

Statement by the Honourable Louise Arbour, President & CEO of the International Crisis Group, on the occasion of the High-level Meeting of the 67th Session of the General Assembly on the Rule of Law, 24 September 2012.

“Between the rich and the poor, between the master and the servant, between the strong and the weak, it is freedom that oppresses, and the law that sets free.”
(52e Conférence de Notre-Dame, 1848)

So said Henri-Dominique Lacordaire, a French ecclesiastic, preacher, journalist and political activist who re-established the Dominican Order in post-Revolutionary France, in 1848.

And he was right. The purpose of law in a free and democratic society is to liberate, not to restrain. It is to create a safe and just environment in which human conduct is regulated and power is constrained so that maximum freedom and safety is attained by all.

In our eagerness to promote the Rule of Law, we often confuse three competing visions of it. One is institutional, one procedural, and one substantive.

The institutional Rule of Law is the most familiar. It is concerned mostly with law enforcement and is reflected in the way the Rule of Law is currently housed in DPKO, as "Office of Rule of Law and Security Institutions". It has under it: Police Division, Mine Action Service, DDR section and Criminal Law and Judicial Advisory Division. It is functionally interested in law and order, and is heavily reliant on ideas of security, and security institutions. In fact, we should call it "law and order" rather than the Rule of Law.

The second understanding of the Rule of Law is procedural: it reflects a formal understanding of the concept, and emphasizes the preference for rules over human arbitrariness. The rules themselves are subject to formal requirements, designed to further restrict arbitrariness: the laws must be public, they must have been properly enacted by a competent authority, they must not be retroactive and it must be possible to comply with them. We could call this Rule by Law.

Under the Rule by Law concept, the content of the law doesn't really matter as long as the formal requirements are met. So as to prevent arbitrariness, it also requires that laws be properly enforced, in a non-discriminatory manner, which includes the acclaimed principle that "No one is above the law".

Like the idea of "Law and order", "Rule by law" has a certain attraction. It conveys a sense of fairness and of protection from the capricious exercise of power. But it still falls far short of what the modern understanding of the Rule of Law should offer.

The real Rule of Law is substantive and encompasses many human rights requirements. It reflects the idea of equality in a substantive way: not just that no one is above the law, but that everyone is equal before and under the law, and is entitled to its equal protection and equal benefit.

Only this understanding of the Rule of Law would prevent a law being enacted to regulate the use of torture, for example. Under this substantive understanding of the rule of the law that would be impossible -- no matter how well promulgated that law were, nor how equitably it were enforced. Properly understood in this fashion, the Rule of Law would also prohibit the enactment of a law that would deprive women of the right to vote, or otherwise offend fundamental human rights guarantees.

Under this substantive understanding of the Rule of Law, rules serve a higher purpose than the mere orderly regulation of human conduct; laws must also enhance liberty, security and equality and strive to attain a perfect coincidence between law and justice.

This is a tall agenda both at the national and the international level, but it is the one that the Rule of Law commands. It requires that laws be just, and justly enforced.

The endorsement of the Rule by Law and Law and Order models, rather than the real, substantive Rule of Law does not merely fall short of its objective. It runs the risk of subverting its purpose entirely. The robust enforcement of laws that violate fundamental human rights can entrench authoritarians and, worse still, give them the additional veneer of respectability associated with respect for the Rule of Law.

There could be no worse perversion of a legal and political concept that holds so much for the advancement of individual freedom and of proper collective governance.