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Whatever happened to democratic reform in Canada?

By Peter Cornakovic, Justice Advocate

I was very pleased to read the editorial by David Asper in the Dec 5 edition of the National Post in which he advocates for the political will to attack Canada's democratic deficit. There was a tremendous amount of irony on this issue for on the very front page of the same newspaper, Canada's Chief Justice of The Supreme Court, Madam Beverley McLachlin, was advocating for continued 'judicial activism' by the courts in their dedication to defend human rights in reaction to criticism for the courts more recent decisions.

This is not a coincidence, but the two matters are philosophically correlated on how constitutional democracy is supposed to work. Madam Justice is patronizingly mistaken when she presents that "the rule of law requires judges to uphold unwritten constitutional norms, even in the face of clear enacted laws". The position that laws are to be interpreted based on unwritten 'fictions' must be one of the most politically terrifying comments ever recorded by a Chief Justice of Canada.

The preamble of the Canadian Charter of Rights and Freedom states 'Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:' places the rule of law as a fundamental principle of our political and justice system. The rule of law is understood as justifying judicial authority in terms of the separation of powers and responsibilities from the executive and legislative branches. However, most legal pundits do not understand or appreciate its more detailed meaning and significance to constitutional democracy. Aristotle's Politics is the first historical reference to the concept of rule of law, which has since been championed by many of the Enlightenment period philosophers including Locke, Montesquieu, Rousseau, Hume, Hobbs to name a few..

Albert Dicey is recognized as the modern authority on the rule of law. His Introduction to the Study of the Law of the Constitutions, 1885, articulates in significant detail the tenets of the rule of law. A summary of his interpretation of the rule of law is:

- **The supremacy of law, which means that all persons (individuals and government) are subject to the law.**
- **A concept of justice which emphasizes interpersonal adjudication, law based on standards and the importance of procedures.**
- **Restrictions on the exercise of discretionary power.**
- **The doctrine of judicial precedent.**
- **The common law methodology.**
- **Legislation should be prospective and not retrospective.**
- **An independent judiciary.**
- **The exercise by Parliament of the legislative power and restrictions on exercise of legislative power by the executive.**
- **An underlying moral basis for all law.**

I will not make detailed comparison of the Canadian political and judicial reality with the rule of law described above, with the exception of a summary analysis of the last three points.

Canada does not have an independent judiciary. The PMO and the Minister of Justice for all Superior and Federal Court positions secretly appoint them. As recently noted by the Honourable Brian Peckford's letter to the National Post, there is significant back-office politicking and highly contentious process, without any reference to appointments based on merit. As the Gomery Inquest has exposed, five Quebec judicial appointments where given to ideological political supporters, yet the Chief Justice of the Quebec Appellate, himself a former President of the provincial party apparatus, claimed that their appointment was not political and therefore acceptable. Thank goodness for his objective observations. Even the basic optics, never mind the actual facts, of the Federal (and most Provincial) judicial appointment process is not consistent

with the rule of law.

The next point on the exercise by Parliament of legislative power and restrictions on the exercise of legislative power by the executive is based on the 'checks and balances' concept best implemented by the 'American Founding Fathers' in their Constitution. The theory is that power corrupts and that absolute power corrupts absolutely. Therefore, by distributing power and having different checks and balances between the executive, legislative and judiciary creates the best form of ensuring none of identified branches would be in a position of absolute authority, thereby threatening constitutional democracy and the rule of law. As written by Alexander Hamilton in The Federalist Papers, the judiciary was intended to be a check, but the weakest party of the three groups. David Asper articulated that Canada is run by the PMO's office with the elected party officials expected to follow the Prime Minister's lead. In other words, we have the PMO's office as the effective executive authority, which appoints and 'whips' the elected legislature and the judiciary. This is not consistent with the rule of law.

Finally, the underlying moral basis of law is based on the obvious assumption that all laws are based on the collective culture of what is right and wrong behaviour. According to Madam Justice McLachlin, judges are the best people to decide what is the best moral right way to live, based on their interpretation of the written and unwritten values and norms. In other words, we do not need democracy and the collective will of the people to decide what the laws will be because we have judges instead. The usurpation of the people's decision to elected representative governments to pass and enforce the laws is not consistent with the rule of law.

Yet, anyone following the recent American judicial appointments process of Chief Justice Roberts and Sam Alito to the U.S. Supreme Court would recognize the dynamics and beauty of the rule of law at work. Through the American citizens elected representatives, the President has the authority for nomination and the Senate for approval of high court vacancies. The President is elected for many reasons; one of the primary reasons is that he will place non-ideological judges on the courts that understand the significance of judicial restraint, which is part of the rule of law. This will allow and force the legislative branch to be responsible for making democratic laws as the citizen's representatives, with the overriding protections for minorities stipulated in the Constitution or Charter and protected by the judicial 'referees'. There are constitutional mechanisms to change most constitutions to include privacy or other types of human rights not currently specified by the Charter, if the citizen's so democratically choose. This is despite the fact that the justices being appointed may be of Catholic, Jewish, Hindu, Muslim, Protestant or even Agnostic and Secular faiths.

This is a verification that the American citizens, through their elected representatives, are 'returning' to the democratic principles of legislative prerogative and the rule of law. Again, this is consistent with David Asper's observations on the nature of the Canadian democratic deficit, when elected officials do not make the laws based on their prerogative under the Charter or Constitution. Yet the justices throughout the western constitutional democracies have created this new concept called judicial activism or reading into charters and constitutions 'unwritten' values and norms.

The democratic solution is very simple. The Judiciary should follow the rule of law and not legislate from the bench unwritten norms or values. Following the written law is the rule of law. If the citizens are truly to be empowered within a constitutional democratic framework, the people, through their elected representatives make the laws or change their charter or constitution. The judiciary role is one of being the 'referee', not the rule makers. This has been the historical norm in both Republican countries such as the U.S. and even with Parliamentary systems like Canada's.

The constitutional and legal philosophy, as 'written' in the first paragraph of Canada's Charter, states that the country should be 'ruled by laws, not by ideological men or women'. Otherwise, you do not have the rule of law but a democratic deficit, which leads us down the path towards elitist oligarchy and ultimately the 'decline and fall' of constitutional democracy. The democratic deficit philosophy has been clearly identified by David Asper that without the rule of law you have rule of paternalist ideologues.

It is ironic again, that while much political discussion has been made of the separation of church and state, very little has been debated about the separation of the judiciary and legislative; as required by the rule of law in the first paragraph of Canada's Charter. That is a major reason why Canada suffers from the democratic deficit. We should be cognizant that without the rule of law, we are on that slippery slope towards the rule of tyranny.

Peter Cornakovic is a Canadian businessman and parent who advocates for family law reform in Canada. He can be reached by e mail at: peter.corn@lycos.com