The Rule of Law

Once upon a time in the West, the law was determined by, enforced, and adjudicated by the ruler. But the ruler was not subject to the law. He or she was placed above the law. The ruler was sovereign and considered immune, with a divine source of power…

Two things happened. The nobility – which had to pick up the tab for and fight the sovereign's wars – became fed up with the capricious exercise of royal power. This is what the great *Magna Carta Libertatum* agreed to by King John at Runnymede in 1215 was all about. It would take a few more centuries however for the West to land on the idea that the sovereign was a subject of law, and that the source of their power was not divine, but derived from the governed.

This brings us to the modern rule of law doctrine, a *governing* principle "in which all persons, institutions and entities, public and private … are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards (United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616 at para. 6)."

The rule of law and democracy are linked. Geert Corstens, a former president of the Supreme Court of the Netherlands, writes: "…[a] 'democratic state under the rule of law' means a state where citizens elect their own leaders, a state where government itself is bound by the law and helps ensure that the law is respected in the relations between citizens. The law guarantees everyone's individual freedoms against contraventions by government or other citizens. This can only happen if the legislature, executive and judiciary are separate. And a crucial element is an independent court system which is truly accessible to the citizen (Corstens, G. J. M., and Annette Mills*. Understanding the Rule of Law* Oxford; Hart Publishing, 2017. p.2)."

In the last blog post, we discussed the doctrine of parliamentary sovereignty which emanates from the British Westminster system of parliamentary democracy. Canada's system of government has always featured Constitutional limits on legislative and executive power. Prior to the *Constitution Act, 1982*, these limits were based on the allocation of the areas of legislative powers as they are distributed between the federal and provincial governments. After 1982, the *Canadian Charter of Rights and Freedoms* placed additional limits. Canada thus migrated from Parliamentary supremacy to Constitutional supremacy. This constitutional structure makes Canada a democratic state, with the federal and provincial governments operating under the rule of law as described by Corstens.

However, Section 33 – the 'notwithstanding clause' of the *Charter* – provides an out for the legislative branch of government. It enables legislatures to protect laws from the limitations normally imposed on parliamentary supremacy by key sections of the *Charter* – those that deal with fundamental freedoms, legal, and equality rights. The purpose of this section was to give legislatures (provincial and federal) a degree of *temporary* latitude to derogate from their usual duty to respect these Constitutional rights and freedoms. This approach was designed to provide the legislative branch with a way to respond to an unconstitutional law.

Unfortunately, Section 33 has recently been used by some provinces to pre-emptively protect legislation that does - or most likely would – violate the Constitutional rights and freedoms of its citizens. This tactic is decidedly *undemocratic*, given that the legislatures in question are not acting within the spirit of the rule of law. They are, in fact, acting in a way that consciously rejects the Constitutional limits placed on their power. Moreover, by invoking this section, these legislatures deny their citizens any recourse – by preventing them from seeking remedy through the courts. The result is a distressing one for a democracy: there is nothing people can do to protect rights infringed by legislation protected through the invocation of Section 33.

Instead, citizens are placed at the mercy of the law and the unchecked power of the legislature.

Ubi jus, ibi remedium is a Latin maxim that translates to 'where there is a right, there is a remedy.' The corollary is that where there is no remedy, there is no right. And where there are no rights, there is no democracy.