

Rule of Law

The 'rule of law' is mentioned in the preamble to the *Constitution Act, 1982*. It refers to no one single idea, but to a cluster of ideas. It is a term often associated with the English legal scholar Albert Venn Dicey who described the rule of law as a paramount characteristic of the English Constitution. It was comprised of three "kindred conceptions": (1) that government must follow the law that it makes; (2) that no one is exempt from the operation of the law - that it applies equally to all; and (3) that general rights emerge out of particular cases decided by the courts.^[1] According to Dicey, the last conception would provide a role for the judiciary in stemming what was called "collectivist" legislation. The English judiciary could police legislative activity "to ensure that legal change was slow paced and conservative".^[2]

The concept of rule of law emerged as an important constitutional principle in the case of *Roncarelli v Duplessis*.^[3] The Supreme Court concluded that Quebec Premier Maurice Duplessis, could not unlawfully strip Mr. Roncarelli of his restaurant liquor licence without the proper legal authority. The Court ruled that Premier Duplessis exceeded his statutory authority when he revoked Roncarelli's licence solely on the ground that he was a Jehovah's Witness. According to Frank Scott, the McGill constitutional law professor who represented Mr. Roncarelli before the Supreme Court, the case stands for the proposition that "no public officer has any power beyond what the law confers upon him" or, more plainly, "that all are equal before the law".^[4]

The Supreme Court in the *Reference re Secession of Quebec* identified the rule of law as one of the "underlying principles" upon which Canada's Constitution is founded.^[5] The rule of law, according to the Court, guarantees the supremacy of law over persons and government, and that the exercise of public power requires a source in some legal rule.^[6] At its most basic level, the Court wrote, the rule of law provides a shield for individuals from "arbitrary state action" - this is the role it performed in the Roncarelli case.^[7] The Court went even further, suggesting that the 'rule of law', as a foundational principle of constitutional law, "may in certain circumstances give rise to substantive legal obligations."^[8] This suggests that a principle implicit in Canada's constitutional order can override otherwise constitutionally valid acts of Parliament or the legislatures - a troubling idea for a constitutional democracy.

Others have argued that the rule of law is a constitutional principle which limits arbitrary government action.^[9] This argument became prominent in the controversy over the federal government's cancellation of a contract to privatize (to hand over from public to private hands) a terminal at Toronto's Pearson Airport. The cancellation of the contract, it was argued, amounted to a violation of the rule of law for which a court would be empowered to intervene. Courts however, have not relied upon the rule of law to declare legislation invalid. Rather, the rule of law has required only that legislators follow the constitutionally-proscribed framework for law making.

The rule of law is now common parlance in political discourse. We see it invoked in all contexts by differing political perspectives. The British historian E.P. Thompson famously described the rule of law as being a “cultural achievement of universal significance.”^[10] If the rule of law idea has such wide-spread appeal, it should not be surprising to find that it is a concept over which political contests will continue to be fought far into the future.

[1] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 5th ed (London: Macmillan and Co, 1897) at 175-84.

[2] David Sugarman, *Legality, Ideology, and the State* (London: Academic Press, 1983) at 110.

[3] *Roncarelli v Duplessis*, [1959] SCR 121, 1959 CanLII 50 (SCC).

[4] FR Scott, *Civil Liberties and Canadian Federalism* (Toronto: University of Toronto Press, 1959) at 48.

[5] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 49, 1998 CanLII 793 (SCC)

[6] See also: *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, 1985 Can LII 33 (SCC).

[7] *Reference re Secession of Quebec*, *supra* note 5 at 70-71.

[8] *Ibid* at para 54.

[9] See: Patrick J Monahan, “Is the Pearson Airport Legislation Unconstitutional: The Rule of Law as a Limit on Contract Repudiation by Government” (1995) 33:3 Osgoode Hall LJ 411.

[10] EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975) at 265.