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The Rule of Law and Canadian Minority Rights: An Analysis

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The rule of law lies at the heart of Canadian society. The Canadian Charter of Rights and Freedoms proclaims that “Canada is founded upon principles that recognize [...] the rule of law” (Constitution Act, 1982). But despite its enshrinement at the forefront of the Canadian constitution, the details of what the rule of law entails can be ambiguous. Many consider there to be a thin procedural version and a thick substantive version of the rule of law. And the extent of what the thick version encompasses is a topic of contention. In its most basic form, however, core principles of the rule of law include that laws are enacted by the government transparently based on known statutes and are applied equally to everyone, regardless of political or outside influence (Provincial Court of British Columbia). This concept of equal application is particularly pertinent to advancing rights for minorities as equals under the law. And, as Canadian history has shown, the rule of law has not always assured minorities civil rights but acted as a necessary foundation for their construction.

The rule of law in procedural terms is not always a sufficient warranty for advancing minority rights. It is no secret that Canada is a nation built upon a history of colonialism, fraught with overtly discriminatory laws. Many laws passed targeted minority groups with blatant prejudice in manners contrary to the principles of the rule of law, such as the British North America Act. The act allowed only men over 21 who owned property to vote in federal elections. (“A Brief History of Federal Voting Rights in Canada”). First Nations individuals could not vote at all. However, even some amendments seemingly per the procedural principles of the rule of law contravened the rights of disadvantaged minority groups. For example, under the Indian Act, indigenous peoples were afforded suffrage only if they surrendered their Indian status. They could be awarded the ability to vote and own property like their counterparts, but they would no longer be considered ‘Indian’ under the law and surrender their rights to live on a reserve and

other treaty rights associated with Indian status (“First Nations Peoples and the Right to Vote Case Study”). Although the rule of law is rooted in the equal application of laws, it does not guarantee morality, as “none of the principles that the rule of law embraces speak directly to the terms of legislation” (*British Columbia v. Imperial Tobacco Canada Ltd.* 59). As such, since First Nations people were subject to the same conditions as their non-indigenous counterparts, the law was technically being applied equally. But at the same time, it pushed Aboriginal peoples to reject their language, culture, and way of life for assimilation, something many would regard as unjust. Nonetheless, the rule of law “is not to be confused with [...] justice, [...] human rights, [...] or respect for persons” (Raz 211). So, while the rule of law provides an orderly safeguard against arbitrary abuses of power, its guidelines have not been enough to remedy prejudiced values of society against minorities and its reflections within the laws of Canada.

Although the rule of law in and of itself is not enough to guarantee fair outcomes for the rights of minority groups, it provides valuable tools to challenge existing legislation. The rule of law holds that “decisions should be based on stated criteria and [...] amenable to legal challenge” (Bingham 53). Canada operates based on judicial independence, providing an orderly method for citizens to appeal decisions and reform laws which violate fundamental rights. Much of the headway to date made on minority rights took place within the Canadian courts. For instance, the Ontario *Family Law Act* did not consider same-sex couples under the definition of ‘spouse,’ restricting their rights to receive spousal support. This culminated in a Supreme Court appeal in the *M. v. H.* case, which ruled that failure to provide the same rights to homosexual couples infringed on equality rights guaranteed by section 15 of the Canadian Charter of Rights (3). The government of Ontario rewrote its family law legislation within six months. Thus, the landmark decision for LGBT+ rights in Canada demonstrates the utility of the rule of law in amending

legislation and progressing minority rights. The laws in Canada have not always supported equal rights for minority groups, but the rule of law creates orderly means for change.

Aside from making strides to better minority rights, the rule of law is fundamental in protecting the existing rights of disadvantaged minority groups. In situations where the rule of law begins to slip, this is especially apparent. When the rule of law is forgone, the rights of minorities often follow suit, not protected from the whims of arbitrary government legislation. After all, “if people cannot challenge government actions in court, individuals cannot hold the state to account [and] the government will be [...] above the law” (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* 40). The recent use of the notwithstanding clause to pass Bill 21 in Quebec exemplifies this tie between the rule of law and minority rights. The notwithstanding clause is a provision in section 33 of the Charter of Rights that allows governments to enact legislation despite violations of some Charter rights (Murphy et al. 40). It was pre-emptively invoked to support Bill 21, which prohibits workers from wearing religious symbols in the public sector, preventing the bill from judicial review for five years. As a result, many minority groups with associated religious customs have suffered ill consequences, especially Muslim women. Surveyed Muslim women reported increasing unfair treatment by authority and incidents of hate crime, with over 78 percent saying they felt less accepted in Quebec society (Rukavina). Moreover, they could not challenge the bill for violating their Charter rights, such as their section 2(b) freedom of religion and expression, section 7 freedom to liberty and security of the person, and section 15 rights to equal protection under the law without religious discrimination (Constitution Act, 1982). This illustrates how essential the rule of law is, given that its absence permits unchecked government powers to take away rights without due

process. Hence, not only does the rule of law form the basis of creating positive change in pursuit of minority rights but prevents the nullification of established rights.

Furthermore, understanding of the rule of law continues to evolve, lending itself to more substantive contents which allow for equitable consideration of minority rights. In *The Rule of Law*, Bingham describes the rule of law as “embrac[ing] the protection of human rights within its scope” (70). This thicker version of the rule of law prioritizes upholding civil rights over identical procedure, a position supported by “the language [of the Charter, which] specifically invites an interpretation of the section that relates to both substance and procedure” (Gall 464). As, section 15(2) of the Charter of Rights allows concessions to the equality rights outlined in section 15(1) for laws or programs that aim to ameliorate the conditions of disadvantaged individuals or groups (Constitution Act, 1982). In other words, commensurate precedence is given to ensuring equal outcomes for those disadvantaged under the status quo over uniform procedural methods. Notably, Aboriginal peoples are overrepresented in the prison population, “mak[ing] up 30 percent of Canada's [inmates] despite only representing 5 percent of the [overall] Canadian population” (Festinger 17:01). Considering historical contexts of oppression that led to their disproportionate conviction, the Supreme Court ruled in the *R v. Gladue* case that courts should take into account the background of indigenous offenders when making sentencing decisions. The judge enumerated that the decision followed the sentencing objective of providing reparations for harm done to the community, as outlined in the Criminal Code (43). Ergo, substantive views on the rule of law have emerged in Canadian society, providing more accommodation for equity-based action to reconcile past wrongs and reinforce the civil rights of minorities who have been historically disadvantaged.

The rule of law paved the way for promoting minority rights in Canadian society. Canada's laws do not and have not always followed principles of equality. Within the framework of rule-of-law principles, however, citizens are presented with the tools necessary to enact change for the betterment of minority rights. Ultimately, our independent judicial system and protection against arbitrary state enforcement are rooted in the principles of the rule of law. Under its promise, Canadians can feel secure in their rights while advocating for further civil rights amendments. But while the rule of law is exalted as a bulwark against oppressive regimes and a hallmark of democracy, it is ultimately an instrument for positive change, not a guarantee. As history has shown, the efficacy and reign of the rule of law are dependent on how Canadians choose to uphold its principles. The future of minority rights is in the hands of the Canadian people. The rule of law simply provides the pen and paper—it is up to us to write history.

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