

The Rule of Law in a World of Flux

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In the past weeks, the world has watched on its screens what is quite probably the biggest demonstration for a cause as has ever taken place in history. The million-plus people who turned out were not demonstrating for peace, or an end to persecution, or recognition of a particular group right, or pollution of our oceans and air, although their cause was related to all of these. They were demonstrating for a cause that seldom attracts much attention: the rule of law.

I refer, of course, to the mass demonstrations in Hong Kong against a law that would allow individuals to be extradited from Hong Kong, which prizes the rule of law and the freedoms that it connotes, to mainland China. I make no comment on the substance of the issue – I am a judge of the Hong Kong Final Court of Appeal. I refer to the demonstrations only to note how unusual they were. It is not often that one sees people demonstrating on legal issues or in support of the rule of law.

We in Canada enjoy the rule of law. So much so that we take it for granted. We're not alone in that – everywhere in the world people take the rule of law for granted. Even when it slips away, as has happened in Russia and other eastern European countries, the slide away from the rule of law is so subtle that few turn out to protest the decline.

We should not take the rule of law for granted. Nor should we despair because legal solutions and regulation sometimes seem slow; rather we should seek to improve them. The rule of law and independent, impartial and effective justice are fundamental preconditions of personal flourishing, economic activity and a stable prosperous society. And they are vital to maintaining democratic governance. We need the rule of law, but central as it is to our existence, we are beginning to understand that it can be weakened and lost.

Western democracies, like Canada and the United States, possess strong institutions and strong traditions of support for the rule of law. In the 75 years since the end of World War II, the rule of law as a bulwark against chaos and tyranny has become deeply entrenched. Yet even in these democracies, we see slippage, as the independence of the justice system is undermined and people seek quicker, cruder solutions to their perceived problems.

Even in Canada we are not immune to the drift. It seems easier than it once was to invoke the notwithstanding clause to prevent the courts from upholding Charter rights, to cut legal aid that is essential to just court determinations, to cut court budgets to the point that they can't do the basic job of deciding disputes between citizens. Who needs fair process? Who needs the law? We risk entering a vicious downward spiral. Denied what they need to do justice and uphold the rule of law, our judicial institutions risk faltering.

Public confidence in the justice system slides. It becomes easier and easier to say we don't need lawyers and court proceedings. The rule of law is weakened and begins to founder.

The truth is that maintaining the rule of law requires constant vigilance. Who must be among the vigilant?

The first group that must be vigilant is the bar. To maintain the rule of law requires a strong and independent bar. Lawyers are sworn to uphold the law and the rule of law. And so they must. It is not enough to earn a good living from the practice of law. The same traditions that give lawyers the exclusive right to practice law demand that they uphold the foundations of the system in which they practice. No one else can do this as effectively as lawyers. Judges are limited in what they can say about issues affecting the rule of law. Only the bar can tell the public when particular actions undermine the rule law. A few years ago, when I found myself attacked, I personally experienced the importance of lawyers speaking up for judges and the judicial system to counter allegations that otherwise would have undermined confidence in the judicial system.

A strong and independent bar alone is not enough to maintain the rule of law. We also need a strong and independent judiciary. Judges must be vigilant to ensure that the judiciary remains strong, independent and effective.

Like the rule of law, we tend to take independent and impartial courts for granted. Yet we should not. We have seen overt attempts to undermine the independence of judges in eastern European states like Hungary and Poland.

We have also witnessed more subtle attacks on judicial independence in places like Russia and Turkey. The techniques of undermining an independent judiciary are well known. Court orders are left unenforced, reducing judges to impotence. Judges are imprisoned on dubious charges. Or the judicial system is slowly politicized.

The United States possesses a strong and independent justice system. Yet it is worrying to see the trend to appointing judges on the basis of their political views, and to witness growing public expectation south of the border that judges will vote the party line on critical issues. This has the potential to erode the actual and perceived independence of the courts and to transform independent judges into a third level of political actors. Instead of an independent judiciary, we risk a judiciary inclined to one political view or another. Instead of impartial judging on the basis of the law, we risk partisan decision-making dressed up in legal garb.

We have been fortunate in Canada to be spared the politicization of the judiciary. No one can point to this or that justice of the Supreme Court of Canada and say that person is a Liberal Judge or Conservative Judge. We prize a tradition of appointments based on legal qualifications, not political leanings. But we face challenges of our own. To the extent that the courts are deprived of the necessary resources to operate effectively, they are crippled in their task of upholding the rule of law. To the extent that people are denied counsel or deterred from seeking justice because they lack the necessary funds to hire a lawyer, we hamper the ability of the courts to do justice. We need to ensure that our courts have the necessary resources to do their job of upholding the rule of law. We need to ensure that a person whose rights are violated can come to court with the legal assistance she needs to present her case effectively. If we do not do these things, the rule of law will slowly decline.

I have been talking of where we are now – the status quo. But let me move to the future. Changes occurring as we speak will increase the challenges we now face, formidable as they are, to maintaining the rule of law in our society. Traditionally, the law has been harnessed to deal with social and economic problems that society faces. The gap between the wealthy and the disadvantaged of the late nineteenth century, a gap that threatened democracy, was dealt with by introducing anti-competition law, and social stability was restored. When consumers suffered from mass-produced products - think *Donoghue v. Stevenson* and the snail in the bottle of ginger beer – the law stepped in to introduce a new theory that allowed recovery of damages even if the defendant didn't personally know the plaintiff. I could go on. Whenever society threw up a new problem, the response was to turn to the law to regulate the activity and provide justice to those who were injured.

But now, as we approach the second quarter of the 21st century, we are less and less engaging the law to deal with social change and the resultant damage it is causing. Think of the big changes in society and the negative fallout they are producing and ask yourself whether the law is effectively being used to deal with them.

Think of the impact of social media on privacy and reputation. In the past, the law has always protected privacy and reputation. It has targeted false and defamatory statements and held their makers to account. It has curbed pornography and hate speech. In the age of the internet, however, these protections don't work so well. People's privacy and reputations are invaded and trashed with impunity. Enforcement agencies struggle to contain harmful speech but fall short. We are told there is nothing that can be done about these harms – it is simply the price of being linked in to social media. I do not know whether that is true or not. But I do know that the law is no longer seen as the way to protect people against these abuses. And that does not augur well for the rule of law.

Think data manipulation and interference with elections and other democratic processes. When foreign states mine data and use it to undermine our democratic processes, how does the law hold them to account?

Think automation and artificial intelligence. When automated cars decide to strike this pedestrian rather than another, who is responsible and on what principles? When artificial intelligence, based on digitalized experience, develops a new set of operational algorithms, who is responsible if they injure a person and on what basis? It was not reasonably foreseeable that the machine would make this particular leap, the programmer will say, on traditional negligence law I am not responsible. Will our law be impotent to deal with the matter, or will it change?

Think of the big problems that face the world, the problems of climate change, mass migrations and the growing (once again) gap between the rich and the poor. Where are the legal efforts to come to grips with these problems?

In the past, generation after generation has used the law to deal with the big problems they faced. Now, the problems seem so big, so complex, so global, that solving them seems beyond the law's reach, some suggest. I, for one, am not convinced. With imagination, will and determination, it should not be beyond human capability to devise legal solutions for the problems of the 21st century.

But let me return to the rule of law. My fear is that if we do not find creative and effective legal solutions for the negative impacts of modern technology, injustice will increase, people will lose their faith in the law and the rule of law will be weakened.

It is less fashionable than it once was to talk of the rule of law and the attendant goods it has delivered to the world in the seventy-five years since the end of World War II, human rights, protection for minorities, and effective remedies for wrongs among them. Yet I believe it is important to do so. Indeed, I see no alternative. No other mechanism exists to protect rights and guarantee just outcomes, not just for the powerful and privileged, but for everyone.

In the end, the only weapon against injustice the world possesses is the rule of law. It has always been and ever will be thus. In an age of skepticism about the rule of law, I believe we must affirm it, keep it strong and keep it growing to meet the challenges of the future.

So let me encourage each and all of you to do what you can to uphold the rule of law. Don't take the rule of law for granted. Speak up for it. Educate kids and adults about the importance of the rule of law. Support an independent bar. Speak up for the courts and the other institutions whose independence must be maintained for the rule of law to survive. Work for legal solutions to the problems our communities, our country and the world faces. In everything you do, seek to keep the law strong, vigorous and respected. If we do these things the rule of law will survive and the world will be a better place.

Thank you for allowing me to be part of your evening and to share these thoughts with you.