

Uninformed Criticism of the Courts can Undermine the Rule of Law

“The Courts are not helping us, I have to be honest with you. It’s ridiculous. Somebody said I should not criticize judges. Ok, I’ll criticize judges.”¹

- President Trump, quoted on March 21, 2017 following court decisions concerning his second Executive Order on immigration

“Enemies of the people”

- Headline in The Daily Mail (UK), November 4, 2016 following High Court decision on Brexit processes

It is worrying that the leader of the United States of America would publicly undermine the courts and that, despite being advised not to criticize judges, he would do so anyway. It is no less worrying that a leading newspaper in the United Kingdom would call judges “enemies of the people” because of a decision made by the court. Nevertheless, these comments give us an opportunity to examine the role of judges and courts in any society governed by the rule of law.

The rule of law requires questions of legal rights, obligations and liabilities to be resolved by application of law and not arbitrarily. It requires that laws apply and govern everyone within a state. Officials of the government, including the Executive body of government, must exercise their powers within the confines of the law.

Courts exist to adjudicate disputes. Judges, who are experts in law and adjudication, are appointed to apply the law to resolve legal disputes that are brought before them. They must do so fairly and impartially. Confidence in the process of the courts requires confidence that judges can resolve disputes fairly and impartially. That is why the principle of judicial independence is, in Canada, and in other mature democracies, a fundamental, constitutional principle.

Governments and their officials have a crucial part to play in maintaining this confidence. The media has a different but no less important role to play. Governments are frequent users of the courts. The media reports on decisions made by the courts because the results are often on a matter of public interest and therefore interesting to the public. The *legal* principles underlying a decision may be legitimately criticised and litigants who disagree with the outcome of a decision may appeal until the appeal process is complete. But personal criticism of the judge making a decision simply because the litigant does not like the outcome is not appropriate. The rule of law as a principle requires that final decisions are respected and followed. Public confidence in the justice system, which is fundamental to a democratic, well-ordered and prosperous society, cannot be maintained if the decisions of judges are unduly disparaged at high levels. Nor can public confidence be maintained if the media takes seemingly gratuitous

¹ <https://www.msn.com/en-ca/news/politics/trump-ill-criticize-judges-even-though-somebody-said-i-should-not/ar-BByzJ51>

shots at judges who are exercising a constitutional role in a fair and impartial manner. Castigating the intelligence, morality, wisdom and intent of those who are required to adjudicate disputes diminishes the confidence of everyone else whose disputes are adjudicated by the courts. Such comments invite disrespect for judicial decisions.

The willingness of a political leader to express dissatisfaction with judges or their decisions because they do not assist his or her government's agenda invites wider disrespect of the judicial process by the population as a whole. If the media inflames public opinion by calling judges "enemies of the people," despite the fact that a decision follows constitutional principles that had been settled for many centuries, the public will not have confidence that judges are up to the task of resolving disputes, or that they are doing so fairly and impartially. If everyone were to disrespect and ignore judicial decisions, anarchy would reign.

Comments such as those quoted above do not aid in improving the conditions under which judges must operate. Morale can be eroded. If judges are being targeted by the leader of government simply for doing their job to the best of their ability, and impartially – judges might ask themselves why they are bothering. Well-functioning societies need good judges who are able to act impartially and fairly. If the best are unprepared to become judges, the legal system and the rule of law further suffers.

The Lord Chief Justice of England recently admonished the Lord Chancellor for failing to understand her constitutional role in the aftermath of the "Brexit" judgment, in which the *Daily Mail* labelled the judges who made the decision "enemies of the people".² He noted that in doing so, he did not feel he was being controversial, especially after hearing circuit judges report to being called "enemies of the people" by litigants in person. Where those in power make little effort to explain the principles of judicial independence and why it is important in the face of an irresponsible media pronouncement, confidence in judges and the courts is eroded further. When litigants feel that an appropriate response to suffering a defeat in court is to call the judge an enemy of the people because that's what they heard the media say, the respect for and confidence in the rule of law obviously suffers, and for no good reason.

Without the rule of law, arbitrary actions of the state and those who are powerful risk proceeding in an unimpeded fashion. The institutions of democracy, including the officials of government and the media, must understand their responsibilities in preserving public confidence in the judicial system and the courts. While the correctness of any judicial decision is always open for public debate, that debate must be focussed on the legal principles in issue and must not become a personal attack on the judge. Where the leader of the state openly criticizes judges for making decisions against his or her government, or where popular media outlets make inaccurate and unfair inflammatory remarks, it becomes that much harder to preserve society's respect for the rule of law. This is a result that we all should guard against.

² <https://www.lawgazette.co.uk/news/enemies-of-the-people-lcj-sought-police-protection/5060363.article>