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Politicization and Legitimacy: Exploring Threats to the Canadian Rule of Law

Fundamental to our perception of democratic justice is the rule of law. It underpins the structure of Canadian governance and has even influenced how Supreme Court justices decide verdicts.[1] But the rule of law is not invulnerable. In his seminal *Law of the Constitution,* A. V. Dicey warns against believing the rule of law should have exceptions, even when breaking the law seems necessary for a "just and desirable" cause.[2] He claims that citizens often conflate unjust laws with unpopular laws because they believe "deference to public opinion is in all cases the sole or the necessary basis of a democracy."[3] But Dicey argues that law does not exist to bend here and there for popular morality and that legal institutions should remain completely separate from politics.[4]

This essay follows Dicey in arguing that the rule of law requires institutional legitimacy, an inherent and enduring cultural valuation distinct from the popularity of particular laws, legislators, or judges.[5] It contends the greatest threat to the rule of law is the politicization of legal institutions: high-level unsubstantiated accusations of subjectivity or bias that erode the law's placement "above" politics by legitimizing the consideration of popular morality in the application of justice. This paper therefore argues that defending the rule of law requires preserving the normative legitimacy of the current structure of the Constitution. It analyzes criticism of the notwithstanding clause as an example of when criticism intending to serve the rule of law actually weakens its legitimacy and therefore resilience.

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[1] Peter W. Hogg and Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada," *The University of Toronto Law Journal* 55, no. 3 (2005): 720, http://www.jstor.org/stable/4491663.

[2] A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (Indianapolis: Liberty Fund, 1982), 60.

[3] Ibid.

[4] Ibid.

[5] Thomas Henry Bingham, *The Rule of Law*, (London: Penguin Books, 2011), 20.

Dicey describes two facets of the rule of law. First, it requires the "absolute supremacy or predominance of regular law,"[6] where governments can only punish citizens for violations of established laws that apply to everyone, as opposed to vaguely worded laws that governments can exploit to give punishments differing severity based on "arbitrary power"[7] or bias. Second, the rule of law entails "equal subjection of all [social] classes to the ordinary law of the land administered by the ordinary Law Courts," with "ordinary" carrying the sense of universal: citizens should be tried by the same or identically constituted courts to prevent unequal treatment. Taken together, Dicey establishes the rule of law as the unbiased, universal enforcement of publicly established laws to all citizens of the state.[8]

Yet the rule of law requires continuous social confidence and legitimacy to exert its influence. In a counterfactual where the rule of law lacks public legitimacy, it becomes far easier for citizens to justify breaking the law in one particular case on the basis that the law is constantly being misused in other, apparently less morally worthy cases. Thus the absence of public faith in the equal application of the law produces self-justifying lawlessness. Later legal philosophers, such as Lon Fuller, have echoed Dicey's definition by conceptualizing the rule of law as a "morality of aspiration,"[9] functioning at best as an honour system supporting mature democracies.

Contemporary Canadian thinkers, notably the Albertan Court of Appeal Justice Jack Watson, have furthered Dicey and Fuller's view of the rule of law requiring public faith to

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[6] Dicey, *Introduction to the Study,* 120.

[7] Ibid.

[8] Bingham, *The Rule of Law,* 47.

[9] Jack Watson, "You Don't Know What You've Got 'Til It's Gone: The Rule of Law in Canada - Pt. I," *Alberta Law Review* 52, no. 3 (June 12, 2015): 701, https://albertalawreview.com/index.php/ALR/issue/view/3.

function. Watson contends the rule of law's rooting in popular legitimacy makes it vulnerable to cultural flux. He suggests much undermining of the rule of law occurs with the intention to preserve it: the "infectious self-delusions that can arise in the course of planning and governance."[10] Governments or the public may justify infringing the law (such as pressuring judges into certain verdicts) as a means towards some more "just" ends. However, this sets a precedent for the large-scale "substitution of partiality for equality"[11] in numerous cases beyond the one being heard. Watson thus argues the rule of law cannot rely on majoritarian inclinations. As an unselfish entity providing "stable neutrality and continuity,"[12] the rule of law entails more "enduring and foundational aspects"[13] of justice and therefore should not change its basic principles for specific moments of intense political polarization.

Politicization primarily occurs when political leaders or movements question the independence of legal institutions, suggesting they are politically influenced. In Canada in particular, the tension between federation on the one hand and provincial autonomy on the other has politized the Supreme Court, which mediates between these two values. The 1982 Charter, for example, placed statutory limits, in the form of human rights, on what legislation provinces could pass, and the Supreme Court ultimately adjudicates when a province has violated the Charter. Kelly claims the institution of the Charter turned the Court into a "significant

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[10] Ibid, 698.

[11] Ibid, 700.

[12] Ibid, 697.

[13] Jack Watson, "You Don't Know What You've Got 'Til It's Gone: The Rule of Law in Canada - Pt. II," *Alberta Law Review* 52, no. 4 (September 25, 2015): 22, https://albertalawreview.com/index.php/ALR/issue/view/33.

constitutional power broker,"[14] which usurps "policy functions that belong to political actors."[15] In truth, these accusations contain little evidence. The power of appointing Supreme Court judges lies within the executive, not the judiciary; before judicial appointments, the executive must consult many other actors: the Chief Justice, Cabinet ministers, provincial and territorial attorneys, opposition Justice Critics, committees from both legislative houses, etc.[16] Thus the judiciary cannot skew the appointment process towards its own politicized ideological trends. Further, according to David Weiden, SCC judges are statistically less likely to vote based on ideology or attitude compared to their Australian and American counterparts.[17]

However invalid, suggesting the Court is partial can still weaken public faith in the institution, thereby creating an insecurity within Supreme Court judges which itself may produce a partiality towards public opinion. Vuk Radmilovic emphasizes that courts rely on other government branches to enforce their orders, and high court judges cannot garner legitimacy through regular elections like legislators or executives; thus the judiciary is uniquely dependent on public goodwill to function.[18] Radmilovic uses empirical methods to test the validity of court behaviour theories and finds courts do consider strategically cultivating their legitimacy within

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[14] James B. Kelly and Michael Murphy, "Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor," *Publius* 35, no. 2 (2005): 218, http://www.jstor.org/stable/4624710.

[15] Ibid, 217-18.

[16] "Supreme Court Act, RSC 1985, c S-26," Canadian Legal Information Institute, December 18, 2019, https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-s-26/latest/rsc-1985-c-s-26.html; "Frequently Asked Questions," Office of the Commissioner for Federal Judicial Affairs Canada, July 11, 2016, https://www.fja-cmf.gc.ca/scc-csc/2023/questions-eng.html#:~:text=The%20Prime%20Minister%20will%20review,branch%20of%20the%20federal%20government.

[17] David L. Weiden, "Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia," *Political Research Quarterly* 64, no. 2 (2011): 345, http://www.jstor.org/stable/23056395.

[18] Vuk Radmilovic, "Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec Secession Reference and Beyond," *Canadian Journal of Political Science / Revue Canadienne de Science Politique* 43, no. 4 (2010): 845, http://www.jstor.org/stable/40983557.

verdicts to protect their impartial image.[19] He claims an unpopular verdict could prompt backlash endangering the Court's independence, should the unsatisfied public call for changing the judiciary itself.[20] Here, Dicey's argument—that legal institutions require institutional legitimacy separate from the legitimacy of their particular rulings—becomes integral. If an unpopular ruling can immediately reduce public support for the Supreme Court, then a court with weak inherent legitimacy will feel pressured to at least consider popular morality. Radmilovic posits that the SCC justices particularly exhibited "legitimacy-attentive behaviour"[21] in the landmark *Secession Reference* case by considering political discourse over Quebecois secessionism.

Irrespective of whether the Court already exhibits some partiality within verdicts, the Court will likely exhibit more partiality precisely the more it is accused of partiality. The Court's only protection from public pressure is cultivating their normative legitimacy which Dicey emphasizes that democracies must preserve, and the Court may lose this legitimacy if it is undermined. Political parties can justify intervention in the Court using tit-for-tat logic, where influencing legal institutions becomes acceptable because one fears opposing parties already influence them. Politicization thereby becomes a self-fulfilling prophecy: because citizens do not believe their legal institutions are independent, they tamper with them. To defend the rule of law, responsible political actors—leaders, educators, and the media—should be careful how and to what extent they question the legitimacy of our legal institutions.

Section 33 of the Charter, the notwithstanding clause, is an example of criticism that ostensibly serves the rule of law while possibly undermining it. The clause lets legislatures pass

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[19] Ibid, 846.

[20] Ibid.

[21] Ibid, 865.

laws potentially violating certain Charter rights, though they would have to re-invoke the clause after five years.[22] It was introduced to placate a brewing Quebecian succession in 1982.[23] However, since the clause's legal language does not specify it is intended for Quebecois use only, other provinces such as Ontario and Saskatchewan have recently invoked it too. Section 33 remains controversial because it is often accused of diluting the rule of law when certain provinces violate certain constitutional rights while others do not. Yet the notwithstanding clause's allowance of suspending Charter rights is a necessary evil which preserves the rule of law in the long run because it prevents further politicization of the Supreme Court. Compared to the heavily politicized and unpopular US Supreme Court, Radmilovic argues removing the notwithstanding clause forces the SCC to decide on provincial violations of the Charter, thereby opening up the Court to accusations of bias as it tries to settle such matters of extreme political consequence.[24] Thus the notwithstanding clause is a "necessary evil" for preserving the rule of law: it may translate into certain Charter rights not being universally applied by all provinces, but in the long term it preserves the Supreme Court's legitimacy.

Despite Section 33 preserving our rule of law, criticisms of it have questioned the legitimacy of the Canadian judiciary. From premiers Allan Blakeney and Sterling Lyon in the 1981 First Ministers conference to recent political commentators Conrad Black and Asher Honickman, the judiciary has been accused of bias and illegitimacy.[25] This paper has warned

[22] Tsvi Kahana, "Understanding the Notwithstanding Mechanism," *The University of Toronto Law Journal* 52, no. 2 (2002): 222, https://doi.org/10.2307/825966; McIntosh, Andrew, and Stephen Azzi, "Constitution Act, 1982," The Canadian Encyclopedia, February 6, 2012, https://www.thecanadianencyclopedia.ca/en/article/constitution-act-1982.

[23] Hogg and Zwibel, "The Rule of Law," 724.

[24] Radmilovic, "Strategic Legitimacy Cultivation," 843.

[25] Black, Conrad, "Supreme Court on the Loose," National Post, February 14, 2015, https://nationalpost.com/opinion/conrad-black-supreme-court-on-the-loose; Honickman, Asher, "A Troubling Decision on the 'Right to Strike,'" National Post, February 5, 2015, https://nationalpost.com/opinion/asher-honickman-a-troubling-decision-on-the-right-to-strike; Siddiqui, Haroon,

exactly against such hasty accusations: the judiciary is not perfect, but it is less partial than many of its cousins abroad, and calling its independence into question is perhaps the single greatest threat to the rule of law in Canada, producing a political fight for control over the judiciary analogous to that observed in the United States.

"Canada's Cherished Charter Could Not Have Happened without 'Kitchen Accord,'" Toronto Star, April 15, 2012, https://www.thestar.com/opinion/canada-s-cherished-charter-could-not-have-happened-without-kitchen-accord/article_b109ac5e-6c80-575f-ba03-32db5108c5a0.html.

Works Cited

Bingham, Thomas Henry. *The Rule of Law*. London: Penguin Books, 2011.

Black, Conrad. "Supreme Court on the Loose." National Post, February 14, 2015. https://nationalpost.com/opinion/conrad-black-supreme-court-on-the-loose.

Dicey, A. V. *Introduction to the Study of the Law of the Constitution*. 8th ed. Indianapolis: Liberty Fund, 1982.

"Frequently Asked Questions." Office of the Commissioner for Federal Judicial Affairs Canada, July 11, 2016. https://www.fja-cmf.gc.ca/scc-csc/2023/questions-eng.html#:~:text=The%20Prime%20Minister%20will%20review,branch%20of%20the%20federal%20government.

Hogg, Peter W., and Cara F. Zwibel. "The Rule of Law in the Supreme Court of Canada." *The University of Toronto Law Journal* 55, no. 3 (2005): 715–32. http://www.jstor.org/stable/4491663.

Honickman, Asher. "A Troubling Decision on the 'Right to Strike.'" National Post, February 5, 2015. https://nationalpost.com/opinion/asher-honickman-a-troubling-decision-on-the-right-to-strike.

Kahana, Tsvi. "Understanding the Notwithstanding Mechanism." *The University of Toronto Law Journal* 52, no. 2 (2002): 221–74. https://doi.org/10.2307/825966.

Kelly, James B., and Michael Murphy. “Shaping the Constitutional Dialogue on Federalism: Canada’s Supreme Court as Meta-Political Actor.” *Publius* 35, no. 2 (2005): 217–43. http://www.jstor.org/stable/4624710.

McIntosh, Andrew, and Stephen Azzi. “Constitution Act, 1982.” The Canadian Encyclopedia, February 6, 2012. https://www.thecanadianencyclopedia.ca/en/article/constitution-act-1982.

Radmilovic, Vuk. “Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec Secession Reference and Beyond.” *Canadian Journal of Political Science / Revue Canadienne de Science Politique* 43, no. 4 (2010): 843–69. http://www.jstor.org/stable/40983557.

Siddiqui, Haroon. “Canada’s Cherished Charter Could Not Have Happened without ‘Kitchen Accord.’” Toronto Star, April 15, 2012. https://www.thestar.com/opinion/canada-s-cherished-charter-could-not-have-happened-without-kitchen-accord/article_b109ac5e-6c80-575f-ba03-32db5108c5a0.html.

“Supreme Court Act, RSC 1985, c S-26.” Canadian Legal Information Institute, December 18, 2019. https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-s-26/latest/rsc-1985-c-s-26.html.

Watson, Jack. “You Don’t Know What You’ve Got ’Til It’s Gone: The Rule of Law in Canada - Pt. I.” *Alberta Law Review* 52, no. 3 (June 12, 2015). https://albertalawreview.com/index.php/ALR/issue/view/3.

Watson, Jack. “You Don’t Know What You’ve Got ’Til It’s Gone: The Rule of Law in Canada - Pt. II.” *Alberta Law Review* 52, no. 4 (September 25, 2015). https://albertalawreview.com/index.php/ALR/issue/view/33.

Weiden, David L. “Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia.” *Political Research Quarterly* 64, no. 2 (2011): 335–47. http://www.jstor.org/stable/23056395.