RETREATING TO JUSTICIABILITY: DRAWING A FINE LINE BETWEEN “LEGAL” AND “MORAL” RIGHTS QUESTIONS

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INTRODUCTION

Determining the membership of a religious organization may not appear to be an issue that courts should address; however, there is reason to re-examine how courts determine whether such issues are “justiciable.” Justiciability refers to whether the subject matter of a legal issue is “appropriate for a court to decide.”¹ In the recent Supreme Court of Canada (SCC) decision *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*,² Calgary-based Jehovah’s Witness Randy Wall was disfellowshipped, or expelled, from the Highwood Congregation after admitting to drunkenness and verbal abuse of his wife.³ Disfellowship is a serious sanction for Jehovah’s Witness congregation members because it allows to speak only with their immediate family within the congregation exclusively about “non-spiritual matters.”⁴ In effect, disfellowship amounts to community shunning, especially if the family members of a former Jehovah’s Witness remain committed to their faith.⁵ In an attempt to overturn the Congregation’s decision, Mr. Wall applied for judicial review to the Alberta Court of Queen’s Bench and was successful in his initial hearing to determine whether the court had jurisdiction. The chambers judge found that Mr. Wall’s application could be heard because his civil rights were affected.⁶ The Alberta Court of Appeal upheld this decision, noting that courts may intervene in the membership decisions of voluntary organizations if there was a breach of the rules of natural justice or the complainant exhausted internal organizational processes.⁷

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¹ 2018 SCC 26 at para 32 [*Highwood Congregation SCC*].

² *Wall v Judicial Committee of the Highwood Congregation of Jehovah’s Witnesses*, 2016 ABCA 255 [*Highwood Congregation ABCA*].

³ *Ibid* at para 5.

⁴ *Highwood Congregation SCC*, *supra* note 1 at para 5.

⁵ *Highwood Congregation ABCA*, *supra* note 2 at para 6.

⁶ *Highwood Congregation SCC*, *supra* note 1 at para 8.

⁷ *Ibid* at para 16.

While the SCC overturned the Alberta Court of Appeal's decision for reasons other than justiciability, the court provided helpful *obiter* on how courts should evaluate whether an issue is justiciable.⁸ The SCC emphasized that justiciability is largely context specific, focusing on whether an issue brought before the courts is an efficient use of judicial resources with a "sufficient factual and evidentiary basis for the claim."⁹ On the issue of religious membership, the SCC held that it lacked the legitimacy and institutional capacity to resolve matters that are ecclesiastical, rather than legal, in nature.¹⁰ This decision affirmed the interpretation of Justice Wakeling in his dissenting Alberta Court of Appeal judgment, which held that the absence of property or civil rights of a legal nature meant that Mr. Wall's disfellowshipping was non-justiciable.¹¹

The *Highwood Congregation* decisions provide a useful opportunity to explore the intersection of justiciability and morality in Canadian jurisprudence. The majority and dissent in the Alberta Court of Appeal decision characterized the legal nature of the issue differently, resulting in different conclusions about whether the matter was justiciable.¹² These divergent interpretations demonstrate that the scope of "legal rights" and "justiciability" can be subjective, rather than objective, inquiries. While Justice Wakeling drew a sharp distinction between legal and moral questions in his dissent,¹³ his subjective interpretation of justiciability has a distinctly moral foundation based on his own "normative preferences."¹⁴ These normative preferences were demonstrated when Justice Wakeling characterized the issue as one of "Church doctrine," rather than recognizing the detriment to Mr. Wall's legal rights.¹⁵ This case demonstrates that judges can "define the boundaries of justiciability"¹⁶ differently, and doing so can have significant consequences for the scope of rights, the separation of powers, and the rule of law in Canada.

While justiciability serves an important gatekeeping function in our legal system, it can also provide a legal justification for judges to avoid value-laden moral decision-making. Justiciability can serve as a "retreat to formalism,"¹⁷ allowing judges to avoid engaging with the

⁸ *Highwood Congregation* SCC, *supra* note 1 at para 32.

⁹ *Ibid* at para 34.

¹⁰ *Ibid* at paras 34–37.

¹¹ *Highwood Congregation* ABCA, *supra* note 2 at paras 127–30.

¹² *Ibid* at paras 22, 139. Recognizing that the ABCA decision was overturned on appeal, I use the ABCA decision for this analysis because the SCC decision was unanimous, demonstrating no divergence among the judges in their decision-making process.

¹³ *Ibid* at paras 77, 80, citing *Cavanaugh v Grenville Christian College*, 2009 CanII 9439, [2009] OJ No 875 (QL) (Sup Ct J) ("[a] dispute is not justiciable where it requires a court to decide a matter of *morality*, religious doctrine, politics or the wisdom of government action" at para 22 [emphasis added]).

¹⁴ Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Thomson Reuters Canada, 2012) at 7.

¹⁵ *Highwood Congregation* ABCA, *supra* note 2 at para 31. Wakeling JA distinguished this case from *Bruker v Marcovitz*, 2007 SCC 54 at para 41, in which Abella J stated: "The fact that a dispute has a religious aspect does not by itself make it non-justiciable."

¹⁶ Sossin, *Boundaries of Judicial Review*, *supra* note 14 at 6.

¹⁷ Robert M Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975) at 199.

substantive dimensions of morally charged questions. By retreating to justiciability, judges can draw sharp, artificial distinctions between legal and moral questions. This can have significant consequences for litigants and the justice system at large because it prevents parties from seeking legal recourse to resolve disputes, and it constrains the development of jurisprudence (e.g., novel claims under the *Canadian Charter of Rights and Freedoms*¹⁸ [*Charter*]). In exploring this tension between legal and moral questions, I assert two key claims about justiciability: (1) judges should take a broad approach to determine whether a question is sufficiently legal in nature, recognizing that substantive moral dilemmas can have important legal implications; and (2) retreating to justiciability is a missed opportunity for judges to resolve moral dilemmas within a legal framework. In asserting these claims, I adopt the definition of justiciability put forward by Justice Lorne Sossin, former professor and dean of Osgoode Hall Law School, as “a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life.”¹⁹

I rely on the assumption that the value of the rule of law is its ability to advance substantive moral objectives, rather than merely ensure compliance with the law as a “rule book” to govern social relations.²⁰ While these claims are motivated by a substantive philosophical orientation, the importance of clarifying how legal and moral questions are evaluated as part of a justiciability inquiry is also relevant to a formalist perspective. My use of the concept of “retreating to formalism,”²¹ raised by the late Yale Law School professor Robert Cover, is not a rejection of a formalist approach to justiciability, but rather a discussion of how formalism can prevent judges from exploring the important intersections of legal and moral questions. To advance these claims, I use the justiciability of *Charter* rights as a case study of how courts can, and should, contend with the moral dilemmas inherent within legal questions. I conclude my paper by exploring how a broader approach to justiciability can serve to strengthen, rather than undermine, the rule of law in Canada.

I. A PHILOSOPHICAL FRAMEWORK FOR JUSTICIABILITY

Justiciability is a normative and largely undefined concept in Canadian jurisprudence, and judges do not have a prescribed legal doctrine to assess whether an issue is justiciable.²² While judges tend to apply several factors consistently when assessing justiciability, such as the legitimacy of the judicial process, the constitutional separation of powers, and the nature of the dispute,²³ the inquiry itself is subjective and context specific. Despite this ambiguity, judges consider justiciability frequently in their judicial decision-making. Whether the court is

¹⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

¹⁹ Sossin, *Boundaries of Judicial Review*, *supra* note 14 at 7.

²⁰ Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 11.

²¹ Cover, *supra* note 17 at 199.

²² Sossin, *Boundaries of Judicial Review*, *supra* note 14 at 3.

²³ *Ibid* at 7.

determining whether a party should be granted public interest standing,²⁴ articulating the scope of judicial review of administrative decisions,²⁵ or drawing the boundary between legal and political questions,²⁶ justiciability is one of the foundational concepts of our judicial system.

Justiciability has a philosophical dimension because judges can interpret the source of the judiciary's legitimacy differently, then use that perspective to inform their decision-making. Sossin noted that judges "expand or contract" the concept of justiciability based on their perceived objective of judicial review—for example, resolving disputes or articulating public values.²⁷ In this paper, I draw parallels between these different value systems that inform justiciability and the late New York University jurisprudence professor Ronald Dworkin's rule of law framework, which suggests that the rule of law can be understood using either the "rule-book conception" (which emphasizes compliance with the formalist structure of law) or the "rights conception" (which emphasizes the law's role in furthering substantive justice).²⁸

Understanding the philosophical dimensions of justiciability is essential because of its important role in judicial decision-making. Justiciability has both internal and external effects: it allows the judiciary to define the scope of its own powers and provides a gatekeeping function for citizens seeking dispute resolution. By allowing judges to "reflect upon [their] own capacity and legitimacy to resolve the disputes brought before courts," justiciability can promote modest, prudent decision-making.²⁹ However, narrow approaches to justiciability can have "devastating effects" on access to justice, particularly when judges use summary procedures to dismiss *Charter* litigation.³⁰ Justiciability has been a key factor in courts dismissing important issues early in the litigation process, such as whether the Government of Ontario has a legal obligation to complete its basic income pilot project,³¹ whether Canada is obliged to fulfill its Kyoto Protocol commitments,³² or whether Canadians should have a right to adequate housing.³³

In this paper, I rely on Cover's work to explore the normative dimensions of justiciability. While many legal theorists, such as Dworkin, have theorized about the role of morality in the law, Cover provides a unique perspective on how judges and lawmakers perceive the law as an

²⁴ *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at 615.

²⁵ *Highwood Congregation SCC*, *supra* note 1 at para 13.

²⁶ *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at 91–92 [*Minister of Energy*].

²⁷ Sossin, *Boundaries of Judicial Review*, *supra* note 14 at 10.

²⁸ Dworkin, *supra* note 20 at 11.

²⁹ Sossin, *Boundaries of Judicial Review*, *supra* note 14 at 2; see also *Minister of Energy*, *supra* note 26 ("ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme" at 91).

³⁰ Gerard Kennedy & Lorne Sossin, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada" (2017) 45:4 *Fed L Rev* 707 at 708, DOI: <doi.org/10.22145/flr.45.4.10>.

³¹ *Bowman v Her Majesty the Queen*, 2019 ONSC 1064 [*Bowman*].

³² *Friends of the Earth v Canada (Governor General in Council)*, 2008 FC 1183, *aff'd* 2009 FCA 297 [*Friends of the Earth*].

³³ *Tanudjaja v Canada (AG)*, 2014 ONCA 852 [*Tanudjaja*].

extension of our collective “commitment in the cause of justice.”³⁴ Cover argued that law is a socially constructed endeavour and a “normative universe”—it exists as a psycho-social structure rather than an autonomous set of rules and principles by which we choose to govern ourselves.³⁵ Cover’s theoretical frameworks are relevant to the issue of justiciability, as judges and lawyers use justiciability to normatively define the boundaries of “legal” questions.

Judicial concerns with justiciability often reflect what Cover described as a moral-formal problem, in which there is a disjuncture between the “substantive moral propositions ... and the moral ends served by the formal structure as a whole.”³⁶ Cover described this problem as follows:

The judicial conscience is an artful dodger and rightfully so. Before it will concede that a case is one that presents a moral dilemma, it will hide in the nooks and crannies of the professional ethics, run to the caves of role limits, seek the shelter of separation of powers ... [b]ut with all its resources for avoiding definition of judicial problems as moral ones, it is yet possible to trap the elusive creature.³⁷

Cover emphasized that when judges are confronted with these moral-formal problems, they often rely on several “responsibility-mitigation mechanisms”: (1) elevating the formal stakes of an issue and minimizing the moral stakes; (2) retreating to mechanistic formalism; and (3) ascribing responsibility elsewhere.³⁸ While Cover’s framework was specific to judicial decisions about slavery that ran contrary to the judges’ personal moral beliefs, it also provides a useful framework to consider how judges engage with the issue of justiciability when confronted with moral dilemmas.

Cover’s framework is useful in this context; however, his methodology is difficult to replicate. Cover’s argument succeeded because he reconciled judicial decisions with private correspondence that provided extrinsic evidence of the moral dilemmas judges faced.³⁹ I do not intend to replicate Cover’s approach of drawing conclusions about judges’ “personal world[s].”⁴⁰ In the absence of such extrinsic evidence, it is very difficult—if not impossible—to make definitive assertions about how judges reconcile their own moral uncertainties when assessing whether an issue is sufficiently justiciable. Instead, I propose applying Cover’s responsibility-mitigation mechanisms to judicial decisions in order to understand how judges reconcile moral issues within legal frameworks.

³⁴ Howard J Vogel, “In the Cause of Justice: Reflections on Robert Cover’s Turn toward Narrative” (1989) 7:1 *JL & Religion* 173 at 185, DOI: <doi.org/10.2307/1051196>.

³⁵ Julen Etxabe, “The Legal Universe after Robert Cover” (2010) 4:1 *L & Humanities* 115 at 119, DOI: <doi.org/10.1080/17521483.2010.11423778>.

³⁶ Sossin, *Boundaries of Judicial Review*, *supra* note 14 at 197.

³⁷ Cover, *supra* note 17 at 201.

³⁸ *Ibid* at 199.

³⁹ *Ibid* at 119.

⁴⁰ *Ibid* at 226.

Cover noted that his use of cognitive dissonance theory was intended as a heuristic device, rather than a “rigorously testable prediction [of] behaviour.”⁴¹ Similar to Cover, I use judicial decision-making about justiciability to draw inferences about how judges analyze moral-formal problems. Without extrinsic evidence to demonstrate judges’ internal moral viewpoints, I am limited to their rationale in judicial decisions and secondary sources, including academic legal scholarship and case commentaries. Secondary sources are essential to this methodological approach to adopt a “perspective beyond, rather than within, the closed system” to understand justiciability.⁴²

II. WHAT IS “LEGAL”?

When judges consider whether an issue is justiciable, they often discuss whether the issue is sufficiently “legal.” What is “legal” is often difficult to distinguish from “political” or “moral.”⁴³ This distinction has been handled very differently in Canadian judicial decisions. In the *Secession Reference*,⁴⁴ the SCC drew a sharp distinction between legal and political questions, opting only to decide on the former.⁴⁵ In doing so, the court demonstrated Cover’s second mechanism of mitigating judicial responsibility—relying on mechanistic formalism. The court recognized that political questions often exist within a legal framework and emphasized that the legal nature of those political questions can be adjudicated by courts without “usurp[ing] ... democratic decisions” or disrupting Canada’s constitutional framework.⁴⁶ In contrast, in *Reference Re Canada Assistance Plan (BC)*,⁴⁷ the court emphasized that the issue must have a “significant legal component” to be justiciable and there must be “no other forum in which these legal questions could be determined in an authoritative manner.”⁴⁸

Judges often define “legal” issues by describing what they are not. In *R v Operation Dismantle*,⁴⁹ Justice Wilson indicated that issues may be non-justiciable if they involve “moral and political considerations” that are beyond the scope of courts to address, rather than simply lacking an evidentiary basis to be tried at law.⁵⁰ In *Minister of Energy*, Chief Justice Dickson emphasized that the principle of parliamentary supremacy should inform how the courts evaluate

⁴¹ *Ibid* at 227.

⁴² Thomas Barton, “Justiciability: A Theory of Judicial Problem Solving” (1983) 24 Boston College L Rev 505 at 507.

⁴³ Recognizing that moral and political questions are distinct, I frequently discuss them in this paper as related concepts based on how they have been considered in judicial decisions. Where appropriate, I distinguish between moral and political questions to provide additional clarity.

⁴⁴ *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Secession Reference*].

⁴⁵ *Ibid* at 237.

⁴⁶ *Ibid* at 236–37.

⁴⁷ [1991] 2 SCR 525.

⁴⁸ *Ibid* at 546.

⁴⁹ [1985] 1 SCR 441 [*Operation Dismantle*].

⁵⁰ *Ibid* at 465. While Wilson J provided the dissenting judgment, the majority affirmed her justiciability analysis.

justiciability, and rights should be understood as non-justiciable when Parliament expresses such an intention through statute.⁵¹ This approach reflects Cover's third mechanism of mitigating judicial responsibility—ascribing responsibility elsewhere, namely, to Parliament. This approach was subsequently applied in *Friends of the Earth*, where the Federal Court ruled that matters with clear mechanisms for public and parliamentary accountability can displace the role of the court, except for a narrow scope of authority to enforce mandatory elements of a statute.⁵²

However, drawing sharp distinctions between legal, moral, and political questions fails to accomplish the formalist objective of clarity. An issue arises when judges interpret the nature of a “legal issue” differently, as was the case in *Highwood Congregation SCC*. In *Friends of the Earth*, the Federal Court indicated that the justiciability of Canada's failure to fulfill its Kyoto Protocol commitments was a matter of statutory interpretation to assess Parliament's intent.⁵³ While the court in *Friends of the Earth* unanimously decided that the issue was not justiciable, it is entirely possible that the sitting judges could have drawn very different conclusions about whether the issue was “legal” based on their interpretation of whether the Government of Canada “[intended] to meet its Kyoto Protocol commitments” via its Climate Change Plan.⁵⁴

These cases illustrate that if legal reasoning itself is a subjective process, the scope of “legal” questions can vary significantly. Oxford University legal theorist Geoffrey Marshall noted that “legal issues” have been defined in British jurisprudence to refer to instances where judges are “deciding whether legal rights, already determined by pre-existing law, existed in a particular case.”⁵⁵ However, Marshall has aptly noted that the distinction between applying existing laws and creating new legal rights can be blurred, as judges are always engaged in a revisionist exercise when interpreting, applying, and exercising their judicial discretion.⁵⁶ Since the scope of “legal” questions can be highly subjective, classifying a problem as “legal” is merely a conclusion that grants access to the judicial method, grounded in the principles of objective decision-making, independence from popular pressure, and finality.⁵⁷

While judges will decide “legal” questions in a manner that is consistent with their philosophical orientation (depending on where they fall on the positive-natural law spectrum), moral considerations will always be invoked, either overtly or implicitly. Moral considerations appear in legal reasoning in subtle ways: considering the “public interest” as part of the *Oakes* test,⁵⁸ identifying changes in the “legislative and social facts”⁵⁹ or correcting the moral

⁵¹ *Minister of Energy*, *supra* note 26 at 91–92.

⁵² *Friends of the Earth* (2008), *supra* note 32 at paras 42, 46.

⁵³ *Ibid* at para 31.

⁵⁴ *Ibid* at para 11.

⁵⁵ “Justiciability” in AG Guest, ed, *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford: Oxford University Press, 1961) at 271.

⁵⁶ *Ibid* at 272.

⁵⁷ *Ibid* at 278; see also Barton, *supra* note 42 at 507, n 4.

⁵⁸ *Canada (AG) v Bedford*, 2013 SCC 72 at para 125 [*Bedford*].

⁵⁹ *Carter v Canada (AG)*, 2015 SCC 5 at para 47 [*Carter*].

assumptions made by Parliament in “defining and defending the boundaries of rights.”⁶⁰ Even if judges conclude that they are addressing a pure “legal” question such as the division of powers, they are inevitably incorporating moral considerations by making “normative claims about how political and judicial institutions should work.”⁶¹ As Justice Wilson noted in *Operation Dismantle*, when judges reject moral considerations as part of justiciability, they may be denying the legitimate and important moral foundation for their decision-making. Morality is essential because it “illuminates, supplements and enhances both the law and our interpretation of the law.”⁶² Its role should be made explicit.

The judicial history of *Rodriguez*⁶³ and *Carter*⁶⁴ is particularly illustrative of how judges can have divergent viewpoints on “legal” and “moral” questions and how this may impact their assessment of whether an issue is justiciable. In *Rodriguez*, Chief Justice Lamer noted in his dissent that “the Court should answer this question [of assisted suicide] without reference to ... philosophical and theological considerations It should consider the question before it from a legal perspective.”⁶⁵ In doing so, Chief Justice Lamer demonstrated Cover’s first mechanism of mitigating judicial responsibility: elevating the formal stakes of the issue and minimizing the moral stakes. Chief Justice Lamer’s approach differed from that of Justice Hollinrake of the British Columbia Court of Appeal, who emphasized the importance of “sanctity of life”—a moral principle—foregrounding the legal analysis surrounding the issue of assisted suicide.⁶⁶ In *Carter*, morality was again at issue when the SCC applied an expansive interpretation to the “right to life” under section 7 of the *Charter* and sought to craft an appropriate remedy.⁶⁷ Contrary to Judge Richard Posner’s assertion that “the moral issue in the euthanasia cases dissolved in the judicial consideration,”⁶⁸ when compared to analogous American cases, moral considerations were distinctly present in *Rodriguez* and *Carter*.

Determining the boundaries of “legal” questions has an important democratic foundation that relies on moral considerations. There are numerous examples of the judiciary playing a critical role holding the executive accountable or resolving sensitive political disputes that require a neutral arbiter, where the issues themselves have been deemed to be justiciable.⁶⁹ In *Roncarelli v*

⁶⁰ *Frank v Canada (AG)*, 2019 SCC 1 at para 126.

⁶¹ Ronald Dworkin, “Darwin’s New Bulldog” (1998) 111:7 Harv L Rev 1718 at 1730, DOI: <doi.org/10.2307/1342478>.

⁶² Erik Hagen, “The Moral Judiciary: Restoring Morality as a Basis of Judicial Decision-Making” (2013) 48 New Eng L Rev 139 at 139.

⁶³ *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519 [*Rodriguez*].

⁶⁴ *Carter*, *supra* note 59.

⁶⁵ *Rodriguez*, *supra* note 63 at 553.

⁶⁶ *Rodriguez v British Columbia (AG)*, [1993] 22 BCAC 266 at para 150.

⁶⁷ *Carter*, *supra* note 59 at paras 63, 130.

⁶⁸ Richard A Posner, “The Problematics of Moral and Legal Theory” (1997) 111 Harv L Rev 1637 at 1702.

⁶⁹ See *Secession Reference*, *supra* note 44; *Bush v Gore*, 531 US 98 (2000); *Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215, 199 DLR (4th) 228 (Ont CA) [*Black*].

Duplessis,⁷⁰ the SCC affirmed that there is “no such thing as absolute and untrammelled ‘discretion.’”⁷¹ While *Roncarelli* was an issue of discretion exercised by an executive authority, it raised important questions about the scope of justiciability and how it should be used as a tool to safeguard the rule of law.⁷² Recognizing that parliamentary supremacy is not absolute, judicial review “seeks to address an underlying tension between the rule of law and the foundational democratic principle.”⁷³ In cases such as *Roncarelli*, courts make a moral assessment when they decide whether public power was exercised in good faith. By doing so, judges perform an important service for the legitimacy of Canada’s democracy and the rule of law.⁷⁴ Broadening the scope of “legal” questions serves both a moral and democratic purpose by advancing Dworkin’s conception of a just society, preserving the separation of powers, and safeguarding the rule of law.

III. BROADENING THE SCOPE OF JUSTICIABILITY

Instead of relying on Cover’s mechanisms of mitigating responsibility, judges should instead take a broad approach to determining “legal” questions and, if appropriate, consider moral dilemmas within a legal framework. In making these claims, I do not suggest that *all* issues should be justiciable or that justiciability should be a purely subjective inquiry, at the whim of each individual judge. Instead, I emphasize that taking a broader approach to “legal” questions would allow judges to apply legal frameworks to issues that may have a more complex nexus between law and morality. In declaring an issue to be justiciable, judges are not expected to revise legal tests or guarantee particular outcomes—they are only required to give the issue full and fair legal consideration for how it might implicate rights, obligations, and liabilities.

Determining whether an issue is justiciable provides an important opportunity for judges to articulate what the rule of law is intended to accomplish in society. If we accept the assertion of Joseph Raz, a University of Oxford legal philosophy professor, that the rule of law is “meant to enable the law to promote social good,”⁷⁵ then Dworkin’s rights conception can provide a framework for how judges should approach questions of justiciability. Dworkin notes that the rights conception allows judges to apply moral principles to resolve difficult cases, provided that those principles are compliant with the rule book.⁷⁶ Applying moral principles to justiciable “legal” questions allows judges to contribute to building a just society, subtly shifting their societal role from legal interpreter to moral arbiter. In *Operation Dismantle*, Justice Wilson emphasized

⁷⁰ [1959] SCR 121, 16 DLR (2d) 689 [*Roncarelli*].

⁷¹ *Ibid* at 140.

⁷² Lorne Sossin, “The Unfinished Project of *Roncarelli v Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law” (2010) 55:3 McGill LJ 661 at 663, DOI: <doi.org/10.7202/1000628ar>.

⁷³ *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 27.

⁷⁴ Sossin, “The Unfinished Project,” *supra* note 72 at 686.

⁷⁵ Joseph Raz, “The Rule of Law and Its Virtue,” reprinted in *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 229.

⁷⁶ Dworkin, *supra* note 20 at 17.

the normative role of justiciability when she indicated that “we should focus our attention on whether the courts *should* or *must* rather than on whether they *can* deal with such matters.”⁷⁷

It is true that there are several risks—both individual and structural—when judges take such an approach. As Justice Wakeling noted in his dissent in *Wall ABCA*, applying an overly broad approach to justiciability could lead to absurd outcomes: courts cannot meaningfully adjudicate social disputes between hockey fans, bridge players, or family members.⁷⁸ Similarly, an overly broad approach to justiciability could overburden the judicial system and require judges to make decisions that are beyond the scope of their capacities or legal training. However, these risks can be mitigated if judges comply with Dworkin’s notion of the rule book and preserve the integrity of “legal” questions. Dworkin emphasized that the rights conception of the rule of law is not incongruent with the rule book conception; he noted that “[while] the rights model concedes that the rule book is ... a source of moral rights in court, it denies that the rule book is the exclusive source of such rights.”⁷⁹ To advance the rights model, judges should inquire as to whether moral rights and principles may be invoked for the purpose of creating a just society, even if the “legal” nature of the question is more subtle.

Used improperly, justiciability can also pose significant structural risks by overstepping the separation of powers or eroding the rule of law, which are both troubling potential outcomes. However, these risks are mitigated if judges approach the question of justiciability carefully. Courts frequently adjudicate rights claims that have broader policy implications without directing Parliament to adopt a specific policy approach. Courts are particularly well-equipped to assess the legal implications by “insulating [rights] from majority preferences, administrative expedience, and other ‘utilitarian considerations.’”⁸⁰ Dworkin drew a useful distinction between arguments of “political principle” and “political policy,” arguing that judges should incorporate the former, but not the latter, in their judgments.⁸¹ Dworkin noted that political principles address the “political rights of individual citizens”; in contrast, political policy promotes a particular “conception of the general welfare or public interest,” which logically should remain within the purview of democratically elected legislatures.⁸²

The distinction between these two concepts is that political principles are rights-based, while political policies are interest-based. Conceivably, an issue of political policy—for example, Parliament’s role in providing Canadians with adequate housing—can be easily reframed as an issue of political principle (whether Canadians have a *Charter*-protected right to adequate

⁷⁷ *Operation Dismantle*, *supra* note 49 at 467 [emphasis in original].

⁷⁸ *Highwood Congregation ABCA*, *supra* note 2 at paras 82–84.

⁷⁹ Dworkin, *supra* note 20 at 16.

⁸⁰ Janet Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal: McGill-Queen’s University Press, 1996) at 103.

⁸¹ Dworkin, *supra* note 20 at 11. This distinction was made in *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 105 [*PHS Community Services Society*].

⁸² Dworkin, *supra* note 20 at 11. I understand Dworkin’s concept of “political rights” to move beyond the existing political rights that are recognized by courts (e.g., democratic rights under section 3 of the *Charter*).

housing).⁸³ This ambiguity, namely the ability to advance rights claims to test the legal soundness of policies that legislatures adopt or fail to adopt, does not compromise the separation of powers or rule of law provided that the question itself is sufficiently legal in nature. Where appropriate, adjudicating political rights in courts can serve to correct the majoritarian problem of modern democracies and advance the “democratic ideal of equality of political power”⁸⁴ without overstepping the boundaries of the separation of powers.

IV. *CHARTER* RIGHTS AS A JUSTICIABILITY CASE STUDY

Charter rights provide a unique case study to explore justiciability because the SCC has held that they are “inherently justiciable.”⁸⁵ As a value-laden legal framework, the *Charter* embodies a substantive conception of the rule of law in Canada because it privileges moral concepts like dignity, equality, and personal autonomy.⁸⁶ With the exception of *Tanudjaja*, Canadian courts have largely adopted a bold, affirmative stance on the justiciability of *Charter* rights issues—even if those rights claims risk imposing positive obligations on governments⁸⁷ or involving courts directly in policy matters.⁸⁸ In *Chaoulli v Quebec (AG)*,⁸⁹ the SCC held that “[t]he fact that [a] matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by the Constitution to review legislation for *Charter* compliance when citizens challenge it.”⁹⁰ *Charter* rights challenges have had a significant role in shaping public policy of great moral significance in Canada, whether by introducing assisted dying legislation,⁹¹ legalizing sex work,⁹² or permitting safe injection sites.⁹³

The constitutional nature of *Charter* challenges provides a clear justification for courts to embrace moral considerations in a different manner than other questions of justiciability. However, this discrepancy demonstrates that courts are not confined to their narrow view of “legal” questions in other areas of the law, as demonstrated in cases like the *Secession Reference*.⁹⁴ The *Charter* can

⁸³ See *Tanudjaja*, *supra* note 33.

⁸⁴ Dworkin, *supra* note 20 at 28. I acknowledge, as Dworkin does, that access to justice remains an issue that prevents minority groups from advancing rights claims in the judicial system. However, the value of independent, non-political adjudication—compared to the majoritarian will of the legislature—largely outweighs this problem.

⁸⁵ Gerard Kennedy & Mary Angela Rowe, “*Tanudjaja v Canada (Attorney General): Distinguishing Injusticiability and Deference on Motions to Strike*” (2015) 44 Adv Q 391 at 392, citing *Operation Dismantle*, *supra* note 49 at 472.

⁸⁶ See Jeremy Waldron, “How Law Protects Dignity” (2012) 71:1 Cambridge LJ 200, DOI: <doi.org/10.1017/S0008197312000256>.

⁸⁷ *Gosselin v Quebec (AG)*, 2002 SCC 84 at para 83.

⁸⁸ *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 26.

⁸⁹ 2005 SCC 35.

⁹⁰ *Ibid* at para 107. It is important to note that in the *Wall* decisions, the Alberta Court of Appeal and the SCC were reviewing the issue of membership to a religious organization, rather than the *Charter* compliance of legislation.

⁹¹ *Carter*, *supra* note 59.

⁹² *Bedford*, *supra* note 58.

⁹³ *PHS Community Services Society*, *supra* note 81.

⁹⁴ *Secession Reference*, *supra* note 44.

also render issues to be justiciable even if they extend into areas of the law that were previously perceived to be impervious to judicial review, such as exercises of Crown prerogative power.⁹⁵ Courts have adjudicated political or moral questions through the lens of *Charter* rights with rigour and sophistication, being careful to not overstep the separation of powers or significantly disrupt the policymaking process. Section 1 of the *Charter* fulfills the gatekeeping function of justiciability, permitting courts to “deal with what might be termed ‘prudential’ considerations in a principled way without renouncing [their] constitutional and mandated responsibility for judicial review.”⁹⁶ As a result, the “*Charter* path” to justiciability demonstrates that courts are entirely equipped to consider political and moral issues within the boundaries of “legal” questions.

How courts reconcile the justiciability of *Charter* claims, compared to other areas of law, raises an important hypothetical question. In *Bowman*, the Ontario Superior Court of Justice dismissed an application for judicial review on the basis that a political issue—the continued funding of Ontario’s basic income pilot project—was non-justiciable and did not “give rise to individual rights enforceable on judicial review.”⁹⁷ Similarly, in *Friends of the Earth*, the Federal Court dismissed the application for judicial review on the basis that it could not review the reasonableness of the government’s response to its Kyoto Protocol obligations.⁹⁸ *Charter* issues were not raised in either case. It is entirely possible that these issues would have been deemed justiciable if the applicants advanced creative *Charter* claims (e.g., claiming that the early termination of Ontario’s basic income project compromised the participants’ right to life or security of the person under section 7). Even if the rights claims were unsuccessful, invoking *Charter* arguments would have likely rendered the issue to be justiciable and allowed the parties to make legal arguments. This clear discrepancy supports my two key claims: (1) drawing a sharp distinction between legal and moral questions to determine if an issue is justiciable is largely artificial; and (2) adopting a broader legal-moral framework for questions of justiciability is both possible and appropriate. This example demonstrates that in the absence of a *Charter* rights claim, judges can rely on justiciability to circumvent their own moral uncertainties.

V. IMPLICATIONS FOR THE RULE OF LAW

Formalists and positivists may raise several objections to my proposal for a broader justiciability framework—most significantly, they may argue that justiciable overbreadth would compromise the rule of law. This objection relies on two false premises: (1) the purpose of the rule of law is not to advance a substantive conception of justice or morality (a positivist objection); and (2) expanding the judicial approach to justiciability is inconsistent with how the rule of law should function (a formalist objection). The first premise mirrors Dworkin’s rule book conception, which argues that the rule of law “does not stipulate anything about the content of the rules ... it insists

⁹⁵ See *Black*, *supra* note 69; *Canada (Prime Minister) v Khadr*, 2010 SCC 3.

⁹⁶ *Operation Dismantle*, *supra* note 49 at para 104.

⁹⁷ *Bowman*, *supra* note 31 at para 10.

⁹⁸ *Friends of the Earth*, *supra* note 32 at para 46.

only that whatever rules are put in the book must be followed until changed.”⁹⁹ Theorists such as HLA Hart, a University of Oxford legal philosophy professor, emphasized that “rules that confer rights, though distinct from commands, need not be moral rules or coincide with them.”¹⁰⁰ However, taking such a narrow view fails to account for the judiciary’s important role in “seizing such issues as opportunities for moral re-evaluation and possible moral growth.”¹⁰¹ Governing political parties rely on moral convention when they are motivated by the prospect of re-election, often choosing to preserve the *status quo* instead of promoting social change. Since electability is not a concern for the Canadian judiciary, judges can fill this institutional void by taking a broader view on justiciable legal issues and, in doing so, facilitating moral evolution for society.¹⁰²

The second premise—that a broad view of justiciability would violate the function of the rule of law—is rooted in a fear that the integrity of the rule book itself could be violated. This fear is motivated by the risk of arbitrariness, infidelity, and illegitimacy, which are risks that could compromise the rule of law’s enforceability and power. However, several Canadian cases point to a different conclusion. When courts decide that issues are non-justiciable in a manner that is inconsistent with precedent, that act itself has the potential to undermine the integrity of the rule of law,¹⁰³ such as the Ontario Superior Court of Justice’s decision in *Tanudjaja* that the *Charter* rights claim was non-justiciable, despite clear precedent that *Charter* rights should be considered *de facto* justiciable. Similarly, when courts periodically revisit how they draw the distinction between “legal” and “moral” questions, they subtly redefine the separation of powers and gradually erode the rule of law. When courts vigorously engage with the moral dimensions of legal questions in *Charter* claims and use justiciability as a tool to avoid addressing those same moral dimensions for non-*Charter* legal questions, they contribute to a lack of clarity in the definition and administration of the rule of law. Clarity is one of the “most essential ingredients of legality,”¹⁰⁴ and without it, the integrity of the rule of law can be significantly compromised.

CONCLUSION

In this paper, I have advanced two key claims: (1) judges should take a broad approach to determine whether a question is sufficiently legal in nature, recognizing that substantive moral dilemmas can have important legal implications; and (2) retreating to justiciability is a missed opportunity for judges to resolve moral dilemmas within a legal framework. Using *Charter* rights claims as a case study, I established that “legal” and “moral” questions may be more similar than judges recognize. Cover’s responsibility mitigation mechanisms permit judges to defer their moral

⁹⁹ Dworkin, *supra* note 20 at 11.

¹⁰⁰ HLA Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv L Rev 7 593 at 606.

¹⁰¹ Michael J Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (New Haven: Yale University Press, 1982) at 101.

¹⁰² Hiebert, *supra* note 80 at 99.

¹⁰³ Kennedy & Rowe, *supra* note 85 at 391.

¹⁰⁴ Lon Fuller, *The Morality of Law* (New Haven and London: Yale University Press, 1964) at 63.

uncertainties about legal questions when they decide that a particular issue is non-justiciable. However, this practice of relying on justiciability, rather than analyzing the issue for its legal merit, may erode the rule of law because it rejects the judiciary's role as a moral arbiter and fails to clarify the boundaries of legal, moral, and political issues effectively. *Highwood Congregation SCC* demonstrated that a single issue can surface many different interpretations—what a chambers judge characterized as a property and civil rights issue was identified as an issue of natural justice by the Alberta Court of Appeal and an ecclesiastical issue by the SCC. If courts considered justiciability as a broader concept, Mr. Wall may have been able to have his claim—which would otherwise have no other form of recourse—assessed on its legal merits.

Justiciability is the key gatekeeping function that allows citizens to have their rights adjudicated before courts, and it is one of the most important hurdles for citizens to cross to seek recourse and remedies when they perceive their rights to be violated. Applying a more consistent framework to justiciability would “promote public confidence in the judicial process” by allowing judges to apply common norms and principles in a more flexible way.¹⁰⁵ When citizens lose their political power under the majoritarian will of their democracy, the judiciary can enforce their rights in “spite of the fact that no Parliament had the time or the will to enforce them.”¹⁰⁶ It is only appropriate, therefore, that courts apply a broad, inclusive framework to consider when an issue is justiciable, recognizing that legal and moral questions often remain deeply intertwined.

¹⁰⁵ Sossin, *Boundaries of Judicial Review*, *supra* note 14 at 284.

¹⁰⁶ Dworkin, *supra* note 20 at 27.