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## Protecting the Rule of Law:

Emerging threats against the principles of the Rule of Law

The written laws governing countries are vast, complex, and comprehensive.

Paradoxically, the most important of these rules is often left unwritten or undefined in the legal codes of many jurisdictions – it is more likely that the Rule of Law is taken as a general principle. The Canadian Charter of Rights and Freedoms begins, “Whereas Canada is founded upon principles that recognize the supremacy of God and the Rule of Law” (Canadian Charter of Rights and Freedoms). In fact, the Rule of Law is a rule so fundamental that it need not be written in law. As every Canadian statute is in reference to this rule, that all are equal under the law, defining it in the Charter is unnecessary. However, the Rule of Law is by no means uniform and unchanging. It is a working concept, and legal scholars often have different definitions of the Rule than ordinary people do. Legal scholars may take the Rule of Law to mean rule by general norms, rather than by specific laws, instead of the more common definition of equality under the law (Waldron, Stanford Encyclopedia of Philosophy). In contrast to this contestation about the nature of the Rule of Law, courts and governments have agreed upon certain aspects of the Rule: that laws must be transparent, citizens must have access to legal remedy, and the judiciary must operate independently from the legislative and executive branches. These notions form the basis of just legal systems, and are crucial safeguards against arbitrary and unequal government. To the

detriment of the integrity of the law, there have been several recent threats against the Rule of Law.

The Rule of Law is undermined where there exists a discrepancy between rapidly advancing digital technology and the ability of the legal system to keep up with said technology. The definition of the operation of the Internet in the case of *Perfect 10, Inc. v. Google Inc.*, argued before the United States Court of Appeals for the Ninth Circuit as recently as 2007, is already vastly out of date (Griffith, Suffolk University School of Law). Data protection laws are rapidly evolving with technology. However, not all aspects of the law can adapt to novel technologies. During the United States Congressional hearings of Facebook CEO Mark Zuckerberg, members of the US Senate, effectively investigators in the hearing, were largely confused about Facebook's workings, particularly on the subject of the sale of data (Griffith). Accordingly, one could conceive of ways that the Rule of Law could be subverted due to the lack of awareness surrounding technology. Indeed, due to this legal-technological gap, violations of the Rule of Law have occurred.

Paramount to a discussion of the effects of social media monitoring on the Rule of Law is the mention of the British data analytics firm Cambridge Analytica, and the multiple allegations and lawsuits in numerous jurisdictions of the firm's wrongdoings. The most notorious

of these claims involves the firm's use of Facebook to harvest the personal information of up to 87 million United States citizens using, according to one of Facebook's messages to users, their "public profile, current city, timeline, and messages" (Satariano et al., The New York Times). Most of Cambridge Analytica's clients were political candidates from around the world, and the information was used illegally to sway individuals towards these candidates. Subsequently, in 2018, the United Kingdom Information Commissioner's Office announced its intention to fine Facebook £500,000 (\$817,000 CDN), saying Facebook "contravened the law by failing to safeguard people's information" (Monetary Penalty Notice).

In 2019, the United States Federal Trade Commission fined Facebook an unprecedented \$5bn USD, settling the investigation into the scandal ("FTC Imposes \$5 Billion Penalty"). Thus, the flagrant breach in the Rule of Law, in the case of this 2016 scandal, does not lie in Facebook's legal consequences, but in the inadequate consequences for Cambridge Analytica's Chief Executive Officer, Alexander Nix. Nix helped to orchestrate the illegal data mining of 2016, helped the *Leave.EU* campaign with its successful Brexit, and helped influence many more elections globally for his clients (Campaign). In 2018, Nix was suspended from his company after video footage showed him claiming his company was using illegal traps, bribery sting operations, and prostitutes, among other tactics, to influence more than 200 elections for his

clients (Gilbert, Vice News). Harvesting data while contravening laws is a wrong both on the part of Nix, and on the part of Facebook. In fact, much of the evidence that led the US Trade Commission and the UK Information Commission to bring consequences to Facebook, also implicates Nix. Despite many claims, witnesses, and evidence all amounting to reasonable suspicion, no legal remedy for Nix's wrongdoing has commenced. Equality under the law is a pillar of the Rule of Law, and Nix's case is a flagrant breach of this principle integral to international society. Furthermore, the case is an example of the lack of awareness of technology in legal systems, and its adverse effect on the Rule of Law. The fact that corporate monitoring of social media is complex and involves recently invented technology may have contributed to this breach.

The Rule of Law is a core component of just societies, and the recent pandemic has further exposed the unfortunate consequences of breaching it. In an effort to curb the spread of COVID-19, and at the urgent recommendation of public health experts, governments worldwide have accepted sweeping restrictions on public life. Citizens have been ordered to stay in their homes, obey curfews, and avoid unnecessary travel. Basic tenets of democracy have been compromised under the justification of prevention of the spread of the novel coronavirus. As such, to prevent the misuse of power, democracies have established oversight to keep this power

within its necessary bounds. However, the UN-declared pandemic has also provided pretext for authoritarian governments to wield power beyond an amount necessary for stopping the spread of COVID-19. In certain nations, the concentration of power in the hands of leaders, combined with lack of oversight, has led to effects detrimental to democracy and the Rule of Law.

In March 2020, Slovakia passed a measure allowing state institutions to access data from telecommunications providers, giving the government the ability to monitor the cell phone activity of citizens (Deutsche Welle). Also in March, Bulgarian President Rumen Radev partially vetoed a controversial law that would introduce prison sentences for spreading false information about infectious diseases (“Czech and Slovak Governments to Use Mobile Data to Track Virus.”). As well, four members of the Council of Europe – Armenia, Latvia, Moldova and Romania – have announced they are temporarily disregarding the provisions of the European Convention on Human Rights (“Reservations and Declarations for Treaty No.005”).

However, looming behind these instances of mobile phone tracking and partial vetoes of controversial laws, there is a far greater violation of the Rule of Law. After the onset of the recent pandemic, the Hungarian National Assembly voted to authorize Prime Minister Viktor Orban to rule by decree for an indefinite period of time (Walker et al., The Guardian). Since then, Hungary has seen increased control of the country’s judiciary by Orban’s administration,

resulting in a lack of transparency of law. The Prime Minister's decrees can effectively bypass Parliament and even existing laws. In addition, the administration has modified the country's criminal code. As of March, anyone who publicizes a "falsehood" that "obstructs or prevents successful protection" from the disease can be punished with up to five years in prison (Zerofsky et al., The New Yorker). The Committee to Protect Journalists has condemned this move, warning that it poses risks to journalists and doctors alike (Committee to Protect Journalists). This amendment of the criminal code has widely been seen as a way for the country's government to silence criticism of the administration. Hungarians have been stripped of their human right to due process. Due to COVID-19, the Rule of Law in Hungary has been severely undermined, and its justice system crippled.

History has shown that the Rule of Law is the sole feature that can bind the people of a society together as equals. By subordinating citizens to the law, rather than to a ruler, president, or prime minister, it ensures the safety of communities from the arbitrary and unequal use of power. To the detriment of the global community, there are multiple emerging threats to the Rule of Law. Novel technologies can outpace the equalizing hand of the law. Social media monitoring can weaken the Rule, as shown through the case of Cambridge Analytica. Finally, in times of crisis, nations can be quick to vest power in the hands of leaders, while taking it away from the

law. The most prized element of any just society must be the Rule of Law, for without it, true justice cannot exist.



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