YOU DON'T KNOW WHAT YOU'VE GOT 'TIL IT'S GONE: THE RULE OF LAW IN CANADA — PART II✧

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This article is the second part of an article that was printed in the Alberta Law Review, *Volume 52, Issue 3 at 689. In this part, the article explores how the rule of law has found expression in Canada. It defines the major elements and characteristics of the rule of law. It then goes on to explore how the different branches of government are affected and constrained by the rule of law. The role of the courts in upholding the rule of law is emphasized, as well as the importance of judicial independence.*

Cet article constitue la deuxième partie d'un article paru à 689 du numéro 3, du volume 52 de la revue Alberta Law Review. *Dans cette partie-ci, l'auteur explore de quelle manière la primauté du droit se manifeste au Canada. Il détermine les principaux éléments et principales caractéristiques de cette primauté. L'auteur examine comment les divers organes du gouvernement sont concernés et restreints par cette primauté. On y souligne le rôle des tribunaux pour confirmer la primauté du droit ainsi que l'importance de l'indépendance judiciaire.*

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I. RULE OF LAW AS EXPRESSED BY CANADA

The Constitution of Canada signals the rule of law and the role of the courts as its guarantor in a combination of provisions. First, there is the preamble to the *Constitution Act, 1867* which commences with the following:

✧ Joni Mitchell, (born Roberta Joan Anderson, 7 November 1943 in Fort MacLeod, Alberta), included this line in "Big Yellow Taxi," which was originally written and performed by her in 1970 (Joni Mitchell, "Big Yellow Taxi" in *Ladies of the Canyon*, CD (Burbank, CA: Reprise, 1970); Wally Breese, "Biography: 1943-1963 Childhood Days" (January 1998), online: <www.jonimitchell.com/library/view.cfm?id=2042>). The last part of the song seems intentionally ambiguous, as it is not clear who her "old man" was. Metro Toronto Police patrol cars were painted yellow until 1986 ("Getting Around," online: <www.torontopolice.on.ca/publications/files/misc/history /3t.html>).

* The author attributes his passion for the rule of law to his patriotic and generous parents, both descended from hardy pioneers who came to Saskatchewan before it was a province. His parents and grandparents were in the front lines of courageous and diligent service to Canada in its travails of the nineteenth to twentieth centuries. By their efforts and that of their generation, he lived in a free and democratic nation and was able to graduate from Carleton University in 1969 (BA) and the University of Saskatchewan in 1972 (LLB). After 27 years as Crown counsel, he was appointed to the Court of Queen's Bench of Alberta in 2000, and the Court of Appeal of Alberta in 2006.

> WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom.[1]

There is also the legal supremacy clause in section 52 of the *Constitution Act, 1982*: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[2] To this should be added the assertion in section 26 of the *Canadian Charter of Rights and Freedoms* that: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."[3] There is as well the potent recognition of the equality of "male and female persons" in section 28 of the *Charter*, the non-derogation of rights of Aboriginal people in section 25 of the *Charter*, and other provisions.[4]

There is, furthermore, the statement of judicial power and duty in section 24 of the *Charter* and the declaration in section 32 of the *Charter* that:

> This Charter applies
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> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
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> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.[5]

There is also the content of the amending formula provisions in the *Constitution Act, 1982* which notably includes sections 41 and 42, which assert a durable status of the Supreme Court of Canada and, lately, the Senate.[6] Finally, the distribution of legislative power was left alone by section 31 of the *Charter*.[7]

Eugene Forsey contended that the preamble to the *Constitution Act, 1867* did *not* institute into the Canadian Constitution the *Bill of Rights, 1689* or the *Habeas Corpus Amendment Act, 1679*, because, in his view "the phrase 'a Constitution similar in principle to that of the United Kingdom' meant simply 'responsible government.'"[8] This was just "Colonial Office legalese."[9] Forsey asserted that the other statutes had been in effect in the various parts of Canada well before the Charlottetown debates and there was "no ground whatever for dragging them in by any preambular back door."[10]

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1 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, Preamble, reprinted in RSC 1985, Appendix II, No 5.
2 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52(1).
3 *Canadian Charter of Rights and Freedoms*, s 26, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
4 *Ibid*, ss 25-29.
5 *Ibid*, ss 24, 32(1).
6 *Supra* note 2, ss 41, 42(1).
7 *Supra* note 3, s 31.
8 Eugene Forsey, *A Life on the Fringe: The Memoirs of Eugene Forsey* (Toronto: Oxford University Press, 1990) at 182; *Bill of Rights, 1688* (UK), 1 Wm and Mar, c 2; *Habeas Corpus Act, 1679* (UK), 31 Cha 2, c 2.
9 Forsey, *ibid*.
10 *Ibid*.

Fortunately for Canada — and whatever the opinion may have been of the scribes of the Colonial Office when this wording was installed in the preamble to the *Constitution Act, 1867* — that preamble had become the "grand entrance hall" of the greater *Constitution Act, 1982* by the time of the *Provincial Judges Reference* and the *Secession Reference*.[11]

In the *Provincial Judges Reference*, Chief Justice Lamer wrote about the tripartite government Canada was given and the crucial role of the independent judiciary, which (Forsey notwithstanding) came through that grand entrance hall of the Constitution and said:

> [T]he preamble does have important legal effects.… It recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*.… [T]he preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.
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> What are the organizing principles of the *Constitution Act, 1867*, as expressed in the preamble?
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> The preamble speaks of the desire of the founding provinces "to be federally united into One Dominion", and thus, addresses the structure of the division of powers. Moreover, by its reference to "a Constitution similar in Principle to that of the United Kingdom", the preamble indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged.[12]

Chief Justice Lamer went on in the *Provincial Judges Reference* to discuss the "underlying logic" of the Constitution in its various elaborations. He wrote, "[t]he preamble, by its reference to 'a Constitution similar in Principle to that of the United Kingdom', points to the nature of the legal order that envelops and sustains Canadian society. That order … is 'an actual order of positive laws', an idea that is embraced by the notion of the rule of law."[13]

Chief Justice Lamer furthered the "logic" of the Constitution and the overarching concept of the rule of law by discussing the key feature of tripartite government reflected in the privileges of legislatures, saying "[t]hese privileges are necessary to ensure that legislatures can perform their functions, free from interference by the Crown and the courts."[14] As to judicial independence, he added:

> [P]olitical institutions are only one part of the basic structure of the Canadian Constitution. … [T]here are three branches of government — the legislature, the executive, and the judiciary.… Courts, in other words, are equally "definitional to the Canadian understanding of constitutionalism" … as are political institutions. It follows that the same constitutional imperative — the preservation of the basic structure — which led Beetz J. to limit the power of legislatures to affect the operation of political institutions, also extends

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11 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 109 [*Provincial Judges Reference*]; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 53 [*Secession Reference*].

12 *Provincial Judges Reference*, *ibid* at paras 95-96.

13 *Ibid* at para 99, quoting *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 749.

14 *Provincial Judges Reference*, *ibid* at para 101.

> protection to the judicial institutions of our constitutional system. By implication, the jurisdiction of the provinces over "courts", as that term is used in s. 92(14) of the *Constitution Act, 1867*, contains within it an implied limitation that the independence of those courts cannot be undermined.[15]

The themes in the *Provincial Judges Reference* regarding the division of jurisdiction between the three branches of government subject to the common and overriding rule of law was carried forward in the *Secession Reference*. There we find this:

> The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the *Provincial Judges Reference*.… Finally, as was said in the *Patriation Reference* … the Constitution of Canada includes
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> > the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.
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> These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities.[16]

Addressing the question of secession of Quebec from Canada, with its potential for shattering the bonds of the Constitution, the Court said:

> The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our 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. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.
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> The democratic vote, by however strong a majority … could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces

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15 *Ibid* at para 108, quoting *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 11.

16 *Secession Reference*, *supra* note 11 at para 32, quoting *Provincial Judges Reference*, *supra* note 11 at para 92; *Re Resolution to amend the Constitution*, [1981] 1 SCR 753 at 874 [*Patriation Reference*].

> or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations.[17]

In the *Supreme Court Act Reference*, it was said that patriation of the Canadian Constitution from England was a turning point in the rule of law, and not merely because the great promulgated law of the Constitution was now our own:

> Patriation of the Constitution was accompanied by the adoption of the *Canadian Charter of Rights and Freedoms*, which gave the courts the responsibility for interpreting and remedying breaches of the *Charter*. Patriation also brought an explicit acknowledgement that the Constitution is the "supreme law of Canada"
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> The existence of an impartial and authoritative judicial arbiter is a necessary corollary of the enactment of the supremacy clause. The judiciary became the "guardian of the constitution".… As such, the Supreme Court of Canada is a foundational premise of the Constitution. With the adoption of the *Constitution Act, 1982*, "the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy": *Secession Reference*, at para. 72.
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> Accordingly, the *Constitution Act, 1982* confirmed the constitutional protection of the essential features of the Supreme Court. Indeed, Part V of the *Constitution Act, 1982* expressly makes changes to the Supreme Court and to its composition subject to constitutional amending procedures.[18]

The fact that by virtue of sections 32 and 52 of the *Constitution Act 1982* there is no express statement that the supremacy principle applies to the courts does not authorize judicial lawlessness as an emanation of judicial independence. Rather, the Constitution and the rule of law demands nothing less than a declaration that the independent judiciary, while empowered by the Constitution to decide, as Chief Judge Marshall said, what the law "is," is also subject to the Constitution.[19]

One of the things the Supreme Court made clear very early was that the common law and courts also were to be consistent with the Constitution.[20] This was, no doubt, with the purpose of assuring Canadians that the Constitution did not merely shift political power to

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17 *Secession Reference*, *ibid* at paras 150-51.

18 *Reference Re* Supreme Court Act, ss 5-6, 2014 SCC 21, [2014] 1 SCR 433 at paras 89-90 [*Supreme Court Act Reference*]. Albeit with the tools of "division of powers" and "vires," Rand J and others of the Supreme Court soon after the end of appeals to the Privy Council had begun to develop a rule of law inclusive of Constitutional values for Canada: see Lorraine E Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80:1&2 Can Bar Rev 699 at 702-703. As she points out, this post-war model of rights protection encouraged the acceptance for Canada of the substructure of unwritten constitutional norms, and made those ideas familiar old friends by 1982.

19 *Marbury v Madison*, 5 US (1 Cranch) 137 at 177 (1803) [*Marbury*].

20 See *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 603. See also *Cloutier v Langlois*, [1990] 1 SCR 158 at 184; *R v Salituro*, [1991] 3 SCR 654 at 675; *R v Golden*, 2001 SCC 83, [2001] 3 SCR 679 at para 86; *R v Mann*, 2004 SCC 52, [2004] 3 SCR 59 at paras 17-19.

a privileged aristocracy as Thomas Jefferson condemned,[21] but fundamentally shifted authority to the law itself.

Interestingly, while full and equal access to the courts is presumptively understood, if not expressly imbedded by the Constitution,[22] in our notions of the rule of law, access to publicly funded counsel is not. In *Christie* we find this:

> The issue, however, is whether *general* access to legal services in relation to courts and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law. In our view, it is not. Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.[23]

The Supreme Court has also made clear, however, that the Courts have jurisdiction, at least in criminal cases, to appoint or remove counsel in order to ensure fundamental justice.[24] That said, this article does not provide a suitable opportunity to burrow further into the topic of legal representation at public expense in Canada. Moreover, the tension between the recognized authority of a Province under section 92(14) of the *Constituton Act, 1867* to set the conditions of the administration of justice, on the one hand, and the necessary authority of the courts to declare law and give equal access to justice, on the other, has been recently illuminated.[25] This article also does not provide a suitable means to predict how that tension will be addressed in future.

Further, to extend the legitimacy granted by the rule of law, and to invigorate the confidence and morale of the governed, the rule of law commands that courts and judges will themselves act with integrity and with respect for law, including respect for the limits of their jurisdiction, respect for the policies of finality and hierarchy within the judicial branch, and respect for the obligations of the judicial office, and the necessary distance and separation of the judicial office from other locations of authority under promulgated laws.

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21 In a letter to Adamantios Koraes (a classics scholar, notably as to Aristotle, and referred to as Adamantios Coray by Jefferson) written 31 October 1823, Jefferson observed that "aristocratical and hereditary" elements had impeded the efficacy of representative government in England. He went on to say that "at the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous": Letter from Thomas Jefferson to Adamantios Koraes (31 October 1823) in Library of Congress, Thomas Jefferson Papers, ser 1, General Correspondence 1651-1827, online: <memory.loc.gov/ammem/collections/Jefferson_papers>.

22 *BCGEU v British Columbia (AG)*, [1988] 2 SCR 214 at 230, quoting *Re British Columbia Government Employees' Union* (1985), 64 BCLR 113 at 121 (CA), Dickson CJC affirmed that access to the courts was "under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens" and interference with access to courts from whatever source "will rally the court's powers to ensure the citizen of his or her day in court." Salmon LJ in *Morris v The Crown Office*, [1970] 1 All ER 1079 at 1086 (CA) said "[e]very member of the public has an inalienable right that our courts shall be left free to administer justice without obstruction or interference from whatever quarter it may come."

23 *British Columbia (AG) v Christie*, 2007 SCC 21, [2007] 1 SCR 873 at para 23 [*Christie*] [emphasis in original].

24 *R v Cunningham*, 2010 SCC 10, [2010] 1 SCR 331 at paras 18-20; *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3 at para 2 [*Criminal Lawyers' Association*].

25 *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59, [2014] 3 SCR 31 at para 48, where judicial discretion to waive court fees was described as "a tradition that goes back to the *Statute of Henry VII*, 11 Hen 7, c 12, of 1495."

In relation to this, Dawson wrote nearly a half century ago that we wish a judge to be placed "in a position where he has nothing to lose by doing what is right and little to gain by doing what is wrong; and there is therefore every reason to hope that his best efforts will be devoted to the conscientious performance of his duty."[26] This is not wrong, but it is far from an adequate reflection of the duty of judges, as it speaks only to instrumental independence and in a pinched way even at that.

Nonetheless, this is another of the more particular examples of legal norms, nostrums, or notions which have, over the generations, become linked to our understanding of the rule of law such that they can arguably be said to be elements of the rule of law. It is time to turn to those.

II. ELEMENTS OF THE RULE OF LAW IN CANADA

With this inheritance and expression in mind, the emphasis of the rule of law in Canada has to be on ensuring that the promulgated laws of our society and the procedures developed for the administration of those laws and the organization of our relationships with one another thereby, continue to respect and reflect the sheltering and justifying enrichment of the rule of law. To be laws in the rule of law sense, the requirements, prohibitions, authorities, or directions in promulgated laws must be rational, objective, accessible, understandable, impartial, and reasonably fit (not more than necessary) to the purposes sought to be achieved by the laws. They must be capable of being applied even-handedly. Their future application must be reasonably predictable. No individuals should be able to cherry pick which ones apply to themselves. Moreover, for any area where any promulgated law is intended to operate, it should operate rationally and consistently in that area. Its administrators and executors should be under surveillance of the law and restricted by the controls of law through sufficiently resourced and independent institutional structures. For any area where the law is not intended to operate, the institutions of governance should have within them the restraints necessary to protect the rights, freedoms, property, and privacy of members of society from unjustified intrusions.

These characteristics of the rule of law demand that each promulgated law has a visible scope and manner of application and a visible scope and manner of limitation. Our consensual wisdom expressed in bills of rights and freedoms (which have often come into existence following very destructive wars) has arisen to give definition and guidance to both forms of scope and manner for each promulgated law. Each matter which has come to be identified or asserted as being an element or manifestation of the rule of law tends to be either (1) a natural extension, elaboration, or completion of an original core principle within the rule of law, or (2) a formalization or institutionalization of measures designed to protect those core principles or any such extension, elaboration or completion of any one of them.

What follows is an effort to identify, albeit in a generalized overview fashion, some major elements of the rule of law in Canada. These things are what we Canadians have come to believe are not merely as reasonable expectations under law but as entitlements of law

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[26] R MacGregor Dawson, *The Government of Canada*, 5th ed by Norman Ward (Toronto: University of Toronto Press, 1970) at 409.

defining what it is to be a Canadian. There is, necessarily, overlap between the concepts and applications which are subsidiary to the rule of law.

A. COMMON ELEMENTS AFFECTING GOVERNANCE

A major common element is the entrenchment of legality as the sole basis of authority or legitimacy for the exercise of any form of governance, either by way of state power through the legislative, executive, or judicial branches.[27] This is not merely a hypothesis or theory, but is a working doctrine shared by the branches. This entrenchment of required legality is reflected in the constitutionalization of law, notably by section 52 of the *Constitution Act, 1982*, as well as in the hierarchy of promulgated laws and of the entities that carry them out.[28] Similarly, a hierarchy of court authority entrenches legality within the judicial process as well, as noted below.

Any form of promulgated law or court order must be nourished by a pre-existing and recognized authority of the law. There must be territorial jurisdiction and subject matter jurisdiction supporting any law or court order. With Canada being a federal country, there is a division of authority, compactly defined recently by the Supreme Court in *Criminal Lawyers' Association* as follows:

> [O]ur constitutional framework prescribes different roles for the executive, legislative and judicial branches.… The content of these various constitutional roles has been shaped by the history and evolution of our constitutional order.
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> Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

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27 See e.g. *Electrolux Home Products Pty Ltd v Australian Workers' Union*, [2004] HCA 40, [2004] 221 CLR 309 at 329; *R v Secretary of State for the Home Department, Ex Parte Pierson* (1997), [1998] AC 539 at 587, 589; *Saeed v Minister for Immigration and Citizenship*, [2010] HCA 23; [2010] 241 CLR 252 at 259.

28 *Constitution Act, 1982*, *supra* note 2, s 52(1). The United States Constitution has a similar provision (US Const art VI). Article VI has two significant clauses, the first of which is quaint in an historical sense, because it refers to debts of the nation. The second clause provides as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

> All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others.
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> Accordingly, the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.[29]

Laws or court orders should also have a measure of stability in the sense of not being constantly in flux or in debate. Finality is an important value in any decision or conclusion under any legal system, subject to a process of review for legality and reasonableness by independent courts.[30] By the same token, it is also necessary for laws to be able to change. As noted, the rule of law is dependent on popular support, which is challenged if promulgated laws depart from social norms or consensus by virtue of sitting too still. At the same time, too frequent or radical change is like monetary inflation, in that laws will not have public confidence. Laws must be predictable if they are to be relied upon.

The common law demonstrates this phenomenon of careful forward motion in the law. The Supreme Court has observed that big steps are for Parliament and the legislatures.[31] Lord Bingham has embellished the points thus:

> So the judges do have a role in developing the law, and the common law has grown up as a result of their doing just this. But, and this is the all important condition, there are limits. The judges may not develop the law to create new criminal offences or widen existing offences so as to make punishable conduct of a type hitherto not subject to punishment, for that would infringe the fundamental principle that a person should not be criminally punished for an act which was not criminal when it was done. In civil cases also we may agree … that judicial activism taken to extremes can spell the death of the rule of law: it is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the antithesis of the rule of law. It is also, of course, very tough on the loser in the particular case, who has lost because the goalposts have been moved during the course of the litigation. This can, if the movement is substantial and unpredictable, offend the rule suggested earlier, that laws should generally take effect in the future.[32]

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29 *Supra* note 24 at paras 27-30.

30 Lord Atkin observed in *Ras Behari Lal v The King-Emperor*, [1933] All ER Rep 723 at 726 (PC) that "Finality is a good thing, but justice is a better." See also *Smith v Western Australia*, [2014] HCA 3 at para 43. Lord Atkin was referring, however, to case-specific adjudication. For law, it has been contended that it is usually "more important that the applicable rule of law be settled than that it be settled right": *Burnet v Coronado Oil & Gas Co*, 285 US 393 at 406 (1932), Brandeis JA (dissenting). See also *Kimble v Marvel Entertainment, LLC*, 576 US (2015), Kagan JA; *Canada (AG) v Confédération des syndicats nationaux*, 2014 SCC 49, [2014] 2 SCR 477 at para 24. See discussion of *stare decisis* below.

31 See e.g. *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210 at para 93.

32 Tom Bingham, *The Rule of Law* (London: Penguin Books, 2010) at 45-46 [footnotes omitted]. That retroactive criminal laws are forbidden is an ancient element of the rule of law: see e.g. *R v Serdyuk*, 2012 ABCA 205, 533 AR 199 at paras 36-47; *Charter*, *supra* note 3, s 11(i). But there is, in addition, in Canada the further constitutional fact that the criminal law has been given exclusively to the Parliament of Canada under section 91(27) of the *Constitution Act, 1867*, *supra* note 1, and the courts have been excluded by Parliament from enacting crimes beyond the power of contempt.

On the other hand, legislatures and Parliament effectively invite cautious judicial fiddling with the laws that they enact, fully expecting courts to add colour to the tapestry they commence. Legislation is usually written in general terms that give rise to adaptation and flexibility, not to mention, as noted above, expressly delegating its elaboration to executive branch agencies. Wording the legislated law that way is not merely to provide a scope of discretion for the agencies of the state to make determinations that genuinely apply the general law equally to particular situations, but likewise to empower the courts to continue to embroider the legal framework and, in a real sense, to explain why the law is what it is, and where it stops.

In Canada, a process called "dialogue" appears to have developed as a form of constitutional convention or practice whereby the interplay between legislated law — for which the rule of law notion of judicial deference to the supremacy of Parliament remains in place — and the fundamental notions elsewhere protected in the constitutional order can be reconciled.[33] This ongoing discourse was described in *Bell ExpressVu* this way:

> It has long been accepted that, where it will not upset the appropriate balance between judicial and legislative action, courts should apply and develop the rules of the common law in accordance with the values and principles enshrined in the *Charter*.… One must keep in mind, of course, that the common law is the province of the judiciary: the courts are responsible for its application, and for ensuring that it continues to reflect the basic values of society. The courts do not, however, occupy the same role *vis-à-vis* statute law.
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> Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard … it must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity.
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> [A] blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent.
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[33] This should not be confused with the type of communication questioned as "impropriety" in *Tobiass v Canada*, [1997] 3 SCR 391 at para 75. Nor is it the same as described by PA Keane, a Justice of Australia's High Court, in "The Idea of The Professional Judge: The Challenges of Communication" (Speech delivered to the Judicial Conference of Australia Colloquium, Noosa, Australia, 11 October 2014) [unpublished], online: <www.jca.asn.au/wp-content/uploads/2013/11/P01_14_02_28_1-Justice-P-A-Keane.pdf>. Justice Keane states that:

> At the time John signed Magna Carta, the judges had considerable personal contact with the King himself. We know this because they "often marked their cases 'loquendum cum rege'", that is, "to be discussed with the king". The practice reflected the political reality that the judges were not then independent of the executive government of the day; they were institutionally connected to, and directly dependent for their authority upon, the King. It may even be that this practice gave rise, to some extent, to the grievance addressed by Ch 45 of Magna Carta.

Ironically, that link to the Crown early on was one of the reasons the judiciary developed into a potent force in the law. Slipping that bond, however, was essential to the Rule of Law.

> [T]he relationship among the legislative, executive, and judicial branches of governance [is] … one of dialogue and mutual respect.… [J]udicial review on *Charter* grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches.
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> …
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> [I]f courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status.[34]

The notion and process of "dialogic balance" *between branches of government* seems to be a relative novelty in legal thinking, when compared with the ancient provenance of the rule of law. And it is not free from controversy according to Grant Huscroft who wrote in a tune resembling that hummed by Jefferson:

> Dialogue theory offers a means of rationalizing this world of judicial interpretive supremacy.
>
> …
>
> I am all in favour of a dialogue between the Supreme Court of Canada and the other branches of Canadian government about the meaning of the *Charter*, in which the Court would respect and be influenced by the legislature's interpretation of the *Charter*. But this is not the sort of dialogue that dialogue theorists have in mind. They specifically reject the idea of coordinate interpretation, portending interpretive anarchy, tyranny of the majority, and a host of other disasters if the legislature is permitted to disagree with the judicial interpretation of the *Charter*. The "dialogue" they have in mind is one in which the Court is free to interpret the *Charter* as it will, with the legislature required to adopt the Court's interpretation and act within such parameters as the Court allows. This is not a dialogue. It is top-down constitutionalism, and it is a poor way in which to run a constitutional democracy.[35]

By comparison to inter-branch dialogue, discourse has been a characteristic of judicial thinking — namely dialogic balance amongst judges — at least since *Coke's Institutes*.[36] Indeed, it is precisely this sort of incrementalism which, as we have seen, built up the common law and the rule of law in the first place. Huscroft's suspicions are thus misplaced in that the resort to dialogical reasoning simply came to the judiciary naturally, and was not confected as a device to push opinions onto the political branches.

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34 *Bell ExpressVu Ltd v Rex*, 2002 SCC 42, [2002] 2 SCR 559 at paras 61-66 [*Bell ExpressVu*] [emphasis in original].

35 Grant Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 50 at 50-51.

36 EDW Coke, *The Institutes of the Laws of England* (London: William Rawlins, Samuel Raycroft & H Sawbridge, 1629). Talking to each other, or to "wiser heads" as Chief Justice Holt said in *Coggs v Bernard* (1703), 2 Ld Raym 909 at 920, ER 107 (KB), is the essence of the common law.

Huscroft was correct when he said that judicial review was no longer a somewhat deferential mechanism where the government had the last word. That was so when judicial review was a search for legislative intent, but once judicial review was constitutionalized, and the judiciary was empowered to examine laws for reasonableness as well as legality, the mechanism was not what it had been. Huscroft also dismissed section 33 of the *Charter*, the legislative override, as largely window dressing, and there his argument breaks down to anecdote, so it is essentially neutral.[37]

Where Huscroft's thesis mainly falls short is in not noticing the ability of the legislatures and Parliament to set the fact base on which the legal analysis will rest. Although the decision in *Bedford* may in some respects reflect a robust view of judicial notice, it does not give a broad power to the courts to decide what social realities *are*.[38] Parliament and legislatures have lately demonstrated no diffidence or inability to set the context of the legal debate by setting the societal facts. This they do in preambles within legislation, as well as policy statements that accompany legislation, and finally by the manner in which the laws are introduced and explained in *Hansard*.

Some might think that perhaps what is going on is also the smuggling of section 1 material into the enactments. If so, there is nothing sinister about that. There is no reason to presume that our elected representatives would not be acting in good faith. When one considers how frequently challenged legislated laws are sustained, and how rarely they are struck down, the dialogue does not seem to be particularly unbalanced.

For Canada the strengthening of dialogue as a characteristic of the relationship of the branches can probably be attributed to the establishment of the *Charter*. Arguably, however, the idea that the branches of government are not merely co-existing but in actuality are working together as a self-maintaining whole in a form of equilibrium offers a variety of benefits.[39] Indeed, it has been found to be possible and even convenient on occasion for the political branches to directly refer questions to the highest court of the province, in the case of provincial governments, and to the Supreme Court of Canada for advice as to the law.

The notion of constitutional references is now more common to Canadian experience than to the United Kingdom,[40] but it was inherited from there. In the 1910 decision of the Supreme Court, *Re References*, we find this:

> [I]t is our duty to consider the questions submitted. It is not necessary for us to say now whether everything that is or may be involved in the consideration of each of the questions referred would or would not properly fall under our cognizance. If in the course of the argument or subsequently it becomes apparent that to

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37 Huscroft, *supra* note 35 at 55-57; *Charter*, *supra* note 3, s 33(1).

38 *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].

39 William N Eskridge Jr & Philip P Frickey, "Foreword: Law as Equilibrium" (1994) 108:1 Harv L Rev 26 at 62-65. The authors deploy the concept of equilibrium to explain how judicial interpretation of statutes responds to signaling from the legislature, even after the enactment of the provision. But recall the caution about the views of Eskridge mentioned in Part I of this article: Jack Watson, "You Don't Know What You've Got 'Til It's Gone: The Rule of Law in Canada – Part I" (2015) 52:3 Alta L Rev 689 at 699-700.

40 See e.g. *Secession Reference*, *supra* note 11; *Reference re Objection to a Resolution to Amend the Constitution*, [1982] 2 SCR 793; *Re References by the Governor-General in Council* (1910), 43 SCR 536 [*Re References*]; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.

> answer any particular question might interfere with the proper administration of justice, it will then be time to ask the executive, for that reason, not to insist upon answers being given; and this might very properly be done notwithstanding that such answers would not in any circumstances have the binding force of adjudications, like decisions given in regular course of judicial proceedings.… [T]he members of this court are the official advisers of the executive in the same way as the judges in England are the counsel or advisers of the King in matters of law.
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> …
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> In England the practice of calling on the judges for their opinion as to existing law is well established. Evidence of its existence will be found as far back as history and tradition throws any light on British legal institutions.[41]

There the Supreme Court explained that it was being asked for guidance on the constitutional limits on "important subjects of insurance, incorporation of joint stock companies and control of fisheries."[42] The Court cast its mind to Lord Wynford who

> said he did not doubt the power of the House to call on the judges and to have their opinion as to existing law. He recalled the instance when he was Lord Chief Justice of the Court of Common Pleas that he communicated to the house the opinion of the judges with regard to the usury laws, and the house subsequently passed a law on the subject. The Lord Chancellor (Lord Lyndhurst) concurred "as to our right to have the opinions of the judges" on existing law. In a previous case the judges begged to be excused from giving an opinion, requested by the House of Lords, upon the question whether a pending bill was in conflict with previous acts relating to the Bank of England. The questions were argued by counsel on both sides; but the judges said that the inquiries were not confined to the strict construction of existing Acts of Parliament.[43]

Another controversy noted by the Supreme Court in 1910 was whether such a reference could directly relate to an existing or pending case before the Courts. Quoting Lord Mansfield, the Supreme Court said that even if the court might answer such a question, it would not hesitate to change its mind when the case actually came before it.[44]

All that said, this article suggests that a principle characteristic of the rule of law is its adaptability over time in association with progress (or, sadly, not) in society. The communication of those changes would most logically emanate by shared information amongst the branches done in a public way. A clandestine consultation would cloud the process and seriously undermine public confidence in it. Such an idea was rejected in England in 1928.[45] A more thorough examination of this topic is worthy of a different article,

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41 *Re References*, *ibid* at 546-47.

42 *Ibid* at 549.

43 *Ibid* at 549-50. The case being discussed was *Daniel M'Naghhten's Case* (1843), 10 CI & F 200 at 213-14, 8 ER 718 (HL).

44 *Re References*, *ibid* at 550. Lord Mansfield said in *Sackville (Lord George) Court-Martial*, 2 Eden 371 at 371, 28 ER 950 (Ch), "we shall be ready, without difficulty, to change our opinion, if we see cause, upon objections that may then be then laid before us, though none have occurred to us at present which we think sufficient."

45 See ES Turner, *May It Please Your Lordship* (London: Michael Joseph, 1971) at 214:

> In 1928 the [British] Government, under heavy fire from lawyers, abandoned a proposal in a rating Bill which would have entitled the Minister of Health to submit doubtful points of law to the High Court for an opinion. The idea … was to save the money of those who could not afford to test an action in the courts, but legal opinion saw the procedure as a revival of the Stuart practice of

because the idea of "dialogue" is controversial in some quarters. Nonetheless, even the United States Supreme Court has used the word "dialogue" when discussing constitutional development.[46]

Recognizing the complexity of the interrelationship between the legislative and judicial branches (with the executive branch not a mere lurker in the debate) shows once again the need to have an independent judiciary to provide guidelines or determinations as to the legality or reasonableness of outcomes within the scope of such adaptation or flexibility of application of the law. Absent such a focus on legality, the legal and social structure will not renew themselves in harmony, nor in any sort of circumspect and foreseeable way let alone in a manner which is fair to all those affected, and particularly those with less access to the political branches.

Further still, the interactive feature of legal evolution in tripartite government also may and should, if it involves a proper exchange of awareness, support and respect another key element of the rule of law regarding the division of legal jurisdiction:

> [I]n a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature.[47]

In comparison to this "dialogic" relationship is the central concept, more visible in the constitutional jurisprudence of the United States and Australia, that neither the executive nor legislative branches should be able to conscript the judicial branch to do their work. This is not a matter simply of the other branches not being able to impose the heavy lifting on the judicial branch. This goes directly to the need to maintain both the fact and appearance of the distinction between the branches. As put by Justice Blackmun for the United States Supreme Court in *Mistretta*, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action."[48] To this, Justice Blackmun added:

> This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.
>
> …
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> In applying the principle of separated powers in our jurisprudence, we have sought to give life to Madison's view of the appropriate relationship among the three coequal Branches. Accordingly, we have recognized … the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely

holding a one-sided consultation with the judges on an issue which, at a later date, they might have to decide on the Bench.

46 See e.g. *Schuette v Coalition to Defend Affirmative Action*, No 12-682, slip op (SC 2014).

47 *R v Salituro*, *supra* note 20 at 670.

48 *Mistretta v United States*, 488 US 361 at 407 (1989) [*Mistretta*].

> separate and distinct.… In a passage now commonplace in our cases, Justice Jackson summarized the pragmatic, flexible view of differentiated governmental power to which we are heir:
>
> > "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."
>
> …
>
> In adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.
>
> …
>
> Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.[49]

The Australian constitutional order emphasizes this principle all the more, as this principle has been a key element in recent decisions of the Australia High Court declaring the crucial and foundational nature of the distinction between branches of government.[50] In *Fardon*, Justice McHugh explained the constitutional framework this way:

> The doctrine of the separation of powers, derived from Chs I, II and III of the *Constitution*, does not apply as such in any of the States, including Queensland. Chapter III of the *Constitution*, which provides for the exercise of federal judicial power, invalidates State legislation that purports to invest jurisdiction and powers in State courts only in very limited circumstances. One circumstance is State legislation that attempts to alter or interfere with the working of the federal judicial system set up by Ch III. Another is the circumstance dealt with in *Kable*: legislation that purports to confer jurisdiction on State courts but compromises the institutional integrity of State courts and affects their capacity to exercise federal jurisdiction invested under Ch III impartially and competently. Subject to that proviso, when the federal Parliament invests State courts with federal jurisdiction, it must take them as it finds them.[51]

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49 *Ibid* at 380-82, quoting *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 at 635 (1952).

50 See e.g. *Kable v Director of Public Prosecutions (NSW)* (1996), 189 CLR 51 (HCA) [*Kable*] (asserting that the state legislation which purported to confer upon State Supreme Courts a function which substantially impairs its institutional integrity is incompatible with its role as a repository of federal jurisdiction and thus was invalid); *North Australian Aboriginal Legal Aid Service Inc v Bradley*, [2004] HCA 31, 218 CLR 146 (six judges wrote that "it is implicit in the terms of Ch III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal" at 163); *Fardon v Attorney-General (QLD)*, [2004] HCA 46, 223 CLR 575 [*Fardon*]; *Attorney-General (NT) v Emmerson*, [2014] HCA 13, 307 ALR 174. See also *Wainohu v New South Wales*, [2011] HCA 24, [2011] 243 CLR 181 which pointed out that Commissions, established by executive governments to inquire and report to government, are non-judicial in character. Properly structured, they do not necessarily impair judicial functioning or the separation of powers and jurisdiction in a tripartite democracy, any more than a power of regulation on the part of an executive tribunal does so. The courts scrutinize the structures to ensure the rule of law is protected in these situations.

51 *Fardon*, *ibid* at para 37 [footnotes omitted].

Fardon emphasized that the mere creation of a court jurisdiction within the boundaries of legislative power did not constitute such a conversion of the courts into a tool of the executive. To say so itself affronted the notions imbedded in the rule of law, as Chief Justice Gleeson pointed out:

> In some of the reasons in *Kable*, references were made to the capacity of the legislation there in question to diminish public confidence in the judiciary. Those references were in the context of a statute that was held to impair the institutional integrity of a court and involve it in an ad hominem exercise. Nothing that was said in *Kable* meant that a court's opinion of its own standing is a criterion of validity of law. Furthermore, nothing would be more likely to damage public confidence in the integrity and impartiality of courts than judicial refusal to implement the provisions of a statute upon the ground of an objection to legislative policy. If courts were to set out to defeat the intention of Parliament because of disagreement with the wisdom of a law, then the judiciary's collective reputation for impartiality would quickly disappear. This case involves no question of the interpretation of an ambiguous statute, or of the application of the common law. It concerns a specific challenge to the validity of a State law on the ground that it involves an impermissible attempt to resolve a certain kind of problem through the State's judicial process.[52]

What was objectionable in rule of law terms in Australia was a form of legislated law that directly commands the courts to carry out (and add judicial legitimacy to) a policy of the executive or the legislative branches.

Another element of the relationship between the branches of government arises in situations where the executive branch fails to carry out the promulgated laws according to their terms by simply declining to enforce them.[53] This presents a unique problem with legality in that the courts may have no case before them in which to declare the legality, or not, of such conduct. Yet this can undermine the law and its reputation as effectively as abusive deployment of the law. As pointed out by Griffith:

> What then is meant by 'the rule of law'? The law rules in this sense: that government and all who exercise power as part of established authority are themselves bound by the existing body of laws unless and until they repeal or reform any of those laws. When a government makes a law under Parliamentary authority it makes a rod for its own back as well as for the backs of others. The Declaration of Rights of 1689 declared illegal the suspending of execution of laws by royal authority without the consent of Parliament; and the power to dispense with laws. The exercise of arbitrary power by governments is contrary to the rule of law and the true mark of the despot is that he can, at his own wish and without restraint, set aside the existing laws in any case.[54]

Legality also demands that each law and each court decision or order meet a level of basic rationality. A promulgated law (as defined in this article) or an order for a court should not require the impossible. Nor should it prohibit with threat of imprisonment conduct which is

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52 *Ibid* at para 23 [footnotes omitted].

53 This idea of executive exemptions from legislated law was a crucial issue in the 17th century English reconstruction of law: see e.g. David L Smith, "Change & Continuity in 17th Century English Parliaments" *History Review* (September 2002) 16 at 17-19. It is replicated as a concept of equality to the effect that laws of general application are to be administered equally and not subject to individualized discretion or estoppel: see e.g. *Immeubles Jacques Robitaille Inc v Quebec (City)*, 2014 SCC 34, [2014] 1 SCR 784 at para 24.

54 JAG Griffith, *The Politics of the Judiciary*, 4th ed (London: Fontana Press, 1991) at 321.

not really wrong.[55] Nor should it characterize as a form of serious crime (which is deserving of imprisonment) conduct which by no logical conception fits that definition.[56] Additional to the requirement that the criminal law requires "fault" (hence law must not be overbroad) and that there must be fair notice of its scope (hence no vagueness in the law), the necessarily normative and, for that matter, the inspirational core of the criminal law is reflected in the words of section 718 of the *Criminal Code*. The scope of the debate over law and morality is beyond the range of this article.[57] But at the very least it can be said that even the criminal law should not purport to force people to do that which is impossible.[58] Nor should it punish people for conduct they did which, under the circumstances, was unavoidable.[59]

On the other hand, as stated in *Malmo-Levine*, it is for Parliament to decide whether conduct is serious enough to be called criminal and it is not up to the individual involved.[60] Justices Gonthier and Binnie go on to refer to Sir James Fitzjames Stephen, who agreed that the criminal law should be restrained in its application but:

> However, Stephen himself was a prominent critic of [John Stuart] Mill's harm principle. He believed that "immoral" behaviour *can* be a proper subject for the criminal law. Clearly, his reference to "evils" inflicted on the community includes the idea of moral harm, which Mill specifically excluded from the scope of his "harm principle". Stephen thus supported a much larger view of the legitimate purposes of the criminal law than is permitted by the appellants' argument.[61]

In Canada:

> The criminalization of possession is a statement of society's collective disapproval of the use of a psychoactive drug such as marihuana … and, through Parliament, the continuing view that its use should be deterred. The prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm. In particular, criminalization seeks to take marihuana out of the hands of users and potential users, so as to

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55 *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 492: "A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter*."

56 See e.g. *R v Martineau*, [1990] 2 SCR 633 at 645-47.

57 The debate seems interminable and unavoidable. But it bespeaks the wisdom of how fundamental principles inform the common law: see e.g. Aharon Barak, *The Judge in a Democracy* (Princeton, NJ: Princeton University Press, 2006) at 57-58.

58 See Albert Mayrand, "La garde conjointe, rééquilibrage de l'autorité parentale" (1988) 67:2 Can Bar Rev 193 at 196 stating "no one is bound to do the impossible," translated and cited in *W(V) v S(D)*, [1996] 2 SCR 108 at para 66.

59 What is unavoidable, of course, is decided by reference to grundnorms. Blackstone said that a man "ought rather to die himself, than escape by the murder of an innocent." Sir William Blackstone, *Commentaries on the Laws of England*, vol 2 (New York: WE Dean, 1830) book four at 21. As justified in moral terms as that idea may be, it has a weakness on the practical level. See Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 2 (London: Macmillan, 1883) at 107, which says it is "a misfortune for a man that he should be placed between two fires" but criminals should not confer "impunity upon their agents by threatening them with death or violence." On the other hand, at 109-10 Stephen did admit that "it is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it, but these cases cannot be defined beforehand."

60 *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 at para 86 [*Malmo-Levine*]: "While we accept Malmo-Levine's statement that smoking marihuana is central to his lifestyle, the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle."

61 *Ibid* at para 121. Stephen was largely responsible for the English Draft Code, which the Canadian *Criminal Code* was based off of: Toddy Kathol, "Defence of Property in the Criminal Code" (1993) 35:4 Crim LQ 453 at 455.

> prevent the associated harm and to eliminate the market for traffickers. In light of these findings of fact it cannot be said that the prohibition on marihuana possession is arbitrary or irrational, although the wisdom of the prohibition and its related penalties is always open to reconsideration by Parliament itself.[62]

Under the rule of law, no promulgated law or court order should be structured in a manner which is incoherent, irrational, or beyond the reach of its putative authority. Even if a promulgated law or court order can be said to be valid in those regards, the law or court order should also be capable of predictable enforcement in the sense that the consequences of compliance or breach are knowable as would be the process of enforcement. In not just that sense, the principle of legality also demands that the laws be accessible, in the sense that people who will be affected by them have a fair opportunity to become aware of them in advance in order to govern their conduct accordingly. Similarly, the source of authority of those laws should be apparent on the face of the law or order when they are pronounced against any individual.

Even though there must be flexibility in any law in order to make for the humane and sensible application of that law with a clear eye upon real equality in its application, laws should not be so vague or ambiguous as to be incapable of supporting a rational analysis or appreciation.[63] Moreover, laws should not be so overbroad as to allow for a standardless sweep in the conduct thereunder by agencies of government.[64] Laws should also not involve gross disproportionality: "Overbreadth occurs when the means selected by the legislator are broader than necessary to achieve the state objective, and gross disproportionality occurs when state actions or legislative responses to a problem are 'so extreme as to be disproportionate to any legitimate government interest.'"[65]

A law or order should not be arbitrary in the sense of bearing no relationship to the authoritative source from which it is said to arise:

> The case law on arbitrariness, overbreadth and gross disproportionality is directed against two different evils. The first evil is the absence of a connection between the infringement of rights and what the law seeks to achieve — the situation where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law. The first evil is addressed by the norms against arbitrariness and overbreadth, which target the absence of connection between the law's purpose and the s. 7 deprivation.

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62 *Malmo-Levine*, *ibid* at para 136.

63 Bingham, *supra* note 32 at 54: "The rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered."

64 Numerous cases say this. Recently, *R v Khawaja*, 2012 SCC 69, [2012] 3 SCR 555 at para 35 [*Khawaja*]: "It is a principle of fundamental justice that criminal laws not be overbroad. Pursuant to s. 7 of the *Charter*, laws that restrict the liberty of those to whom they apply must do so in accordance with principles of fundamental justice. Criminal laws that restrict liberty more than is necessary to accomplish their goal violate principles of fundamental justice. Such laws are overbroad."

65 *Ibid* at para 40, quoting *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 at para 133 [*PHS Community Services*].

> The second evil lies in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.[66]

Arguably, a law or order is arbitrary in that sense if it is based on attitudes or characteristics of the agency or court which produced the law rather than the circumstances and characteristics of the persons affected by the law. In *PHS Community Services* we find this:

> The discretion vested in the Minister of Health is not absolute: as with all exercises of discretion, the Minister's decisions must conform to the *Charter*.… If the Minister's decision results in an application of the *CDSA* that limits the s. 7 rights of individuals in a manner that is not in accordance with the *Charter*, then the Minister's discretion has been exercised unconstitutionally.[67]

Bedford held that "the ultimate question remains whether the evidence establishes that the law violates basic norms because there is no connection between its effect and its purpose."[68] *Bedford*, however, cautioned that it is not easy to establish that there is *no connection* in whole or in part, between the effects and the purpose of impugned legislation.[69]

Legality also demands that the law that applies to any situation must be lawfully in existence at the time of the situation. Retroactive laws are generally unacceptable, and particularly so in the criminal law. Even in civil matters, retroactive laws that disturb settled expectations or vested rights must be justifiable by objective standards. While it may be possible to have *ex post facto* laws attach legal consequences or implications to matters already done, the laws should provide a means of hearing and redress.

Legality demands that where any decision under law is to be made affecting the rights, freedoms, property, or privacy of any individual, the individual being affected should ordinarily receive reasonable notice of the onset of the law. In the case of laws of general application, the extent of notice may also be generalized. In the case of decisions which are specific to an individual, there should be a fair process for the making of the decision, including some opportunity to respond and be heard that is suitable to the occasion. Nor is the rule of law hospitable to the idea that an "organ of state [may] reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process."[70]

Another matter to recall when considering the interrelationship of the branches was expressed in *Authorson*.[71] In that case, the question was whether the legislative process itself by our federally recognized legislatures including Parliament (to be distinguished from the

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66 *Bedford*, *supra* note 38 at paras 108-109. Chief Justice McLachlin reaffirmed that a law is overbroad when it goes too far past its purposes and interferes with some conduct that bears no connection to those objectives (at para 101).

67 *PHS Community Services*, *supra* note 65 at para 117.

68 *Bedford*, *supra* note 38 at para 119 [emphasis omitted].

69 *Ibid*.

70 See e.g. *Head of Department, Department of Education, Free State Province v Welkom High School*, [2013] ZACC 25, [2013] 9 B Const LR 989 (CC) at para 86.

71 *Authorson v Canada (AG)*, 2003 SCC 39, [2003] 2 SCR 40 [*Authorson*].

creation of regulations or by-laws of municipalities) was a process requiring a fair hearing for affected persons. The Supreme Court wrote:

> The submission that a court can compel Parliament to change its legislative procedures based on the *Bill of Rights* must fail. The *Bill of Rights* purports to guide the proper interpretation of every "law of Canada", which s. 5 of the *Bill of Rights* defines to mean "an Act of the Parliament of Canada *enacted* before or after the coming of force of this Act" (emphasis added). Court interference with the legislative process is not an interpretation of an already enacted law.
>
> Due process protections cannot interfere with the right of the legislative branch to determine its own procedure. For the *Bill of Rights* to confer such a power would effectively amend the Canadian constitution, which, in the preamble to the *Constitution Act, 1867*, enshrines a constitution similar in principle to that of the United Kingdom. In the United Kingdom, no such pre-legislative procedural rights have existed. From that, it follows that the *Bill of Rights* does not authorize such power.[72]

The foregoing points are, to some extent, technical in nature in that they speak to characteristics of the legal process which the rule of law has come to include as vital to a credible and fair architecture of law. Against all this background remains the risk and threat which is present in Canada as much as anywhere else that the rule of law has actually been accepted.

A final observation under this heading is a reminder that because Canada is a federal country, there is also a concept, linked to the rule of law and in any event supportive of legality, of an integrative concept of law called "full faith and credit." This refers to the notion that jurisdictions with legal authority within Canada, particularly courts, should respect the orders and directions of jurisdictions elsewhere in Canada where those orders and directions on their face invoke a cognizable and constitutional jurisdiction. This was explained prior to the *Charter* in *Morguard*:

> The integrating character of our constitutional arrangements as they apply to interprovincial mobility is such that some writers have suggested that a "full faith and credit" clause must be read into the Constitution and that the federal Parliament is, under the "Peace, Order and Good Government" clause, empowered to legislate respecting the recognition and enforcement of judgments throughout Canada.… The present case was not, however, argued on that basis, and I need not go that far. For present purposes, it is sufficient to say that, in my view, the application of the underlying principles of comity and private international law must be adapted to the situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation. In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.
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> …
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> A similar approach should, in my view, be adopted in relation to the recognition and enforcement of judgments within Canada. As I see it, the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a

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[72] *Ibid* at paras 40-41.

> territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action. I referred earlier to the principles of order and fairness that should obtain in this area of the law. Both order and justice militate in favour of the security of transactions. It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides, whatever the inconvenience and costs this may bring, and whatever degree of connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?[73]

In the end, it is one thing to adopt the rule of law definition of what it is to be a free and equal citizen in a democratic and free, as well as a safe, society. It is another to avert one's attention from the persistent risk, indeed the actual movement in all societies, towards the centralization of practical power in the hands of a single branch of government. Comment on this phenomenon appears in each discussion of the "elements" below.

B. ELEMENTS AFFECTING THE LEGISLATIVE BRANCH OF GOVERNMENT

The Canadian constitution specifies the balance of subject matter and territorial jurisdiction given to Parliament and to the legislatures of the provinces and territories. The provinces in turn have devolved subordinate (but significant) by-law or regulatory jurisdiction to municipalities, while Parliament has also done so with respect to First Nations.

As noted above in *Authorson*, the legislative process itself has not so far been considered to be reviewable. Let's face it: the legislative process is full of compromises and even the occasional subterfuge. Otto Von Bismarck once observed that legislation is like sausage, in that while both things can be enjoyable products, the process of making them is better left unseen.[74]

All forms of promulgated law generated by such legislative or quasi-legislative bodies are covered by the rule of law instruction that there are requirements of clarity, relevance, purpose, and even-handedness in the language of promulgated laws, with reasonable predictability of outcome. The points of legality mentioned above apply to these situations.

It is established, arguably, now that no legislated law should be interpreted in a manner which would exceed either its consensus purpose or its source authority in the constitutional division of powers. From the other direction, it is acknowledged that no executive discretion should be able to dispense with the enforcement of a legislated law according to its terms for impermissible reasons, notably discriminatory ones. Similarly, no legislated law should permit a subsidiary official to effectively enact legislation beyond the scope of the original authority in the legislated law in the first place. Nor should it ordinarily be possible for a state agent to effectively change the legislated law by the manner or scope of action authorized for that agent.

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73 *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1100-103 [*Morguard*].

74 See Peter L Strauss, "The Courts and the Congress: Should Judges Disdain Political History?" (1998) 98:1 Colum L Rev 242 at 265, n 92.

As discussed elsewhere in this article, however, it has come to be accepted that the delegation of power to an executive branch person or agency cannot be such as to put the person or agency in a straightjacket. To allow discretion is inevitable. As long ago as 1929, with the modern administrative state still in relative adolescence by comparison to the present era, Lord Hewart decried the movement to what he felt was "new despotism" in the delegation of discretionary power to administrative officials or bodies.[75] He called this a development "to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive unfettered and supreme."[76]

At that time, however, judicial review was constrained in practical as well as legal terms as the *Wednesbury* test was not on the horizon.[77] Judicial review as modernly operative is discussed further below.

In light of the content of human rights and freedoms, it is accepted in Canada now that no legislated law should be worded as to either directly, or by implication or effect, operate to bring about or encourage abuses of rights or freedoms. Generally, therefore, it has been held that legislation should be neutral on issues of religion or conscience, even if they can put forward statements of normative values. Similarly, it is accepted that legislated laws should not authorize random or arbitrary action by state officials, or authorize unreasonable searches or seizures, and so forth. Nor should legislated law impose cruel or unusual punishments, or impede the free exercise of expression.

For present purposes it is unnecessary to provide examples of limitations on legislated laws that arise from these principles. But it should also be noted that legislation is subject to challege should it authorize any form of process for the determination of any substantial rights (such as property rights, commercial freedoms, and so forth) that does not provide for a suitable fair hearing, including issues of *audi alteram partem*, to the extent the situation requires it, or that effectively denies an impartial or informed tribunal to the extent justice demands.[78]

Nonetheless, it is, as noted above, a phenomenon in most democratic societies that the less robust the division between the legislative and executive branches of government, the more likely it is that the legislative branch will orient their funding power towards the objectives of the executive branch. The executive branch in Canada is not immune to the adage that "power granted is seldom neglected." This compact statement, reminiscent of Lord Hewart, comes from *Wunderlich*, where it was written:

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75 Rt Hon Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn, 1929) at 17.

76 *Ibid*.

77 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947), [1948] 1 KB 223. Despite being brief and expressed in an almost offhand manner, the case became a remarkable watershed in the law of judicial review in England. Lord Greene MR said that administrative decisions could be quashed as unreasonable if they (1) took into account factors that ought not to have been taken into account, (2) failed to take into account factors that ought to have been taken into account, or (3) the decision was so unreasonable that no reasonable authority would ever consider imposing it (*ibid* at 229). This last recalled a case called *Short v Poole Corporation* (1925), [1926] 1 Ch 66 referring to the example of the dismissal of a teacher because she had red hair. The example fit all three error types.

78 See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

> Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.
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> The instant case reveals only a minor facet of the age-long struggle. The result reached by the Court can be rationalized or made plausible by casting it in terms of contract law: the parties need not have made this contract; those who contract with the Government must turn square corners; the parties will be left where their engagement brought them. And it may be that in this case the equities are with the Government, not with the contractor. But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected.
>
> The principle of checks and balances is a healthy one. An official who is accountable will act more prudently. A citizen who has an appeal to a body independent of the controversy has protection against passion, obstinacy, irrational conduct, and incompetency of an official. The opinion by Judge Madden in this case expresses a revulsion to allowing one man an uncontrolled discretion over another's fiscal affairs. We should allow the Court of Claims, the agency close to these disputes, to reverse an official whose conduct is plainly out of bounds whether he is fraudulent, perverse, captious, incompetent, or just palpably wrong. The rule we announce makes government oppressive. The rule the Court of Claims espouses gives a citizen justice even against his government.[79]

In our Parliamentary system, the legislative branch is dominated by supporters of the executive branch. That being so, the practical reality is that the executive branch is necessarily less in contact with those who might resist any policy of that majority.

The rule of law does not include a principle that the courts may reverse or correct legislated laws by reason of their being unwise or undesirable from a policy standpoint.[80] Indeed, as discussed below, the rule of law imposes limitations on courts' ability to interfere with legislated laws on many bases. Further, it has been said that the rule of law is not a "catch-all" provision available to re-write legislation for discrepancy from some judicially perceived normative arrangement.[81] Moreover, the opportunity of courts to examine even the *vires*, jurisdiction or alleged constitutional defects of such laws is somewhat hit and miss. So without legislative restraints pre-configured on discretion, agencies of the executive are largely unimpeded in the practical sense, absent a challenge in the courts.

As noted below, what the executive may think best to do is to set out a policy arrangement that furthers the executive's objectives by weakening any checks or balances thrown up by the rule of law. It is not *physically* outside the capacity of the executive branch to take steps

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79 *United States v Wunderlich*, 342 US 98 at 101-102 (1951)[*Wunderlich*], Douglas JA, albeit in dissent, about review of a decision of the Secretary of the Interior.

80 See e.g. *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 SCR 810 at paras 27-28 [*Katz Group*].

81 *Lemus v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114, 461 NR 310 at para 15.

to limit or orient resources that the legislative branch might be minded to provide to the courts and for the justice systems.[82] But unilateral executive conscription and disposition of the public fisc, in affront of the authority of Parliament to decide how to raise or to spend it, was a key factor in the fall of Charles I. The legality of what the executive does in this respect is a question for the courts.

Resources are, of course, required for the processes or law, including the processes of the courts, which sustain or facilitate the checks and balances of our constitutional order. That said, it is appropriate to look at elements of the rule of law which affect the executive branch of government.

C. ELEMENTS AFFECTING THE EXECUTIVE BRANCH OF GOVERNMENT

Pride of place here belongs to *habeas corpus*, which enjoys the deserved reputation of a venerated and storied legal instrument developed by the courts to prevent abuses of power by the executive in relation to liberty:

> This Court has recognized in its decisions that *habeas corpus* should develop over time to ensure that the law remains consistent with the remedy's underlying goals: no one should be deprived of their liberty without lawful authority. The significance of *habeas corpus* to those who have been deprived of their liberty means that it must be developed in a meaningful way.… This remedy is crucial to those whose residual liberty has been taken from them by the state, and this alone suffices to ensure that it is rarely subject to restrictions.[83]

As governments are increasingly calling in new forms of indictable and summary offences, punishable by imprisonment, to enforce legislative endeavours and objectives, and as the executive's capacity therefore to arrest or detain people expands, the role of, and need for, *habeas corpus* is not likely to diminish. Moreover, it has been expressly recognized in section 10(c) of our *Charter*, for evident functional purposes.[84] As Justice Kennedy wrote in *Boumediene*:

> Magna Carta decreed that no man would be imprisoned contrary to the law of the land.… [T]he writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled.
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> …
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> The development was painstaking, even by the centuries-long measures of English constitutional history. The writ was known and used in some form at least as early as the reign of Edward I.… Yet at the outset it was used to protect not the rights of citizens but those of the King and his courts. The early courts were considered agents of the Crown, designed to assist the King in the exercise of his power.… Thus the writ, while it would become part of the foundation of liberty for the King's subjects, was in its earliest use a mechanism for securing compliance with the King's laws.… Over time it became clear that by issuing the writ of habeas corpus common-law courts sought to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner.

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82 See note 25 above.
83 *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 54 [*Khela*].
84 *Supra* note 3.

…

> Even so, from an early date it was understood that the King, too, was subject to the law.… And, by the 1600's, the writ was deemed less an instrument of the King's power and more a restraint upon it.[85]

Beyond this, the larger concept of judicial review of executive and administrative action has come to broadly apply to all such powers as may have been granted by law, or which are putatively claimed without legal authority, especially, as noted above, with the centralization of state power in the hands of the executive branch. Judicial review has come to be accepted as perhaps the principal instrument of the rule of law.[86] As said in *Khela*, "[a]fter all, 'judicial review,' '[i]n its broadest sense', simply refers to the supervisory role played by the courts to ensure that executive power is exercised in a manner consistent with the rule of law.… This is also the purpose of *habeas corpus*, if distilled to its essence."[87]

In sum, as well as insisting upon basic requirements of legality and jurisdiction for executive or administrative action, the rule of law demands that any significant executive power given to any person or agency under any promulgated law must be

(a) transparently exercised with its authority clear,

(b) channeled and executed under effective rules and standards, known in advance, that conform with what are acceptable as necessary to a fair and just process applicable to the exercise,

(c) based upon sufficient grounds for its exercise as pre-defined by the specific promulgated law or other known laws and in accord with constitutional values, and

(d) capable of scrutiny, review, and reversal if need be by a judiciary independent of the executive so as to require the exercise to be done in conformance with law or discontinued.

Part of this can be put that the rule of law insists that, in all exercises of legal power, there must be compliance with requirements of procedural fairness and fundamental justice as a matter of being necessary ingredients to the validation and legitimacy of any process of government, including any judicial process.

A related proposition concerns the potential for abuse of the judicial process by the executive. This is a major point in the Australian constitutional law noted above. This is most clearly shown in situations where state agents conduct themselves, notably in relation to criminal investigations, directly against individuals. The police and the prosecution agencies in less rule of law-oriented nations virtually commandeer the courts into legitimizing abuses of individual rights. But even in free nations, there is a need under the rule of law to ensure

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85 *Boumediene v Bush (President of the United States)*, 553 US 723 at 740-41 (2008).

86 *Eba v Advocate General for Scotland*, [2011] UKSC 29, [2012] 1 AC 710 at para 8.

87 *Supra* note 83 at para 37, citing Judith Farbey, Robert Sharpe & Simon Atrill, *The Law of Habeas Corpus*, 3rd ed (Oxford: Oxford University Press, 2011) at 18.

that the courts are not co-opted into supporting, or even condoning, abusive practices by state agents, particularly in relation to the criminal law. Hence the doctrine loosely called "abuse of process" in criminal law emerged by the 1960s in Canada.

Although the approach in the United Kingdom, the United States, Australia, New Zealand and Canada differ, a common theme is well-reflected by the statements of Lord Nicholls and Lord Hoffman in *R v. Looseley*.[88] Lord Nicholls opened thus:

> [E]very court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen.[89]

Lord Hoffman added to the definition of the concept of entrapment as a method of judicial regulation of state agent behaviour. He made clear that the role of the court was not in a traditional form of looking to whether the executive had proven a specific offence, but whether the prosecution itself should be permitted:

> First, entrapment is not a substantive defence in the sense of providing a ground upon which the accused is entitled to an acquittal. Secondly, the court has jurisdiction in a case of entrapment to stay the prosecution on the ground that the integrity of the criminal justice system would be compromised by allowing the state to punish someone whom the state itself has caused to transgress. Thirdly, although the court has a discretion under section 78 of the Police and Criminal Evidence Act 1984 to exclude evidence on the ground that its admission would have an adverse effect on the fairness of the proceedings, the exclusion of evidence is not an appropriate response to entrapment. The question is not whether the proceedings would be a fair determination of guilt but whether they should have been brought at all.[90]

Canadian law is in accord, with the emphasis on the fact that this form of judicial surveillance is not charge approval, or general review, or quality control. Intervention can be justified and the remedy grounded exclusively in a form of state agency overreach that actually impacts on the fairness of the process or distorts the justice of the situation in the sense of truly unacceptable behaviour.[91] In other words, the courts do not (and should not) purport to take over the discretionary management of issues of law enforcement. This, of course, is just one element of the exercises of (putative and usually legal) authority by agents of the state, albeit it is the plainest one since it is at the sharpest cutting edge of state power.

More generally, any exercises of discretion or decisions by any person or agency of government (just as any exercises of discretion or decisions of any court) that may touch

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88 *R v Looseley*, [2001] UKHL 53, [2001] 1 WLR 2060.
89 *Ibid* at para 1.
90 *Ibid* at para 36.
91 *R v Regan*, 2002 SCC 12, [2002] 1 SCR 297 at paras 50-52; *R v Imoro*, 2010 SCC 50, [2010] 3 SCR 62.

upon the rights and freedoms defining a free citizen should not be arbitrary or disconnected from the authority of any law on which they purport to rest. *PHS Community Services* offers this to explain arbitrariness in the application of law:

> When considering whether a law's application is arbitrary, the first step is to identify the law's objectives.
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> …
>
> The second step is to identify the relationship between the state interest and the impugned law, or, in this case, the impugned decision of the Minister. … [T]he burden is on the claimants to establish that the limit imposed by the law is not in accordance with the principles of fundamental justice.[92]

Similarly, there must be an appropriate degree of impartiality, integrity, reasonableness, transparency, and accountability in the conduct of any activity of government including any judicial process. The degrees of each of these requirements will vary depending on the situation.[93] But the rule of law here too is demanding. For example, not every situation of discretionary authority demands a full-blown hearing and all the characteristics of *audi alteram partem*. The variations arise from society's consensus as to what is fair treatment and what is appropriate to the nature of the activity being done.

In this respect, the rule of law does not shatter all privileges and confidences. Rather, because those things may be definitive of freedom, the rule of law also protects the valid examples of privileges and confidences (not to lose sight of the entire concept of privacy and autonomy), just as it protects human rights and freedoms and the contours of democracy, behind what James Madison called "parchment barriers."[94] But preserving these noble things by the measures that have emerged over the years is not free of cost. It requires institutions, and notably able courts, to make them meaningful. The judicial branch of government in most modern democracies is in no position to effectively influence the legislative branch when it gets around to raising and appointing public revenue to the needs of the courts. The trend of centralization of executive power may well be unabated as long as governance by the executive branch appears to the public to not have reached a level of oppression (at which point it is too late).

So the result is that even if the executive branch faces the risk of having its agencies under judicial surveillance, that risk is easy to temper or forestall by the simple expedient of stinting the resources available to the courts to do that job. Although Madison was speaking of the potential reach of the legislative branch, and although he presumably did not foresee the potential for effective subjection of the legislative branch to the executive branch under a Parliamentary system, he explained his point about the weakness of the parchment barriers in the following terms:

> The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the

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92 *Supra* note 65 at paras 129-30.
93 *Baker*, *supra* note 78 at paras 21-28.
94 James Madison, "The Federalist No. 48" (1 Feburary 1788) in Terence Ball, ed, *The Federalist with Letters of "Brutus"* (Cambridge: Cambridge University Press, 2003) 240 at 241.

> greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real-nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature; and the judiciary being described by land marks, still less uncertain, projects of usurpation by either of these departments, would immediately betray and defeat themselves. Nor is this all: As the legislative department alone has access to the pockets of the people, and has in some Constitutions full discretion, and in all, a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.[95]

Nowadays the stinting of the "rewards" of judges is not a matter of central concern.[96] The real concern as to judicial independence arises from stinting the ability of the courts to manage their functions, keep courts operating effectively, and stay current with social needs while keeping distance from the executive and legislative branches. A form of budgetary chokehold on the capacity of courts can happen quite unintentionally or without malice. It may even be inevitable if the budget for courts and their necessary operations are simply blended into funding for all aspects of the functioning of a justice ministry. When that happens, the courts are left to trust the Ministry with the discretion to decide, off the corner of whose desk is involved, what the courts need on a given topic. Yet those officials will not have the ability or right to assess the business intelligence of the courts except in the most exterior and superficial manner.

This can be a self-propagating problem. The chiefs of the courts may become effectively starved of any ability to assess the court needs for themselves, let alone to explain those to the executive, which in turn may well have adopted the perspective that the money taxed from the public by the legislative branch, belongs to the executive branch. Moreover, the Minister of Justice and Attorney General may well be in a conflict that makes it difficult for the Attorney General to be an advocate for the courts either inside the executive branch or before the legislative branch. After all, the Attorney General is the leading litigant before the courts at all levels.

The Minister's tasks are often multifaceted.[97] He will be the director of not merely the prosecution of cases before the courts, but also the superintendent of law enforcement and corrections, and further still the instructor of legal counsel routinely litigating before the courts in all manner of administrative, family law, and civil disputes. In modern regulatory states, as private litigation withdraws towards alternative dispute resolution methods, the majority of non-penal litigation left behind seems to also involve the Minister's agents as counsel or parties. The wry observation of Robert Mankoff, in a famous cartoon, may have encapsulated the potential response of officialdom to requests from the courts for a meeting to discuss the resources to effectively enforce the rule of law in cases where the executive

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95 *Ibid* at 242.

96 As Justice Brian W Lennox noted in his afterword entitled "Judicial Independence in Canada — The Evolution Continues" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 623 at 625, recent decisions on the topic of judicial independence had been too readily characterized as "pay, parking, and pensions."

97 The *Extradition Act*, SC 1999, c 18, provides a clear example of this, as the same Minister may be involved in all of the input, throughput, and output stages of the process.

branch is a direct litigant highly interested in the outcome: "No, Thursday's out. How about never — is never good for you?"[98]

In Canada, we have been fortunate enough to have Ministers of Justice such as Anne McLellan (also Deputy Prime Minister), who recognized the importance of the executive in ensuring the necessary support for the courts. In a speech on the introduction of a 2001 bill to amend the *Judges Act*,[99] she first quoted constitutional scholar Peter H. Russell for the following:

> If government is to be based on the rational consent of human beings, adjudication by impartial and independent judges must be regarded as an inherent requirement of political society.[100]

McLellan then added herself:

> An independent judiciary is essential to the rule of law. Judges must be free from undue influence of any kind, be it from those with money or power. There is a growing recognition that stability, human security and the rule of law are necessary to economic growth. There is a growing appreciation that an independent judiciary with the proper resources is the first step down this path [to economic growth].
>
> [*Translation*]
>
> Canadians are envied around the world for the quality, commitment and independence of our judiciary. Increasingly our court system and our judges are looked to as models of integrity and impartiality by developing democratic nations as they strive to implement fair and effective systems of their own.
>
> [*English*]
>
> We need only open the papers or listen to the international news to be reminded of the importance of a courageous, independent and impartial judiciary in ensuring the basic elements of a free and civil society. Like so many of the rights and advantages enjoyed by all Canadians, the importance of an independent judiciary cannot be underestimated or taken for granted. Without it our country would be a very different place.[101]

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98 Robert Mankoff, in a cartoon of *The New Yorker* (3 May 1993) at 50, depicting an authoritative figure of some sort with his calendar open, speaking on the phone to someone.

99 She was speaking to Canada Bill C-12, *An Act to Amend the Judges Act and to amend another Act in consequence*, 1st Sess, 37th Parl, 2001 (assented to 14 June 2001).

100 *House of Commons Debates*, 37th Parl, 1st Sess, Vol 137, No 26 (12 March 2001) at 1527 (Hon Anne McLellan) [McLellan], citing Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 21. A prolific writer, Peter H Russell has produced, *inter alia*, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004). The title reflects the fact that much of the content of the book addresses in exquisite clarity how Canada became a sovereign nation, but the concept carried by the title also reflects how Canadians acquire and maintain sovereignty over their government. He proposed that despite an inheritance of Parliamentary sovereignty, the vision of John Locke, which heavily influenced the American form of government, had taken hold in Canada, even if it did so along with the pro-Parliamentary (but anti-tyranny) views of Edmund Burke, the Whig statesman, author, orator, political theorist, and philosopher.

101 McLellan, *ibid* at 1527-28.

D. ELEMENTS AFFECTING THE JUDICIAL BRANCH OF GOVERNMENT

It can be noted at the outset that judicial independence is a crucial element of the rule of law. But judicial independence is not as much to make judges' work easier (although that is neither categorically nor actually irrelevant) but to assure the public that the rule of law exists, and is effective, and that it guarantees each individual equal justice under the law and that all actions of government will be lawful.

Jefferson was skeptical of the power of the courts when he wrote in 1821 at age 78,

> the germ of dissolution of our federal government is in the constitution of the federal judiciary; an irresponsible body … working like gravity by night and by day, gaining a little to-day and a little to-morrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall … render powerless the checks provided of one government on another, and will become as venal and oppressive as the government from which we separated.[102]

This was not an opinion that came new to Jefferson at an advanced age. He worried about judicial despotism as early as 1804 when he was President of the United States.[103] Being a principal author of the American Constitution, Jefferson fretted about how his work was being interpreted when he said that:

> For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, [our constitution] has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation.… The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.[104]

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[102] Letter from Thomas Jefferson to C Hammond (18 August 1821) in HA Washington, ed, *The Writings of Jefferson* (New York: Riker, Thorne & Co, 1859) at 216. Kermit L Hall & Kevin T McGuire, eds, *The Judicial Branch*, (Oxford: Oxford University Press, 2005) at 21-23 suggest that Jefferson over-stated. In their view, *Marbury*, *supra* note 19, was a relatively balanced decision intended to protect legal rights and the jurisdiction of the courts, but also to respect boundaries and facilitate the workings of the political branches of the new democracy.

[103] Jefferson wrote many letters to Abigail Adams, wife of his predecessor as President, over their lifetime. In an otherwise cordial letter, he saw fit to protest her husband's "personally unkind" appointment of federal judges in the final days of his administration, being "my most ardent political enemies, from whom no faithful cooperation could ever be expected." See Letter from Thomas Jefferson to Abigail Adams (13 June 1804) in Library of Congress, Thomas Jefferson Papers, ser 1, General Correspondence 1651-1827, online: <memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field%28DOCID+@lit%28tj1000 39%29%29>. Indeed, John Adams had on 3 March 1801, his last day in office being the next day, appointed 16 Federalist circuit judges and 42 Federalist justices of the peace to offices created by the *Judiciary Act*, 2 Stat 132 (1801), including one William Marbury. A brief flurry of unhappy correspondence (that ended in nine years of silence before their relationship was restored) included another letter by Jefferson to Ms Adams on 11 September 1804 that "nothing in the Constitution has given them [the federal judges] a right to decide for the executive, more than to the executive to decide for them.… [T]he opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves, in their own sphere of action, but for the legislature and executive also in their spheres, would make the Judiciary a despotic branch." Letter from Thomas Jefferson to Abigail Adams (11 September 1804) in Library of Congress, Thomas Jefferson Papers, ser 1, General Correspondence 1651-1827, online: <memory.loc.gov/master/mss/mtj/mtj1/031/0100/0170.jpg>. Jefferson was no doubt referring to *Madison*, *ibid*, where John Marshall declared the power of judicial review.

[104] Letter from Thomas Jefferson to Judge Roane (6 September 1819) in Washington, *supra* note 102 at 134.

But what Jefferson feared has not happened in Canada nor has it happened anywhere else in the democratic world due to the power of the rule of law. By comparison, Jefferson's contemporary Alexander Hamilton noted that the judicial branch of government had no money and no military and was thus the "least dangerous" branch of government.[105] To the contrary of Jefferson, Hamilton's view was that judicial review of legality of legislative and executive action was essential, although it was crucial that the judiciary itself also be checked by its own decision-making process:

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.[106]

Hamilton went on to contend as follows:

> But it is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of.
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> …
>
> To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.[107]

What Jefferson said could readily apply to the executive branch, which, when in control of the legislative branch as it is in modern parliamentary systems like Canada's, does have money and military. As noted at the start of this article, Canadians trust the executive

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105 Alexander Hamilton, "The Federalist No. 78," (28 May 1788) in Ball, *supra* note 94 at 378.

106 *Ibid* at 379.

107 *Ibid* at 382-83. Hamiltonian Federalists may have had something of a mixture of Francis Bacon and Athenian democracy in their perspective of the judiciary. Hall & McGuire, *supra* note 102 at 10 wrote that in the 1790s:

> Hamiltonian Federalists developed a four-part program. First, they attempted to organize judges into cohesive courts capable of developing a published body of case law by which to decide future cases. Second, they planned to deprive juries of power to determine law and to confer that authority exclusively on judges. Third, they cultivated a conception of law as a science that could be grasped only by men who had received a professional legal education. Fourth, they sought to give the judiciary a broad power of judicial review — a jurisdiction, that is, to invalidate legislation with which courts disagreed on policy grounds.

branches of government (federal and provincial). But the rule of law helps us to verify the legitimacy of what the executive and legislative branches do. Hamilton was perspicacious, but his vantage point was on the shoulders of Blackstone and his predecessors.

The powers of judicial review such as certiorari and *habeas corpus*, together with the full range of other prerogative powers and immanent attributes of what are often called "section 96 judges"[108] are arrows in the quiver of the rule of law. Such powers as *parens patriae*, or the ability to impose contempt of court sanctions, exist not to enable judges to act unreasonably or as they choose, but to ensure that the rule of law really exists. Superior courts possess an immanent power to imprison people for contempt. This is not a power to be trivialized or routinized. It is not a power to be exercised without substantial justification and in an open and rationalized manner subject to review by a higher court.

As for review of what judges do in adjudications, the rule of law has contributed to the creation over time of the hierarchy of courts so as to allow, for instance, for a "General Court of Appeal for Canada."[109] Institutionalization of the appellate process has been accomplished by legislation in all provinces and by Parliament under federal jurisdiction. This in turn has extended and made manifest both the duties and the control of courts and judges by law. Practically, this appellate architecture exists to address as wide a variety of phenomena in the judicial process as: risks of reasonable apprehension of bias; lack of judiciality; errors of law; abuses of legal discretions; and palpable and overriding errors of fact. Were appellate review not possible, the drift to elitist and anti-democratic caprice on the part of individual judges might be as imminent as Jefferson feared.

Doctrines of deference to special tribunals, finality of adjudication, the vertical and horizontal concepts of *stare decisis*,[110] as well as doctrines of *res judicata* and issue estoppel, concepts of standing, and notions of mootness or ripeness (prematurity) are also internalized disciplines within all levels of the judicial process. All being issues of law, these are also subject to review by the appellate processes established under legislated law. The key purpose of these principles and doctrines is to ensure that judge-made law and the decisions or orders thereunder are *also* consistent with the rule of law, and to make for a predictable and accessible law result.[111] One way of looking at the matter is to think of the speaking of the courts as the speaking of the law itself and not of the judges as individuals.[112]

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108 See e.g. *Criminal Lawyers' Association*, *supra* note 24 at para 39.

109 *Constitution Act, 1867*, *supra* note 1, s 101.

110 See *Quebec (Commission des normes du travail) v Asphalte Desjardins Inc*, 2014 SCC 51, [2014] 2 SCR 514 at para 26: "A decision by a court of appeal that overrules a dominant line of authority at the trial level is not, of course, open to challenge for that reason alone. On the contrary, such a decision is within the jurisdiction of an appellate court. After all, someone always has to take the first step if the law is to change."

111 Even without application of a specific legal doctrine, ordinary consistency is part of our common view of justice: see e.g. *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, 366 NR 301 at para 61; *Kossow v Canada (MNR)*, 2013 FCA 283, 456 NR 381 at para 29.

112 There are different points of view of course. JD Heydon, a former judge of the High Court of Australia, known for writing separately in the Court, in "Threats to Judicial Independence: The Enemy Within" (2013) 129 Law Q Rev 205 at 216-17, asserted that judges ought to reflect their independence from one another by writing. Indeed, he suggested that each judge should show "gumption" and avoid the "herd behaviour" of signing on, which he compared to the parable of the Gadarene swine. In his view, joint decisions transmitted a message that only one judge really made the decision, a phenomenon that he suggested was the actual case in some courts. One man's accountability is another man's elitism perhaps. Indeed, Heydon's favouring of multiple opinion writing triggered a critical response by Peter Heerey, in "The Judicial Herd: Seduced by suave glittering phrases?" (2013) 87 Austl LJ 460 at 463. In Keane,

Imbedded in this as well is the important tenet that, to the extent courts invoke the Constitution, they are not to do so in a manner which would set off one part of the Constitution against another part of the Constitution. In *PHS Community Services* it was said that

> [m]ore broadly, the principle that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution is of no assistance in dealing with division of powers issues on the one hand, and *Charter* issues on the other. There is no conflict between saying a federal law is validly adopted under s. 91 of the *Constitution Act, 1867*, and asserting that the same law, in purpose or effect, deprives individuals of rights guaranteed by the *Charter*. The *Charter* applies to all valid federal and provincial laws. Indeed, if the *CDSA* were *ultra vires* the federal government, there would be no law to which the *Charter* could apply. Laws must conform to the constitutional division of powers and to the *Charter*.[113]

Principles of statutory construction also have a controlling effect upon judges and courts. They operate to prevent courts and judges from re-casting legislation according to their own preference or opinions. Rather, canons or principles of construction are primarily intended to give the effect to the statute that it was intended to have when enacted. Even when legislative wording is ambiguous, no rules or principles of construction direct courts to simply invent substitutes of their own preference for the wording chosen. Should that meaning of a statute fall afoul of the Constitution, the supremacy clause in section 52 of the *Constitution Act, 1982* kicks in.[114] Should the meaning be ambiguous, or should the terms of a specific enactment be seemingly in conflict with other parts of the same statute or other statutes of the same legislature or Parliament, interpretational principles will be called in to resolve the ambiguity or to search out the harmony that can properly be assigned. Similarly we find this with the principles dealing with the bilingual nature of Canadian legislation.

But in any of those situations, the Court is not licensed to insert a purpose or meaning that the words do not support or to overthrow what is there, whatever it may think of the wisdom or value or overall aim of either the specific law or the law generally.[115] The means chosen under the law must conform to the Constitution but need not conform to merely idiosyncratic views of particular judges. By the same token, in the course of judicial review of a regulation generated by an executive agency under the direct authority of legislated law, the courts are not there to "re-think" the value of the regulation or what led up to it:

> A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate.
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> …
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> Regulations benefit from a presumption of validity.… This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them

supra note 33, Justice Keane marshalled the arguments against the unnecessary writing of separate decisions.

113 *PHS Community Services*, *supra* note 65 at para 82.

114 *Supra* note 2, s 52(1).

115 See e.g. *Attorney-General (NT) v Emmerson*, [2014] HCA 13 at para 85.

> … and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires*.
>
> …
>
> This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice."[116]

Similarly, the courts have been deferential to the individual exercise of state power:

> The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court.… The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict.[117]

Another concept of judicial self-discipline that has been less frequently associated (in an express way) with the rule of law and goes more to ordinary adjudicative self-discipline was expressed by Justice Breyer in this way: "[T]he 'cardinal principle of judicial restraint' is that 'if it is not necessary to decide more, it is necessary not to decide more.'"[118] In a *cri de coeur* in the otherwise now well-entrenched decision in *Miranda*, Justice Harlan, dissenting, cited this passage: "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."[119]

It is arguable that this judicial reticence is, or should be, a principle of the rule of law (assuming it is not already). It is noteworthy that American judges and legislators are required to take an oath of office to stay within the Constitution.[120] Judges of the United Kingdom offer a comparable oath or affirmation, rather reflective of the historic structure of

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116 *Katz Group*, *supra* note 80 at paras 24-25, 27 [emphasis in original], quoting *Jafari v Canada (Minister of Employment and Immigration)*, [1995] 2 FC 595 at 604 (CA).

117 *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 at para 32.

118 *Morse v Frederick*, 551 US 393 at 431 (2007), quoting *PDK Laboratories Inc v United States Drug Enforcement Administration*, 362 F (3d) 786 at 799 (DC Cir 2004). This is particularly so as to constitutional law pronouncements. For this, Breyer JA cited at 429 the remark of a judge whose name is associated with bulking the courts with briefs containing elaborate analysis: Brandeis JA in *Ashwander v Tennessee Valley Authority*, 297 US 288 at 347 (1936) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of").

119 *Miranda v Arizona*, 384 US 436 at 526 (1966) [*Miranda*]. Justice Harlan was quoting "the wise and farsighted words of Mr. Justice Jackson" in *Douglas v Jeannette (City of)*, 319 US 157 at 181 (1943). There is, however, the contrary view that the common law of the Constitution has not suffered from occasional forays or inventions. *Miranda* itself, though recognized later in *Dickerson v United States*, 530 US 428 at 432, 440, n 5 (2000) as something of a distortion of constitutional requirement, was enshrined as nevertheless a constitutional rule with "constitutional underpinnings."

120 Article VI of the United States Constitution, *supra* note 28, has a third clause which provides as follows:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.

English law.[121] Canadian judges, however, offer a comparatively brisk oath or affirmation.[122] There is no logic in the idea, however, that the "powers and duties" to which the commitment of judges of Alberta is made could be contradictory, in the sense that somehow the "powers" override the "duties" of office. Both powers and duties are defined by law, not by the office holder, and the officer holder undertakes to exercise them "honestly and faithfully and to the best of my ability."[123] Nonetheless, judges cannot shirk their jobs. Chief Justice Roberts in *Citizens' United* wrote with respect to the dissenting view in that case:

> This approach is based on a false premise: that our practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings somehow trumps our obligation faithfully to interpret the law. It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.… There is a difference between judicial restraint and judicial abdication. When constitutional questions are "indispensably necessary" to resolving the case at hand, "the court must meet and decide them."[124]

There is also the view that the remedial powers of the court, when they intrude on legitimate areas of jurisdiction of the other branches of government because the court finds their exercise of jurisdiction to be illegitimate, should go no further than is necessary to rectify the illegality. In *MiningWatch* it was written,

> the fact that an appellant would otherwise be entitled to a remedy does not alter the fact that the court has the power to exercise its discretion not to grant such a remedy, or at least not the entire remedy sought. However, because such discretionary power may make inroads upon the rule of law, it must be exercised with the greatest care.… In the exercise of that discretion to deny a portion of the relief sought, balance of convenience considerations are involved.… Such considerations will include any disproportionate impact on the parties or the interests of third parties.[125]

Significantly, the entrenchment of the Supreme Court of Canada as an institution in Canada has been accomplished by installing the Court's composition within the range of subject matters of the Constitution which now cannot be amended without unanimous

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121 See *Promissory Oaths Act, 1868* (UK), 31 & 32 Vict, c 72, s 4: "I, [name,] do swear that I will well and truly serve our Sovereign Lady Queen [Elizabeth the Second] in the office of [office], and I will do Right to all Manner of People after the Laws and Usages of this Realm, without Fear or Favour, Affection or Illwill." The alternative Judicial Affirmation is "I, [name], do solemnly sincerely and truly declare and affirm that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of [office], and I will do right to all manner of people after the laws and usages of this Realm without fear or favour, affection or ill will." See Courts and Tribunals Judiciary, "Oaths," online: <www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/oaths/>.

122 The oath of office of an Alberta judge under the *Oaths of Office Act*, RSA 2000, c O-1, s 3 is very brief: "I, [name], swear that I will honestly and faithfully and to the best of my ability exercise the powers and duties of a [office]. So help me God." The affirmation alternative substitutes "solemnly affirm" for the word "swear," and omits the words "So help me God." This Oath is prescribed for judges of the Court of Queen's Bench in the *Court of Queen's Bench Act*, RSA 2000, c C-31, s 5. The same applies to judges of the Court of Appeal in the *Court of Appeal Act*, RSA 2000, c C-30, s 5.

123 The Constitution works as a whole, and its parts are not in conflict: *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667 at para 30; *McAteer v Canada (AG)*, 2014 ONCA 578, 121 OR (3d) 1, leave to appeal to SCC refused, 36120 (8 October 2014). The Constitution in turn regulates the interaction between promulgated laws — which promulgated laws include those specifying the powers of judges.

124 *Citizens United v Federal Election Commission*, 558 US 310 at 375 (2010) [*Citizens' United*], quoting *Ex parte Randolph*, 20 F Cas 242 at 254 (CC Va 1833).

125 *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6 at para 52 [*MiningWatch*].

consent of Parliament and all of the provinces.[126] This effectively puts the Supreme Court of Canada out of reach of any law insofar as its composition is concerned. But it cannot be out of the view of the public. The "open court" principle is also an essential element of confidence in the rule of law.[127]

Entrenchment of the Supreme Court also, of course, does nothing to suggest that the Supreme Court can, let alone should, act as a knight errant in relation to legal topics. Further, the reach of the Courts under the Constitution is one thing, but the civil liability before the Courts of the Crown in right of Canada or a province is still covered by sovereign immunity unless the legislation says otherwise.[128] So Courts cannot invent vulnerability of the executive or legislative branches to ordinary civil liability if it is expressly excluded by legislation.[129]

As mentioned above, the practical and legal reality is that the courts do not draw directly from the public purse. Therefore, while the courts have certain authorities associated either with their statutory capacities or, in the case of superior courts, with their character as such, this is not an open cheque book. In *Criminal Lawyers Association*, the majority wrote:

> The framers of our Constitution established a delicate balance between the federal and provincial governments, anchored by s. 96 courts, whose independence and core jurisdiction and powers provide a unified, national judicial presence.… While the federal government is responsible for the appointment of s. 96 judges, the Constitution has charged the provinces with the responsibility for the administration of justice in the provinces.
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> …
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> Pursuant to this power, the provincial legislatures enact laws and adopt regulations pertaining to courts, rules of court and civil procedure, or delegate this function to another body. They also pass laws to provide the infrastructure and staff necessary to operate the courts and establish schemes to provide legal representation to persons involved in court proceedings. The provincial legislature votes the funds necessary to operate the justice system within the province, and the executive, mainly through the office of the Attorney General, is charged with the responsibility of administering these funds and, more broadly, the administration of justice itself.[130]

Conscious of this division, the Supreme Court in *Criminal Lawyers Association* continued the thought to point to the constitutional obligations that arose from it:

> It is vital that each branch of government respect its proper institutional role and capacity in the administration of justice, in accordance with the Constitution and public accountability.

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126 *Supreme Court Act Reference*, *supra* note 18.
127 *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37, [2014] 2 SCR 33 at paras 24-26.
128 *Toney v Royal Canadian Mounted Police*, 2013 FCA 217, 368 DLR 4th 361 at paras 6-10, citing *R v Eldorado Nuclear Ltd*, [1983] 2 SCR 551 at 558.
129 *Authorson*, *supra* note 71.
130 *Criminal Lawyers Association*, *supra* note 24 at paras 32-33.

> Section 96 judges possess inherent power to make orders necessary to protect the judicial process and the rule of law. The courts must of course safeguard their own constitutional independence to assure the fairness of the judicial process and to protect the rights and freedoms of Canadians that are entrusted to them under the *Charter*.… As such, these powers are exercised within the framework for the administration of justice that the province has established.
>
> …
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> The proper constitutional role of s. 96 courts does not permit judges to use their inherent jurisdiction to enter the field of political matters such as the allocation of public funds, absent a *Charter* challenge or concern for judicial independence.
>
> …
>
> Of course, a complaint that inadequate funding risks undermining the justice system may be subject to court oversight, whether by way of a *Charter* application or a challenge based on the constitutional principle of judicial independence.
>
> …
>
> However, the allocation of resources between competing priorities remains a policy and economic question; it is a political decision and the legislature and the executive are accountable to the people for it.[131]

To explain what it meant by "allocation of resources," the Supreme Court went on:

> [T]he government of the day bears the responsibility for weighing public priorities and then allocating the resources and designing the programs required to act on its policy choices.
>
> Obviously, court decisions can have ancillary financial consequences.
>
> …
>
> However, an order that the Attorney General must provide compensation at a particular rate goes beyond an order with ancillary financial consequences, and becomes an order directing the Attorney General to pay specific monies out of public funds.[132]

The Supreme Court concluded with this:

> While the rule of law requires an effective justice system with independent and impartial decision makers, it does not exist independently of financial constraints and the financial choices of the executive and legislature.… [J]udicial orders fixing the expenditures of public funds put public confidence in the judiciary at risk.[133]

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131 *Ibid* at paras 38-39, 41-43.
132 *Ibid* at paras 58-60.
133 *Ibid* at para 83.

There is also the subject of judges personally. The Canadian Judicial Council has been created by legislation to ensure that federally appointed judges are given guidance as to their functioning[134] and also to ensure judges are not entirely immune from accountability.[135] Analogous legislation appears in provincial jurisdictions. Needless to say, judges can also be prosecuted as criminals, just like everybody else.

Also, it has long been said that the requirement that judges must show fairness and impartiality is part of the very nature of the judicial process.[136] Professor Borrie has written that conflict of interest on the part of judges undermines the rule of law:

> It is of the essence of the judicial function that anyone exercising judicial powers should be impartial. If there is a likelihood of conflict between some political, business or personal interest of his own and his responsibility as a judge to be impartial, a possibility that such conflict may cause him to be biased in certain types of dispute or to lean towards one party or the other in some particular case he is to determine, the Rule of Law is at risk. To the extent that people are aware of such conflict, popular faith in the integrity of the judiciary is at risk too.[137]

There is, once again, insufficient room for expansive discussion of the ethical rules binding on judges. But Borrie is plainly right that, where judges act in an unjudicial, unprincipled, or unethical manner, it injures support for the rule of law, and that injury is not overcome merely by an assertion of the judge's of good intentions.[138]

As for liability of judges for any form of misconduct, the judicial office is different from the individual who occupies it in an important regard. Immunity from suit for judicial action is a well-established principle under the rule of law.[139] This is so in practical part because the ability to adequately perform the judicial function would be stymied by the prospect of personal liability for the judge on a suit at the behest of a party aggrieved by a judicial decision. After all, it is foreseeable that there will be at least one unhappy person in every single case before the courts. In other words, the immunity has a profound functional justification. As Lord Denning colourfully put it in *Sirros*:

> If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from

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134 For example, the Council has produced the *Ethical Principles For Judges* (Ottawa: Canadian Judicial Council, 2004), online: <www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>. They are intended to be "advisory in nature" and are designed "to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role" (*ibid* at 3). For a consideration of their advisory nature, see *Rando Drugs Ltd v Scott*, 2007 ONCA 553, 86 OR (3d) 641 at para 24.

135 The *Judges Act*, RSC 1985, c J-1, ss 59-62 deal with the structure and role of the Council. Section 63 and following deal with inquiries into the conduct of judges of superior courts of Canada as well as office holders of similar types.

136 See e.g. *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson*, [1892] 1 QB 431.

137 Gordon Borrie, "Judicial Conflicts of Interest in Britain" (1970) 18:4 Am J Comp L 697 at 697.

138 In *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)*, [2000] 1 AC 119 at 141 (HL), Lord Hope said that "[i]t is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of partiality."

139 *MacKeigan v Hickman*, [1989] 2 SCR 796; *Filarsky v Delia*, 132 S Ct 1657 (2012), Roberts CJ (referring to cases back to 1847 at 1663-65); *Fingleton v The Queen*, [2005] HCA 34, 227 CLR 166.

> fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?"[140]

More important for judicial immunity, however, are the co-existing policy supports for such immunity. For example, immunity resides in the fact that no judge should become tangled in the hazards of a litigation for which the judge is duty bound to be impartial: "[t]his freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who are to administer justice ought to be."[141] Back in the time of Coke, the principle of judicial immunity was recognized on the following ground: "for this would tend to the scandal and subversion of all justice. And those who are the most sincere, would not be free from continual calumniations."[142] Similarly, the finality principle and the concepts of issue estoppel and *res judicata* would be undermined by the prospect of litigation on top of litigation. Nothing good could come of that.[143]

Finally, it may be that in some times and places the failings of the courts may well have made worse the abuses of law by government. The courts may well help to resolve dissension and restore the legitimacy and veracity of the systems by contributing to an open truth, acknowledgment, apology, and reconciliation process such as seen in South Africa, or in Chile with the remarkable recent expression of public regret by the Chilean Supreme Court for the conduct of the courts during the Pinochet era.[144]

E. ELEMENTS AFFECTING INDIVIDUALS

As pointed out, the rule of law means that "every man" should be governed by the law in their individual conduct as well as the government.[145] Indeed, the justification for retaining the judicial power of contempt is said to be the maintenance of the rule of law, and not merely the effective operation of the courts.[146]

In our free democracy, there are many forms of private associations and collectivities where interests or functions or objectives are shared, notably in commercial and economic activities, such as with labour unions or professional societies or social or religious organizations. These associations also must function consistently and predictably in service

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140 *Sirros v Moore*, [1975] 1 QB 118 at 136 [*Sirros*].

141 *Garnett v Ferrand* (1827), 6 B & Cress 611 at 625-26, 108 ER 576 (KB).

142 *Floyd v Barker* (1607), 12 Co Rep 23 at 25, 77 ER 1305 (KB).

143 *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422 at para 28.

144 Steve Anderson, "Chile's New Supreme Court President Criticizes Pinochet-Era Justice" *The Santiago Times* (21 December 2009), online: <santiagotimes.cl/chiles-new-supreme-court-president-criticizes-pinochet-era-justice>.

145 AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: Macmillan, 1915) at 189.

146 See *United Nurses of Alberta v Alberta (AG)*, [1992] 1 SCR 901 at 931:

> Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependant on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.

of their members on the one hand, and with due regard to the implications of such organizational activity on the rest of society on the other.

As a consequence, here too can be found requirements for the assurance of legality not only in the internal operations of such organizations, but in their relationship with others. The requirements of legality often are initially addressed by executive branch regulation under the authority of legislated law, and then finally evaluated with the lens of judicial review.

III. CONCLUSION

The foregoing article submits that the rule of law in a free and democratic society is the greatest concept of human governance that the world has so far devised. We have had it handed down to us by the combined contributions of wise and courageous ancestors. It continues to reflect the consensus and commitment that is of the very essence of living in a peaceful, orderly, and equal society. It defines what we are, and what we can be. It stands for, and protects, the best in us, including our ability to tolerate what we reject.

The lofty goal of this article, mentioned at the start, was to attempt to reveal the brilliance of the rule of law. Though evolving for centuries, it is a still a concept that defies precise definition and specific delineation. This article traced the evolution of the rule of law to its receipt into Canada, described how our foundational law reflects that bestowment, and offered some observations about how the rule of law applies to governance in Canada.

To this, the article offers a cautionary note: the rule of law is a human invention of great value. But like anything else that humans can build up, it can be taken down again, also at the hands of humans. It is well integrated into Canadian society. But it can be distorted. It can be deflected. It can be affronted directly. But worst of all, it can be forgotten, and can be nibbled away by authorities acting with the best of intentions while the rest of us are not paying attention.[147] Let us not allow that to happen.

[147] A more extreme characterization of the dissolution of the rule of law is set out in an assertion often attributed to Edmund Burke that "The only thing necessary for the triumph of evil is for good men to do nothing." Assigning him that specific phraseology is apocryphal but in 1770 he wrote in *Thoughts on the Cause of the Present Discontents*, 5th ed (London: J Dodsley, 1775) at 106 that "[w]hen bad men combine, the good must associate; else they will fall, one by one, an unpitied sacrifice in a contemptible struggle." John Stuart Mill made a closer statement in an inaugural address delivered to the University of St Andrews in 1867: "Bad men need nothing more to compass their ends, than that good men should look on and do nothing." John Stuart Mill, *Inaugural Address at St. Andrews* (London: Saville, Edwards & Co, 1867) at 36.