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# What the Rule of Law means to the Freedom of Expression

Over the past century, people have become increasingly aware of the freedom of expression, which is constantly a hot topic in Canada and around the world. The Canadian Charter of Rights and Freedoms defines the purpose of the freedom of expression as “promot[ing]... participation in social and political decision-making and the opportunity for self-fulfillment through expression.”<sup>1</sup> Freedom of expression not only includes the freedom of speech but also the freedom of assembly, demonstration, et cetera. Simultaneously, it can threaten the security of society when it is abused through public disturbance and whatnot. In order to ensure property rights and stability, Enlightenment thinker Thomas Hobbes argued in the “social contract theory” that people automatically consent to have certain rights and freedoms taken away by their leader in exchange for protection when they live in a society.<sup>2</sup> Thus a dilemma is formed, should freedoms be given up for the security of society, or should they be kept to protect the democracy and pluralism of our society? The answer to this is not definite, but must be formed while considering the rule of law. According to the Provincial Court of B.C. website, the rule of law “means that all people [including those in power] are treated equally by the same standard.”<sup>3</sup> In other words, the freedom of expression of every individual in the society should be protected no matter their political, ethnic background, et cetera. The rule of law is essential to the protection of the freedom of expression of individuals, but if it is abused or misused in movements such as demonstrations, courts can decide to intervene, limit, or prohibit the movement with the rule of law as the primary concern in the decision-making process.

Freedom of expression is protected by the rule of law. As mentioned, under the rule of law no one, including the government, is above the law. In other words, those wielding political

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<sup>1</sup> Government of Canada. “Charterpedia - Section 2(b) – Freedom of expression.” *Department of Justice*, 1 September 2021, <https://www.justice.gc.ca/eng/csjsj/rfc-dlc/ccrf-ccd1/check/art2b.html>

<sup>2</sup> Lloyd, Sharon A., and Susanne Sreedhar. “Hobbes's Moral and Political Philosophy (Stanford Encyclopedia of Philosophy).” *Stanford Encyclopedia of Philosophy*, 12 February 2002, <https://plato.stanford.edu/entries/hobbes-moral/>

<sup>3</sup> Watson, Jack. “What is the Rule of Law - and why does it matter?” *Provincial Court of British Columbia*, 4 November 2020, <https://www.provincialcourt.bc.ca/enews/enews-04-11-2020>

power and ordinary citizens are treated equally with the law standing above them, entailing that the government has no right in using the law and its political power to suppress citizens for its own political interests without facing responsibility. There would be no “rule of law” but “rule by law” when the “law is used as a tool of political power... [which] mean[s] that the state uses [the] law to control its citizens but tries [to] never to allow [the] law to be used to control the state.”<sup>4</sup> Thus, under the rule of law, everyone is treated equally in the sense that people can freely exercise their freedom of expression in various forms, such as displaying dissent toward the government in an assembly, without facing political consequences. Nonetheless, the rule of law does not imply there are no limits to freedom of expression, but in fact the opposite.

Section 1 of the Canadian Charter of Rights and Freedoms introduces the “reasonable limits clause,” the purpose of which is to “effect a balance between the rights of the individual and the interests of society by permitting limits to be placed on guaranteed rights and freedoms.”<sup>5</sup> For instance, “Canadian courts have made it clear that reasonable limits can be placed on our freedom of speech in order to deal with hate.”<sup>6</sup> Calgary mayoral candidate Kevin J. Johnston was sentenced to jail in 2021 after making hate speech and racist remarks.<sup>7</sup> In his reasons for decisions, the judge stated that Section 2 of the Charter ensures the freedom of expression of Canadians, but at the same time the rights of others could be violated by “exercising their rights” if there were no limits to the freedom of expression.<sup>8</sup> The rule of law protects individuals’ freedom of expression, but also entails limits to it in the sense that

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<sup>4</sup> Waldron, Jeremy. “The Rule of Law (Stanford Encyclopedia of Philosophy).” Stanford Encyclopedia of Philosophy, 22 June 2016, <https://plato.stanford.edu/entries/rule-of-law/>

<sup>5</sup> Government of Canada. “Charterpedia - Section 1 – Reasonable limits.” Department of Justice, 14 April 2022, <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art1.html>

<sup>6</sup> Walker, Julian. Hate Speech and Freedom of Expression: Legal Boundaries in Canada. Library of Parliament, 29 June 2018

<sup>7</sup> Nasser, Shanifa. “Racist Calgary mayoral candidate gets 18 months’ jail time for violating Ontario judge’s hate speech order.” *CBC*, 4 October 2021, <https://www.cbc.ca/news/canada/toronto/kevin-johnston-sentence-1.6198801>

<sup>8</sup> Court of Queen’s Bench of Alberta. “Reasons for Decisions of the Honourable Mr. Justice A.W. Germain.” Alberta Courts, 7 July 2021, [https://albertacourts.ca/docs/default-source/qb/judgments/alberta-health-services-v-johnston-2021-abqb-508---reasons-for-decision.pdf?sfvrsn=2ebc4c83\\_5](https://albertacourts.ca/docs/default-source/qb/judgments/alberta-health-services-v-johnston-2021-abqb-508---reasons-for-decision.pdf?sfvrsn=2ebc4c83_5)

individuals can not abuse their guaranteed freedoms to infringe the rights of others. Otherwise, it would not be fair and it would appear as if some people are above the law and other members of society. In *Paths of Justice*, Hong Kong Honourary Senior Counsel Johannes Chan stated that “human rights are not absolute. Yet the mere fact that human rights are not absolute does not mean that any restriction is permissible.”<sup>9</sup> In that case, what should the courts consider before deciding whether to limit a protest or demonstration?

Democracy was critiqued by Plato, whose teacher, Socrates, was accused of being religiously unorthodox and sentenced to death by a majority vote after changes in political circumstances in Athens, despite being previously tolerated.<sup>10</sup> Mob rule was Plato’s definition of democracy. He believed that the general population do not make political decisions with skill, but can be easily “swayed by those who speak [the] loudest,” allowing the tyrannical majority to violate the rights of the minority.<sup>11</sup> That is why Aristotle outlined the rule of law in *Politics*, which is to ensure every individual in society is treated equally and to prevent the rights of the minority infringed by the majority.<sup>12</sup> In this sense, courts should only intervene, limit or prohibit a demonstration if it threatens the rights of others, even if it is widely supported by the majority of the population. While the courts should assess whether the demonstration infringed the rule of law, it is also important for them to consider other stakeholders, especially those in power.

There were numerous peaceful assemblies in Hong Kong during the 2019 Pro-democracy Movement, which was supported by the majority of the population as projected by the District Council election results in the same year. Opposition to the government was met with the Public Order Ordinance, which is a law in Hong Kong that grants the police commissioner power to limit or prohibit a demonstration if he or she believes it will disrupt public

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<sup>9</sup> Chan, Johannes M. M. *Paths of Justice*. Hong Kong University Press, 2018

<sup>10</sup> Kraut, Richard. “Socrates | Biography, Philosophy, Method, Death, & Facts.” *Encyclopedia Britannica*, n.d., <https://www.britannica.com/biography/Socrates>

<sup>11</sup> Wolff, Jonathan. *An Introduction to Political Philosophy*. Oxford University Press, 2016

<sup>12</sup> Bernard, George. “Rule of Law.” *National Geographic Society*, 15 March 2019, <https://www.nationalgeographic.org/encyclopedia/rule-law/>

order.<sup>13</sup> In other words, an assembly is illegal once the government declares so. The law gives the government unchecked power to limit citizens' freedom of expression and can disguise political motives behind bans as the need to maintain public order. 1.7 million participated in a peaceful, but declared illegal, march on August 18th 2019. Afterwards, the police arrested one of the participants, media tycoon Jimmy Lai. He was later sentenced to jail for participating in a march in Hong Kong.<sup>14</sup> By doing so, the court legitimised the government's use of the ordinance and undermined the opposition's and protestors' freedom of expression, contradicting the rule of law. Conversely, if the court gave in to popular demand, the government and their supporters may argue that the minority's right to peace and public order is neglected. Nonetheless, the demonstration did not tread on the rights of others and was a peaceful utilisation of the freedom of expression that respected the security of the society. Yet, it was declared illegal and participants were prosecuted. The ordinance grants unchecked powers to the government, allowing the opposition to be easily suppressed, threatening democracy and pluralism. Hence, the courts should revise the ordinance instead in order to preserve the rule of law. At the end of the day, laws can be changed to better adapt to society and reflect moral values.

Hongkong-American martial artist Bruce Lee once said, "Water can flow or it can crash." The same applies to freedom of expression, which can be used to promote civic participation in decision-making processes and pluralism. It also allows people to monitor the government, keeping its powers checked in balance and unabused. Conversely, it can be used as a weapon to bring harm to society and threaten security. In order to keep it from "crashing", limits premised on the rule of law should be placed. The rule of law should also be strictly adhered to and protected, as it ensures equal treatment of every individual in society, and prevents the government from undermining the rights of the people. The rule of law and freedom of

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<sup>13</sup> Government of the Hong Kong Special Administrative Region. "Cap. 245 Public Order Ordinance." Hong Kong e-Legislation, 12 December 2019, [https://www.elegislation.gov.hk/hk/cap245?xid=ID\\_1438402885591\\_001](https://www.elegislation.gov.hk/hk/cap245?xid=ID_1438402885591_001)

<sup>14</sup> Chan, Michelle. "Hong Kong's Jimmy Lai and others jailed over illegal assembly." *Nikkei Asia*, 16 April 2021, <https://asia.nikkei.com/Politics/Hong-Kong-s-Jimmy-Lai-and-others-jailed-over-illegal-assembly>

expression are strongly dependent on each other as the freedom of expression is protected by the rule of law, while unviolated freedom of expression in society is proof that the rule of law stands firm.

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