Chapter 5

THE NOTWITHSTANDING CLAUSE AND THE RULE OF LAW

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The "notwithstanding clause" of the *Canadian Charter of Rights and Freedoms*[1] has, in recent years, often been in the limelight. From Saskatchewan funding non-Catholic students in Catholic schools, to Ontario removing seats on Toronto's city council during a municipal election campaign, to Quebec banning certain public servants from wearing religious symbols, to New Brunswick obliging schoolchildren to be vaccinated without exemptions for religious or conscientious objections, the use or threatened use of the notwithstanding clause to insulate controversial legislation from judicial scrutiny for compliance with the Charter is a familiar headline of late.

Whenever the notwithstanding clause appears on Canada's politico-legal radar, fresh debate on the merits and demerits of the clause ensue. There has been no shortage of back and forth on the wisdom of the clause since it arrived in 1982 as part of the Charter. This paper does not engage directly with this dimension of the debate on the notwithstanding clause. Rather, this paper is a modest attempt to engage with theoretical contours of the debate. My essential claim is that opposition to the notwithstanding clause is to a significant degree rooted in the conviction that a law which violates basic norms of justice is, for all intents and purposes, not a true law.

More specifically, this paper explores the relationship between the notwithstanding clause and the rule of law. The rule of law is an underlying principle of the Canadian Constitution. This principle is often described as unwritten, but it makes a textual appearance not far from the notwithstanding clause. The preamble to the Charter declares that Canada is "founded upon principles that recognize the supremacy of God and the rule of law".[2] The relationship between the notwith-

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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] Preamble to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

standing clause and the rule of law, how the clause and the concept speak to each other, is largely untheorized.

The rule of law — the rule that law rather than raw power governs a society — is a complex, nuanced and contested concept. Scholarship has given rise to a spectrum with "thin" and "thick" accounts of the concept at both ends.[3] The thin (formal) version says that the rule of law is respected where law is enacted according to prescribed steps and procedures. The thick (substantive) version, in addition to the content of the thin conception, says that the rule of law entails fidelity to norms of justice and human rights. The distinction between the two accounts can be distilled to the rule of duly enacted law on the one hand and the rule of just law on the other hand. The Supreme Court of Canada has, to date, described the rule of law in Canada in thin terms.[4]

The notwithstanding clause, meanwhile, resides in section 33 of the Charter. The clause provides that a legislature in Canada can "expressly declare" in a law which it enacts that the law (or a part of the law) will "operate notwithstanding" certain provisions of the Charter.[5] These provisions are section 2 and sections 7 to 15.[6]

On its face, the clause enables the enactment of legislation that need not respect these Charter rights and freedoms. Where the notwithstanding clause is used, that use is valid for five years.[7]

Use of the clause is renewable by the legislature's reenactment of the declaration.[8]

It is often said that use of the notwithstanding clause "overrides" the Charter. Here, the relationship between the clause and the rule of law quickly becomes distorted. The notion that the clause overrides the Charter, which forms part of the Constitution, carries great import for the rule of law. The Constitution is the "supreme law" of Canada. To simply state that the notwithstanding clause *overrides*

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[3] See Jørgen Møller & Svend-Erik Skaaning, *The Rule of Law: Definitions, Measures, Patterns and Causes* (Basingstoke: Palgrave Macmillan, 2014).

[4] See *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

[5] *Canadian Charter of Rights and Freedoms*, s. 33(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[6] Section 2 of the Charter guarantees several "fundamental freedoms" such as "freedom of conscience and religion", "freedom of association" and "freedom of peaceful assembly". Section 7 guarantees the right to life, liberty and security of the person (and the right not to be deprived of these interests unless the deprivation accords with principles of fundamental justice). Sections 8 to 14 guarantee rights that, in general terms, pertain to criminal proceedings. Section 15 guarantees equality before and under the law.

[7] *Canadian Charter of Rights and Freedoms*, s. 33(3), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[8] *Canadian Charter of Rights and Freedoms*, s. 33(4), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

the supreme law is to give the distinct impression that the clause *violates* the supreme law. It suggests that use of the notwithstanding clause is, at some level or in some respect, unlawful.

The notwithstanding clause forms part of the Constitution, so use of the clause cannot override it. The clause, according to the thin version of the rule of law, is a legal exercise of state power. The thin version, as stated above, only requires formal legality for the rule of law to be respected. At times, critics of the notwithstanding clause seem to gloss over this requirement. They appear to view the notwithstanding clause as illegitimate within a liberal democracy that has entrenched a bill of rights. One could say that, in their criticism of the clause, these critics smuggle concepts such as justice, dignity and equity from the thick into the thin version of the rule of law.

Alternatively, one could say — as I do — that this criticism of the notwithstanding clause is a nod to the thick version of the rule of law at work in Canada. If the clause does not override the Constitution and thus satisfies the thin version of the rule of law, does the unease created by the existence and use of the clause gesture to the presence of the thick version? In other words, do the negative reactions sparked by the notwithstanding clause reveal support for a conception of the rule of law that, beyond formal legality, demands normative legitimacy for a purported law to truly be a law? If the clause does not violate legality in the thin sense, does the clause violate legality in the thick sense?

To tackle these questions, consider a common critique of the clause: it enables legislation that violates human rights and the values that inform them. Bill 21 in Quebec — a law that bans certain public servants from wearing religious symbols such as face coverings — is a useful case study.[9] Forceful criticisms of Bill 21, which point to religious freedom and gender equality, seem to be inspired by concerns that run deeper than the notion that Bill 21 infringes parts of the Charter that protect these interests. Opposition to Bill 21 springs first, it seems, from the view that the legislation is inherently unjust and unworthy of being called a law, before the Charter even enters the picture.

Even so, the existence and content of the Charter certainly reinforces this view on the legal legitimacy of Bill 21. There are substantive implications for the rule of law that follow from entrenching a bill of rights like the Charter. It would be odd to ask whether we are dealing with a law when Parliament enacts legislation that the Constitution only allows a province to enact (or vice versa). We are more likely to ask this question, however, when a legislature enacts legislation that violates interests like equality, freedom of expression, or the right not to be arbitrarily detained or imprisoned. We are more likely to question whether these latter examples satisfy the definition of "law".

If the supreme law of a society affirms inescapably normative concepts like

[9] *An Act respecting the laicity of the State*, S.Q. 2019, c. 12.

freedom and equality, there will be, in my view, an inevitable effect on the rule of law. Legislation that disrespects these normative concepts will be viewed as more than merely unconstitutional, according to the degree to which it disrespects them. The legislation will be viewed at some level as lacking legality — even if, from the formal point of view, it is enacted through use of a mechanism such as the notwithstanding clause. This view, I submit, lies beneath the surface of negative reactions engendered by use of the clause, especially where use of the clause strikes us as permitting a fundamental injustice.

My view, in other words, is that the constitutional commitment of a society to protect fundamental rights and freedoms from unreasonable limitation by the state necessarily entails a commitment to a thicker version of the rule of law — to the rule of just law — in that society. Illegitimate use of the notwithstanding clause, a topic to which I will soon turn, betrays these commitments.

There is certainly room for debate on the extent to which a commitment to a thicker version of the rule of law in Canada predates the Charter and the extent to which the adoption of the Charter accelerated the growth of this version of the rule of law. Arguably, this commitment would have largely if not entirely arrived without the Charter, as it has in advanced liberal democracies such as Australia (which lacks an entrenched bill of rights) or even in the United Kingdom (which has an unwritten Constitution).

I submit that support in Canada for the idea that law — to be properly understood as law — demands more than formal legality long predates the Charter. It has become common for Canadians to think that legal concern for human rights began in 1982 with the arrival of the Charter. Legislation in Canada protecting human rights existed before the Charter, and our inheritance of a Constitution "similar in Principle" to that of the United Kingdom means that a firm commitment to basic civil liberties existed in Canada from Confederation in 1867.[10] The Charter did not give birth to the idea that law in Canada — to truly count as law — must satisfy certain normative standards, but the Charter has served to more tightly weave this norm into the fabric of Canadian society.

What does the foregoing mean for the notwithstanding clause? Given what has been said, is the notwithstanding clause incompatible with the version of the rule of law that follows from the entrenchment of fundamental rights and freedoms? Put at its strongest, was notwithstanding clause a dead letter from the moment the ink dried?

The answer, in my view, is not straightforward because not all uses of the notwithstanding clause are made equal. The notwithstanding clause can be and has been used in varied contexts and for varied reasons. There may well be instances in which recourse to the clause serves a laudable and just purpose, in which case

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[10] Preamble to the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5.

concerns about violating the rule of just law disappear. Saskatchewan's decision to invoke the notwithstanding clause to maintain funding for non-Catholic students in Catholic schools was generally well received even though a court ruled that the policy violated the state's duty of religious neutrality.[11] Indeed, both the province and the Catholic school authorities shared the position that the policy should continue.

The clause may also be used in response to a judicial interpretation of the Charter that is, in the eyes of a legislature, incorrect. Where a government believes that a court has misinterpreted the Charter, use of the notwithstanding clause may safeguard rather than suppress the Charter. Setting aside the wisdom of a law in Ontario that shrank the seat count on Toronto's city council during a municipal election campaign, the use of the clause in response to a court decision that struck down the law on what many legal observers considered to be shaky constitutional reasoning would serve rather than subvert constitutionalism.[12]

The notwithstanding clause has even been suggested as a way for legislatures to buy time to craft new legislation after existing legislation has been found unconstitutional by a court and invalidation of the law in the absence of new legislation would cause social upheaval. Discussion of this use of the clause occurred in the wake of the Supreme Court's ruling that invalidated the crime of assisted suicide and thereby opened the door to physician-assisted death in Canada.[13]

But where the notwithstanding clause is used to oust or substantially imperil a Charter right or freedom without justification, there is good reason — based on what has been posited in this paper — to conclude that such a use of the clause offends the rule of just law and is, for that reason, illegitimate and even unlawful. The matter of determining when the clause has been used "without justification" is of course contestable, but we can think of examples of when this threshold will surely be reached. If a province, out of hostility to religion, were to use the clause to enact a law that bans worship, this would offend the thick form of the rule of law. The same would be true if Parliament were to use the clause to bypass the right not to be arbitrarily detained or imprisoned to legislate the internment of certain races for odious reasons animated by social Darwinism.[14]

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[11] "Sask. Government invokes notwithstanding clause over Catholic school ruling" *CBC News* (November 8 2017), online: <https://www.cbc.ca/news/canada/saskatchewan/sask-notwithstanding-schools-1.4392895>.

[12] Paola Loriggio, "Law that cut Toronto city council nearly in half is constitutional, appeal court rules" *CTV News* (September 19, 2019), online: <https://toronto.ctvnews.ca/law-that-cut-toronto-city-council-nearly-in-half-is-constitutional-appeal-court-rules-1.4600716>.

[13] Sarah Burningham, "Sarah Burningham: Use the notwithstanding clause, if you must" *National* Post (December 21, 2015), online: <https://nationalpost.com/opinion/sarah-burningham-use-the-notwithstanding-clause-if-you-must>.

[14] Regarding a standard for determining whether use of the clause is legitimate, using

I say that these uses of the notwithstanding clause may even be unlawful because the Supreme Court has found that the rule of law — as an underlying constitutional principle — will, in certain circumstances, dictate substantive legal outcomes. In *Re Manitoba Language Rights*, the Court found that most of Manitoba's laws were unconstitutional because they were not enacted in French as well as in English.[15] As a result, most of the laws in Manitoba were "of no force or effect".[16] The Court found that such an outcome would violate the rule of law, which requires a stable body of laws by which a society is ruled. To resolve the impasse, the Court temporarily prolonged the validity of the unconstitutional laws so that the Manitoba legislature could calmly cure the defect.

Based on the reasoning of the Court in *Manitoba Language Rights*, there is no glaring bar to it applying in the context of a use of the notwithstanding clause that offends the thick version of the rule of law. Whether the reasoning is sound is a separate question that requires further exploration elsewhere.

I reiterate my view, in closing, that the common critique of the notwithstanding clause as being antithetical to the project of entrenching a bill of rights is, in effect, an articulation of the idea that this project entails an endorsement of a thicker version of the rule of law by the society in question. The existence of the notwithstanding clause along with certain uses of it do not inherently betray a thick version of the rule of law, but the existence of the clause certainly opens the door to legislation that commits this betrayal.

When the notwithstanding clause arrived in 1982, many politicians and scholars accurately predicted that it would not be widely used due to the political cost of using of the clause. Apart from political considerations, it seems plausible to suggest that scant usage of the clause over the nearly four decades of its existence stems in part from a recognition of the conceptual friction between the clause and what the rule of law means in a society that has inserted a bill of rights into its supreme law.

I suspect that much of the discomfort with the notwithstanding clause stems from a profound tension between it and the endorsement by Canadian society of the view that the rule of law is, properly understood, the rule of just law — something more than a formal commitment to justice, equality human rights. We have not wrestled sufficiently with this possibility. This paper is, I hope, a starting point.

New Brunswick's mandatory vaccination law as a case study, see Mark Mancini & Geoffrey Sigalet, "What constitutes the legitimate use of the notwithstanding clause" *Policy Options* (January 20, 2020), online: <https://policyoptions.irpp.org/magazines/january-2020/what-constitutes-the-legitimate-use-of-the-notwithstanding-clause/>.

[15] *Re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 (S.C.C.).

[16] *Constitution Act, 1982*, s. 52(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.