Chapter 7

RIGHTS AGAINST THE RULE OF LAW?

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I. INTRODUCTION

How should *Canadian Charter of Rights and Freedoms*[1] rights be "limited" in accordance with the rule of law? There are at least two conceptual approaches to the "reasonable limits" that legislatures may enact concerning Charter rights under section 1: the first *proportionality* approach conceives of limits on rights as "infringements" that can be justified (or not) by balancing interests; the second *constructive* approach understands limits on rights as specifications of the content and scope of rights. Which of these two approaches better protects the rule of law?

In this article, I shall argue that the proportionality approach to limiting rights has likely made the adjudication of Charter rights more arbitrary, less legitimate, and more uncertain. Proportionality may thereby set Charter rights against the rule of law. In contrast, the constructive approach promises to better align Charter rights with the values of the rule of law.[2] The argument uses the recent non-resident voting case of *Frank v. Canada (Attorney General)* to illustrate how the proportionality and constructive approaches can help set rights adjudication against or in alignment with the rule of law.[3]

II. RIGHTS ADJUDICATION AND THE RULE OF LAW

Before exploring how the proportionality and constructive approaches to rights relate to the rule of law, it is worth first explaining how the principle of the rule of

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("Charter").

2 This argument does not purport to resolve the more empirical question of which approach to limiting rights better characterizes the historical development of the Supreme Court of Canada's approach to Charter rights under the "Oakes test". For an account of this development, see Geoffrey Sigalet "American Rights Jurisprudence Through Canadian Eyes" 2020 (23) University of Pennsylvania Journal of Constitutional Law (forthcoming).

3 [2019] S.C.J. No. 1, [2019] 1 S.C.R. 3 (S.C.C.) ("*Frank*").

law itself relates to adjudication. This section will explain how the task of adjudicating Charter rights raises the rule of law problems of judicial complicity in arbitrary, illegitimate and uncertain types of state action. These problems are mitigated through the *legally directed* reasoning of judges about the requirements of rights.

Francisco Urbina has helpfully identified three intrinsic rule of law problems facing adjudication: (1) *the problem of the subdued party*; (2) *the problem of legitimacy*; and (3) *the problem of uncertainty*.[4] The way legally directed adjudication deals with these problems corresponds to principles the Supreme Court has attributed to the rule of law in Canada.

The problem of (1) the subdued party concerns the subjection of parties to the arbitrary personal will of judges rather than the application of "impartial and publicly available" laws.[5] Independent courts are designed to help mitigate the arbitrariness of state decision-making by ensuring that the decisions of state actors follow impartial legal rules and standards.

This requires judicial reasoning about legal disputes to be constrained by impartial legal rules and standards. Without legally constrained adjudication, parties in similar circumstances may receive different judicial decisions as a simple matter of being assigned a different judge or panel of judges. Legally directed reasoning constrains and coordinates judicial decision-making to allow subjects of state interference to be treated with a degree of impartial uniformity across courts. The Supreme Court of Canada has recognized the problem of the subdued party by affirming that the rule of law is the supreme constraint on arbitrary state and private decisions.[6] It has also tied the mitigation of arbitrary decision-making to keeping adjudicative reasoning impartially sourced in positive law.[7] In a similar vein, it has acknowledged that the rule of law must constrain the adjudication of disputes

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[4] Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 181-85. Urbina distinguishes between "outcome" and "intrinsic" problems facing the task of adjudicative reasoning. Outcome problems facing adjudication concern matters that make it less likely for a well-meaning judge to resolve issues reasonably, *e.g.*, a confused, overly passionate or unduly influenced judge. Intrinsic problems stem from the way an issue is decided. In this article I am primarily concerned with intrinsic rule of law problems. Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 161.

[5] Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 181.

[6] *Re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 at 748 (S.C.C.).

[7] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] S.C.J. No. 75 at para. 111, [1997] 3 S.C.R. 3 (S.C.C.).

concerning Charter rights.[8]

The problem of (2) legitimacy concerns the connection between state decision-making and the authority of the political community.[9] The law partly derives its legitimacy from its ability to minimize the arbitrary decision-making of state officials, but also from the democratic will of the people and the justice of the law's substantive requirements.[10] Insofar as the law is a source of political legitimacy, then adjudication that is not guided and constrained by legal rules and standards risks interfering with parties subject to its power beyond what is authorized by the political community. Legally directed adjudication does not itself guarantee legitimacy, but it does directly imbue judicial decision-making with the legitimacy of minimizing the problem of the subdued party. It also allows adjudication to channel whatever other sources of legitimacy may flow into the law of the political community. The Supreme Court has reasoned that legitimate adjudication must respect the "creation and maintenance of an actual order of positive laws which preserves and embodies the more general principles of the normative order".[11]

The problem of (3) uncertainty relates to how reliably and predictably the state will interfere in the lives of its subjects.[12] In Lon Fuller's famous parable of King Rex, the King's pursuit of good ends was frustrated by his own incompetence.[13] As in the case of Rex, the uncertain enforcement change, and application of the state's laws can undermine its ability to achieve good ends for its subjects. Legally directed adjudication helps to make the patterns of state decision-making more reliable and predictable by enforcing and following consistent rules and standards. The Supreme Court has relied on the "legal certainty and predictability" supplied by adjudication under the rule of law in justifying its own power of constitutional judicial review.[14]

III. TWO APPROACHES TO LIMITING CHARTER RIGHTS

The rule of law is by no means the only value at stake in rights adjudication, as we undoubtedly value the substantive requirements of rights as proper ends. But the substantive value of rights could be better realized by legally directed forms of

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[8] *RWDSU v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75 at para. 36, [1986] 2 S.C.R. 573 (S.C.C.) ("the Courts are, of course, bound by the *Charter* as they are bound by all law").

[9] Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 183-84.

[10] Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles" (2001) 29 Political Theory 766.

[11] *Re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 at 749 (S.C.C.).

[12] Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 184-85.

[13] Lon. L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) at 34.

[14] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61 at para. 53, [1998] 2 S.C.R. 217 (S.C.C.).

adjudication that help to resolve rule of law problems.[15] The rule of law in many cases protects substantive rights as the efficient means for protecting their requirements the same way that the sharpness of a knife is the chef's means to slice ingredients for a delicious meal.[16]

How legally constrained are different approaches to the adjudication of Charter rights? In this section, I will first (a) use the voting rights case of *Frank* to outline the basic elements of the proportionality approach and then argue that majority's proportionality-based adjudication in that case exacerbated the problems of the subdued party, legitimacy and uncertainty. I will then (b) make the case that Justices Côté and Brown's constructive approach to voting rights in the dissent better directs rights adjudication as law.

1. Proportional Voting Rights and the Rule of Law

In *Frank*, the majority opinion of Chief Justice Wagner held that sections of the *Canada Elections Act*[17] unreasonably limited citizens' section 3 Charter right to vote by denying non-residents who are absent from Canada for five years the right to vote in until they resume residence. Justices Côté and Brown dissented, with Justice Brown writing the dissenting justification of the federal residency voting requirements as reasonable means "to define and shape the boundaries of a positive entitlement which, as such, necessarily requires legislative specification".[18] *Frank* featured explicit disagreement between the Justices over how to deal with the "reasonable limits" that section 1 of the Charter permits legislatures to enact when "demonstrable justified in a free and democratic society". In my view, the majority opinion in *Frank* showcases the rule of law difficulties facing the proportionality approach.

The landmark case for understanding section 1 "reasonable limits" on Charter rights is *R. v. Oakes*, in which the Supreme Court developed the "Oakes test" for assessing the justification for rights limitations.[19] *Oakes* separated the analysis of the

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[15] Grégoire Webber, "Rights and the Rule of Law in the Balance" (2013) 129 Law Quarterly Review 399.

[16] Joseph Raz "The Rule of Law and its Virtue" in *The Authority of Law* (Oxford: Oxford University Press, 1979) at 211.

[17] S.C. 2000, c. 9, ss. 3, 6, 8, 11(d), 127, 191(d), 220, 222, 223(1)(e), (f), 226(f), Part 11; *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 83, [2019] 1 S.C.R. 3 (S.C.C.). Justice Rowe concurred with the plurality holding, while insisting that residency requirements can have a rational connection to electoral fairness and could thereby justify limits on the right to vote other than the specific provisions challenged in *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 91, [2019] 1 S.C.R. 3 (S.C.C.).

[18] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 124, [2019] 1 S.C.R. 3 (S.C.C.).

[19] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) ("*Oakes*").

"violation" of a right from the question of its justified "limitation" under section 1.[20] It articulated the "Oakes test" for assessing the justification for limitations as a matter of the impugned legislation's (1) rational connection to a substantial aim, (2) it's minimal impairment of the right and (3) the overall proportionality of the law's good over its deleterious effects.[21] *Oakes* inadvertently created the problem that analysis of the aim, rational connection, *etc.* of laws challenged under the Charter can be crucially relevant to understanding whether or not laws violate rights. It also oversimplified the scope of rights to the basic jural structure "P has the right to ϕ", such that Charter rights became defined as ubiquitous interests that are regularly and easily violated by laws.[22] These problems have even led Canadian courts into the awkward position of reasoning about limitations as *necessary* violations of rights.[23]

Chief Justice Wagner's opinion emphasized the proportionality approach to limitations by treating federal residency requirements as "infringements" on the right to vote in need of justification under the "Oakes test".[24] The Chief Justice argued that "limits" on the "scope" of voting rights must take the form of "internal limits" separate from section 1, and that because section 3 of the Charter links voting rights to citizenship alone, it "does not allow for residence to operate as an internal limit on the right to vote".[25] A few paragraphs later, the Chief Justice dismissed the dissenting Justices' concerns about treating section 1 "limits" as "infringements" as "semantic in nature" and a "departure from decades of Charter jurisprudence".[26] The plurality opinion then goes on to explain how the voting residency requirements are not sufficiently rationally connected to the substantial objective of ensuring electoral fairness, nor minimally impairing and proportionate in their effects.[27]

How legally directed is this reasoning about the right to vote? It is best characterized as a kind of legally unconstrained moral reasoning about the violation of rights. By focusing his analysis on the government's justification for violating voting rights, Chief Justice Wagner's approach exacerbated the problems of the subdued party, legitimacy and uncertainty.

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[20] *R. v. Oakes*, [1986] S.C.J. No. 7 at para. 60, [1986] 1 S.C.R. 103 (S.C.C.).

[21] *R. v. Oakes*, [1986] S.C.J. No. 7 at paras. 69-71, [1986] 1 S.C.R. 103 (S.C.C.).

[22] Grégoire Webber *et al.*, *Legislated Rights* (Cambridge: Cambridge University Press, 2018) at 28-32.

[23] *R. v. Sharpe*, [2001] S.C.J. No. 3 at para. 29, [2001] 1 S.C.R. 45 (S.C.C.).

[24] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 40, [2019] 1 S.C.R. 3 (S.C.C.).

[25] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 31, [2019] 1 S.C.R. 3 (S.C.C.).

[26] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at paras. 40, 41, [2019] 1 S.C.R. 3 (S.C.C.).

[27] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at paras. 59-82, [2019] 1 S.C.R. 3 (S.C.C.).

First, although simplifying the jural structure of the right to vote may appear to favour subdued parties such as non-residents; the opposite is likely true. To be sure, understanding the right to vote in federal elections as simply extending to all Canadian citizens, everywhere, without qualification, *prima facie* appears to inclusively protect citizens from the arbitrary interference of the state with this right. But interpreting citizenship as the "internal limit" of the text of section 3 on the scope of the right to vote, to the *exclusion* of other limits such as residency, spreads the scope of the right too thin. This renders not only residency requirements and prisoner disenfranchisement, but also age, election timing, constituency, elections official status *etc.* based voting qualifications as violations of the right to vote. And so, whether these alleged violations of the rights of subdued parties are justified becomes a matter of whether a judge concludes that they are rationally connected to substantive ends, minimally impairing, and proportionate. The parties to the alleged violation of rights, which in this case includes the government of Canada, rely more on the morally preferences of judges than the law concerning the scope of the right. The potentially subdued parties are forced to rely less on the law's guidance concerning the scope of the right to vote than on the moral reasoning of judges inclined to value ex-patriate voting.

Second, the majority opinion's treatment of the right to vote frustrates the goal of legitimacy. As Jeremy Waldron has argued, the kinds of rights entrenched in bills of rights are often vague and subject to good faith reasonable disagreement by democratic citizens.[28] This heightens the problem of legitimacy in the context of rights adjudication, as judges often have less detailed legal text to guide their reasoning. In my view, citizens of democratic societies can reasonably disagree about whether different ways of restricting voting to residents threatens or protects the right to vote. At the very least, the paucity of qualifications on the right to vote in the Charter leaves open how the right relates to this disagreement. As mentioned above, in *Frank* the parties to the case included the government of Canada, defending a law enacted by a Parliament that was elected by millions of voters. Basing the invalidation of a democratic enactment on the allegedly unjustified infringement of the right to vote illegitimately *distorts* the position of those who might think of residency restrictions as a reasonable means of protecting and constituting citizens' right to vote.[29] Instead of arguing, for instance, that residency restrictions ensure that voting enables citizens to equally exercise influence over issues facing local constituencies, as part of the *protection* of the right to vote, the proponent of restrictions is caricatured as advocating the *violation* of the voting rights of non-residents.[30]

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[28] Jeremy Waldron, *Political Political Theory* (Cambridge: Harvard University Press, 2016) at 199-202.

[29] Geoffrey Sigalet, "Dialogue and Domination" in G. Sigalet, G. Webber & R. Dixon, eds., *Constitutional Dialogue* (Cambridge: Cambridge University Press, 2019) at 85-125.

[30] Justice Brown correctly chastises the Attorney General of Canada for perpetuating the

Furthermore, legitimacy is threatened by the way the minimal impairment and *stricto sensu* proportionality steps of the "Oakes test" allow C.J. Wagner discretion to weigh the importance of an enumerated right against other extra-constitutional interests. If Chief Justice Wagner counter-factually *upheld* the residency requirements *as justified infringements*, his approach could illegitimately treat the enumeration of voting rights as less important than other unenumerated rights and interests.[31] That creates judicial discretion to illegitimately devalue the importance of the *particular* rights that the political community has entrenched in the constitution. The problem of legitimacy is thus doubly heightened by the distorting and devaluing effects of justifying legislation concerning rights *against* rights.

Finally, the Chief Justice's approach creates uncertainty about the right to vote. By expanding the scope of the right to vote to any qualification on the right beyond citizenship, *Frank* potentially endangers all other manner of legal rules and regulations qualifying the ability of citizens to vote in elections. *Frank* renders other reasonable limitations on the right to vote, such as the limitation of the franchise to adults aged 18 years and older, *prima facie* violations of the right that may or may not one day fail any one of the prongs of the "Oakes test" depending on the moral preferences of judges. That reduces the certainty of Charter adjudication.[32]

2. Constructive Rights and the Rule of Law

Justice Brown's dissenting opinion in *Frank* demonstrates an alternative *constructive* approach to limiting Charter rights that better minimizes the problems of the subdued party, legitimacy and uncertainty. The constructive approach helps resolve the rule of law difficulties raised by *Oakes*.

Justice Brown argues that by restricting the scope of voting rights to the "internal limit" of citizenship in section 3, and by treating section 1 "limits" as requiring "justified infringements", the majority treats section 1 as "dead letter", impugns other reasonable limits on voting rights, and engages in legally undirected philosophical reasoning.[33] Chief Justice Wagner's opinion treats section 1 as "dead letter" because it treats section 1 "limits" as analogous to "infringements", such that all legislative qualifications on the right to vote outside of citizenship are set *against* the right to vote. Even the use of "internal limit" to describe the qualification of

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"analytical error of conceding an 'infringement' ". *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 123, [2019] 1 S.C.R. 3 (S.C.C.).

[31] Grant Huscroft, "Proportionality and the Relevance of Interpretation" in G. Huscroft, B. Miller & G. Webber, eds., *Proportionality and the Rule of Law* (Cambridge: Cambridge UP, 2014) at 186-202.

[32] It may be that settled expectations about the moral and political preferences of the current membership of the Supreme Court reduces such uncertainty, but judicial preferences and membership can change.

[33] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at paras. 142-146, [2019] 1 S.C.R. 3 (S.C.C.).

citizenship in section 3 shows that the term "limit" in section 1 can relate to reasonable articulations of the scope of rights. By ignoring this, the Court turns a blind eye to the legal work that could be done by understanding certain qualifications (age, residency, *etc.*) on the right to vote as section 1 "limits" that "define and shape the boundaries of a positive entitlement".[34] This epitomizes what I call the *constructive* approach to limiting rights, because it conceives of justified limits on rights not as infringements, but as constructions of the scope and nature of rights.

Justice Brown's dissent makes an eloquent case for the constructive approach. He argues that it is more legally constrained to reason about whether Parliament's voting qualifications are sources of law reasonably settling "the unavoidability of moral philosophical considerations in defining the boundaries of that right".[35] This helps solve the problems of the subdued party and legitimacy by guiding the Court away from arbitrary moral judgments that depend more on the political morality than on the content of the law. Some moral judgements about the reasonable range of views on the scope of rights may be inevitable, but judicial reasoning can become less arbitrary and more legitimate where it acknowledges and defers to legislation reasonably *specifying* rights. That constrains arbitrary moralizing to some degree by recognizing that legislation can help articulate the scope of Charter rights under the "reasonable limits" authorized by section 1.

This approach also makes the law more certain by renovating the "Oakes test" so that it is more of a unified inquiry. The constructive method restructures the inquiries of the "Oakes test" toward establishing the scope of Charter rights. Justice Brown finds that the residency requirements are rationally connected to a goal of protecting "a relationship of currency between electors and their communities" as a reasonable construction of the right to vote.[36] He then argues that the five-year residency limit is minimally impairing because it was within the range of reasonable options available to Parliament, and proportionate because the right to vote remains open to any Canadian who takes up residence in Canada.[37] This turns the rational connection inquiry into the heart of the "Oakes test" because it outlines how the means and purpose of the legislation violate or protect the right. The minimal impairment and proportionality prongs become elaborations of how the means and purpose of legislation is reasonable. This makes laws more likely to succeed or fail on *all* the prongs of the test, thereby allowing for more coherent and reliable judgements.

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[34] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 124, [2019] 1 S.C.R. 3 (S.C.C.).

[35] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 146, [2019] 1 S.C.R. 3 (S.C.C.).

[36] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at paras. 160-162, [2019] 1 S.C.R. 3 (S.C.C.).

[37] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 172, [2019] 1 S.C.R. 3 (S.C.C.).

In my view, Justice Brown's dissent in *Frank* offers a roadmap for turning section 1 analysis toward constructing the limits of Charter rights, rather than justifying their infringements. This constructive approach promises to better align the adjudication of Charter rights with the rule of law by building fewer but sounder constitutional protections for fundamental rights.