Thickening Rather than Abandoning the Rule of Law: Revisiting What Counts as "Law" through a Controversy about What Should Guide Judges in Awarding Spousal Support

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Date : May 8, 2020

Jodi Lazare, The *Spousal Support Advisory Guidelines*, Soft Law, and the Procedural Rule of Law 31 **Can. J. Women & L.** 317 (2019).

The rule of law is a ubiquitous if elusive policy and legal term deployed worldwide. It is also a founding narrative of British colonialism. It thus strikes some as anathema to equality. But given its foundational stature in numerous legal orders, when equality-promoting measures are perceived as promoting the rule of law, they can receive the validation they may desperately need. Conversely, when such measures are seen to offend the rule of law, they risk being dismissed as constitutionally illegitimate. What we understand the rule of law to be, then, vitally matters to substantive equality goals. Currently, a formal or thin conception prevails in many jurisdictions. In this narrow conceptualization, the rule of law is directed at maintaining formal separation of powers and a system of positive laws where all exercise of public authority has a legal source, and no one is above the law.

Many equality initiatives, however, to be seen to have rule of law backing and thus legal legitimacy, need a thicker account of the rule of law, one that can keep pace with changing social mores and normative commitments. How, then, to move our legal systems toward this thicker conceptualization? In The *Spousal Support Advisory Guidelines*, Soft Law, and the Procedural Rule of Law, Jodi Lazare deftly contributes one answer to this all-embracing question with her analysis of a particular tool meant to ensure women's substantive equality: the Spousal Support Advisory Guidelines ("the Advisory Guidelines") in Canada.

Lazare explains that the Advisory Guidelines, which set out "ranges of both amount and duration of support" (P. 317) upon relationship breakdown in various circumstances, were intended to bring more consistency to the judicial discretion judges had under the Divorce Act to make awards. Authored by two family professors working with a 15-member advisory committee, she summarizes the comprehensive consultation and deliberation that took place across Canada with the family law bar and bench to generate their content. While impressively engendered through the "ground up" (P. 320) and although the Department of Justice funded the research, the Advisory Guidelines are not the result of any legislative act and are also not mentioned in any piece of related legislation.

Whereas some courts in certain provinces have endorsed the Advisory Guidelines in their making of spousal support awards as a legitimate guide for judicial discretion, courts in other provinces have dismissed them because they are not legislative in character, viewing them as "informal, unofficial, and non-binding (in) nature" (P. 318) and any judicial reliance on them as an affront to the rule of law. As a result of the mixed judicial reaction, "the unpredictability and sense of injustice that provided the impetus for the creation of the Advisory Guidelines continue to undermine the family law system." (P. 319.) Lazare's analysis is devoted to showing why "judicial reliance on the Advisory Guideline might be understood as upholding, rather than offending, the foundational constitutional principle." (P. 343.)

Her analysis deploys public law theory (administrative, constitutional, and rule of law) and a discussion of deliberative democracy to do so. What could understandably have been an abstruse argument given the conceptually dense subject matter is instead rendered as a concise, accessible, and generative analysis that impresses upon its reader both the analytical acumen and elegance in writing of the author, but also the pressing need for equality advocates not to abandon the rule of law as a colonial holdover. Lazare shows, through the prism of family law and spousal support in

particular, why equality advocates need to thicken the meaning of the rule of law so as to "open up new understandings of legitimacy and expand the existing pool of sources of normativity" (P. 345) as to what law is and how it comes into being.

She begins her argument by explaining how the Advisory Guidelines promote substantive gender equality for women who are most often the dependent spouse. (Pp. 322-24.) After making this connection, Lazare is then able to focus on making the case as to why the Advisory Guidelines' "soft law"-like status is actually compatible with the rule of law *properly conceived* (even though, as Lazare acknowledges, the Advisory Guidelines are likely more reprehensible to rule of law purists than actual "soft law" as the former are not only unlegislated but also not created by the administrative or executive branch or any public authority).

Lazare builds a layered argument for why the rule of law should be "something more than a requirement of form and authorship." (P. 335.) She calls for a vision of the rule of law that aligns with "thick constitutionalism" (P. 333), specifically locating the rule of law features of the Advisory Guidelines in the quality of the procedures that led to their creation, arguing that the Advisory Guidelines' deliberative democratic genesis is superior to anything emanating from formally legislated sources as they pertain to spousal support. Lazare persuasively argues that policy-making that is the outcome of deliberative democratic principles and mindful of constitutional values respects the rule of law despite its informal, unbinding, and non-legislated character.

As Lazare sensibly recognizes, her article "does not purport to settle the meaning of the rule of law." (P. 343.) But what her grounded analysis of the Advisory Guidelines does is to provide a persuasive equality-focused analysis of why legal thinking about the rule of law should not remain tethered to a thin conceptualization in Canada (or elsewhere). As she notes, her argument has resonance beyond equality for women or other dependent spouses in family law. Consider animal rights, another important research area for Lazare. Establishing that the rule of law properly conceived permits, say, courts to treat guidelines from animal protection organizations with similar quality of deliberation to those underlying the Advisory Guidelines would be a powerful legal argument in a legal landscape where animal interests are overwhelmingly absented.

Further, Lazare's careful and cogent analysis prompts scholars like myself, seeking to mine the rule of law in aid of animal protection because of its formidable legitimating value, to closely consider the nuances of what a properly conceived thick description of the rule of law would be. Her argument that a deliberatively democratic process and general respect for constitutional values like equality can impart legal character to guidelines developed by non-public entities, also implicitly highlights the *illegitimacy* when such deliberation is absent in the documents produced by non-public entities such as agricultural industry-driven norms regarding the farming of animals.

In other words, Lazare's analysis helps us to see when the outputs of non-public actors can legitimately supplement judicial discretion, but also the dangers of regulatory capture. Her analysis advances a deeper contemplation of precisely how to thicken the concept of the rule of law. In doing so, the analysis productively moves the conversation forward in Canada about the need to rethink the rule of law and how to rehabilitate it from a tool of colonialism to an ally of equality.

Cite as: Maneesha Deckha, *Thickening Rather than Abandoning the Rule of Law: Revisiting What Counts as "Law" through a Controversy about What Should Guide Judges in Awarding Spousal Support*, JOTWELL (May 8, 2020) (reviewing Jodi Lazare, The *Spousal Support Advisory Guidelines*, Soft Law, and the Procedural Rule of Law 31 **Can. J. Women & L.** 317 (2019)),
https://equality.jotwell.com/thickening-rather-than-abandoning-the-rule-of-law-revisiting-what-counts-as-law-through-a-controversy-about-what-should-guide-judges-in-awarding-spousal-support/.