

From the Rule of Law and Lawyer Independence Advisory Committee

Holding our democracy to account: The rule of law vs. the rule by law

The phrase “rule of law” is in the news a great deal. While referred to often, it is rarely well explained, with its true meaning often lost. Despite the fundamental constitutional importance of the concept, if the meaning of “rule of law” is not well understood there is a significant risk of it being challenged and torn down. The rule *of* law — where the law applies equally and everyone is subject to it — becomes conflated with its antithesis, which is rule *by* law — where those in power can arbitrarily create and apply law as they choose, with no accountability. The rule *of* law provides an orderly method for a society to change and evolve through addressing issues such as inequality and prejudice. Rule *by* law, on the other hand, permits the arbitrary creation and application of the law and excludes the ability to challenge its validity or its application. If the rule *of* law loses public support because it becomes associated in the public mind with the rule *by* law, a most effective method of bringing orderly change in a democratic society to address important societal issues will be lost.

The rule of law is both simple and complex. It is simple because it can be stated simply: The rule of law ensures citizens are governed equally and fairly by the law and not by anyone or anything else. This means that even law-makers must obey fundamental laws, even while making other laws. On the other hand, the rule of law is complex because once you get beyond its simple premise, its extent is not agreed upon. It has been the subject of much writing, debate, construction and application. Moreover, even as a simple phrase, it is too easily susceptible to being sloganized or weaponized for political purposes. But, at its heart, it is very straight-forward: The laws governing society must be known, with none in society (including law-makers) outside the law or favoured before it.

In a democracy, officials are elected to create laws that govern the conduct of the people living in the country. Judges interpret laws and make decisions that are binding on the future application of law. The decisions of Parliament or a legislature are interpreted by judges to ensure that they conform to a standard of statutory interpretation, that the Parliament or legislature has jurisdiction to make them and that the laws conform to the constitution. Lower court decisions are subject to review by appellate courts to ensure proper application of legal principles. Where a decision is made by a court, the order is binding and a breach of the order is subject to consequences. The laws passed by Parliament or by a legislature are binding on everyone, but there is a process through which the application of those laws can be challenged on the basis of legal principles. Laws cannot, however, be ignored simply because they are inconvenient. All this results in a structure of governance with an orderly process for the review of laws, their legality

and their application in any given situation. The rule of law requires that people know what the law is, meaning that governments cannot obscure the law and then purport to apply it at a later date against an unsuspecting citizen.

The rule of law also requires the equal application of laws. It is on this point where, in many western democracies including Canada, the rule of law is sometimes particularly challenged on the basis that the law is not applied equally to various groups. This, however, is a failing of society, not a failing of the rule of law. It is the rule of law in particular that permits challenges to the social order on the basis of inequality. While the legal system cannot solve all social problems, the legal system is well designed, through the application of the rule of law, to yield processes to better ensure equal application of law to the people of our country and to strike down laws that target or unfairly affect particular groups. Conduct of administrative officials can be judicially reviewed, and the statutes under which officials act can be challenged on the basis of human rights violations, or violations of other fundamental principles of justice stated in the *Charter*. The rule of law as described by Tom Bingham in his book, *The Rule of Law*, provides that “the law must afford adequate protection of fundamental human rights.” Consequently, laws that do not protect these fundamental rights, even as they evolve over time, themselves contravene the rule of law.

Accordingly, the unequal application of law is itself fundamentally contrary to the rule of law. It is to the rule of law that we may look to find protections and remedies where law is applied unequally. Without it, inequality would persist with no hope — short of revolution — of it being addressed or eliminated.

All of this is very much to be contrasted to rule *by* law. Rule *by* law is the opposite of the rule *of* law. In a society where rule by law applies, those in power choose which laws to apply — or not apply — against which citizens. While each society has a system of laws, the application of the law in a society where rule *by* law exists is arbitrary. Rule *by* law gives cover to authoritarian states where there is little or no freedom because protections guaranteeing that all citizens are governed equally by the law are not assured. There is no guarantee that a challenge brought against the application of a law in a system where the rule by law applies will be effective, or even heard. There likely are no real processes available permitting orderly and serious challenges to the conduct of state officials or others because those in power control all the levers through which the system operates. Judges will often be required to interpret the application of the law on the basis of the interests of those in power, rather than by a dispassionate analysis of legal principles. The protections afforded by equal application of law no longer apply, and the law becomes subsumed as a tool of the state.

Admittedly, it often appears that even in the countries where the rule *of* law governs, the powerful also seem to operate the levers to the legal system, resulting in the unequal application of the law to various groups. A review of current affairs demonstrates

governments in western democracies do pass laws that are intended to have unequal application. This, however, is a failure of government, and it is the rule of law that provides an avenue to hold those governments to account to the law. There is a path to challenging the laws passed on the basis that they violate principles of fundamental justice. Where there is rule *by* law, such challenges will not be permitted,

The rule of law therefore also requires independent judges who can make decisions based on legal principles rather than on political directions, and an independent bar where a lawyer's duty is first and foremost to the client and not to other interests. Both concepts of independence — judicial and lawyer — are integral to the success of the rule of law. Where the rule *of* law applies, lawyers can act on the instructions of their client and are able to freely challenge the conduct of the state or others and ensure that every citizen is entitled to be represented and to have their day in court. Independent lawyers operating in a society governed by the rule of law are able to take instructions from clients to hold the state and its officials accountable to the law without fear, intimidation or reprisal before a judge who will make the decision on the application of the law and not on the directions of the state. This process remains society's best bulwark against authoritarianism. In countries where there is rule *by* law, lawyers may lose their licences to practise, or be imprisoned, when they represent the interests of individuals challenging the actions of the state or other powerful interests.

There are inequities in Canada's justice system. There are problems obtaining access to legal services, and these need to be addressed by both government and by the legal profession. Access to legal advice is integral to ensure there can be proper challenges to unfair or discriminatory laws, or to the unfair or unequal application of the law. But that will only be relevant in a system where we remain vigilant to ensure the rule of law is properly understood, recognized and supported.