Title

Children of Exception: Redefining Categories of Illegality and Citizenship in Canada

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Abstract

This article examines legal discourses on precarious status children in Canada over the last decade. Drawing on different theoretical frameworks and taking into account laws and court decisions, the paper will examine the way in which precarious status children are regarded as powerless subjects in need of protection and as threatening others. The article argues that these two apparently contrasting discourses are embedded within specific socio-historical constructions of childhood and children's citizenship which deny and limit their agency and conceive of their claim to membership as illegitimate. In the case of precarious status children, illegality and citizenship need to be redefined in a developmental perspective, questioning the potential risks associated with prevalent moral and social assumptions on childhood.

He is here, and he is not here. It is within this condition of existence that they exist.

Nadine Gordimer, *The Pickup*

Introduction

Among the 7 million immigrants who live in Canada (UNDESA 2009), it is estimated that a small but significant number –from approximately 200,000 (Jiminez 2006) to 500,000 (SSG 2006) are undocumented. Children who don't have legal status, or whose parents are illegal, are a particularly vulnerable group. In fact, even when they hold citizenship and legal status, children may be subjected to deportation along with their parents and they often have limited or no access to health and other services (Ruiz-Casares et al. 2010; Montgomery 2002). Their social and political status is acknowledged in an ambiguous way in legal discourse: they exist "here and not here," in an indefinite zone between legality and illegality, citizenship and non-citizenship.

This paper explores the treatment of non status children in laws and court decisions over the last decade, a period which corresponds to an increased "securitization" of immigration policies and the weakening of immigrants' rights and freedoms in Canada (Crépeau and Nakache 2006). As we will argue, children's limited entitlement to rights needs to be understood not only within the context of recent restrictive immigration policies, but also in light of socio-historical assumptions about

children as "semi-citizens", dependent on their parents. This analysis aims to understand the complexity and ambiguity of laws regarding precarious status children, by demonstrating how the categories of illegality and citizenship are re-defined and complexified in relation to minors.

The paper is divided into three sections which examine respectively theoretical perspectives dealing with the categories of illegality, citizenship, and childhood; legal discourse on children's rights in Canada; and, thirdly, the complexity underlying the application of the law.

1. Illegality, Citizenship and Childhood: Towards a Theoretical Framework

Prior to reviewing Canadian laws and court decisions on precarious status children, it is crucial to contextualize the categories of illegality, citizenship, and childhood. We will refer here to four theoretical frameworks: the first and second will be useful in order to unpack the definitions of illegality and citizenship, while the third and the fourth will help to examine the category of childhood. These four ways of seeing and approaching undocumented children propose a critical approach to citizenship, childhood, and illegality and provide a sound starting point for understanding the complexity of children's immigration status, as well as for understanding the contradictory legal attitudes towards migrant minors, which will be played out in legal hearings and appeals

1.1 Unpacking Illegality

To grasp non status children's limited rights and access to services, and their uncertain existence as being "here" and "not here", it is useful to refer to the literature on undocumented immigration, in particular to the critical study of illegality as a socio-historical construction (Goldring, Berinstein, and Bernhard 2009; Ngai 2004). These studies go beyond the binary opposition between legality and illegality, taking into account the construction and institutionalization of multiple forms of "legal illegality".

By highlighting the ambiguous relations between legality and illegality (Heyman 1999), this literature has conceived of irregular migration as a dynamic socio-historical process, rather than a static concept. Calavita (1998), for instance, analyzes how Spanish exclusionary policies relentlessly "irregularize" Third World immigrants, consigning them to the margins of the economy. With respect to the Canadian context, Goldring (2009) advocates the use of "precarious status" to describe variable forms of irregular status and illegality, interrogating the social, administrative, legal and political institutionalization of multiple forms of precariousness, which is accompanied by limited access to public services. In this article we will adopt the term "precarious status" in order to define different forms of children's legal and non legal status which restrict their entitlement to rights in the Canadian context.

1.2 Unpacking Children's Citizenship

Precarious status and the claim to national membership are also complexified in relation to the specific dimension of age. To examine the complexity of children's citizenship, as defined in the Canadian legislation, two subfields within this literature are particularly relevant.. The first perspective draws on the extensive feminist critique

on the exclusion of women from citizenship (Canning and Rose 2001). As occurred in the past for women, children are barred from full citizenship due to their alleged dependence and incapacity to make rational and informed decisions (Breen 2006). Cohen (2005), among others, has examined the way in which the construction of children's "semi-citizenship" has been grounded within a paternalistic discourse, relegating them to a mere status as 'minors'. From this point of view, childhood is conceived to be a mere preparatory stage to adulthood. During this period, children's interests and agency are rarely acknowledged.

The second perspective has analyzed the creation of stateless (Boyden and Hart 2007) and "alien citizens" (Bosniak 2008), persons who are citizens by virtue of their birth but who are presumed to be foreign by the mainstream culture and by the state. Bhabha (2009) insightfully explores the alien citizenship of children of undocumented parents, studying the ambiguities surrounding birthright citizenship, and pointing out that the children's status has been seen as deriving from their parents. This particular category of children is described by Bhabha as "Arendt's children", drawing on Arendt's analysis of the emergence of statelessness after the Second World War. The definition includes a wide array of minors who share three characteristics: they are under eighteen years of age; they are, or they might be, separated from their parents or legal guardians; and they are not members of any country because of their status or their parents' status. Montgomery (2002), referring to the case of unaccompanied minors in Quebec, suggests that their double status as refugee claimants and as minors makes them outsiders in the "imagined community" which, in turn, limits their access to services and increases their vulnerability.

1.3 Unpacking Childhood

Children's semi-citizenship and statelessness also have to be understood within the framework of socio-cultural assumptions about childhood which underlie the historical dimension of international and Canadian laws regarding children. Aries (1962) was one of the first to draw attention to the social and historical specificity of modern childhood. According to Aries, the category of children gradually grew into existence in the upper classes in the XVI and XVII centuries with the emergence of the bourgeois notions of family, home and individualism. In the XX century, he argues, the notion of childhood was widely accepted by upper and lower classes as a specific developmental stage in which the particular needs of children should be satisfied by a nurturing family. Building on Aries' insights, other scholars have contributed to framing the emergence of children as a distinctive group in the history of law and civil rights (Qvortrup 1991). After the Second World War, child protection rights movements were developed, bringing the delivery of specific services, especially with regards to child abuse and neglect and the universalisation of children's rights (Scheper-Hughes and Sargent 1998). Children were thus recognized as a specific vulnerable group which the family and the State should protect and be responsible for.

1.4 Unpacking Immigrant Children

In policy discourses, the portrait of children as vulnerable is challenged when talking about youth from minority groups. To understand the social representations of immigrant youth, we will refer here to the literature addressing policies and cultural

views that depict immigrant children as risks and threats to national security, as well as to the literature analyzing the role that race and racialization play in the production of social exclusion (Hopkins, Dwyer, and Bressey 2008; Peake and Kobayashi 2002). Otherness, conceived of as a socially constructed process, adds another dimension to the cultural view of immigrant children and their entitlement to membership. As minors, these youth are perceived as being in need of protection. A paradox arises, however, when these same youth are also considered to be potentially threatening others. These two types of representations – as both vulnerable and as potentially dangerous – may in fact reflect two opposing yet convergent ways of denying children's agency. On the one hand, as already discussed, they are considered vulnerable, in need of being protected by adults who speak on their behalf. On the other hand, they are considered to be threatening others who should assume the consequences of decisions which they often have not made. In both cases they are not heard in terms of who they are: young individuals who have personal and collective voices to represent their experience and decisions.

A number of examples illustrate this ambivalence towards migrant youth whose childhood is partially negated. With regard to undocumented children, Uehling (2008) has examined how the Division of Unaccompanied Children Services in the United States has constructed non status minors as "a window on the complex relationship between humanitarianism and security". In fact, while protecting them as vulnerable subjects, the state exercises its power through measures of detention and deportation. With respect to US born children with non-status parents, Chavez (2008) has examined the construction of the narrative of "anchor babies," a metaphor meant to capture the

strategy among undocumented immigrants of having a child in the United States in order to obtain US citizenship. Popular representations of babies as anchors may thus point to their danger to the nation and their illegitimate claims to membership.

These different perspectives on childhood help to make sense of the complex representations of immigrant minors which underlie policies and political discourses. A close examination of laws and court decisions in Canada provides an excellent illustration of the disparities and contradictions inherent both in citizenship and childhood, particularly of the tensions between two contradictory, yet converging discourses on children as both vulnerable subjects and threats to the nation.

2. Legal Discourse in Canada

Regarding children's rights, Canadian law considers the state to be responsible for children's protection and welfare, at least in theory if not always in practice. Since World War II, the best interest principle, stating that the parent or the legal guardian has the primary responsibility for protecting a minor's rights and determining her or his best interest, has become the cornerstone in children's legislation . Nevertheless, when a child is suspected to be at risk of abuse or neglect by his or her parents, the state is considered to act as the arbiter of best interest.

The best interest is also the paramount consideration of the Convention on the Rights of the Child, signed by the Canadian government in 1990 and ratified in 1991. By ratifying the Convention, Canada signed a formal engagement to comply with the articles of the Convention and to implement children's rights. Of particular relevance to

precarious status children are the following articles: not separating children from their parents; ensuring family reunification ; and assuring the right to be heard .

Regarding the application of rights of precarious status minors, the issue of protection becomes more complicated**.** A crucial problem, highlighted by many reports, is the discrimination of specific groups of children based on their status categories. The UN Committee on the Rights of the Child (2003), for instance, has voiced concern about the detention of undocumented minors, the exclusion of non-status children from the school system, the absence of a national policy on unaccompanied asylum-seeking children, and the delays and barriers to family reunification.

Further problems are created in relation to the application of the best interest principle in the immigration processes. In 2002, the *Immigration and Refugee Protection Act* introduced for the first time the obligation for decision-makers to consider children's best interest. The Canadian Council for Refugees (2004) applauds the introduction of the best interest principle as a welcome step, but notes at the same time that it is not sufficient in itself to protect children's rights. While the Act takes into account the best interest principle in very specific cases, such as applications on humanitarian and compassionate grounds, it is not applied to all decisions concerning children, as stated by the Convention on the Rights of the Child.

With respect to the right to citizenship, Canadian law is based on *jus soli*, according to which every child born in Canada is entitled to citizenship. Nevertheless, a new law amending the *Citizenship Act* came into effect in 2009, limiting birthright citizenship in two ways. First, Canadian-born children can only be entitled to citizenship if at least one of their parents is a permanent resident or citizen of Canada.

Second, Canadian parents cannot transmit their citizenship to generations born overseas after one generation. This means that children born overseas in countries based on *jus sanguinis,* that is to say countries where citizenship is determined not by place of birth but by having a parent who is a citizen of the nation, may become stateless. Such restrictions on citizenship have raised many concerns regarding the potential statelessness of children born overseas, the creation of a second class of citizens, and the negative impact on individual choices of working or studying outside Canada (Galloway 2009).

3. The Application of The Law

Canadian courts have wrestled with the tension between children's best interest and issues relating to national security. This tension is particularly evident in cases concerning the deportation of precarious status children and their parents. A key court decision involving the best interest is *Baker v. Canada*, which sets out the case of an undocumented Jamaican woman who was ordered to be deported with her four Canadian children in 1992. Ms. Baker applied for an exemption on the basis of compassionate and humanitarian considerations, arguing that she was the sole caregiver for two of her Canadian-born children and that her two other children depended on her for emotional support. Her application was refused. Subsequently, Ms. Baker applied to the Supreme Court for a review of the case, with the objective of determining whether federal immigration authorities must treat the best interest of the Canadian child as a primary consideration in assessing an applicant under the Immigration Act. The Supreme Court agreed that the Federal Court's decision was unreasonable and that,

although the best interest was not of primary consideration, immigration authorities should "give substantial weight, and be alert, alive and sensitive to the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision" (SCR 1999: 75), following an approach that respects humanitarian and compassionate values.

Interestingly, the court decision did not determine that best interest must always outweigh other considerations, stating instead that they should be carefully considered in a manner consistent with Canada's humanitarian and compassionate tradition. Thus, the best interest of the child is here mentioned as a reflection of humanitarian values and of Canadian tradition, rather than as a fundamental right or a duty of the host society.

A more detailed examination of specific cases concerning precarious status children will enable allow a more complex understanding of the legal ambiguities in cases dealing with children's illegality and citizenship and also highlight the relative absence of their voices. In the following examination of three different legal cases, we will look specifically and more closely at the fractures between children's rights as enshrined in international conventions and national legislation, and children's perceptions of their status as non-agents and citizens of exception.

3.1 She Is Canadian, Her Mother May Be Deported

In the first case to be considered (*Hawthorne v. Canada*), the child was eight years old when her mother left Jamaica and moved to Canada, in 1992, to join the child's father. Her mother never gained legal status and, after a short time, left the child's father due

to physical and emotional abuse. In 1999, the father sponsored the child's admission as a permanent resident but, since her arrival in Canada, the child lived with her mother who supported her financially. When a removal order was issued to the mother, the woman made an application on humanitarian and compassionate grounds (H & C application), stating that her removal would cause the child irreparable harm. The child was then 15 and a grade 10 student. She declared that she enjoyed "school a great deal" and that she was doing very well. She did not wish to live with her father, since she understood that he had been charged with sexually abusing a step-daughter. Moreover, she stated that she felt very close to her mother who was very supportive of her. As she states: "If my mother is deported to Jamaica, I do not know what I will do. I cannot live with my father, but I cannot live alone in Toronto since I am only fifteen years old. I would miss my mother desperately". Further, she did not wish to return to Jamaica, because she considered "Canada to be my home now" " and felt safe there. As well, she said that she wouldn't have the opportunity to pursue her studies in Jamaica, since her mother would not be able to financially support her school education:

When I lived in Jamaica, before coming to Canada, my mother sent me money to support myself, money that she earned at her job in Canada. She would not be able to support me if we were deported to Jamaica and I do not know what would happen to me. Also, there is a great deal of crime in Jamaica and I am scared to return there for that reason. I feel safe in Canada. (Canada 2001: 5)

In spite of the youth's plea, the immigration officer found that there were insufficient grounds to waive the removal order and argued that the deportation would not cause any hardship. The Federal Court noted that, since the child had lived separated from her mother until she was eight years old, their relationship could not have been so close and that their separation would not be a major hardship for either of them (FCT 2001) thus giving more weight to the judge's opinion than to the child's subjective experience. Further, the judge stated that if her daughter lived in Jamaica before, he did not see the hardship of living there again (Canada 2001: 3). There was no mention that the child was a Canadian resident and that she considered Canada to be her home, since she had established social relations and attachment there.

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The Federal Court decision is an example of insensitivity to child's interests and voice, as well as this child's political and social rights as a permanent resident. Although the child clearly stated that she did not want to live with her father or to return to Jamaica, her voice was not heard in the judgment. Fortunately, the appeal court contested the court's decision, pointing out that "hardship is not a term of art (…) Children will rarely, if ever, be deserving of any hardship" (FCA 2002: 9).

3.2 They Are Canadian, Deported with Their Parents

In a second case (*Pillai v. Canada*), a Canadian four-year-old boy and his three-year-old sister faced removal from Canada, after their Tamil parents had been refused refugee status and permanent residence based on humanitarian and compassionate grounds. When the negative H&C response was given in December 2007, there was an

increasing state of alert about the risk, for Tamils, of arbitrary detention and torture by the Sri Lankan authorities. Their parents, of Christian Tamil faith, claimed to have been arrested, sexually abused and tortured in Sri Lanka by the Tamil Tigers and the Sri Lankan police. Although the father had been diagnosed with Post Traumatic Stress Disorder, their story was considered to lack credibility.

The grounds advanced by the applicants to justify their application for permanent residence were the risk of detention and torture should they return to Sri Lanka, and the best interest of their children. The H&C officer remarked that the risk of arbitrary detention could effectively exist for the Tamil family, but that it should not have "severe consequences" (FC 2008: 6). Further, the officer stated that because the children were young, and "the family remains the centre of their social development", he was "satisfied they will be able to transition successfully into Sri Lankan society" (FC 2008: 27). As a result, he found that re-integration would not cause the children unusual and undeserved or disproportionate hardship.

In this decision, there is no specific examination of the children's best interest. The children were not heard, and there was no consideration of of their opinion regarding their deportation and re-integration in Sri Lanka. They are considered, due to their young age, simply as dependent on their parents, and consequently tied to their parents' migratory status. There is no mention that these children are also Canadian citizens, and that they are in their formative years of development. The Court of Appeal briefly concludes that the best interest "must be examined with care and weighed with other factors such as public interest factors". It would thus appear that reasons, such as

public interest factors, outweighed the humanitarian grounds and the citizenship rights of these two Canadian children.

3.4 She Is a Refugee, She Is Deported

In the third case (*A.M.R.I. and K.E.R.*), a 12 year-old girl arrived in Canada from Mexico in 2008. Her refugee claim was accepted in 2010, based on the claim that she was abused by her mother who had the legal custody of the child. Shortly thereafter, the father, with whom she lived, was denied refugee status in Canada and moved to Norway. The girl lived in Toronto with her aunt, who had commenced a custody application. At this time, the mother invoked the Hague Convention on International Child Abduction in an appeal ordering the girl's return to Mexico. The aunt asked to be added as a party to the appeal application and appointed counsel for her niece, but their motion was denied. The hearing eventually proceeded on an uncontested basis, without the participation of the father, the aunt or the girl. A few months later, the application judge granted an order for her immediate return to Mexico. The girl was removed from her school in Toronto under police escort, and flown to Mexico despite her protests and without notice to her father or her aunt.

The judges at the appeal court remarked that the application judge made several errors with regard to the case, including the fact that the girl was not present or represented at the hearing, that her refugee status was never seriously considered, and that she was taken by police from school and sent back to Mexico without even a chance to speak to the aunt with whom she had been living for nearly 2 years.

According to the Court of Appeal's decision, this case raises significant international, human rights and family law issues in relation to the return of a refugee child to her country of origin. Normally, a child who is a refugee must be accorded procedural protections under the Canadian Charter of Rights and Freedoms in proceedings to return the child to her country of origin pursuant to the Hague Convention. In this context, the Charter requires that the application judge conduct an assessment of the risks associated with returning the child, and that the child has the right to representation, to notice of the application, and to respond and to state her views. The case of this child was considered as an exception from this procedural protection: even if entitled to refugee status and international protection, the Hague Convention's reasons and the legal custody of her mother prevailed on the Refugee Convention, the Canadian Charter and the child's rights.

4. Discussion

The cases presented include a wide array of minors with diverse migratory statuses rather than focusing only on undocumented children and minors whose parents are non-status. Referring to the definition of "Arendt's children" (Bhabha 2009), we argue that the rigid categories of illegality and citizenship fail to capture the zone of exception where immigrant children's rights are located. The cases illustrate how, in court decisions relating to undocumented minors, Canadian minors, and refugee minors, children's rights are often considered as revocable, rather than absolute.

Examining the Canadian legal discourse on children's best interest and rights and their application, it is evident that there is a gap between the human rights enshrined in

international conventions as "abstract principles" and "social ideals" (Ignatieff and Gutmann 2001), on the one side, and their implementation in institutional procedure, on the other side (Ruiz-Casares et al. 2010). As highlighted in the examination of these court decisions, legal discourse is grounded in the idea that children's protection as citizens is dependent on their parents' nationality, a notion contrary to the non-discriminatory provision of national and international law regarding children's rights and family unity. Further, the best interest principle, the cornerstone of Canadian and international legislation, is problematically applied to precarious status children, since it is often only one among many factors examined by immigration officers and courts.

In the court decisions reviewed, two relevant and complementary assumptions about children and citizenship can be singled out. First, minors are conceived of as vulnerable subjects in need of protection,. Second, migrant children are also portrayed as threatening others which, like their parents, are not entitled to be members of the community. These two images do not contradict one another, as it might seem, but rather mutually sustain each other. The common thread that links the two together is the adult-centered approach, which characterizes children as being both vulnerable and voiceless. Whether they are acknowledged as threats, or as vulnerable subjects in need of protection, these children are assumed to lack moral agency and, consequently, to have fewer social and political rights (Breen 2006). They fall into a gray zone, where their voices are essentially muted and their political rights are not acknowledged.

The role played by adult-centered perspectives is evident in the three court decisions examined. Strikingly, in all these cases, the children's voices are not listened to. In the first court case, even though the girl had clearly stated that she did not want to

return to Jamaica or to leave her mother, the immigration officer did not take her opinion into account. In the third case, the girl was not represented at the hearing and, at the moment of her deportation, the police did not pay attention to her when she tried to explain that she had refugee status. These court decisions are permeated by the notion of children as *infans*, "someone who cannot speak", which has characterized children's "politics of mutism" (O'Neill 1994: 6), the absence of children's voices as autonomous subjects.

Moreover, in both the second and third court cases, a Canadian citizen and a refugee are deported due to their parent's removal despite the fact that the children themselves are entitled to citizenship rights or refugee status. In these cases, minors are once again understood as dependent subjects. The public interest factors are clearly the most important dimensions weighed in these two decisions, and the best interest principle is considered as only one among many other relevant issues. However, the predominance of the security dimension is also sustained by the notion that children are powerless subjects, dependent on their parents, and should thus be deported in the case of their parent's removal.

Finally, it is interesting to observe that, in the case of Canadian-born children, their citizenship rights are rarely acknowledged. They are conceived of as non-citizens, or as second class citizens, in a zone of exception where their rights can be revoked. Their diminished entitlement to rights has been worsened further by the increasing restriction of immigration policies that has occurred over recent decades. In the first and second court cases, the citizenship rights of Canadian children with non status parents are never mentioned as an important factor that could call into question their

deportation or their parents' removal. In the best case scenario, the family is allowed to stay in Canada on humanitarian and compassionate grounds, by reason of the children's vulnerability, but not by virtue of the children's rights as citizens.

As we have attempted to demonstrate by drawing on different theoretical frameworks which critically reflect on the categories of illegality, citizenship and childhood, both the compassion-based agenda which conceives of children as powerless subjects, and the security dimension, which portrays minors as threats, limit children's agency. Both are embedded within specific socio-historical constructions of childhood and children's citizenship. Fassin (2005), among others, has also highlighted the tension between the practices of "compassion and repression" in immigration policies, pointing out how these two are intimately linked together as part of a moral economy which bars immigrants from social and political life. Ticktin (2005), with respect to immigration policies in France, suggests that policing and humanitarianism are two sides of the same coin – a regime based on sovereign exceptions, which creates non-rights-bearing, apolitical and non-agentive victims. Following from Ticktin, we argue that precarious status children can be considered as "children of exception", meaning that their rights are acknowledged based on the exceptionality of each individual case, rather than within a systematic form of justice. Interestingly, several of the cases discussed above were overturned on appeal, meaning that children's deportation is waived not on the grounds of their political rights, but on the grounds of benevolence, that is to say, on an exceptional basis.

Considered as non-citizens, these minors live in an uncertain zone between legality and illegality, and they often have limited access to services such health and

education. Their life is considered by the law as "bare life" as mere bodies excluded from political rights, as opposed to *bios*, the morally and politically qualified life of citizens (Agamben 1995a). Deprived of citizenship rights and limited in their access to public services, these children are left with only abstract human rights; that is to say, their future in Canada is dependent on compassionate grounds. Agamben, in relation to refugees, observes that "it is necessary resolutely to separate the concept of the refugee from that of the Rights of man, and to cease considering the right of asylum (which in any case is being drastically restricted in the legislation of the European states) as the conceptual category in which the phenomenon should be impressed" (Agamben 1995b: 116). In the case of children, there is a need to consider the limits of the abstract rights of justice and equality, to protect precarious status children, and to rethink the best interest as a notion which should take into account not only children's agency but also the social networks which define their belonging to a community. Shachar (2009), for instance, proposes to adopt, as an alternative to *jus soli* or *jus sanguinis*, the model of *jus nexi*, which defines children's citizenship as based on factual membership and social attachment rather than birthright entitlement. In summary, we should question our moral and social assumptions concerning the rights of precarious status children, along with our definitions of citizenship and membership. Only in this way will it be possible to avoid the perpetuation of exclusionary practices through policies of compassion and repression.

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