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The Rule of Law and Minority Rights: A Theoretical and Practical Perspective

Canadians are fortunate to live in a society with broad respect for the rule of law. Indeed, most Canadians would find it a difficult task to conjure genuine opposition to equality before the law, and for good reason: the rule of law is a cornerstone of a free, fair, and just society. But what impact did the rule of law have on the development of another such cornerstone: minority rights? This paper asserts that the rule of law forms the moral and legal principle upon which the rights of minorities repose. Indeed, rights for minorities are the logical corollary of the rule of law, as barring the equality of all people, regardless of race, gender, and other such considerations, there can be no rule of law. This paper will first discuss the theoretical framework of the rule of law—specifically, how upholding the rule of law requires rights for minorities. Secondly, this paper will discuss the practical implications of the rule of law; specifically, how these principles have led to tangible gains for minority rights.

A. V. Dicey's *Law of the Constitution* (1915), widely regarded as a foundational text in the study of the rule of law, broadly identifies it as possessing two key aspects, the belief in both of which necessitates rights for minorities. (Dicey, 1915, p. 198). Dicey (1915) first defines the rule of law as the "absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power" (p. 120). Indeed, there perhaps is no construct more arbitrary than that of discrimination; it takes an arbitrary quality—race, gender, and the like—and attributes to it an arbitrary worth. Discrimination, when capable of influencing the laws of a society, represents an instance of arbitrary power that undermines the rule of law. Minority rights thus serve as a force to restore the rule of law against the arbitrary power of discrimination. Secondly, the rule of law means "equality

before the law, or the equal subjection of all classes to the ordinary law of the land" (Dicey, 1915, p. 120). Again, minority rights are a logical necessity. The principle of the rule of law is clearly undermined if minorities are considered a separate "class," and find themselves subject to laws—or an application of laws—different from that of others. The rule of law—defined as predominance of regular law over arbitrary power, equality before the law—forms a solid legal framework for minority rights; indeed, the rule of law cannot exist so long as the law discriminates against certain arbitrary groups of people.

In practice, the rule of law is commonly invoked as justification for minority rights, and for good reason—as discussed previously, the fundamental aspects of the rule of law necessitate minority rights. The struggle for Asian-Canadian rights is a powerful example of how the rule of law played a crucial role in advancing the rights of minorities. For much of Canadian history, state-sponsored discrimination was a [word] aspect of life for people of Chinese descent; from 1885 to 1923—thirty-eight years in total—the Canadian government "imposed a discriminatory head tax on Chinese immigrants" (Winter, 2008). This head tax only ended with the introduction of its replacement—the Chinese Immigration Act—which banned most Chinese people from immigrating to Canada (Lee, 1995). Not content with prohibiting further immigration, Chinese Canadians found themselves subjected to other forms of oppression: voting disenfranchisement, job discrimination, and segregation (Lee, 1995). British Columbia prohibited Chinese Canadians voting or becoming trained professionals; Chinese Canadian students in Victoria found themselves segregated (Stember, 2017). Indeed, the rule of law as a force for change is clearly exemplified in the repeal of various discriminatory legislation

against Chinese Canadians; for example, the advocacy of lawyer Kew Dock Yip—forced to move to Ontario to circumvent British Columbia's discriminatory bar restrictions—played a pivotal role in the repeal of the Chinese Immigration Act and other arbitrary restrictions on Chinese Canadians (Chan, 2021). Additionally, calls for redress—restitution—over historic discrimination against Chinese Canadians also clearly invoke the rule of law. Issuing a historic apology for the head tax, Chinese Exclusion Act, and other discriminatory measures, former Prime Minister Stephen Harper declared that Canadians "have a collective responsibility to build a country based firmly on the notion of equality of opportunity, regardless of one's race or ethnic origin," a clear nod to the principles of the rule of law (Campbell, 2006).

From an international perspective, the rule of law was defined by Ban Ki-moon, then-Secretary-General of the United Nations, as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated" (Ki-moon, 2011). Crucially, however, Ban Ki-moon further states that the rule of law requires laws to be "consistent with international human rights norms and standards" (Ki-moon, 2011). This 'international' application of the rule of law also produced a significant impact on Chinese Canadian minority rights; according to Stember (2017), British Columbia was forced to repeal its discriminatory legislation against Chinese Canadians as "a condition of Canada's signing the UN Charter on Human Rights" (p. 4). Another area in which the rule of law—and its international understanding—has had a positive impact on minority rights is the advancement of the

rights of Indigenous peoples. For example, the Declaration of the Rights of Indigenous People (UNDRIP)—adopted by the United Nations in 2007—was described by the Truth and Reconciliation Commission as "the framework for reconciliation at all levels and across all sectors of Canadian society" (Yvonne, 2014). Indeed, acceptance of the UNDRIP can be understood as "consistent with international human rights … standards," thereby a standard of the international rule of law; Canada was among the only four states to oppose the UNDRIP in the United Nations (Yvonne, 2014). Nevertheless, despite Canada's long-standing opposition to the Declaration, British Columbia became the first province to "legally implement" the UNDRIP" through the Declaration on the Rights of Indigenous Peoples Act in 2019 (Bellrichard, 2019). Already, this has resulted in tangible gains for Indigenous peoples. For example, Tsilhqot'in Nation *v.* British Columbia in 2021 was the first Indigenous land-claim litigation since 2019; according to Proctor (2021), as a direct result of its acceptance of the UNDRIP, British Columbia was unable, through legal means, to "oppose … the establishment of Aboriginal [land] title." While this case has yet to be resolved, the precedent it sets is clear: the rule of law requires Canada to accept international standards of human rights—for example, the UNDRIP—and in doing so, create legal means for the improvement of minority rights.

The rule of law is unquestionably a crucial foundation for a just society. Its principles—namely, opposition to arbitrary power and equality before the law—all but require rights for minorities from a theoretical perspective. In practice, the rule of law has also served as the framework for the advancement of minority rights—as exemplified by the repeal of the Chinese Exclusion Act and other discriminatory legislation and British

Columbia's adoption of the UNDRIP. In all of these contemptible episodes of Canadian history, the rule of law has played a pivotal role in driving progress—as a catalyst for change, its principles provide a solid foundation for legal activism. Today, Canadians are indeed fortunate to live in a nation that has broad respect for the rule of law; our past serves as a despicable reminder of the scale of injustice that occurs in its absence.

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