Chapter 4

FORGOTTEN FREEDOMS AND THE RULE OF LAW

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I. INTRODUCTION

As part of a larger project on forgotten freedoms,[1] we have recently discussed what we called the forgotten inner freedoms contained in some of the text of section 2(b) of the *Canadian Charter of Rights and Freedoms*.[2] While many tend to refer to section 2(b) as the "freedom of expression" provision, it also contains protections for a number of other freedoms, including the freedoms of thought, belief and opinion. These three freedoms are "inner freedoms" in so far as they protect aspects of the internal forum of the person.[3] They are "forgotten freedoms" in the sense that

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[1] See generally Dwight Newman, Derek Ross & Brian Bird, eds., *The Forgotten Fundamental Freedoms of the Charter* (Toronto: LexisNexis Canada, 2020). This collection is part of a larger research initiative, the Forgotten Freedoms Project, explained, articulated and argued further within that work.

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("Charter"). See Monica Fitzpatrick & Dwight Newman, "Freedoms of Thought, Belief and Opinion as Protected Inner Freedoms" (2020) 98 S.C.L.R. (2d) 249.

[3] Cf. also Brian Bird, "Are All Charter Rights and Freedoms Really Non-Absolute?" (2017) 40 Dal. L.J. 107 at 118 (making a prior claim about the potential absoluteness of the inner freedoms, a matter to which we will return: "I believe Charter rights and freedoms that deal exclusively with the internal forum of the person are candidates for absolute status. Here I have in mind freedom of thought, belief, and opinion under section 2(b) of the Charter"). Obviously, important aspects of freedom of conscience and freedom of religion are also inner freedoms, although the main matters discussed on those freedoms often pertain to their external manifestations. In our work, we have focused on thought, belief and opinion. On conscience, we would refer the reader generally to Bird's important, growing body of work. See *e.g.*, Brian Bird, "Understanding Freedom of Conscience", *Policy Options* (August 2,

they are contained within the legal text of the Charter and would be recognized as legally valid freedoms on a correct interpretation of this text, but they have received little or no scholarly and judicial attention.[4] Consequences of this lack of scholarly and judicial attention include that their interpretation remains less clear than it could be, that those litigating cases may be tempted to try to shoehorn claims that would properly fall within the scope of these freedoms into other freedoms, and generally that they are less usable than they would otherwise be.

Those consequences are serious, as are others we have already discussed,[5] but there are further implications for the rule of law that we have not directly discussed previously. Put simply, when certain constitutionally entrenched freedoms come to be forgotten, there are corroding effects on the rule of law, and this problem is perhaps especially significant in respect of such forgotten inner freedoms as freedom of thought, freedom of belief and freedom of opinion.

In this short paper, we make this claim with specific reference to an aspect of the rule of law that itself warrants more attention than it sometimes receives, that of the accessibility of law. In Part II, we discuss how the presence of forgotten freedoms in a constitutional order undermines the accessibility and, thus, the promulgation of law in a manner that gives rise to rule of law concerns. In Part III, we discuss some broader concerns arising from the forgetting of inner freedoms, noting a broader distortion in the understanding of the relationship between the state and individual human persons that arises from this departure from the rule of law. In Part IV, we sketch out some of the resulting conclusions, noting the need for many actors to work to ensure that constitutionally entrenched freedoms not be forgotten and some tangible implications in terms of the need for ongoing study of established fundamentals in place of a sole focus on the pursuit of evanescent novelties.

II. THE PROBLEM OF PROMULGATED BUT FORGOTTEN FREEDOMS

Part of the concept of the rule of law is the accessibility of the law, the idea that the law be subject to being comprehended in some reasonable way, such that individuals can be guided by the law in a manner that they can predict. This idea is closely associated with the requirement that a law naturally must be promulgated if

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2017); Brian Bird, "The Call in *Carter* to Interpret Freedom of Conscience" (2018) 85 S.C.L.R. (2d) 107; Brian Bird, "The Reasons for Freedom of Conscience" (2020) 98 S.C.L.R. 111.

[4] For discussion of a precise definition of forgotten freedoms, see Dwight Newman, "Recovering Forgotten Freedoms" (2020) 98 S.C.L.R. 47 at 49.

[5] See Monica Fitzpatrick & Dwight Newman, "Freedoms of Thought, Belief and Opinion as Protected Inner Freedoms" (2020) 98 S.C.L.R. (2d) 249 at 271 (noting the resulting denial of these freedoms and the negative effects on a holistic reading of the Charter); Dwight Newman, "Recovering Forgotten Freedoms" (2020) 98 S.C.L.R. 47 at 62 (noting similar concerns for the loss of these freedoms and their broader holistic implications, and also noting the potential failure to recognize intersectional freedom violations).

it is to be a law at all: "Promulgation is of the very essence of law, and a *sine qua non* of legal obligation."[6]

In a complex regulatory environment, of course, some law will be technical in nature, and the layperson may need a lawyer to assist in interpreting these technical aspects of law.[7] But the law must nonetheless be public and be, in principle, subject to being comprehended. A secret law is no law at all, and the government that claims to act on law that is not "in the books" is despotic.

The presence of legal text in the books that does not become part of the "law in action",[8] though, might seem at first glance an opposite and thus unrelated problem. The issue, one might suggest, is not an absence of promulgation but one of "too much" promulgation. In a sense, in this situation, more law has been written down and promulgated than is going to be respected.

The problem, though, is not so distant from that first at issue. If the legal text represents to the reader that there are constitutional freedoms of thought, belief and opinion but these freedoms are then forgotten and thus effectively unusable in the legal system, a problem arises. The individual who would have been guided in interaction with other parts of the legal system by an assumption that it is to be read subject to some plausible conception of these freedoms will face unexpected demands from state actors. The problem of promulgated but forgotten freedoms damages the accessibility of the individual's legal obligations and harms his or her ability to be guided by the law as surely as if there were a simple failure to promulgate the law.

The failure to maintain constitutional freedoms as living freedoms raises, then, a problem not only of the denial of freedoms to which individuals are rightly entitled but also a corrosion of the rule of law. Legal text must be given meaning if its presence is not to deceive the individual seeking to be guided by the law.

III. BROADER DISTORTIONS FROM THE FORGETTING OF THE INNER FREEDOMS

While the problem of forgotten freedoms is broader in scope than just the inner freedoms we have discussed in our recent work,[9] the forgetting of these inner

[6] Gilbert Bailey, "The Promulgation of Law" (1941) 35 Am. Pol. Sci. Rev. 1059 at 1059. See also Fuller's discussion of the requirement that the law be public: Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

[7] See Max Weber, *Economy and Society*, vol. 2, ed. by Guenther Roth & Claus Wittich (Berkeley: University of California Press, 1968 [1922]) at 882–95.

[8] We allude obviously to the distinction from Roscoe Pound, "Law in Books and Law in Action: Historical Causes of Divergence between the Nominal and Actual Law" (1910) 44 Am. L. Rev. 12.

[9] See generally Dwight Newman, "Recovering Forgotten Freedoms" (2020) 98 S.C.L.R. 47.

freedoms does present some distinctive issues. Indeed, we will argue that to forget these inner freedoms is to forget some of the aspects of human nature associated with the very value of the rule of law.

Notably, the inner freedoms in the Charter were not inventions of the moment but have a longer legal lineage, carrying forward historically recognized freedoms discussed at length at the time of their incorporation in the *Universal Declaration of Human Rights* ("UDHR").[10] Describing those discussions, Lebanese delegate Charles Malik wrote in a mid-1948 article, "What are Human Rights?", that the UDHR cannot be focused on protection of economic gain alone, but that it must be oriented more philosophically to what distinguishes human beings from animals and to why human beings deserve freedoms.[11] The drafting discussions encompassed the idea that "[e]ven if the list of social, economic, political and juridical rights of man were complete and adequate, it would count for nothing if man were denied freedom of thought and belief. Those were essential freedoms which made life richer and constituted the supreme goal of all aspirations".[12]

Of course, Canada does not forget these concepts, and some might say that it has been possible to see their constitutional entrenchment become forgotten precisely because they are not violated in our day-to-day lives.[13] But the reality that the constitutionally entrenched inner freedoms become forgotten in legal contexts, even where they could be used, implies tendencies toward the loss of a fully formed conception of human nature, of human freedom, and ultimately of human agency. The commands of the law mean something different when directed to those whom the law does not regard fully as human agents as opposed to when the law sets forth coordination in the pursuit of human flourishing.

The discussions of the inner freedoms during the drafting process for the UDHR assumed a human person who warranted the absolute protection of such inner freedoms as thought, belief and opinion. During the drafting discussions, the French delegate René Cassin, a leading philosophical visionary of the UDHR, strongly expressed at several points his view that the inner freedoms could not be subjected to limits.[14] We have discussed in our recent work the implications of this view in the

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[10] GA Res. 217A(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

[11] Charles Malik, "What Are Human Rights?" The Rotarian (August 1948) at 9, quoted in Linde Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights* (Cambridge: Cambridge University Press, 2017) at 45.

[12] Summary Record of the 127th Meeting [of the Third Committee], UN Doc. A/C.3/SR.127 (November 9, 1948) in William A. Schabas, ed., The Universal Declaration of Human Rights: The Travaux Préparatoires (Cambridge: Cambridge University Press, 2013) at 2497.

[13] We explore such rationalizations in Brian Bird, Dwight Newman & Derek Ross, "The Charter's Forgotten Fundamental Freedoms" *Policy Options* (June 16, 2020).

[14] On Cassin's agreement with Malik within this discussion, see Linde Lindkvist,

Canadian Charter context, where there ought properly to be an absolute core to these rights along with the possibility of justified limits on some external manifestations of them, but with the idea of absolute rights calling for changes in Canadian constitutional theory.[15] A legal system that recognizes certain absolute protections for the human person is qualitatively different from one that would incessantly, and even insidiously, balance off rights in various proportionality analyses.[16] Forgetting the inner freedoms means forgetting aspects of what the law is and how the state is to interact with free human persons.

IV. IMPLICATIONS

The position we have been able to articulate here only briefly within the requisite space constraints is essentially that the forgotten inner freedoms, which we have begun discussing elsewhere, raise particular issues in respect of the rule of law. The very fact that they have been permitted to be forgotten raises rule of law issues related to the accessibility and promulgation aspects of the rule of law. The fact that these inner freedoms, in particular, have been forgotten from the law has particular implications in terms of the law forgetting aspects of human nature, the human person, and human agency that are actually essential to the enterprise of law itself.

One important implication of our position is that the law cannot properly be discussed independently of its deeper heritage and deeper values. While it is proper to use the law to advocate for causes, to work with the law in a contemporary setting should not be solely about playing with a set of rules malleable to causes of the day. To work with the law is to be immersed in a deeper human enterprise that recognizes the absolute value of the human person. It is to be engaged with a deeper tradition of freedoms that have unfortunately sometimes become forgotten. It is to be engaged with the deep foundations of the rule of law.

There are yet more practical implications that flow from these underpinnings. For example, while certain professional academic pressures are oriented toward "knowledge generation", there is a real need within the humanistic enterprise of law also for knowledge preservation, the conservation of the great traditions of the law, and ongoing work on legal issues that may not always seem like they fit in the headlines of today but that are part of the deeper lifelines of humanity over the generations.[17]

Religious Freedom and the Universal Declaration of Human Rights (Cambridge: Cambridge University Press, 2017) at 27–29.

[15] Monica Fitzpatrick & Dwight Newman, "Freedoms of Thought, Belief and Opinion as Protected Inner Freedoms" (2020) 98 S.C.L.R. (2d) 249 at 269–70.

[16] See also Dwight Newman, "Proportionality Analysis: 5 ½ Myths" (2016) 73 S.C.L.R. (2d) 93; Dwight Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests" (1999) 62 Sask. L. Rev. 543.

[17] We note the salience with the historical project of Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queen's University Press, 2020) and look forward to him and others going on to further treatment of

Even while also being ready to discuss novel manifestations of conflict and coordination in human life, law faculties and legal scholars have resulting normative obligations to continue to engage with a certain established corpus and curriculum of legal knowledge.

Legal scholars, legal practitioners and judges have mutual challenges in maintaining life in forgotten freedoms and forgotten foundations of law. To fail to do so is to deny individuals part of their birthright as free persons in proper relation with the order of the state, and it is also to do something that has corrosive effects upon the rule of law. This challenge too implies normative obligations to make continuing efforts to conserve the forgotten freedoms by referencing them, by expositing them, and by being ready to apply them without hesitation and without having to search them out in some dust-encrusted tome.

There is a role here even for those embarking on the enterprise of law. We hope that those concerned with deep values continue to become law students, and we hope that law students continue to ask the intellectually challenging questions, continue to form associations through which they wrestle with deep meaning, and continue toward the roles through which in the noblest traditions of the profession they may serve the rule of law.

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the historical foundations he has been exploring.