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Legality as Reason: Dicey, Rand, and the Rule of Law

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Résumé de l'article

Pour bon nombre d'étudiants en droit au Canada, l'idée d'une primauté du droit est associée au professeur A.V. Dicey et au juge Ivan Rand ainsi qu'à l'affaire *Roncarelli c. Duplessis*. Il est courant pour les étudiants de lire des extraits traitant de la primauté du droit dans l'œuvre de Dicey intitulée *Law of the Constitution*, puis d'examiner comment la primauté du droit est, comme l'a affirmé Rand dans *Roncarelli*, « [l]un des postulats fondamentaux de notre structure constitutionnelle ». En effet, l'arrêt *Roncarelli* a été rendu au moment où, il y a cinquante ans, l'expression académique « la primauté du droit » s'intégrait au sein du discours des juges et des avocats au Canada.

Dans cet article, l'auteur étudie la relation entre la primauté du droit comme idée académique ou conceptuelle et comme idée pratique ou doctrinale. L'auteur fait une distinction entre deux traditions de la théorie de la primauté du droit, soit « la légalité en tant qu'ordre » et « la légalité en tant que raison ». L'auteur reprend alors les approches de Dicey et de Rand et soutient que tous deux souscrivaient à l'idée de la légalité en tant que raison. L'auteur conclut que malgré le fait que les juges canadiens aient maintenant tendance à mettre l'accent sur la légalité en tant qu'ordre, nous comprendrons mieux les traits particuliers du constitutionnalisme canadien si nous nous rappelons que la primauté du droit comporte une autre dimension, celle associée à l'idée de « la légalité en tant que raison ».

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LEGALITY AS REASON: DICEY, RAND, AND THE RULE OF LAW

*Mark D. Walters**

For many law students in Canada, the idea of the rule of law is associated with the names of Professor A.V. Dicey, Justice Ivan Rand, and the case of *Roncarelli v. Duplessis*. It is common for students to read excerpts from Dicey's *Law of the Constitution* on the rule of law, and then to examine how the rule of law is, as Rand stated in *Roncarelli*, "a fundamental postulate of our constitutional structure." Indeed, *Roncarelli* marked a point in time, fifty years ago, at which the academic expression "the rule of law" became a meaningful part of the legal discourse of judges and lawyers in Canada.

In this article, the author considers the relationship between the rule of law as an academic or conceptual idea and the rule of law as a practical or doctrinal idea. A distinction is drawn between two traditions of theorizing about the rule of law, which are labelled "legality as order" and "legality as reason". The author then reconsiders the views of both Dicey and Rand and argues that both advanced the idea of legality as reason. The author concludes that, although Canadian judges now tend to emphasize legality as order, we are better placed to understand the special features of constitutionalism in Canada if we remember that the rule of law has, both conceptually and doctrinally, another dimension—that which is associated with the idea of "legality as reason".

Pour bon nombre d'étudiants en droit au Canada, l'idée d'une primauté du droit est associée au professeur A.V. Dicey et au juge Ivan Rand ainsi qu'à l'affaire *Roncarelli c. Duplessis*. Il est courant pour les étudiants de lire des extraits traitant de la primauté du droit dans l'œuvre de Dicey intitulée *Law of the Constitution*, puis d'examiner comment la primauté du droit est, comme l'a affirmé Rand dans *Roncarelli*, « [l']un des postulats fondamentaux de notre structure constitutionnelle ». En effet, l'arrêt *Roncarelli* a été rendu au moment où, il y a cinquante ans, l'expression académique « la primauté du droit » s'intégrait au sein du discours des juges et des avocats au Canada.

Dans cet article, l'auteur étudie la relation entre la primauté du droit comme idée académique ou conceptuelle et comme idée pratique ou doctrinale. L'auteur fait une distinction entre deux traditions de la théorie de la primauté du droit, soit « la légalité en tant qu'ordre » et « la légalité en tant que raison ». L'auteur reprend alors les approches de Dicey et de Rand et soutient que tous deux souscrivaient à l'idée de la légalité en tant que raison. L'auteur conclut que malgré le fait que les juges canadiens aient maintenant tendance à mettre l'accent sur la légalité en tant qu'ordre, nous comprendrons mieux les traits particuliers du constitutionnalisme canadien si nous nous rappelons que la primauté du droit comporte une autre dimension, celle associée à l'idée de « la légalité en tant que raison ».

* Faculty of Law, Queen's University. I am grateful to the Social Sciences and Humanities Research Council of Canada for its financial support and to Bernie Adell, Trevor Allan, John Allison, Christine Ashbourne and William Kaplan, as well as all of the participants in the *Roncarelli* symposium for their comments and assistance relating to this paper. I also wish to thank All Souls College, Oxford University, for permission to quote from A.V. Dicey's unpublished papers held in the Codrington Library, and I wish to thank librarians Norma Aubertin-Potter and Gaye Morgan for their kind assistance in helping me to access these papers.

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Introduction

In my memory of law school, the names of Dicey and Rand are knotted together with a bundle of ideas that I learned to call the "rule of law". Indeed, the very first thing I read as a law student on the subject of public law was an excerpt from A.V. Dicey's *Law of the Constitution* on "The Rule of Law",[1] and the fourth thing I read was an excerpt from the case of *Roncarelli v. Duplessis*, including, of course, Justice Ivan Rand's famous affirmation of "the rule of law as a fundamental postulate of our constitutional structure."[2]

There is nothing unusual or surprising in the way that I learned to associate Dicey and Rand with the rule of law. Since 1960, the year after the Supreme Court of Canada's decision in *Roncarelli*, student casebooks in Canada have consistently linked Dicey with *Roncarelli*, and thus with Justice Rand.[3] The statements by Dicey and Rand concerning the rule of law have become canonical in legal education in Canada. We are almost tempted to say that Frank Roncarelli's case against Quebec Prime Minister Maurice Duplessis was, from the beginning, a vehicle for teaching Dicey. In May of 1950, the "heroic" constitutional law professor, F.R. Scott, who had learned his Dicey at Oxford University, borrowed barrister's gowns and entered the Quebec Superior Court on behalf of Roncarelli in order to, as Scott himself later put it, deliver his class lectures—to teach what Dicey had taught about the rule of law, including the proposition that, with us, everyone from the prime minister down is subject to the ordinary law of the land.[4] We might also say that the judges proved themselves able students. "Again and again," one commentator wrote,

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1 Bernard Adell, *Public Law Readings* (Faculty of Law, Queen's University, 1989) at 1-3, 14-24, excerpting A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London, U.K.: Macmillan, 1908).

2 *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 142, 16 D.L.R. (2d) 689, Rand J. [*Roncarelli*]. For what it is worth, the second and third things I read were respectively: *Entick v. Carrington* (1765), 19 Howell's St. Tr. 1030, 95 E.R. 807 (Common Pleas); *Liversidge v. Anderson* (1941), [1942] A.C. 206 (H.L.).

3 See e.g. Bora Laskin, *Canadian Constitutional Law: Cases, Text and Notes on the Distribution of Legislative Power*, 2d ed. (Toronto: Carswell, 1960) at 940; J. Noel Lyon & Ronald G. Atkey, eds., *Canadian Constitutional Law in a Modern Perspective* (Toronto: University of Toronto Press, 1970) at 5-21; François Chevrette & Herbert Marx, *Droit constitutionnel : notes et jurisprudence* (Montréal: Presses de l'Université de Montréal, 1982) at 33, 60; The Constitutional Law Group, *Canadian Constitutional Law*, 3d ed. (Toronto: Emond Montgomery, 2003) at 634, 640-44.

4 The description of Scott as "heroic" is Laskin's: Bora Laskin, Book Review of *Civil Liberties and Canadian Federalism* by F.R. Scott, (1960) 13 U.T.L.J. 288 at 288. For Scott, Dicey, and the trial, see Sandra Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Toronto: McClelland & Stewart, 1987) at 308, 311.

"the courts [in *Roncarelli*] referred to Dicey's classic statement."[5] The way that the trial judge, the first beneficiary of Scott's "lectures", introduced Dicey's passage on the subjection of the prime minister to the ordinary law—Dicey, he said, "deals with what is termed the Rule of Law"—might even suggest an enthusiastic novice uttering an unfamiliar academic phrase.[6]

This characterization of the case is neither fully accurate nor completely fair. But to appreciate *Roncarelli* today, fifty years later, it is instructive to think about the case in light of the interplay between practical and academic accounts of the rule of law. The case marks the point when the expression "the rule of law" moved from lecture halls and books of jurisprudence to courtrooms and case reporters in Canada. Of course, principles associated with that expression were already part of the common law tradition, and had been (it is said) since at least Magna Carta.[7] However, it is one thing for a series of principles to be legally enforced and another thing for a professor of law to rope them together into a unified theory of what legality means. And, we may add, it is a different thing again for judges to take up that theory and weave it back into the fabric of the law. Using terms that Ronald Dworkin has used, we may say that there are close connections but also important differences between legality in a "conceptual" or "jurisprudential" sense, and legality in a "practical" or "doctrinal" sense.[8]

In this essay, I will explore some of these connections and differences by returning to the beginning of my own education about the rule of law and reconsidering the views of Dicey and Rand. I now know more about both Dicey and Rand—enough, at least, to appreciate that they came from very different places and times, and held very different opinions. We are told that *Roncarelli* is "perhaps [the] most classical application in Canadian jurisprudence" of the "Diceyan concept of equality and the rule of law."[9] But the legacy of Dicey and of *Roncarelli*, and thus of Rand, is very

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5 Claude-Armand Sheppard, "*Roncarelli v. Duplessis*: Art. 1053 C.C. Revolutionized" (1960) 6 McGill L.J. 75 at 89-90 [footnote omitted], reprinted in (2010) 55 McGill L.J. v. In fact, only four of the fifteen judges involved in the case cited Dicey. See *Roncarelli v. Duplessis* (1951), [1952] 1 D.L.R. 680 at 696 (Qc. Sup. Ct.), Mackinnon J. [*Roncarelli (Sup. Ct.)*]; *Duplessis c. Roncarelli*, [1956] B.R. 447 at 461, 516-17 (C.A.), Pratte and Rinfret JJ.; *Roncarelli*, *supra* note 2 at 184, Abbott J.

6 *Roncarelli* (*Sup. Ct.*), *supra* note 5 at 696, Mackinnon J.

7 *Re Storgoff* (1944), [1945] S.C.R. 526 at 557, [1945] 3 D.L.R. 673, Kerwin J.: "In England, rights had been conferred by Magna Charta, the Petition of Right, and the Bill of Rights, under which was established the Rule of Law."

8 Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 90-96 [Dworkin, *Law's Empire*]; Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006) at 9-18, 155 [Dworkin, *Justice in Robes*].

9 *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at 106, 30 D.L.R. (4th) 481, Beetz J.

uncertain in Canadian law. The Diceyan conception of the rule of law is soundly rejected by some judges, yet celebrated by others.[10] Meanwhile, *Roncarelli* is sometimes cited in conjunction with a rich conception of legality that goes to the heart of what authority, including legislative authority, really is,[11] and sometimes in conjunction with a thin sense of legality that bends against any exertion of power that purports to be legislative.[12] Fifty years after *Roncarelli*, we still have much to learn about the concept of the rule of law and its doctrinal manifestations.

It would take an essay longer than this one to work through the recent cases in Canada that deal explicitly with the rule of law. My objective is much more modest. I shall distinguish two distinctive approaches to the rule of law, which I will call "legality as order" and "legality as reason" (Part I). I will then revisit the ideas of Dicey and Rand and argue that the professor and the judge both appreciated and embraced something like the idea of legality as reason (Part II). Finally, I will suggest that reconsidering Dicey and Rand along these lines (which in Dicey's case will amount to what might be called revisionism) is one way to initiate a better understanding of a basic but neglected aspect of the rule of law in Canada today—that the rule of law is as much about reason as it is about order (Conclusion).

I. Legality as Order, Legality as Reason

We should begin by returning to the suggestion made at the outset that the judges in *Roncarelli* learned about Professor Dicey from Professor Scott. In fact, the judges were hardly in need of lessons on Dicey. Canadian lawyers and judges began citing Dicey's *Law of the Constitution* on various points of law long before Scott ever stepped foot in court.[13] When Dicey visited Toronto to lecture in 1898, he was surprised at the sizable student turnout. "The plain truth," he observed, "was that they wanted to see me because they had read the *Law of the Constitution*."[14] Dicey was no

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[10] For a rejection of Diceyan rule of law, see *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1332-35, 74 D.L.R. (4th) 449, Wilson J. For a celebration of Diceyan rule of law, see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 90, 304 D.L.R. (4th) 1, Rothstein J.

[11] See e.g. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385.

[12] See e.g. *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, 257 D.L.R. (4th) 193.

[13] The first edition was published in 1885: A.V. Dicey, *Lectures: Introductory to the Study of the Law of the Constitution* (London, U.K.: Macmillan, 1885). Early Canadian citations include: *R. v. Brierly* (1887), 14 O.R. 525 at 528 (H.C.); *Canada (A.G.) v. Ontario (A.G.)* (1890), 20 O.R. 222 at 227 (H.C.); *Smith v. London (City of)* (1909), 13 O.W.R. 1148 at 1151 (H.C.); *Dunphy v. Croft*, [1931] S.C.R. 531 at 539, [1931] 4 D.L.R. 284.

[14] Robert S. Rait, ed., *Memorials of Albert Venn Dicey: Being Chiefly Letters and Diaries* (London, U.K.: Macmillan, 1925) at 166.

doubt right. As William Robson observed in 1939, there was "scarcely anyone over thirty-five years of age who studied law, politics or constitutional history ... in England and the British Dominions who was not 'brought up' on Dicey."[15] The book was standard fare among lawyers throughout the common law world.

Still, before Scott's arguments in the *Roncarelli* trial, Canadian judges rarely invoked the expression "the rule of law", either as explained by Dicey or otherwise.[16] Before then, the rule of law was implicit in what judges did, not something they mentioned. As long ago as 1830, Canadian judges asserted the basic points for which *Roncarelli* is now famous. In that year, judges of the Upper Canada King's Bench reasoned that statutory discretion must be exercised for "sound", "*bonâ fide*", and not "arbitrary" reasons, and that it was "inherent in the constitution" and in the idea that the "laws we enjoy extend equal protection to all" that the courts might intervene when discretion was abused.[17] And so it followed that when discretion granted by statute to take property for purposes of building a canal was used to prevent a member of a particular group (i.e., a "Yankee") from operating a tavern, an action in trespass against the officials involved was possible. Chief Justice Sir John Beverley Robinson's statement about public officials from that case captures the basic idea of justificatory reason inherent within the idea of "the rule of law": "It is not their public character alone, but their conduct in that character, which constitutes their protection, and that conduct therefore must be shewn by them to be legal whenever it is brought into question in a court of law."[18] Of course, he did not use that expression. Judges did not have the expression to use until Dicey "coined" it for them.[19]

It is worth pausing at this point to acknowledge the unique intellectual achievement of coining an expression like the "rule of law". It may be the case that Dicey did not really invent the term.[20] He certainly did not invent the ideas behind the term. But his exposition of a set of legal ideas

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15 William A. Robson, "Dicey's *Law of the Constitution*: A Review" (1939) 38 Mich. L. Rev. 205 at 205.

16 Rare examples of pre-*Roncarelli* cases where Dicey was cited in conjunction with the rule of law include: *Hollywood Theatres Ltd. v. Tenney*, [1940] 1 D.L.R. 452 at 471, 54 B.C.R. 247 (C.A.); *Campbell Motors Ltd. v. Gordon*, [1946] 4 D.L.R. 36 at 44, [1946] 3 W.W.R. 177 (B.C.C.A.).

17 *Phillips v. Redpath* (1830), Drap. 68 at 72, 79 (Robinson C.J.), 84, 87 (Macaulay J.) (U.C.K.B.).

18 *Ibid*. at 75.

19 *Canada (A.G.) v. Lavell* (1973), [1974] S.C.R. 1349 at 1365, Ritchie J., citing *Stephen's Commentaries on the Laws of England*, 21st ed. (London, U.K.: Butterworths, 1895) vol. 3 at 337 (stating that Dicey "coined the phrase").

20 H.W. Arndt, "The Origins of Dicey's Concept of the 'Rule of Law'" (1957) 31 Austl. L.J. 117.

within a unified theory captured by the expression "the rule of law" was an important achievement. As Dicey himself confided before the book was published, the *Law of the Constitution* "contains some things (very few I own) which it were absurd to call original but wh[ich] I think have been hardly said expressly before."[21] The value of expressing, for the first time, a theory that brings normative unity to a series of discrete ideas should not be underestimated. Few political values have been as powerful or as transformative as the rule of law. The power of the idea, however, is due not just to the discrete ideas gathered together under the expression (as if the normative significance of these ideas could be individually calculated and added up), but also to the theory of political morality that gives unity to these discrete ideas—a normative force that brings to the rule of law significance that far exceeds the sum of its individuated parts.

There is, in other words, an intrinsically academic aspect to discussions about the rule of law in the sense that reflection about the qualities or character of "legality" as a distinct idea or value is in some respects at least, a different and more abstract interpretive enterprise from the usual reflection about law found in the cases. Ronald Dworkin has distinguished between these levels of analysis using a variety of terms. In *Law's Empire* he identifies the rule of law at a very abstract level as part of the "concept" of law, and distinguishes this "conceptual" analysis from competing interpretations or "conceptions" of this concept, which in turn provide the theoretical foundations for "practical" legal arguments.[22] In *Justice in Robes*, he identifies the rule of law as an "aspirational" concept of law that combines, through interpretation, with the "doctrinal" concept of law at a "jurisprudential stage" of analysis to provide the background for the development of more specific theories of law and their practical application at a "doctrinal stage" of analysis.[23] The general idea that theoretical-general accounts and practical-specific accounts of legality are different but related is, I think, right. For the purposes of this essay, I shall therefore follow Dworkin's general lead in this respect, with the caveat that the labels I will use to capture these two levels of inquiry—"conceptual" and "doctrinal" respectively—do not match his use of these terms in all respects.

In using these terms, care must be taken not to be misled by the word "conceptual". Legal realists gave conceptualism a bad name, and efforts by legal positivists to clear that name have only made matters worse. From Dworkin's perspective, at least, the conceptual analysis of legality is not a matter of abstract metaphysics, descriptive sociology, or linguistic, se-

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21 Letter from A.V. Dicey to J. Bryce (9 December 1884), Oxford, Bodleian Library, Oxford University (MS. Bryce 2, ff. 55-60).

22 Dworkin, *Law's Empire*, *supra* note 8 at 90-96.

23 Dworkin, *Justice in Robes*, *supra* note 8 at 9-20.

mantic, taxonomical, or criterial analysis; rather, it is an exercise in interpretation that seeks to develop a coherent theoretical account of the practice of legality that both fits and justifies that practice. It is, in other words, a deeply normative enterprise. One point of conceptual analysis, when understood in this way, is to make explicit the assumptions and values that are implicit within legality's doctrinal instantiations. Or, as Nigel Simmonds writes, the development of jurisprudential accounts of the rule of law is "the process of deepening by reflection our grasp of the values implicit in our forms of association ... to endow with coherence a form of association that is partially glimpsed and unreflectively understood in our ordinary juridical ideas and practices."[24] It follows, then, that doctrinal and conceptual analyses will, in the end, blend together. Indeed, Dworkin emphasizes that the difference between practical and theoretical senses of legality is one of degree only: in difficult cases, for example, judges may have to ascend theoretically to fairly abstract conceptual heights. In Canada, the example of the *Reference Re Manitoba Language Rights* comes to mind in this respect.[25] In that case, the proposition that the rule of law is "clearly implicit in the very nature of *a* Constitution"—a proposition of general legal theory—was considered relevant by the judges to their understanding of the rule of law in *our* constitution.[26]

Of course, explicating the rule of law conceptually must involve description and abstraction. In rendering explicit the values that are otherwise implicit within a practice, a certain amount of categorizing, modelling, and generalizing is inevitable. Indeed, it has become common for philosophical accounts of the rule of law to offer what might be called conceptual breakdowns of the idea. Dicey may have encouraged this practice, for his account famously subdivided the rule of law into three separate but related ideas, namely, that individual interests are invaded not arbitrarily but only for breaches of law established before ordinary courts; that equality before the law is respected and all officials are subject to ordinary law; and that fundamental rights are not expressly granted by positive law but are inherent in the ordinary law as administered by ordinary judges.[27] Subsequent conceptual breakdowns appear, at first glance at least, even more code-like in form. For law to be *law* rather than pure force, as Lon Fuller wrote, eight demands of legality must be respected: law must be a system of rules and these rules must be general, public, prospective, comprehensible, consistent, possible to obey, relatively stable, and there must

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24 N.E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) at 8.

25 *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 [cited to S.C.R.].

26 *Ibid.* at 750 [emphasis added].

27 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. by E.C.S. Wade (London, U.K.: Macmillan, 1959) at 188-96 [Dicey, *Law of the Constitution*].

be congruence between these rules and their administration.[28] At the conceptual level, at least, these individuated demands of legality have a formal, rigid, rule-like look to them. And perhaps for this reason, Fuller described them as representing a morality of "aspiration" rather than of "duty".[29]

This style of theorizing about legality may be contrasted with one that focuses on reasoning or interpretation. The rule of law from this perspective is exemplified by the unfolding judicial narrative within which the rights of people in specific cases are identified. From this perspective, the rule of law is organic, implicit, dynamic, practical, integrated, and subtle, and the point of conceptual analysis is to explain this special quality of legality in general terms. Examples of this sort of analysis include Dworkin's theory of integrity in law, which explains legality in terms of the way that legal interpretation secures equal concern and respect for each person. It extends rights implicit within the theory of political morality that shows the specific legal rules and principles previously accepted to be coherent and justified.[30] T.R.S. Allan's work provides a second example of the rule of law as interpretive justification for state power. In his view, legality is instantiated when law can be shown to pursue the common good consistently with the equal respect due to each person—an interpretive process that occurs, often implicitly, when general rules are applied in specific cases.[31] Allan finds support in a third example of this style of theorizing about the rule of law: David Dyzenhaus's account of "deference as respect". It is the idea that commitment to the rule of law involves not an unquestioning submission to legislative and executive power, but the search for reasons why the exercise of power should be respected as "law"—a search for reasons that will show the pursuit of public policy objectives as being consistent with the equality of people.[32]

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28 Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1964) at 39, 44.

29 *Ibid.* at 41-44.

30 Dworkin, *Law's Empire*, *supra* note 8 at 90-98. Here, our use of labels diverges somewhat: Dworkin says his theory of law as integrity is a conception of a more abstract concept, and he seems to reserve the word "conceptual" for describing the concept and not the conception. Indeed, in *Justice in Robes*, the development of the conception of law as integrity is said to occur at the "doctrinal" rather than the "jurisprudential" stage of analysis (Dworkin, *Justice in Robes*, *supra* note 8 at 12-18). But, for my purposes, nothing hinges on these terminological distinctions.

31 T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) [Allan, *Constitutional Justice*].

32 *Ibid.* at 25-29. See David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 279 [Dyzenhaus, "Politics of Deference"].

In my view, these various approaches to legality resonate with old accounts of the common law as a "discourse of reason" in which judges extend general principles implicit in past cases to new cases with a view to achieving "unity of reason" or "equality of reason", and thus a sense of "coherence and likenesse" in the cases.[33] Within all of these approaches, then, the search for justificatory reason is regarded as a dynamic process of interpretation or a discourse of reason in which general values are integrated consistently or coherently so as to show how power counts as "law" in specific circumstances.

To summarize, there are two grand traditions in theorizing about the concept of the rule of law. The first seeks to describe the distinctive state of affairs in which governance occurs through law. It thus examines, at a conceptual level, what rules are and what conditions or demands of legality law must meet to constitute a system of rules. This tradition of conceptualizing the rule of law as a state of affairs may thus be called *legality as order*. The second looks mainly to how the rule of law is instantiated through a form of justificatory interpretation aimed at consistency, coherence, or equality of reason. Within this tradition, the rule of law is—to borrow Allan's expression—a "rule of reason",[34] a dynamic process of reasoned justification. We may therefore label this approach to the rule of law as *legality as reason*.

Both types of conceptual legality have doctrinal aspects. The individual demands of legality on Fuller's list requiring prospective and clear laws, for example, are usually enforced as individual rules of law (or at least as canons of construction) by judges. However, as mentioned above, the real power of the rule of law arises not from the normative value of the individual practices or principles that legality subsumes, but from the theory of political morality that brings normative unity and shape to these various practices or principles, and from subsequent doctrinal uses that this theory may have. In Canada, the process of understanding this dynamic relationship between theory and practice is very much a work in progress. The rule of law is best seen as embracing both legality as order and legality as reason, and it falls on judges to ensure that these two conceptual sides of the legality coin are interpreted together doctrinally in a way that makes our sense of constitutionalism rich and valued in practice. This is, I think, the project that *Roncarelli* commenced as an explicit part of legal discourse in Canada.

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[33] Sir John Doderidge, *The English Lawyer: Describing A Method for the Managing of the Lawes of this Land* (London, U.K.: I. More, 1631) at 37, 244, 265-66, 270; Mark D. Walters, "Legal Humanism and Law-as-Integrity" (2008) 67 Cambridge L.J. 352.

[34] Allan, *Constitutional Justice*, *supra* note 31 at 2.

II. Dicey and Rand

With these general comments in mind, we can now turn back to Dicey and Rand. Although these two names are closely associated in my memory about learning the rule of law, I can see now that the association is a problematic one.

Albert Venn Dicey (1835–1922), the Vinerian Professor of English Law at Oxford University between 1882 and 1909, was a complex and contradictory character. He was raised and educated within a family of evangelical Whigs who fought against slavery and for electoral reform, and he claimed to be a liberal sympathetic to the utilitarian ideals of Bentham and Mill.[35] But Dicey also developed a deeply conservative outlook on many of the pressing issues of his day. He argued against female suffrage, Irish home rule, and the loosening of British imperial ties, and he generally celebrated what he considered to be the traditional English virtues of individual freedom and responsibility, and lamented the rise of the new collectivist or welfare state. Writing in 1914, in his eightieth year, Dicey conceded, "I myself belong in reality to the mid-Victorian age."[36]

Ivan Cleveland Rand (1884–1969) was, in contrast, part of a new world and a modern age. Rand was the son of a Moncton railway mechanic, and after excelling in undergraduate studies, he went to Harvard University to obtain his law degree. He practised law in Medicine Hat, Alberta, from 1913 to 1920, when it was very much a frontier town, and then returned to New Brunswick where he was counsel to Canadian National Railways and briefly provincial Attorney General. He served as judge on the Supreme Court of Canada from 1943 to 1959, but was active in public service in other ways too—as labour arbitrator, as representative to the U.N. Special Committee on Palestine, and as Dean of Law at the University of Western Ontario.[37] The "Rand formula" he developed as labour arbitrator—the idea of mandatory union dues regardless of employee union membership—became an important part of the collective bargaining regime in Canada. It is one illustration of how Rand helped to build the modern "collectivist" state that Dicey feared. Rand represents the twentieth-century age that brought Dicey's nineteenth-century world to an end.

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35 See generally Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapel Hill: University of North Carolina Press, 1980).

36 Rait, *supra* note 14 at 232 (Letter from A.V. Dicey to Lord and Lady Bryce (31 December 1914)).

37 William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: University of Toronto Press, 2009). See also E. Marshall Pollock, "Mr. Justice Rand: A Triumph of Principle" (1975) 53 Can. Bar Rev. 519; J.R. Cartwright, J.J. Saucier & R.S. Mackay, "Ivan Cleveland Rand, 1884–1969" (1969) 47 Can. Bar Rev. 155.

Given their different backgrounds, perspectives, and professional roles, it may be assumed that Dicey and Rand approached law and legality differently. The standard reading of Dicey now is that his work exemplifies the peculiarly analytical and conceptual approach to legality associated with nineteenth-century legal positivism—with "analytical" and "conceptual" here being used by critics in their pejorative sense associated with legal realism. In certain respects, his book *Law of the Constitution* bears this reading out. Dicey approached what was a dynamic and unwritten constitutional tradition in a highly analytical, positivist, or schematic style; he separated extralegal usage or convention from the law of the constitution, characterized that law in light of two basic principles (parliamentary sovereignty and the rule of law), and then broke down the rule of law into the three separate but related aspects mentioned above.

Despite the great success of the book, the rise of legal realism and functionalism in the 1930s left Dicey's brand of scholarship vulnerable to criticism. The attacks on Dicey's conceptualism, at least from academic quarters, have been severe and relentless ever since. After reviewing the arguments against Dicey, H.W. Arthurs stated in an influential 1979 article that further criticism would be "to belabour a horse which is thought to have died ... long ago, after assaults ... numerous and savage."[38] Even so, Arthurs decided to inflict another thrashing, and the nature of that thrashing is instructive for our purposes. Arthurs focused upon Dicey's assertion that the rule of law meant that the "ordinary law" was supreme. Although Arthurs noted that Dicey himself did not define ordinary law with precision, he concluded that Dicey's assertion "invites formulistic compliance."[39] Arthurs then tested the proposition and found that, given the pluralistic nature of English law, it could never have been a reasonable one to assert, and that with the rise of the administrative state it was now completely implausible. This thrashing was a terrible one: if Dicey's horse was not dead before, surely it was now.

Arthurs's critique was, however, premised upon the assumption that we should read Dicey's book in a "formulistic" way—as if Dicey's breakdown of the rule of law was meant to be a sort of codification of legal ideas. Martin Loughlin has explained this reading of Dicey in some detail, showing how passages in Dicey's work encouraged the assumption that he viewed law in a formalistic, mechanistic, and scientific way—as "a datum to be analysed and classified and a descriptive account provided of how its various divisions fit together to provide an ordered whole."[40] For these

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38 H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1 at 4 [footnote omitted].

39 *Ibid.* at 8.

40 Martin Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) at 17.

reasons, Loughlin says, *Law of the Constitution* is taken to fall squarely within the late nineteenth-century textbook tradition in which authors sought to provide positivistic "codification" of the common law based on a "systematic and coherent structure founded on general principles."[41]

We may say, then, that one problem identified with Dicey's account of the rule of law (among others) is that he focused upon legality as an autonomous order of rules rather than as an interpretive and engaged narrative or discourse, and that he remained conceptual or abstract rather than doctrinal and pragmatic in his account. Dicey's rule of law was thus focused on legality as order, not legality as reason. We shall return to this critique below and question its accuracy. We will ask whether the critics of Dicey were thrashing the right horse.

Before addressing this point, however, we should look at Rand's approach to the rule of law. Rand painted his image of legality in *Roncarelli* with bold and simple strokes. Other judges cited Dicey in their reasons, but Rand did not. In setting forth, quickly and with minimal reference to authority, the proposition that statutory discretion is always bound, if only implicitly, by the general purposes for which it is conferred, Rand restated an important if uncontroversial idea. But somehow, in just a few short sentences, Rand also ascended from the implied legislative purposes behind a bland regulatory statute to the "fundamental postulate of our constitutional structure,"[42] and so gave us an interpretive statement of the rule of law that effectively, if only briefly, integrated doctrinal and conceptual approaches to legality.

The effect is, we might say, impressionistic. Although in his exuberant assessment of *Roncarelli*, Edward McWhinney saw within Justice Rand's reasons shades of Sir Edward Coke and so located the theoretical sources for Rand's analysis within "the seventeenth century mainsprings of common-law constitutionalism"[43] (an assessment not without merit), Rand's theoretical ambitions are perhaps best seen by placing the case within a more localized historical context. His reasons in *Roncarelli* were an integral part of a larger contribution to a common law discourse on constitutionalism that had been unfolding in Canada during the previous decade. *Roncarelli* was seen at the time as part of a package of cases that, as Bora Laskin observed, affirmed a "judicial Bill of Rights" or the potential for a "basically common law ... protection of civil liberties."[44] In fact, *Roncarelli*

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41 *Ibid*. at 47. See also Matthew Lewans, "Rethinking the Diceyan Dialectic" (2008) 58 U.T.L.J. 75.

42 *Roncarelli, supra* note 2 at 142.

43 Edward McWhinney, Case Comment on *Roncarelli v. Duplessis (S.C.C.)*, (1959) 37 Can. Bar Rev. 503 at 503 [footnote omitted].

44 Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights" (1959) 37 Can. Bar Rev. 77 at 77-78.

was the last case in this chapter of Rand's narrative: Rand would soon retire from the bench, and within just a few years it would become apparent that a distinct moment in Canadian constitutional history had passed.[45] By the mid-1970s, there was already a sense of "[n]ostalgia" and even "reverence" for the cases from *Roncarelli*'s time.[46]

What brought a sense of unity to these cases was Rand's distinctive interpretive style. Rand engaged in a sort of interpretive ascent and descent, moving from explicit legal propositions found in the cases, statutes, and constitutional texts, to their "postulates" in political morality—an expression he frequently invoked that captures simultaneously the ideas of self-evident premise, fundamental principle, and condition or prerequisite.[47] Rand was as concerned with implicit law as he was with explicit law. The "postulates", "implied conditions", "implication[s]", "necessary implication[s]", "corollaries", "implicit" rules and principles, and "the political theory" behind the written texts of the constitution were, for Rand, as important as the written texts.[48] "In the administration of law generally," he wrote, "there may be a tendency toward over-emphasis of the letter and the form rather than the spirit and the substance."[49] Rand, at least, could not be accused of falling prey to that tendency.

Writing extrajudicially in 1951, Rand expressed his sentiments about the nature of law and legality.[50] While his mode of expression was not always clear, his basic point was.

> All bodies of thought lie within assumptions which surround them like invisible boundaries. We are largely unconscious of them, but, imperceptibly, they form barriers whose effectiveness may be virtually absolute. In the refinements of thinking and the more conscious

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45 Edward McWhinney, "Federal Supreme Courts and Constitutional Review" (1967) 45 Can. Bar Rev. 578 at 587-88.

46 Dale Gibson, "And One Step Backward: The Supreme Court and Constitutional Law in the Sixties" (1975) 53 Can. Bar Rev. 621 at 621.

47 See e.g. *Roncarelli*, *supra* note 2; *Switzman v. Elbling*, [1957] S.C.R. 285 at 306, 7 D.L.R. (2d) 337 [*Switzman*]; *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887 at 918, [1951] 4 D.L.R. 529; Ivan C. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 Can. Bar Rev. 135 at 155 [Rand, "Constitutionalism"].

48 Ivan C. Rand, "Canada" (1954) 54 Colum. L. Rev. 787 at 788 ("implied conditions"); Rand, "Constitutionalism", *supra* note 47 at 156 ("implication"), 136 ("implicit"), 155 ("corollaries"); *Saumur v. Quebec (City of)*, [1953] 2 S.C.R. 299 at 331, [1953] 4 D.L.R. 641 ("necessary implication"); *Switzman*, *supra* note 47 at 306 ("political theory").

49 Ivan C. Rand, Book Review of *Minimum Standards of Judicial Administration: A Survey of the Extent to which the Standards of the American Bar Association for Improving the Administration of Justice Have Been Accepted throughout the Country* by A.T. Vanderbilt, ed., (1951) 9 U.T.L.J. 133 at 136.

50 Ivan C. Rand, "The Role of an Independent Judiciary in Preserving Freedom" (1951) 9 U.T.L.J. 1 [Rand, "Independent Judiciary"].

> areas, we easily confound ourselves by passing, unawares, from one to another of the subtle envelopments.[51]

For Rand, the role of the judge, we may say, was to avoid being caught unawares by legality's subtle envelopments; in his view, the judge's responsibility was to reason openly about them. He insisted that there was an "inner compulsion" toward "theoretical" accounts of law.[52] "[W]e seem to crave," he wrote, "for rational theoretical completeness and legitimacy to support action"—a craving for the "shadowy provisional postulates of a transcendental nature" that underlie all positive laws.[53] One postulate was, of course, the rule of law, which Rand defined as follows:

> The rule of law is to be contradistinguished from the rule of man's despotism; it is the rule of the objective standard of reason as contrasted with the subjective standard of the individual; it is the rule of principle as against expediency. It admits of no concession or compromise. From the realities of each situation as they are revealed by the understanding, it crystallizes in pronouncement and takes its place among permanencies.[54]

Again, the style of expression here is perhaps slightly opaque. But we may say that, for Rand, the rule of law was the rule of reason: an interpretive "understanding" of legality's general demands within the context of specific cases or circumstances. Within Rand's rule of reason there were no sharp lines between doctrinal legality and conceptual legality. "That in the questions facing courts we must exclude theory," Rand wrote, "has never been the rule and never can be the rule: theory is simply the completion of ideas."[55] The relevant theoretical principles must be "gathered as best they can" from precedents, legislation, working assumptions, and "organic tendencies" of the polity, as well as conceptions of freedom applied through "the rule of universality"; the meaning of these principles must be articulated, as Rand put it (quoting Coke), through the "artificial reason" of the law.[56] For Rand, the rule of law was a product not of any list or code of principles of legality, but of an interpretive process in which the universal and the particular are reconciled coherently through "law's myriad adjustments".[57]

We may say with confidence, then, that Rand's rule of law was exemplary of what we have called legality as reason. His rule of law thus appears very different from the orthodox understanding of Dicey's rule of

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51 *Ibid*. at 2.

52 *Ibid*. at 3.

53 *Ibid*. at 3, 4.

54 *Ibid*. at 8.

55 *Ibid*. at 12.

56 *Ibid*. at 12-13, citing *Prohibitions del Roy* (1607), 12 Co. Rep. 63 at 63, 77 E.R. 1342.

57 Rand, "Independent Judiciary", *supra* note 50 at 13.

law. But we can now return to the question raised above: is that orthodox view—the view of Dicey's *Law of the Constitution* as a formalistic codification of constitutional law—wholly accurate?

There are certainly passages within Dicey's books that appear to invite the formalist charge. In his work on parties to actions, Dicey sought to "digest the law of parties into a series of rules" in order to save the reader from the necessity of "collecting the principle for which he is in search from the decisions or statutes in which it is embodied," and also to "exhibit[] the law of parties as a whole ... showing the relations between its different parts."[58] It thus made apparent the fact that this complex part of the law "depends upon and is the expression of a few simple principles."[59] In his work on the law of domicil, Dicey stated that he had "reduced [the cases and statutes] into a series of definite rules" with a view to establishing "a code of what may be termed the English law of domicil."[60] Dicey's work on the conflict of laws is perhaps the best known of his efforts at this sort of academic codification of the common law.[61]

It is doubtful whether this brand of legal analysis is as mechanistic, formalistic, or abstractly conceptual as people say it is. It appears to be the sort of reflective oscillation between specific legal rules and their underlying principles in search of justificatory coherence that Dworkin, for example, believed to be inherent to legal interpretation (a deeply theoretical and morally normative task). Of course, if Dicey's goal was to produce for lawyers and judges a set of rigid rules with a view to rendering superfluous further interpretive reflection, we may concede that Dicey's objective (though not his technique) was, in one sense of that contested word, positivistic. But was this his objective in *Law of the Constitution*? Was his account of the rule of law a rule-based one exemplary of what we have labelled legality as order?

Dicey's unpublished papers and private correspondence are revealing on this point. The publication of J.W.F. Allison's forthcoming edition of Dicey's draft work entitled the "Comparative Study of Constitutions" will no doubt provoke a reassessment of Dicey's published work in light of his unpublished writings generally.[62] Perhaps we can begin that reassess-

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58 A.V. Dicey, *A Treatise on the Rules for the Selection of the Parties to an Action* (London, U.K.: William Maxwell & Son, 1870) iii-iv [references omitted].

59 *Ibid*.

60 A.V. Dicey, *The Law of Domicil as a Branch of the Law of England, Stated in the Form of Rules* (London, U.K.: Stevens & Sons, 1879) at v.

61 A.V. Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, 3d ed. (London, U.K.: Stevens & Sons, 1922).

62 The draft is in the Codrington Library, All Souls College, Oxford University (MS. 323). I am grateful to John Allison for drawing my attention to these papers. For a brief discussion of them, see J.W.F. Allison, *The English Historical Constitution: Continuity,*

ment here. In one part of this draft work, written in 1894, Dicey undertook to define "the analytical or expository method" in constitutional law.[63] A writer adopting this method "takes our institutions ... as they are" and sets forth "in an intelligible form the character of English institutions, [and] of the rights enjoyed by British citizens ... expressed in a set of definite propositions placed in a logical order."[64] "His object, in short," Dicey concluded, "is to produce a Constitutional Code accompanied by illustrative comment."[65] But Dicey then argued that for a full understanding of the constitution the analytical method should be supplemented by "historical" and "comparative" methods that help "free us from the delusion that things must be as they are."[66] Dicey here placed great value on comparing the constitution to other constitutions, to its own past incarnations, and even to "ideal or imagined polities, constructed by the fancy of philosophers or poets."[67] He added that the focus of this comparative analysis should not be on "institutions or laws alone" but also on "the conceptions or ideas which underlie political arrangements."[68] Although Dicey seemed hesitant about conceding the point openly, his method appears evaluative or normative in character; indeed, he asserted that it would permit conclusions about how "a good constitution" might affect the freedom and prosperity of a people.[69]

Dicey's definition of the analytical method in this draft chapter, when taken in isolation, is essentially the analytical or conceptual method that he is accused by his critics of having adopted in *Law of the Constitution*—the method of academic codification of law. But did Dicey think that his own book contained such a "Constitutional Code"? Or, did he think that his book embraced aspects of the theoretical, contextual, evaluative, and normative aspects of what he called in the draft chapter a "comparative" method?

Change and European Effects (Cambridge: Cambridge University Press, 2007) at 14-17. Allison's forthcoming edition of Dicey's draft work on the comparative study of constitutions will be published by Oxford University Press. See also G.J. Hand, "A.V. Dicey's Unpublished Materials on the Comparative Study of Constitutions" in Geoffrey Hand & Jeremy McBride, eds., *Droit sans frontieres: Essays in Honour of L. Neville Brown* (Birmingham: Holdsworth Club, 1991) 77.

63 A.V. Dicey, Lecture delivered at Liverpool (16 November 1894), in "The Comparative Study of Constitutions", draft (4 May 1897) 1, Oxford, Codrington Library, All Souls College, Oxford University (MS. 323).

64 *Ibid.*

65 *Ibid.*

66 *Ibid.* at 11-12.

67 *Ibid.* at 8.

68 *Ibid.*

69 *Ibid.* at 39.

Dicey's ideas about how to study the constitution may well have been evolving, and we should not read back into his earlier work ideas that he developed later. However, there are indications that he did not see his famous book, *Law of the Constitution*, as an example of the "analytical method" as he later defined it. When first explaining to his publisher why the book should be published, Dicey insisted that it "would not be a law book in the strict sense of the term," but it would rather be a "readable book on some of the principles of constitutional law."[70] That Dicey never saw his book as a legal treatise in the usual sense is confirmed by a letter he wrote in response to a suggestion by his good friend, James Bryce, in 1894, that he continue to follow the method of codifying common law rules in his work (an approach that, as seen, he clearly took in relation to the law of parties, domicil, and conflicts). In his answer, Dicey revealed considerable self-doubt about his abilities in this respect. In general, he wrote, this style of legal writing must "aim at a kind of clearness [and] arrangement" that is often lacking with many "law writers".[71] "But I also think," he confided to Bryce, "that as far as I am concerned, I lack a particular gift of accurate legal expression" for this style of legal writing.[72] Here we may interject and ask, What about *Law of the Constitution*? How could Dicey have doubted his ability in this respect given the great success of this book?

The answer, quite simply, is that he did not see *Law of the Constitution* as representing the same genre of legal writing as doctrinal legal treatises like his works on, for example, parties and domicil. He continued his letter by stating that because he lacked the "gift of accurate legal expression,"

> I don[']t think that what you may call unauthorised codification is really the right line of labour for me. Whatever I produce in future—if I produce anything—w[oul]d be much more in the style of the Law of the Constitution. It was I consider unfortunate, though the misfortune is now irreparable, that I ever set eyes on the Conflict of Laws. However life is a series of mistakes [and] I have no reason to complain, though it is provoking as one looks back to think how much good work one cd have achieved if one had only been endowed with a certain kind of intellectual foresight.[73]

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70 Letter from A.V. Dicey to Macmillan & Company (9 June 1884), London, U.K., Macmillan Archive, British Library (55084, ff. 7-8).

71 Letter from A.V. Dicey to J. Bryce (15 November 1894), Oxford, Bodleian Library, Oxford University (MS. Bryce 2, ff. 185-88) [*Dicey to Bryce (1894)*]. James Bryce, the politician, diplomat, and one-time Regius Professor of Civil Law at Oxford, wrote the following book, among others: James Bryce, *Studies in History and Jurisprudence* (Oxford: Oxford University Press, 1901).

72 *Dicey to Bryce (1894)*, *supra* note 71.

73 *Ibid*.

Dicey was then working on his book on conflicts and was clearly frustrated by it. True to his word, Dicey's next book after that one, *Law and Public Opinion*, was a reflective work on social and legal history very unlike his legal treatises.[74] What is clear, however, is that Dicey denied that the point of *Law of the Constitution* was to codify constitutional law. In his view, at least, *Law of the Constitution* was more like *Law and Public Opinion* than *Conflict of Laws*.

There is further evidence of Dicey's theoretical ambitions in his correspondence with Bryce. In an 1897 letter, Dicey indicated that he was writing out his lectures on the comparative study of constitutions and one theme he intended to explore in this work was the idea of the "spirit of constitutions".[75] He was trying to work through the idea, and he asked Bryce whether he or anyone else he knew had considered it before. "It rather seems to me," Dicey wrote, "that what we mean by spirit as applied to an age[,] to institutions, or the like is the existence of certain tacit assumptions in one age [etc.], which appear to those who make them to be matters of course, but which are just the assumptions which in another age are not made."[76] A constitutional spirit is not a rigid rule or concept, but a dynamic phenomenon.

In his draft chapters of the work on the comparative study of constitutions, Dicey provided tentative reflections on the theme of constitutional spirit, observing that there are "few things ... more difficult than defining the expression 'spirit of a Constit[utio]n,'" though it is a term that "conveys a notion as indefinite as it is important."[77] After considering Montesquieu's approach in *De l'esprit des lois*,[78] which, he thought, associated law's spirit with its ends or purposes, Dicey turned instead to an attempt to defining spirit by reference to how people "look upon" their institutions in the sense not of their "actual working" but in terms of how "they expect them to work or assume that they will work."[79] The spirit of a constitution, Dicey seemed to be saying, was a deeply contested and dynamic normative concept, not a factual or descriptive one. Dicey concluded that the spirit of constitutions "is the subjective side of

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74 A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London, U.K.: Macmillan, 1905).

75 Letter from A.V. Dicey to J. Bryce (16 March 1897), Oxford, Bodleian Library, Oxford University (MS. Bryce 2, ff. 240-43).

76 *Ibid*.

77 A.V. Dicey, "Chapter III, English Constitutionalism under George the Third (1785)" in "The Comparative Study of Constitutions", draft (n.d.), Oxford, Codrington Library, All Souls College, Oxford University (MS. 323) [Dicey, "Comparative Study, Chapter III"].

78 Charles-Louis de Secondat de Montesquieu, *De l'esprit des lois* (Paris: Garnier, 1973).

79 Dicey, "Comparative Study, Chapter III", *supra* note 77 at 31.

their working."[80] In the examples he gives, it is fair to say that Dicey considered "spirit" broadly, and thus as relevant to assessing the shifting conventions of the constitution. But it was a term he applied to the law of the constitution too. "[T]he spirit of English institutions is legal," he wrote. "Englishmen as a rule look at their institutions from a legal point of view, [and] expect that the law will be rigidly respected, [and] what has been termed the rule of law be maintained."[81]

Another draft chapter, written in 1900, further sheds light on Dicey's link between the rule of law and the subjective side of the constitution. Here, Dicey stated that English constitutionalism "exhibits four characteristics," namely, "antiquity", "continuity", "spontaneity", and "originality".[82] In his comments on continuity, Dicey stated that the English constitution, as an historical constitution, had no obvious beginning and no genuine interruptions in its development. He conceded that England had had its share of rebellions and revolutions, but even so he insisted that it was remarkable that it was always considered important for those in power to find some way to justify what might have been revolutionary as a "return to those fundamental laws of the lawful monarchy."[83] Dicey did not view this tendency as a legal trick or whitewash but as an essential feature of a society committed to the rule of law. Constitutional continuity, he wrote, depends upon an objective condition—not being attacked and subjected by external forces—but also on another, internal condition:

> The other condition is subjective [and] consists in the existence among a people of a legal turn of mind [and] a love for forms [and] precedents. This disposition which is as conspicuous in the annuls of Rome as in the annals of England, may, if looked at from its bad side, be called formalism, but looked at from its good side, may be described as a rational dislike to break with the past.[84]

A society that accepts the rule of law—a people who have a "legal turn of mind"—will always seek to justify power through reasoned appeals to legal forms and precedents, not for the sake of formalism itself but because consistent respect for forms and precedents is substantively "rational" and "good".

Rereading *Law of the Constitution* in light of these various sources, it is, I think, less obvious than commonly assumed that Dicey's method or objective in that book was analytical codification of the rule of law, or that

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80 *Ibid*.

81 *Ibid*. at 31-32.

82 A.V. Dicey, "Chapter I, Historical Constitutions & Non-Historical Constitutions" in "The Comparative Study of Constitutions", draft (26 May 1900) 11, Oxford, Codrington Library, All Souls College, Oxford University (MS. 323).

83 *Ibid*. at 17.

84 *Ibid*. at 36a.

his attitude toward the rule of law was mechanistic, scientific, or formalistic. Perhaps, then, Arthurs and Dicey's other functionalist critics were indeed thrashing the wrong horse—or perhaps they had the right horse but were just a bit too hard on it. Dicey used the same expressions—the *spirit* of legality and the *legal turn of mind*—in his book as he did in his private correspondence and his unpublished drafts, and so perhaps we should interpret these various sources together.

In *Law of the Constitution*, Dicey linked the rule of law to a political order in which institutions are understood from a uniquely *legal* attitude—a perspective that he characterized as the "legal turn of mind", the "spirit of law", and the "spirit of legality".[85] The reconciliation of parliamentary sovereignty and the rule of law, Dicey argued, is achieved, in the end, by the fact that judges construct legislative meaning in light of the "general spirit of the common law" so that legislative authority can only be exercised "in a spirit of legality".[86] His unpublished papers show that Dicey did not associate the ideas behind these expressions with the ideas associated with analytical method, formalism, or codification. This view of Dicey is consistent with Martin Loughlin's ultimate reading of Dicey—that Dicey was not as mechanistic or positivistic as people generally assume.[87] T.R.S. Allan has long argued that there is a connection between Dicey's approach to the rule of law and the interpretive style of theorizing about legality found in, for example, Dworkin's work.[88] Indeed, Allan has invoked Dicey in support of his own theory of the rule of law as a rule of reason.[89] More recently, Dworkin has also seen the connection between Dicey's statements on equality before the law and his own idea of integrity in law.[90] The brief consideration of Dicey's unpublished writings here supports these general conclusions. We may venture to say that there is evidence to suggest that Dicey himself was conscious of and even embraced (though he poorly expressed it) an approach to the rule of law that we have been calling legality as reason. Or, to adopt a more historically grounded reading, we may at least accept that implicit in Dicey's writing was an unconscious sense of the tension between legality as order and legality as reason.

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85 Dicey, *Law of the Constitution*, *supra* note 27 at 187, 199-200, 414.

86 *Ibid*. at 413-14.

87 Loughlin, *supra* note 40 at 146-53.

88 T.R.S. Allan, "Dworkin and Dicey: The Rule of Law as Integrity" (1988) 8 Oxford J. Leg. Stud. 266.

89 Allan, *Constitutional Justice*, *supra* note 31 at 13-29. For Dyzenhaus's reinterpretation of Dicey, see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) at 54-60.

90 Dworkin, *Justice in Robes*, *supra* note 8 at 177.

So instead of trying to apply Dicey's statements about "ordinary law" as a formalistic rule, and then rejecting this account of the rule of law as unworkable, it may be possible to take his point in a more nuanced way, as a compelling, interpretive ideal, of which the real meaning will depend upon its integration within specific constitutional settings. This is, of course, not an easy case to make on purely historical grounds; but a reading of Dicey's famous book that sees it not as a code or rulebook but as a book about (as he put it) constitutional "principles" and "spirit" has real normative appeal. We may say, then, that perhaps Dicey's rule of law is not so different from Rand's.

Conclusion: Fulfilling the Aspirations of Legality as Reason

Conceptually, the rule of law can be seen in two ways: as descriptive of a state of affairs in which a stable normative order prevails, and as a distinctive form of justificatory reason or a normative discourse aimed at coherence and consistency, or to use Dicey's expression, a "legal turn of mind". Viewing the rule of law in the first way, it is helpful to break down the concept into component demands of legality that resemble lists or codes, e.g., laws must be general, prospective, clear, public, and so forth. There is potential for confusion, however, because these individuated demands of conceptual legality also have doctrinal parallels. They are, or may be, enforceable legal rules, and the status of these rules doctrinally may vary depending on circumstances. For example, where a law is discriminatory, the individuated demand of legality requiring legal generality is regarded as constitutionally entrenched in Canada and the law may be struck down under section 15 of the *Canadian Charter of Rights and Freedoms*.[91]

Or, to take another example, where a law affects liberty, the individuated demand of legal clarity is regarded as constitutionally entrenched and the law may be struck down under section 7 of the *Canadian Charter*.[92] The confusion arises when we forget that these individuated demands of legality that have a very particular status in legal doctrine play a slightly different role at the conceptual or philosophical level. There, they are identified not as individuated legal rules, but as different aspects or ways of conceiving or describing at a general level a state of affairs in which there is a stable normative order. This more general idea of legality

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91 *Canadian Charter of Rights and* Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [*Canadian Charter*]. See *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1328-29, 96 N.R. 115. Section 15 of the *Canadian Charter* protects "equality before the law," which is a "value [that] has historically been associated with the requirements of the rule of law" (*ibid*. at 1329).

92 *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36: the "'doctrine of vagueness' is founded on the rule of law" (at 626) and enforced constitutionally through ss. 7 and 1 of the *Canadian Charter* (at 627).

may have normative force of its own, independent of the normative significance of the demands of legality taken individually, and there is no reason to think that this general normative significance cannot have doctrinal force separately from, and above and beyond, the doctrinal force of the individuated demands of legality. However, in Canada, judges occasionally fall into thinking that the rule of law is exhausted by the written doctrinal manifestations of the individuated demands of legality.

But even greater confusion exists when we forget that, aside from legality as normative order, the rule of law has another dimension: legality as normative discourse, or a discourse of justificatory reason. This conceptual sense of legality has doctrinal manifestations too—manifestations within the interpretive practice of law that are often subtle, implicit, and unacknowledged. Unlike the individuated demands of legality associated with the rule of law as normative order, the rule of law as a distinctive form of normative discourse or reason aimed at coherence and consistency cannot be captured doctrinally in the form of written constitutional rules. The "legal turn of mind" (as Dicey would say), or the "standard of reason" or "artificial reason" (to use expressions Rand invoked), or "integrity" in law or "deference as respect" (to use more recent expressions) cannot be written expressly into a constitutional text or code. But it does not follow that the rule of law in this sense cannot have powerful doctrinal force within constitutional law. Indeed, it is, we may say, a central part of the exercise of figuring out which acts of power count as law for us given our constitutional structure and the commitments of political morality implicit within that structure.

By revisiting and reconsidering the views of Dicey and Rand we can see that they both struggled, with varying degrees of success, to articulate that approach to the rule of law that we have called here legality as reason. An examination of the Canadian cases that expressly invoke the rule of law after *Roncarelli* would confirm that this approach to legality is now the subordinate one, gaining explicit recognition only rarely.[93] In general, judges have focused upon what we have called legality as order, and they have been extremely hesitant about admitting that the rule of law may have powerful normative force in constitutional law beyond the written constitutional rules that capture the individuated demands of legality associated with legality as order. But this hesitancy is provisional, and there are clear signs that, if and when necessary, judges will be open to broader

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[93] See e.g. *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 at para. 30, 232 D.L.R. (4th) 385, LeBel J., citing Hon. Beverly McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998) 12 C.J.A.L.P. 171 at 174 (the idea of the rule of law as an "*ethos of justification*" [emphasis in original], relying upon Dyzenhaus's "deference as respect" (Dyzenhaus, "Politics of Deference", *supra* note 32)).

understandings of the rule of law.[94] When that time comes, perhaps they will turn to the other side of the legality coin. If, as Rand said, the rule of law really is "a fundamental postulate of our constitutional structure,"[95] then it will be important to remember the interpretive aspect of the rule of law—the idea that legality can be fully instantiated only through a discourse of justificatory reason—and that in our constitutional structure today, this means that if administrative, executive, and even legislative acts are to be counted as "legal" or as "law", then they must be shown to fulfill the aspirations of legality as reason.

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94 For tentative signs of such an understanding, see *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at paras. 134-35, 276 D.L.R. (4th) 594; *British Columbia (A.G.) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873 at paras. 20-27, 28 D.L.R. (4th) 528.

95 *Roncarelli*, *supra* note 2 and accompanying text.