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Commentary

TRUE NORTH IN CANADIAN PUBLIC POLICY

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Principles to ensure the law is not abused in Canada

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How much discretion should a police officer have when writing a ticket or making an arrest? How much discretion should a judge have when issuing an injunction or when applying sentencing guidelines? How much discretion should a prime minister have when directing an attorney general in matters of law?

Given that every set of circumstances is slightly different, some discretion is clearly necessary. But too much discretion leads to inequality in the application of law. Too much discretion opens the door to the abuse of power and, with it, diminished confidence in government. In a democracy, what guarantee do we have that police officers, judges, and politicians will not use the law to punish their political enemies and reward their political friends?

As J. A. Corry of Queen's University concluded over half a century ago, a little reflection tells us that "there is no arithmetical or statistical test for the presence of the Rule of Law. We cannot identify the additional straw of discretionary power which breaks the back of the constitutional state" (1955, 406). Instead, what we seek is a fair and effective balance of political and legal powers between Parliament and the executive, between the executive and the judiciary, and between the judiciary and the Crown. What we need is a system in which the discretionary powers of a country's enormous bureaucracy are flexible enough to ensure that political objectives can be met but restrained enough to guarantee fair, predictable treatment for all.

Within today's democracies, three guiding principles are especially important for ensuring that the law is not abused: the *rule of law*, the *separation of powers* and *democratic accountability*.

Rule of law

Fundamental to the idea of the rule of law is the requirement that even governments must be bound by law. Under the rule of law, even those who have the ability to make and change the law remain subject to it. Even those who have the power to interpret and enforce the law remain governed by it. It is this feature of law, as much as the ballot box or the free press, that protects the ordinary citizen from arbitrary, unpredictable state power.

Understood in this way, the rule of law is more than just the requirement that governments must act *according* to the law. Should a law be passed that gave a government unlimited power, such a government would not be *bound* by law. To be genuine, the rule of law must place substantial, non-trivial constraints on the use of state power, just as it does with the ordinary citizen. It requires not only that government authority be exercised in accordance with publicly disclosed and appropriately adopted procedures, but also that genuine prohibitions exist against at least some types of state action. It is in this sense that rule of law differs from rule by law or rule *through* law.

Simply put, the rule of law requires not only that all government actions find their source in law. It also requires governments to acknowledge the difference between powers granted to them in law and powers they do not have. As 19th-century British constitutional scholar Albert Venn Dicey writes in his *Law of the Constitution*, the rule of law "means, in the first place, the absolute supremacy or predominance of the regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government" (1915, 198). As the Supreme Court of Canada has reminded us, it is in this way that the rule of law "provides a shield for individuals from arbitrary state action" (*Reference re Secession of Quebec* [1998], 70).

The US Supreme Court holds much the same view. In 2006, the court struck down the use of military commissions established for the purpose of trying suspected terrorists at the US Navy base in Guantanamo Bay, Cuba. In *Hamdan v. Rumsfeld*, it was the court's conclusion that without congressional authorization the government of the day lacked the authority to initiate such trials. Even though Hamdan had confessed to working closely with Osama bin Laden, the court ruled that, "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction" (*Hamdan v. Rumsfeld* 2006, 72). In other words, no administration has the power to act in such cases unless it

first has the legal authorization to do so. This same observation was made two years earlier in *Hamdi v. Rumsfeld*. There, the court put the point even more bluntly: "We have long since made clear that a state of war is not a blank check for the President" (*Hamdi v. Rumsfeld* 2004, 29).

Nothing in these various decisions is new. In London in 1762, the King's chief messenger, Nathan Carrington, broke into the home of the writer John Entick looking for proof of sedition. The resulting trial, *Entick v. Carrington*, focused on whether Carrington, as an agent of the Crown, had unlimited powers or whether his only powers, as a government agent, were those granted to him in law. The court's decision was clear: Carrington had no powers over and above those assigned to him in law.

This case not only emphasized the link between due process and the rule of law. It also served as motivation for the 1792 adoption of the Fourth Amendment in the United States. Today, it is still remembered for giving rise to the dictum, "If it is law, it will be found in our books. If it is not to be found there, it is not law" (*Entick v. Carrington* 1765).

> *It is the rule of law that establishes how and when government action may be undertaken.*

The *Entick* decision has influenced Western democracy's view of government ever since. When the question of Quebec separatism arose in Canada in 1998, Canada's highest court concluded in its *Reference re Secession* of Quebec that any actions leading to the possible breakup of the country would have to take place according to the law. As the court reminded Canadians, even though "democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change" (*Reference re Secession* [1998], 150), and even if there were to be a clear referendum result requesting separation, no province could purport "to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation" (ibid., 151).

Even in such dramatic circumstances, it is the rule of law that establishes how and when government action may be undertaken. Even acts of secession and other acts intended to rewrite a country's most fundamental constitutional law must proceed in accordance with the law. No act of government, let alone an act of separation, can be carried out unless it is authorized through procedures recognized in law.

Despite such assurances, in some circumstances the exact nature of the required procedures may remain open to debate. In the lead-up to Confederation, it was an open question whether citizens of a future, united Canada would need to be consulted prior to the creation of their new country.

On the one hand, supporters of parliamentary sovereignty argued that the supremacy of Parliament meant legislators already held all the power necessary to approve or disapprove any proposed constitutional change. According to this view, the people had already spoken in earlier elections. In doing so, they had selected representatives who were then given the power to act on their behalf. The rule of law was understood to be clear. Citizens were protected against arbitrary government action by their elected representatives and, as history had shown in Britain, it was Parliament and Parliament alone that served as the time-honoured mechanism for constitutional change.

On the other hand, another constituency held that dissolving a province or territory and creating a new dominion required something more than mere constitutional amendment. On this view, either a referendum or an election would be necessary to ensure that democratic principles were being honoured. In the end, among the already existing provinces or territories enjoying responsible government, only two entered into Confederation without first consulting their citizens through fresh elections: Canada and Nova Scotia (Ajzenstat et al. 1999, 420). All others held fresh elections, even if in some cases the elections may have been held reluctantly (ibid., 358).

Today, the 1982 amending formula clarifies the law according to which constitutional change in Canada must now take place (*Constitution Act* 1982). Today, there also remains widespread agreement that, unlike rule by law or rule through law, rule of law continues to exist most clearly in contrast to rule by arbitrary power. As much as anything, it is this idea – that no government is above the law – that distinguishes modern constitutional democracy from other forms of government, including theocracy, totalitarianism and unrestrained mob rule.

Separation of powers

How is it that lawmakers can be bound by law? Almost by definition, lawmakers seem to be people who are above the law; almost by definition, lawmakers seem to be people who, if they don't like a current law, have the power to rewrite it at will, perhaps to their own advantage.

In Canada, as in many other modern democracies, it is the separation of powers that gives a viable solution to this problem. It is the separation of powers that provides a workable system of checks and balances, so that even those who have the power to create and enforce the law still will be bound by it. In slogan form, it is the legislature that *writes* the law, the executive that *imple-*

ments the law, the judiciary that *interprets* the law, the Crown that *safeguards* the law, and the citizenry that gives *consent* to the law. It is the existence of multiple, independent branches of government that guarantees that no single branch can ever have unlimited power.

What prevents the legislature or the executive from exercising unlimited power?[1] One check lies with the courts. Although judges are appointed by other branches of government, once appointed they are no longer responsible to these other branches (*The Queen v. Beauregard* [1986]). They are thus free to strike down unconstitutional laws without recrimination from either the legislative or executive branch.[2] The sub judice rule, which functions both as a rule of court and as a parliamentary convention, also helps guarantee the independence of the judiciary. It does so by prohibiting the publication of statements – for example, by a particularly forthright premier or prime minister – that may be thought to prejudice court proceedings (Sossin and Crystal 2013).

Just as importantly, within cabinet the *Shawcross Doctrine* prohibits an attorney general, when making decisions about criminal prosecutions, from being influenced by politics, making it difficult for politicians to use criminal prosecutions to punish their political enemies and reward their political friends (Stenning 2009; Rosenberg 2009).[3]

In 2019, it was the violation of this separation of powers that led to a finding by the ethics commissioner that Prime Minister Justin Trudeau had broken the law when he improperly attempted to influence then Minister of Justice and Attorney General Jody Wilson-Raybould. At the time, the prime minister and his office wanted to sway the outcome of an ongoing criminal case against the Quebec-based construction company SNC-Lavalin.

The SNC-Lavalin scandal resulted from the government's wrongful intervention when it tried to lobby Wilson-Raybould and her staff to introduce a deferred or suspended prosecution agreement, rather than trusting an independent attorney general to exercise her own good judgment. The ethics commissioner investigated the incident and found that the lobbying of the Prime Minister's Office violated the independence of the attorney general, partly by recommending that she speak to someone like retired Chief Justice Beverly McLaughlin. It was expected that the former chief justice would encourage the attorney general to re-examine her unwillingness to pressure the director of public prosecutions to offer SNC-Lavalin a deferred prosecution agreement (Mancini and Sigalet 2021). The commissioner concluded that Trudeau:

> used his position of authority over Ms Wilson-Raybould to seek to influence, both directly and indirectly, her decision on whether she should overrule the Director of Public Prosecutions' decision not to invite SNC-Lavalin to enter into negotiations towards a remediation agreement.

> Therefore, I find that Mr Trudeau contravened section 9 of the Act [*the Conflict of Interest Act*]. (Canada 2019)

In contrast, Prime Minister Trudeau got it right in 2020 when he said in response to multiple First Nations' blockades of Canadian rail lines that "[w]e are not the kind of country where politicians get to tell the police what to do in operational matters" (Canadian Press 2020). Two years later, however, he took a different position when he remarked in response to the trucker protests that his government would consider requests for military help to end the protests (Woods and Pringle 2022).

Although in theory legal under the federal *Emergencies Act*, discussion of such a dramatic intervention merely served to highlight the unequal application of laws used to regulate protest across Canada in recent years. Politicians and their advisers who invoke the option of military intervention in the case of a truckers' protest but who remain unconcerned by (and sometimes publicly sympathetic with) ecology groups who defy court injunctions, G20 demonstrators who destroy public and private property, rail line and pipeline blockades that cause economic hardship, and arsonists who "understandably" (Lilley 2021) burn down and ransack dozens of churches ultimately bring discredit to the rule of law.

When the *Emergencies Act* was eventually invoked, the situation was also complicated by the fact that it was unclear which section of the act might be used to justify such a dramatic intervention. As section 3 of the act notes, a national emergency of this scope must be understood to be:

> an urgent and critical situation of a temporary nature that (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada, and that cannot be effectively dealt with under any other law of Canada. (*Emergencies Act* 1985)

Despite the significant economic impact of such protests, it will be difficult to make the case that any of the protests seriously endangered "the lives, health or safety of Canadians" or that they seriously threatened the ability of the federal government "to preserve the sovereignty, security and territorial integrity of Canada." This is especially so since the *Emergencies Act* notes in its preamble that when invoking the act, the government will still be "subject to the *Canadian Charter of Rights and Freedoms*." Since Canada's highest court has explicitly ruled that parking a vehicle illegally during a public protest can be said to have "expressive content," and is thus protected as an instance of free expression under section 2(b) of the Charter (Irwin Toy Ltd v. Quebec [1989], VI[B]), using the *Emergencies Act* to remove parked vehicles in some cases may be judged to be ultra vires, or beyond the government's power or authority. Section 48 of the act also outlines the conditions under which "any

person who suffers loss, injury or damage" as a result can be awarded reasonable compensation by the government.

Just as with the now widely discredited use of the *War Measures Act* half a century earlier, when some 497 Canadian citizens were arrested and arbitrarily detained for days or weeks without charge, at some point voters may be forced to conclude that too much political discretion has again begun to corrupt the equal application of the law in Canada. In the short term, it was left to Defence Minister Anita Anand to try to clarify matters with her comment that "[t]he Canadian Forces are not a police force" (Anand 2022; cf. Connolly 2022). In the longer term, it is unclear how courts ultimately will view the invocation of the act for what appear to be little more than economic reasons.

One final feature of the separation of powers lies with the Crown. Today, the reserve powers of the Crown remain operative to ensure that governments remain attentive to both law and constitutional convention. Among these powers are the power of governors general and lieutenant-governors to appoint and dismiss first ministers, and the power to grant and refuse dissolution. All such powers help to ensure that, like a nation's citizens, no government is above the law.

> *Under Canada's system of government, the power to govern is vested in the Crown.*

In this context, it is worth remembering that under Canada's system of government, the power to govern is vested in the Crown. It is then entrusted to the government of the day to be exercised on behalf of, and in the interest of, the people of Canada. In this way, every government is reminded that its source of power lies beyond itself and that the power to govern is only extended to individual governments for limited periods of time.

For this same reason, many reserve powers of the Crown remain active. As various branches of government have matured, other reserve powers – such as the power to reserve or disallow a bill – have become functionally inoperative. As former Chief Justice Bora Laskin notes, the "reservation and disallowance of provincial Bills and Legislation respectively … are dormant if not entirely dead" (1969, 121-122). Peter Hogg makes much the same point when he comments that "the power of reservation is as obsolete as the power of disallowance, and for the same reasons; the federal government would never today instruct a Lieutenant Governor to reserve a provincial bill" (1977, 40). Even so, such powers remain within the country's current Constitution and so are still legally available, should the political climate alter so dramatically that confidence in the rule of law becomes threatened.[4]

The Crown's reserve powers are especially important once it is also recog-

nized that the separation of powers does not allow courts to intervene within the legislative process. As the Supreme Court found in 2018, parliamentary bills may only be challenged in court once they have become law. Even in cases involving the Honour of the Crown (cases in which the Crown has a duty to act honourably toward indigenous peoples and other parties who have entered into direct agreements with the Crown), allowing courts to intervene in the law-making process would violate both parliamentary privilege and the separation of powers (*Mikisew Cree First Nation v. Canada* [2018]). It is thus left to the Crown's representatives to advise governments about their duties as lawmakers through "the right to be consulted, the right to encourage, the right to warn" (Bagehot 1867, 75).

Democratic Accountability

In all democracies, one last check on the abuse of legal discretion lies with the voter. It is the voter who is responsible for selecting parliamentarians who in turn will form both a government and Her Majesty's Loyal Opposition. Equally importantly, it is the voter who ultimately is responsible for ensuring that no government is above the law.

One way of understanding the importance of the rule of law is to note that it is only through the rule of law that governments are able to satisfy a reasonably robust *predictability requirement*. It is only by minimizing the discretion of government officials that we are able to predict how the coercive power of the state is going to be implemented. As Nobel laureate Friedrich A. Hayek writes:

> Stripped of all technicalities, this [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. Though this ideal can never be perfectly achieved … the essential point, that the discretion left to the executive organs wielding coercive power should be reduced as much as possible, is clear enough … Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts. (1944, 80-81)

It is thus the rule of law that allows banks and business owners to make business plans, knowing "with fair certainty" what the tax code will require of them a year from now. It is the rule of law that allows voters to foresee "with fair certainty" how elections are to be organized and how political parties may be formed. It is the rule of law that allows protesters to understand "with fair certainty" which methods may be used when attempting to influence public policy and which may not.

To help minimize arbitrary government power, the Supreme Court has held that administrative discretion is never so absolute that it can be exercised arbitrarily, capriciously, or for purposes irrelevant to the nature of the relevant legislation. Instead, the exercising of administrative discretion requires "complete impartiality and integrity," and any such discretion must "be based upon a weighing of considerations pertinent to the object of the administration" rather than upon other, irrelevant factors (*Roncarelli v. Duplessis* [1959], 140). In this way, although fraud and corruption may not be explicitly prohibited within a piece of legislation:

> they are always implied as exception. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statue is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another Province, or because of the colour of his hair? The ordinary language of the Legislature cannot be so distorted. (ibid.)

A second, and perhaps distinct, way of understanding the importance of the rule of law is to note that it is only through the rule of law that governments are able to satisfy a reasonably robust *universality requirement*. It is only by minimizing the discretion of government officials that we are able to ensure that the law is applied universally to both citizen and lawmaker alike. On this understanding, it is the rule of law that serves as a key foundation for civil society. It is the rule of law that makes all citizens equal before and under the law. It is not some body of shared personal circumstances that binds us together in a civil society. Instead, it is our common respect for, and allegiance to, the law.

When former US President Donald Trump insisted that federal judge Gonzalo Curiel had "an absolute conflict" while presiding over various civil lawsuits against Trump University because he was "Mexican" (i.e., a US citizen of Mexican heritage; Kendall 2016), Mr Trump was attempting to deny this universality requirement, the requirement that all citizens be equal before and under the law. In Canada, Supreme Court Justice Bertha Wilson did much the same thing when she commented about therapeutic abortions: "It is probably impossible for a man to respond, even imaginatively, to such a dilemma [regarding the decision to seek out an abortion] not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma" (*R. v. Morgentaler* [1988], 171).

This suggestion that judges can only exercise their duties fairly and objectively if they have somebody of appropriate life experiences runs counter to the very idea of democratic, civil society. Instead, it is the belief that judges, jury members, lawmakers, police officers, Crown prosecutors and public servants are able to put aside their personal circumstances and make fair, objective

judgments in the areas for which they are responsible that allows democracy to function.

Regardless of whether a decision involves immigration, tax fraud, sexual orientation, poverty, discrimination or any other subject of public interest, it is not necessary for a judge to have had firsthand experience of the particular circumstances under consideration. Rather, it is the belief that evidence can be weighed – and that carefully reasoned, objective decisions can be reached – by judges and other public servants of any background that makes democracy inclusive.

In a democracy, it is these same abilities that citizens exercise when evaluating the work of their governments. As the Supreme Court has noted, the remedy for divergence from the rule of law, just as with remedies for the violation of other constitutional conventions, regularly lies not with the courts but with the voter. "It is because the sanctions of conventions rest with institutions of government other than courts, such as the Governor General or the Lieutenant Governor, or the Houses of Parliament, or with public opinion and, ultimately, with the electorate that it is generally said that they are political" (*Reference re Resolution to Amend the Constitution of Canada* [1981], 882-883). It is thus ultimately to the voter that we turn whenever we see the rule of law being put at risk.[5]

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Endnotes

1 For discussion of the conventions that prevent Canadian courts from exercising unlimited power, see *Schachter v. Canada* [1992].

2 Specifically, three factors relating to judicial independence are regularly identified in this context: financial security, security of tenure and institutional independence. For example, see *Reference re Remuneration of Judges of the Prov. Court of PEI* [1997].

3 Related issues regarding prosecutorial discretion are discussed in *R. v. Anderson* [2014] and *Ontario v. Clark* (2021).

4 For the Supreme Court of Canada's decision that such powers cannot be repealed simply through disuse, see *Reference re The Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province* [1938].

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