actually falls on the "democracy spectrum." Mexico has been labelled a "developing democracy,"[166] a "functioning democracy,"[167] and an "emerging, not a full fledged, democracy."[168] None of these terms were defined by the Court in their respective cases. No attempt has yet been made to incorporate empirical studies from other disciplines that quantify the level of democracy for a particular country. It remains to be seen whether

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162 2015 CanLII 31934 at para 20 (IRB) [footnotes omitted] [emphasis added].
163 Current to 7 June 2017.
164 Liew, *supra* note 8 at 217–18.
165 *Rodriguez Capitaine v Canada (Minister of Citizenship and Immigration)*, 2008 FC 98, 2008 FC 98 (CanLII) at para 23.
166 *De Leon v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1307, 68 Imm LR (3d) 53 at para 28.
167 *Suarez Velazquez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 532, 2006 FC 532 (CanLII) at para 6.
168 *Villa v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1229, 75 Imm LR (3d) 215 at para 14.

the Court can develop an intelligible and justified process for placing countries on a democracy spectrum, and how it can link this placement to a coherent test for what constitutes adequate evidence sufficient to rebut the presumption of state protection.

Unlike the Federal Court's jurisprudence, the DCO designation process is secretive and discretionary. As a result, we do not know whether the analysis of the designation factors, especially the factor of "democratic governance," is applied with more, less, or the same degree of nuance that the Court has suggested is required for state protection analysis in *Sow*. We do not know what, if any, effort is made to quantify the level of democratic governance in a country under consideration for designation. Similarly, the general public is not privy to Cabinet discussions surrounding the initial labelling of the US as a "safe third country," nor to more recent discussions (presuming they occurred) about whether this label continues to be warranted given recent events in the US. The recent public statements of John Manley, who was Deputy Prime Minister of Canada at the time the *Safe Third Country Agreement* was signed, suggest democracy was a relevant factor in the government's decision-making, but again, the extent to which the level of democracy was assessed is not information available in the public realm.[169] As will be seen below, such quantification is no easy task even if attempts were to be made.

IV. MEASURING AND CONNECTING DEMOCRACY TO PROTECTION

In her commentary on the problem with defining democracy, Liew provides an introductory review of qualitative political science literature examining the boundaries of democracy, as well as a very brief discussion of one article critiquing quantitative measurements of democracy.[170] In this part, the article builds on Liew's work by providing a much more comprehensive and detailed review of the different ways that democracy is *quantitatively* measured, as well as a review of the empirical research examining whether democracy is connected to human rights protection.

A. MEASURING DEMOCRACY

If a country is to be placed on a "democracy spectrum" or if a country's level of "democratic governance" is to be considered as part of the DCO regime, then it is essential that the level of democracy be measured in a way that allows for comparative analysis with other countries. Otherwise, all a court may be able to say is that country X is not as democratic as a country like the US, but is more democratic than a country like China. This does not provide the calibration necessary to even begin applying *Kadenko* in a meaningful manner. That case called for a presumption of protection that is "in a way, directly proportional to the level of democracy in the state in question."[171] Proportionality, in this sense, depends on the capacity to measure the "level of democracy." If the DCO regime calls for the creation of a designation process that links protective factors with states that do not normally create refugees, then it is necessary to be able to adequately quantify or qualify the

169 MacDonald, *supra* note 107.
170 Liew, *supra* note 8 at 215–17.
171 *Kadenko*, *supra* note 33 at 534.

level of those factors so as to ensure that a country being designated is, in fact, one that is presumptively safer than non-designated countries.

Much has been written on the process of measuring democracy on a comparative basis. Suffice it to say that measuring democracy is no easy task.[172] There is significant debate within the political science literature on how to measure democracy and the empirical robustness of these measures. As one political scientist explains, "[d]emocracy is probably the most complex concept in political science. It has not been and may never be measured in all its many-faceted, multidimensional glory."[173] Nonetheless, various groups have attempted to develop reliable measures of democracy and democratic governance.

One of the best known indices of democracy is the Polity IV Project.[174] The Polity IV Project is based on the work of Harry Eckstein and Ted Gurr, who examined the characteristics of autocratic and democratic decision-makers.[175] The database attempts to measure four clusters of data concerning (1) how rulers and the ruled attempt to influence each other; (2) the control a ruler has over the ruled; (3) the manner in which a ruler's decision is actually made; and (4) how rulers are created. From these clusters, the Polity IV Project creates a composite score for each country and then classifies each country on a spectrum between full democracy and full autocracy, with partial democracy and partial autocracy as the in-between categories. On this analysis, Hungary, Mexico, Colombia, and Pakistan would be classified as full democracies, Nigeria as a partial democracy, and China as a full autocracy.[176] No classification was available for Haiti.[177]

Another popular ranking of democracy is the Freedom House index that measures civil and political rights around the world, including such factors as the presence of free and fair elections.[178] This index is based on the work of Joseph Ryan[179] and uses a survey approach to create composite scores for civil liberties and political rights.[180] From here, Freedom House classifies countries as not free, partly free, and free.[181] Hungary is classified as free, Mexico, Haiti, Colombia, Nigeria, and Pakistan as partly free, and China as not free.[182]

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172 See Gerardo L Munck, *Measuring Democracy: A Bridge Between Scholarship and Politics* (Baltimore: Johns Hopkins University Press, 2009).

173 Michael Coppedge, "Democracy and Dimensions: Comments on Munck and Verkuilen" (2002) 35:1 Comparative Political Studies 35 at 35.

174 Monty G Marshall, "Polity IV Project: Political Regime Characteristics and Transitions, 1800–2013," online: <www.systemicpeace.org/polity/polity4.htm>.

175 Harry Eckstein & Ted Robert Gurr, *Patterns of Authority: A Structural Basis for Political Inquiry* (New York: John Wiley & Sons, 1975).

176 Monty G Marshall & Benjamin R Cole, *Global Report 2014: Conflict, Governance, and State Fragility* (Vienna, Va: Center for Systemic Peace, 2014) at 45–51, online: <www.systemicpeace.org/vlibrary/GlobalReport2014.pdf>.

177 *Ibid*.

178 See Freedom House, online: <https://www.freedomhouse.org>.

179 Joseph E Ryan, "Survey Methodology" (1995) 26:1 Freedom Rev 10.

180 Freedom House, *Methodology: Freedom in the World 2016*, online: <https://freedomhouse.org/report/freedom-world-2016/methodology>.

181 Arch Puddington & Tyler Roylance, "Overview Essay: Anxious Dictators, Wavering Democracies," online: <https://freedomhouse.org/report/freedom-world-2016/overview-essay-anxious-dictators-wavering-democracies>.

182 Freedom House, "Freedom in the World 2016: Table of Country Scores," online: <https://freedomhouse.org/report/freedom-world-2016/table-scores>.

One final democracy measurement is the Democracy Index developed by the Economist Intelligence Unit.[183] The Index uses a sixty question survey that touches on a country's electoral process and pluralism, functioning of government, political participation, political culture, and civil liberties. Survey questions can be answered with either a binary 0 or 1, and in some cases a 0, 0.5, or 1. Answers to the survey are provided by an undisclosed number of experts whose identity and qualifications are also undisclosed. Some answers to the survey are obtained from publicly available information. Composite scores are then prepared and countries are grouped into one of four categories: full democracies, flawed democracies, hybrid regimes, and authoritarian regimes.[184] Hungary, Mexico, and Colombia are classified as flawed democracies.[185] Nigeria and Pakistan are classified as hybrid regimes.[186] Haiti and China are classified as authoritarian regimes.[187]

There are many other indices,[188] but a review of these is beyond the scope of this article. What is relevant to this article is the degree to which these indices have been critiqued. Even if these indices were reliable for the purposes of adjudicating life and death decisions in the refugee context or for developing a principled and transparent DCO regime, the Polity IV, Freedom House index, and Democracy Index produce only four, three, and four categories of democracy, respectively. The Polity IV index places Mexico in the same regime type as the US. The Freedom House index places Mexico somewhere in between the US and China. The Democracy Index also places Mexico between the US and China but in the same category as, for example, Israel, France, and Sri Lanka. In short, the best indices do not provide much more nuance than the Federal Court has already been able to obtain through an assessment of the qualitative documentary evidence. Leaving this categorical imprecision aside, Gerardo Munck and Jay Verkuilen argue that empirical attempts to measure democracy suffer from three separate challenges: conceptualization, measurement, and aggregation.[189]

The problem of conceptualization results from the fact that there is no uniform agreement on what constituent elements should form part of a metric for assessing the level of democracy.[190] There are many different conceptions of which elements are crucial to democracy and which are merely byproducts of democracy.[191]

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183 The Economist Intelligence Unit, "Democracy Index 2015: Democracy in an Age of Anxiety," online: <https://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex2015>.

184 *Ibid*.

185 *Ibid* at 5.

186 *Ibid* at 7.

187 *Ibid*.

188 See e.g. Mike Alvarez et al, "Classifying Political Regimes" (1996) 31:2 Studies in Comparative Intl Development 3; Zehra F Arat, *Democracy and Human Rights in Developing Countries* (Boulder: Lynne Rienner, 1991); Kenneth Bollen, "Liberal Democracy: Validity and Method Factors in Cross-National Measures" (1993) 37:4 American J Political Science 1207; Michael Coppedge & Wolfgang H Reinicke, "Measuring Polyarchy" in Alex Inkeles, ed, *On Measuring Democracy: Its Consequences and Concomitants* (New Brunswick, NJ: Transaction, 1991) 47; Mark J Gasiorowski, "An Overview of the Political Regime Change Dataset" (1996) 29:4 Comparative Political Studies 469; Axel Hadenius, *Democracy and Development* (Cambridge: Cambridge University Press, 1992); Tatu Vanhanen, "A New Dataset for Measuring Democracy, 1810-1998" (2000) 37:2 J Peace Research 251.

189 Gerardo L Munck & Jay Verkuilen, "Conceptualizing and Measuring Democracy: Evaluating Alternative Indices" (2002) 35:1 Comparative Political Studies 5 at 7–8.

190 See Kenneth A Bollen, "Political Democracy: Conceptual and Measurement Traps" (1990) 25:1 Studies in Comparative Intl Development 7.

191 Michael Coppedge et al, "Conceptualizing and Measuring Democracy: A New Approach" (2011) 9:2 Perspectives on Politics 247 at 248–49.

The problem of measurement arises from the difficulty of identifying indicators that actually measure that which they are intended to measure.[192] Moreover, many developing countries lack the resources to properly staff and operate national statistics units, leaving all but the most common macroeconomic statistics to be less reliable in these countries.[193] In countries that experience prolonged internal or external conflict, events that frequently precipitate large-scale refugee movements, the ability to collect data may diminish. It may also be the case that indicators that are relevant to measuring democracy in one region may not be as useful in another region. For example, Matthijs Bogaards found that electoral outcomes, which are commonly used in many democracy calculations, were not consistently related to democracy in the African context.[194]

The problem of aggregation deals with the difficulty of determining at which level to assess the data. For example, Freedom House breaks their data down into two composite scores that are then combined to form one of three possible regime types. Polity IV uses a single composite score and categorizes countries into four regime types. The Democracy Index aggregates five different composite scores to form a single index that is then categorized into four regime types. All indices could include a larger number of categories, but the problem of aggregation arises in determining whether such specificity can actually be ascertained from the data; that is, if the level of democracy is scored out of 100, can it really be said that a country with a score of 95 is any different than a country with a score of 100?

Munck and Verkuilen conclude that the problems with measuring democracy mean that causal assessments that attempt to link democracy with a particular occurrence — for example, a decrease in human rights abuses — must be approached with caution.[195] There is not a generally accepted standard for measuring democracy, and current measures, far from being irrefutable, are highly debated in the literature. This suggests that both the *Kadenko* decision and the Federal Court's subsequent "democracy spectrum" jurisprudence should be approached with some suspicion and possibly re-evaluated. Worse, for the DCO regime, the designation factors that are currently used can be found interspersed in an inconsistent manner throughout the different indices. There appears to be no agreement on what weight should be given to particular factors such as the protection of civil liberties, let alone what method should be used to measure each factor.

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192 See Robert Adcock & David Collier, "Measurement Validity: A Shared Standard for Qualitative and Quantitative Research" (2001) 95:3 American Political Science Rev 529; Kenneth A Bollen, *Structural Equations With Latent Variables* (New York: John Wiley & Sons, 1989); Edward G Carmines & Richard A Zeller, *Reliability and Validity Assessment* (Beverly Hills: SAGE, 1979).

193 See Anthony B Atkinson & Andrea Brandolini, "Promise and Pitfalls in the Use of 'Secondary' Data-Sets: Income Inequality in OECD Countries as a Case Study" (2001) 39:3 J Economic Literature 771; Kirk Bowman, Fabrice Lehoucq & James Mahoney, "Measuring Political Democracy: Case Expertise, Data Adequacy, and Central America" (2005) 38:8 Comparative Political Studies 939.

194 Matthijs Bogaards, "Measuring Democracy Through Election Outcomes: A Critique With African Data" (2007) 40:10 Comparative Political Studies 1211 at 1213.

195 Munck & Verkuilen, *supra* note 189 at 27–31.

B. A TENUOUS LINK BETWEEN DEMOCRACY AND HUMAN RIGHTS

Even if one presumes that the level of democracy in a given state can be easily ascertained, there is still the second inherent presumption of *Kadenko* — that the level of democracy is directly correlated with a state's willingness and ability to protect its citizens. For the DCO regime, the presumption is similar — that the designation factors are reliably linked to conditions within countries that normally function to prevent the creation of refugees. Even if the analysis moves beyond the mere existence of elections to democratic institutions, both the Court's jurisprudence and Parliament's designation regime make a dispositive presumption between democracy and protection, seemingly without any evidence-based rationale.

Early political science studies did find such a connection. For example, Steven Poe and C. Neal Tate found that democracy was strongly correlated with a decrease in state-based repression of human rights to personal integrity.[196] Likewise, Sabine Zanger found that changes to regime type, from anocracy to democracy decreased life integrity violations during the transition period.[197] Changes from democracy to anocracy were found to result in increased life integrity violations during the transition period.[198] More recent studies, based on improved democracy data, have not been able to confirm the same link between level of democracy and human rights violations. Christian Davenport and David Armstrong II found that the level of democracy had no effect on human rights violations until after a certain threshold was reached.[199] Bruce Bueno De Mesquita et al. reached a similar conclusion, and found that the threshold that had to be crossed before democracy mattered was far to the right on the anocracy-democracy spectrum.[200] Bueno De Mesquita and his co-authors also found that not all aspects of democracy mattered to the same degree, and that their relevance often depended on other institutional characteristics.[201]

If there is a link, it may only be with respect to certain types of human rights violations and not others. It is often the case that a state may have a reasonable human rights record and nonetheless have significant human rights violations of vulnerable minorities, such as sexual minorities[202] or ethnic minorities.[203] Empirical examinations of the purported link between democracy and human rights protections for minorities yield some interesting results. For

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196 Steven C Poe & C Neal Tate, "Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis" (1994) 88:4 American Political Science Rev 853 at 866–67.

197 Sabine C Zanger, "A Global Analysis of the Effect of Political Regime Changes on Life Integrity Violations, 1977–93" (2000) 37:2 J Peace Research 213 at 229–30.

198 *Ibid*.

199 Christian Davenport & David A Armstrong II, "Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996" (2004) 48:3 American J Political Science 538 at 551.

200 Bruce Bueno De Mesquita et al, "Thinking Inside the Box: A Closer Look at Democracy and Human Rights" (2005) 49:3 Intl Studies Q 439 at 456.

201 *Ibid*.

202 See e.g. Suzanne B Goldberg, "Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men" (1993) 26:3 Cornell Intl LJ 605 (discussing the experience of LGBTQ refugee claimants). See also Sonal Singh et al, "Human Rights Violations Among Sexual and Gender Minorities in Kathmandu, Nepal: A Qualitative Investigation" (2012) 12:7 BMC Intl Health & Human Rights 1.

203 See e.g. Sean Rehaag, Julianna Beaudoin & Jennifer Danch, "No Refuge: Hungarian Romani Refugee Claimants in Canada" (2015) 52:3 Osgoode Hall LJ 705 (qualitatively describing the experience of ethnic Roma in Hungary).

example, Mary Caprioli found that democracy was not correlated with decreases in human rights violations of women — women experience human rights violations regardless of the regime type.[204] This finding leads to some troubling concerns regarding whether a link can be drawn between level of democracy and a state's willingness and ability to protect its citizens:

> First, we might not be measuring what we think we are measuring when including regime type and human rights variables in our models. If this is the case, our findings are suspect. On the other hand, we might deliberately conceptualize democracy and human rights on the basis of political rights largely enjoyed by men. Scholars must, therefore, make sure that their theories and conclusions do not conflict with their measurements.[205]

Jonathan Fox and Shmuel Sandler use the Minorities at Risk dataset[206] to test the presumption of a linear relationship between the autocracy-democracy continuum and the discrimination of ethnic minorities.[207] Like Caprioli, Fox and Sandler find that there is no connection between democracy and discrimination of ethnic minorities.[208] However, when ethnic minorities are religiously differentiated, democracy does have an effect, but this effect is non-linear.[209] Autocracies are the worst discriminators against ethno-religious minorities, but the states with the best records are not democracies; rather, semi-democracies are found to discriminate the least against ethno-religious minorities.[210] This counterintuitive result suggests that there may be key differences between full and partial democracies, and that democratization may not explain the risks or protections available to ethno-religious minorities.

Another body of more recent literature questions whether it is democracy that is the relevant factor in protecting citizens or other institutional qualities that are necessary to make democracy work, even if they are not necessarily part of what constitutes a democracy.[211] One of the factors that has been found to be highly important is the rule of law.[212]

Building on this work, Christian Welzel, Ronald Inglehart, and Hans-Dieter Klingemann proposed a concept of "effective democracy" that downgrades the level of democracy in

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204 Mary Caprioli, "Democracy and Human Rights Versus Women's Security: A Contradiction?" (2004) 35:4 Security Dialogue 411 at 421–25.

205 *Ibid* at 424.

206 See University of Maryland, "Minorities at Risk Project," online: <www.mar.umd.edu/>. See also Simon Hug, "The Use and Misuse of the 'Minorities at Risk' Project" (2013) 16 Annual Rev Political Science 191 (for a cautionary discussion on the limitations of this dataset for inferential conclusions).

207 Jonathan Fox & Shmuel Sandler, "Regime Types and Discrimination Against Ethnoreligious Minorities: A Cross-Sectional Analysis of the Autocracy-Democracy Continuum" (2003) 51:3 Political Studies 469.

208 *Ibid* at 474.

209 *Ibid* at 480.

210 *Ibid* at 470, 476.

211 See e.g. Adcock & Collier, *supra* note 192; David Collier & Robert Adcock, "Democracy and Dichotomies: A Pragmatic Approach to Choices About Concepts" (1999) 2 Annual Rev Political Science 537; David Collier & Steven Levitsky, "Democracy With Adjectives: Conceptual Innovation in Comparative Research" (1997) 49:3 World Politics 430; Wolfgang Merkel, "Embedded and Defective Democracies" (2004) 11:5 Democratization 33.

212 See Larry Diamond, "Thinking About Hybrid Regimes" (2002) 13:2 J Democracy 21; Guillermo O'Donnell, "Human Development, Human Rights, and Democracy" in Guillermo O'Donnell, Jorge Vargas Cullell & Osvaldo M Iazzetta, eds, *The Quality of Democracy: Theory and Applications* (Notre Dame, Ind: University of Notre Dame Press, 2004) 9; Richard Rose, "Democratic and Undemocratic States" in Christian W Haerpfer et al, eds, *Democratization* (Oxford: Oxford University Press, 2009) 10.

situations where the rule of law is lacking.[213] However, measuring the rule of law can be as methodologically fraught as measuring democracy.[214] It should come as no surprise that the robustness of "effective democracy" has been questioned.[215]

In their recent paper on state protection, Tess Acton and Donald Galloway posit that rule of law indices could be useful in assessing the operational protective capacities of a particular country as part of the refugee determination process.[216] However, they go on to caution that such indices do not necessarily allow a decision-maker to compare whether adequate protection exists in different democracies, because a particular group may be vulnerable in one country and not in another in a way that is not correlated with the measure of the rule of law.[217] They remind us: "[E]ven where a set of data is sufficiently sensitive to take account of historically disadvantaged groups, a particular refugee claimant could still face such a heightened risk from a source that state authorities would be unable to provide adequate protection."[218]

More recent scholarship by Mila Versteeg and Tom Ginsburg casts significant doubt on the appropriateness of using rule of law indices in the refugee determination process, even with the cautions outlined by Acton and Galloway.[219] In their empirical analysis of rule of law indices, Versteeg and Ginsburg criticize such indices for being inadequately linked to an underlying normative concept;[220] however, they go on to find that the various indices are highly correlated with each other. This suggests that rule of law indices are capturing some higher order concept, or that the correlation results from the indices being derived from the same sources.[221] But it does not suggest that rule of law indices are capturing a particular normative concept that is relevant to the refugee determination process, such as the extent to which a state respects human rights.

For the purposes of this article, it is not necessary to resolve the debate within the political science literature regarding claims that democracy is linked to decreases in human rights violations. It is enough to note that there are serious unsettled issues and debates in this area.

It appears that if such a link exists, it is anything but linear; that is, a state's willingness and ability to protect its citizens is not *directly* proportional to the level of democracy. The literature also suggests that some types of human rights violations may be completely unrelated to the level of democracy, while others do not depend on the level of democracy but instead on other variables such as the rule of law. Current attempts to take these extra-democratic factors into account suffer from some of the same challenges that occur when attempting to measure the level of democracy.

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213 Christian Welzel, Ronald Inglehart & Hans-Dieter Klingemann, "The Theory of Human Development: A Cross-Cultural Analysis" (2003) 42:3 European J Political Research 341 at 345.

214 See Svend-Erik Skaaning, "Measuring the Rule of Law" (2010) 63:2 Political Research Q 449.

215 See Carl Henrik Knutsen, "Measuring Effective Democracy" (2010) 31:2 Intl Political Science Rev 109 at 124–25.

216 Galloway & Acton, *supra* note 12 at 224–27.

217 *Ibid*.

218 *Ibid* at 227.

219 Mila Versteeg & Tom Ginsburg, "Measuring the Rule of Law: A Comparison of Indicators" (2017) 42:1 L & Social Inquiry 100.

220 *Ibid* at 100.

221 *Ibid* at 124.

Further, none of this literature addresses the question of whether democracy is also correlated with decreases in human rights violations by non-state actors. When the state is not the agent of persecution, the analysis must shift to the role and responsibility of non-state actors under human rights regimes[222] and to the capacity of states to prevent abuses.[223] This is a sparsely studied area which is made more challenging by the difficulties associated with measuring state capacity.[224] Given the foregoing, it is unlikely that democracy is any more predictive of ability and willingness to protect in the context of non-state actor persecution. This is important since there are many such claims in the Canadian context,[225] and it may be that the proposition in *Kadenko* is not at all applicable where the agent of persecution is not the state. Moreover, in the absence of a more transparent DCO designation process, it is unclear whether the selection and use of the designation factors being employed is linked to all types of refugee producing situations or only certain types of refugee-producing situations. The government has yet to be required to justify its designation process, as the courts have thus far been willing to presume a connection between democracy (or some semblance of its related factors) and protection, and to instead focus on the minutiae of the DCO regime's effects.

V. THE CASE FOR AN INDIVIDUALIZED APPROACH TO PROTECTION

The foregoing review of the political science literature, which has analyzed whether there is a link between the level of democracy in a given state and that state's ability and willingness to protect the human rights of its citizens, suggests that the robustness of the ratio in *Kadenko* is vastly overstated. It also suggests that the designation factors used in the DCO determination process may not be adequate measures of the conditions that normally disfavour the production of refugees.

Democracy may only be correlated with decreases in human rights violations once a certain level of democracy is reached. Moreover, certain types of human rights violations may be completely unrelated to the level of democracy. Other types of violations may be completely unrelated where the agent of persecution is not the state. The relevant factors may not be democracy at all, and instead some other variable such as the rule of law.[226] Like Liew, this review calls into question the appropriateness of taking judicial notice of a link between democracy and a state's willingness and ability to protect,[227] but it goes further and questions whether there is a link at all. This may be sufficient to constitute the "change in the circumstances" identified in *Bedford* as necessary for reassessing an existing precedent.[228] In the context of the DCO designation process, the designation factors may be completely irrelevant as proxies for measuring safer conditions in a foreign country.

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222 See Jan Arno Hessbruegge, "Human Rights Violations Arising From Conduct of Non-State Actors" (2005) 11 Buff HRL Rev 21.

223 See Neil A Englehart, "State Capacity, State Failure, and Human Rights" (2009) 46:2 J Peace Research 163.

224 *Ibid* at 167–68.

225 See Rehaag, Beaudoin & Danch, *supra* note 203 (qualitatively describing the experience of ethnic Roma in Hungary).

226 See Galloway & Acton, *supra* note 12 (discussing rule of law indices as a method for assessing the operational protective capacity of a given country).

227 *Supra* note 8.

228 *Bedford*, *supra* note 137 at para 42.

Even if a link is presumed, the best political science research on how to measure democracy is inadequate for the needs of the Federal Court in reviewing state protection findings made by the IRB. The leading indices contain only three or four categories of regime type. This means that the best the Federal Court can hope to achieve when placing a state on the "democracy spectrum" is a label of 1, 2, 3, or 4. If a state like the US is classified on one end of the spectrum and a state like China is classified on the other end of the spectrum, then this leaves only one or two categories with which to distinguish all those countries that fall in between these two extremes. This is hardly the level of nuance and calibration that was called for in *Sow* and subsequent cases. There is simply no basis to presume that judges, many of whom possess no specialized social scientific training, are better placed than political scientists to comparatively assess the level of democracy. If those political scientists cannot provide a more meaningful distinction than 1, 2, 3, or 4, then it is highly unlikely that a judge will be able to come up with a more nuanced assessment that is evidence-based.

In short, the available social science evidence on measuring democracy does not provide the type of evidence-based rationale with which to develop a "comprehensive and comprehensible test for determining the *adequacy* of state protection in any given instance,"[229] precisely because it is unclear how the presumption of state protection shifts and what amount of probative evidence is necessary to overcome it.

In the context of the DCO regime, the relationship between the nine designation factors and safer country conditions is tenuous. How those factors are applied is entirely secretive and discretionary. There has been no detailed public justification for the designation factors, nor any explanation of how they are applied. The literature on measuring and connecting democracy with human rights protection strongly suggests regimes designed to label countries as "safe" do not possess high degrees of certainty. Indeed, the government's own statistics show that a number of DCO countries continue to produce many positive refugee claims despite their designation.[230] This suggests that the designation factors used in the DCO regime, or the procedure in which they are applied, do not approximate conditions of greater safety. Alternatively, it could suggest that they fail to approximate greater safety for certain types of claims or certain types of claimants.

It bears repeating that this discussion is taking place in the context of refugee claims which, by their very nature, have some of the most serious and grave consequences of any proceeding in the Canadian legal system when the adjudication process makes an erroneous decision. In these circumstances, there is a concomitant obligation on the courts to ensure that the adjudication of refugee claims is fair — fundamental justice and international law require no less.

In my view, the fairness of the Canadian refugee determination process is implicated when the substantive legal starting point, for a frequently dispositive issue, is a presumption that is not robustly supported by empirical evidence. It is also implicated by an adjudicative regime that changes the procedural protections for some claimants with a secretive process

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229 Zambelli, *supra* note 9 at 266 [emphasis in original].
230 See *YZ*, *supra* note 14.

that uses unproven metrics to designate a refugee claimant's home country as presumptively safer than others. If this type of flawed reasoning or procedural disparity was taking place in the context of criminal proceedings it would, in all likelihood, not be countenanced by the judiciary. Yet in the context of rights claims made by foreign nationals, there appears to be some willingness to accept a more flexible definition of what fundamental justice requires under the guise of administrative efficiency. This is not surprising given the Supreme Court of Canada's repeated statements that non-citizens do not enjoy the same unqualified constitutional rights as citizens.[231] Indeed, as Catherine Dauvergne has shown, after some promising initial decisions the Supreme Court of Canada has largely constructed a *Charter* jurisprudence that grants less rights to non-citizens, even though such diminished protections are less than what is provided by key comparative countries and even though this approach may not be in compliance with Canada's international human rights obligations in some situations.[232]

Leaving aside the declining trend in *Charter* protections for non-citizens in Canada, part of the reason for the persistence of democratic measurement in the refugee determination process is that judicial notice can create and entrench a sort of path dependency in the law. Ratios based on judicial notice, even brief oral decisions from the bench, have the potential to be passed down by stare decisis even though the factual rationale that supports the law is poor. Rather than call into question a dubious appellate ratio that was based on judicial notice, courts are more likely to adapt jurisprudence to soften or clarify, but nonetheless work with, an existing ratio. The Federal Court's development of a "democracy spectrum" is an example of such an adaptation; it leaves intact the Federal Court of Appeal's presumption of a connection between democracy and protection while attempting to provide more nuance. Nuance, however, cannot always rectify what may be a fundamentally flawed starting point. Fortunately, as will be discussed shortly, the law has emerged to allow such situations to be rectified where courts have the courage to do so.

Another reason why the reliance on democracy measurement persists is that there appears to be an emerging split between the federal courts practice and provincial courts practice on how to properly adjudicate constitutional challenges. The Federal Court and Federal Court of Appeal have developed a long line of jurisprudence that takes a conservative stance on what evidence is needed to properly adjudicate a *Charter* challenge.[233] The provincial courts, by contrast, seem increasingly willing to use the concept of reasonable hypotheticals to strike down legislation even where the factual matrix of a given case is only loosely related to the hypothetical.[234] An in-depth discussion of the relative merits of either approach is beyond the scope of this article. What can be said, however, is that one key benefit of the more liberal

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231 See e.g. *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 (where the Supreme Court held: "[I]n determining the scope of principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country" at 733).

232 See Catherine Dauvergne, "How the *Charter* Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill LJ 663.

233 See e.g. *YZ*, *supra* note 14 at paras 18–23 (particularly its reliance on Supreme Court of Canada jurisprudence that is now almost two decades old). See also *Peter* FCA, *supra* note 16 at para 16; *Canadian Council for Refugees*, *supra* note 20 at paras 99–104.

234 See e.g. *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773.

approach of the provincial courts is that problematic legislative regimes may be easier to challenge.

Even though a more complete constitutional assessment of the DCO regime is less likely in the Federal Court, there are not the same types of constraints on reformulating how the *Kadenko* decision is read and applied. While there has been a significant debate in the academic commentary on whether a fact that has been judicially noticed can be challenged and rebutted,[235] recent jurisprudence from the Supreme Court of Canada strongly suggests that judicially noticed facts are not etched in stone. In *Spence*, the Supreme Court approached judicial notice from a practical standpoint, one that ensured adequate protections were taken so that efficiency and expediency did not trump the search for the truth and the safeguards provided by tendering and testing evidence.[236] In *Bedford*, the Supreme Court reinforced the notion that stare decisis, though it may be the bedrock of the common law legal system, should not also be its shackle.[237] When circumstances change and new evidence emergences, the law can and should move beyond existing precedent. Given what we now know about the underlying rationale for *Kadenko*, it is time to reassess whether democracy is a relevant factor in analyzing state protection.

In my view, the time has now come to reorient the adjudication of inland refugee claims toward a more individualized inquiry. The Federal Court has already held that "[s]tate protection cannot be determined in a vacuum."[238] For this to become a reality, the starting point must always be whether a claimant has established a well-founded fear of persecution. Only after this context has been ascertained is it possible to conduct a context-specific assessment of state protection.

The Federal Court has clearly stated that a contextual approach to state protection requires consideration of the following factors:

1. The nature of the human rights violation;
2. The profile of the alleged human rights abuser;
3. The efforts that the victim took to seek protection from authorities;
4. The response of the authorities to requests for their assistance; and
5. The available documentary evidence.[239]

In analyzing these factors, the focus should be on the protection the individual claimant is likely to receive based on his or her situation and the protective institutions available in his or her country as evidenced by their historical effectiveness for the claimant or for people in similar situations.

It must be recalled that *Ward* does not require the claimant to establish a definitive inability or unwillingness to protect, but only some "clear and convincing" evidence.[240] This will normally be achieved through some combination of first person accounts of failed

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235 See e.g. Allan R Flanz, "Judicial Notice" (1980) 18:3 Alta L Rev 471; John T McNaughton, "Judicial Notice — Excerpts Relating to the Morgan-Wigmore Controversy" (1961) 14:3 Vand L Rev 779.
236 *Supra* note 133.
237 *Supra* note 137 at paras 43–44.
238 *Ortega*, *supra* note 147 at para 24.
239 *Torres*, *supra* note 145 at para 37.
240 *Supra* note 29 at 726.

protection efforts and documentary evidence of similarly situated individuals, though there may be instances where documentary evidence is the best and only evidence needed.[241] Elevating what constitutes adequate "clear and convincing" evidence, in practice, risks turning refugee law into a system of conciliatory protection that only comes into effect after a person has experienced recurrent persecutory episodes. That was never the purpose of international refugee protection. While historically refugee law did emerge in response to specific experiences of persecution, the refugee definition in the *Refugee Convention* requires only a well-founded fear of persecution, *not* the actual experience of persecution.[242] Yes, refugee protection is surrogate protection, but surrogacy does not require proof that persecution has transpired, only proof of a state's inability or unwillingness to provide protection. The purpose of refugee protection is to prevent persecution, not to provide humanitarian relief once persecution has occurred. Reliance on faulty measures of protection increases the likelihood that an individual claimant will have to actually experience persecution in order to prove their claim.

It is for these reasons that the IRB and the Federal Court should be leery about using democracy as a proxy for protective institutions — without substantially stronger evidence we should not presume such a link between the two. With that said, there may be instances where a claimant hails from a state with such a long history of protective institutions that it is reasonable to take notice of those institutions. However, such notice should be the exception and not the rule, and even then, it should still be possible for a claimant to rebut the presumption in appropriate circumstances. As the recent US presidential executive orders ought to remind us, even the most democratic countries can quickly become places that are overtly hostile to the notion of refugee protection for certain persons or groups.

VI. CONCLUSION

It is extremely concerning that our legal framework for analyzing state protection findings is not robustly supported by the available social science evidence. In some cases, the best evidence available suggests there is no basis for presuming a connection between democracy and protection. Refugee claims are frequently life and death matters. A negative state protection finding is often the dispositive finding of the IRB. Given these stakes, fundamental justice requires legal tests that are not arbitrary and are not supported by faulty presumptions. The ratio in *Kadenko* is one of those faulty presumptions. It has not been made better by the Federal Court's attempts to utilize the concept of a "democracy spectrum." This is because democracy is not easily measured and does not consistently correlate with the types of protective institutions that our courts have presumed democracy creates.

It is also troubling that the Government of Canada has chosen to adopt a DCO regime that relies on democracy as one of the nine designation factors when determining that a country is relatively less likely to produce refugees. This has been done without any transparent justification of the factors that are used, nor any explanation of how they are applied. Based on the preceding discussion of measuring democracy and its connection with protection, the

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241 *Majoros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 421, 2013 FC 421 (CanLII) at paras 16–17 (discussing when documentary evidence is better and more appropriate than first person accounts).

242 *Supra* note 1, art 1(A).

inclusion of "democratic governance" as one of these designation factors is very problematic. Finally, the recent US presidential executive orders demonstrate the danger of implicitly relying on democracy when labelling countries as presumptively safe, because even long-established democracies can fail to provide refugee protection for some persons or groups.

The connection between democracy and protection is specious. It is an alternative fact of sorts. It may be accurate for some countries, for some claimants, in some instances, but it is not a universal truism. The time has long since passed for a reconsideration of the use of democracy in the refugee determination process.

Such a re-evaluation could take place by a number of actors. The government could reconsider the validity of its DCO regime in the absence of being able to publicly provide evidence that supports the connection between democracy and protection. The government could also repeal or suspend the *Safe Third Country Agreement* on the grounds that the most recent US election and subsequent executive orders have created unsafe conditions for certain refugees. The IRB and Federal Court, citing *Bedford*, could provide a more nuanced assessment of *Kadenko* and a less rigid adherence tos its precedential value. Perhaps the best option is for the Federal Court of Appeal to reassess its position based on a complete record of social science addressing the purported link between the level of democracy and human rights violations. This could be achieved by putting such a record to the IRB and then asking the Federal Court to certify a question of general importance for the Court of Appeal to consider; however, given the Court of Appeal's response in *Mudrak* to the most recent attempt to certify a question on state protection, it may be unwilling to entertain such an appeal.[243]

What should not occur is maintenance of the status quo. We can no longer pretend that democracy is relevant to an analysis of state protection when, in most cases that the IRB adjudicates, its relevance and probative value are grossly overstated. Refugee claims are too important to be relying on presumptions that are weakly supported or have already been refuted. There is no place for alternative facts in the refugee determination process. Instead, a thorough, individualized, and context-specific assessment of the actual available protective institutions should be undertaken for each claimant. Fundamental justice and international law demand no less.

[243] See *Mudrak*, *supra* note 39.

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