

The Deep Structure of *Roncarelli v. Duplessis*¹

David Dyzenhaus

[U]nderlying all systems of social law are shadowy provisional postulates of a transcendental nature. Our lives are said to be rounded with a sleep and a forgetting, but they are couched also in assumptions.²

The absence of express constitutional limitations to legislative action has not remitted the individual to the sometimes precarious and sluggish security of public opinion and legislation. The matrix of legislation in a common law parliamentary sovereignty is instinct with the paramount purpose of sustaining democratic institutions toward which the judicial process of interpretation should be both responsive and resourceful. The urgency for their effective assertion comes into play in times of stress and danger; it is then, in the confusion of fear, distrust and fanaticism, that voices uttering the deep postulates of free men should be heard and felt.³

HATCHING THE EGG

Like others who have had the honour of giving the Rand lecture, I am drawn to an attempt to understand better the jurisprudential vision of a judge whose stature makes a lecture series in his name a worthy tribute. I quake rather at following lecturers who are better equipped to make this attempt, in particular because of a discovery made after I had committed myself irrevocably to my topic – Rand J.’s vision of constitutionalism as revealed in *Roncarelli v. Duplessis*,⁴ his most important judgment in administrative law.

¹ David Dyzenhaus, Professor of Law and Philosophy, University of Toronto. I thank Matt Lewans for superb research assistance, which included preparing the two graphs, as well as for comments. I also thank Lorraine Weinrib and Kent Roach for many conversations over the years about these topics, and Lorne Sossin for a conversation which helped me to understand better certain aspects of my argument. Geneviève Cartier, Evan Fox-Decent, Robert Leckey, Stephen Moreau, David Mullan, and Michael Taggart provided comments on a draft at very short notice and Carissima Mathen, Alope Chatterjee, Michael Plaxton, Diane Pothier and Ed Veitch, provided an illuminating commentary at the seminar which followed my lecture. Finally, I thank Dean Anne La Forest and Thomas Kuttner for the warm hospitality that pervaded my visit to the Law Faculty of the University of New Brunswick.

² Ivan Rand, “The Role of an Independent Judiciary in Preserving Freedom (1951) 9 U.T.L.J. 1 at 4 [Rand, “Independent Judiciary”].

³ Ivan Rand, “Some Aspects of Canadian Constitutionalism” (1960) 38 Can. Bar. Rev.134 at 160 [Rand, “Canadian Constitutionalism”].

⁴ [1959] S.C.R. 121 [*Roncarelli*].

For it was David Mullan, Canada's leading administrative lawyer and one of the finest public lawyers in the common law world, who gave the Rand lecture in 2002, entitled "Underlying Constitutional Principles: The Legacy of Justice Rand".⁵ Moreover, I discovered that David has elaborated some of the themes of that lecture in a subsequent lecture at Auckland University, "The Role for Underlying Constitutional Principles in a Bill of Rights World."⁶ There is also his contribution in 1979 to the University of Western Ontario symposium on Justice Rand, "Mr Justice Rand: Defining the Limits of Court Control of the Administrative and Executive Process".⁷ As I said to Dave after reading these works, my original contribution to understanding Rand J.'s thought would likely be confined to tendentious disagreement with his arguments.

My only comfort as I started preparing this lecture was that Justice Rand's contribution to Canadian legal culture is such that there is work for many hands. As Thomas Berger put it in *Fragile Freedoms*, "Rand's judgments ... cannot be read swiftly, and certainly they require thought, but the truths they yield make a careful reading of them worthwhile. [They] are the Canadian judiciary's greatest monument".⁸ I share with Mullan and Berger the sense that Justice Rand's contribution to public law is so profound that we are only now starting to appreciate it, some fifty years after he gave his oviferous judgments in the unwritten constitution or implied bill of rights cases. In other words, the eggs laid fifty years ago are just starting to hatch.⁹

As I have mentioned, the particular egg I want to hatch tonight is Justice Rand's judgment in *Roncarelli v Duplessis*.¹⁰ This judgment in this case is rightly reputed to be one of the classic judgments in Canadian public law, ranking with Rand J.'s other judgments in *Smith*

⁵ In De Lloyd Guth and John McEvoy, eds., *Rand* [forthcoming] [Mullan, "Legacy of Justice Rand"].

⁶ N.Z.L. Rev. [forthcoming] [Mullan, "Bill of Rights World"].

⁷ (1979-80) 18 U.W.O.L. Rev. 65 [Mullan, "Defining the Limits"].

⁸ Thomas R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto/Vancouver: Clarke, Irwin & Company Ltd, 1982) at 182-3.

⁹ This adjective - a bid to get away from "seminal" - was first used in Canada by an administrative lawyer from that bastion of political correctness, New Zealand, to describe Dickson J.'s judgment in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation* [1979] 2 S.C.R. 227. See Michael Taggart's review article, "Outside Canadian Administrative Law" (1996) 46 U.T.L.J. 649 at 649. Dickson J. was so perplexed by this description that he inquired of the editor of the Journal as to its significance.

¹⁰ *Roncarelli*, *supra* note 4.

and *Rhuland v. The Queen*¹¹, *Saumur v. City of Quebec*¹², and *Switzman v. Elbling*¹³. With these others, it stands as both a signal of judicial commitment to the rule of law or legality and as an elaboration of the content of the idea of legality. And along with these others, it ranks among the other great contributions by common law judges of that time to our understanding of the rule of law. Notably it is in the same class and, I will argue at the head of that class, as the judgments of the majority of the Australian High Court in the *Communist Party Case*¹⁴ and Oliver Schreiner's judgments in 1952 and 1957 in apartheid South Africa, in which he sought to maintain the rule of law against the onslaughts of the first apartheid government.¹⁵

However, it is a curious feature of *Roncarelli* that it is more mentioned than discussed - the main exception being Mullan's earlier article.¹⁶ Moreover, as can be illustrated by the graphs reproduced at the end of this lecture, *Roncarelli's* influence on judicial decisions reached its peak only quite recently. Even then its influence is, at least on the surface, confined to very honourable citations, perhaps with a quotation of the couple most famous lines from the judgment.

In part, an old prejudice explains this phenomenon. *Roncarelli* is a judgment about administrative law, about, in a nutshell, judicial review of abuse of administrative discretion. And administrative law - the common law of judicial review - is usually regarded as the lesser part of public law. (International law is considered its least part, if it is considered law at all). In contrast, constitutional law, by which is meant the study of the written constitutional texts of a legal order, is considered to be the serious component of public law.

This prejudice is, in my view, deeply positivistic in that it considers that Parliament is subject to constitutional law only when there is a written text which sets out legal controls. Moreover, this text must be entrenched so that judges have the final say over whether statutes

¹¹ [1953] 2 S.C.R. 95 [*Rhuland*].

¹² [1953] 2 S.C.R. 299 [*Saumur*].

¹³ [1957] S.C.R. 285 [*Switzman*].

¹⁴ *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1. For discussion, see my "Constituting the Enemy", in Andras Sajo, ed., *Militant Democracy* [forthcoming].

¹⁵ *Minister of the Interior and another v. Harris and others* [1952] 4 S. Afr. L.R. 769 (A.D.) and *Collins v. Minister of the Interior* [1957] 1 S. Afr. L.R. 552 (A.D.).

¹⁶ See also David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 100.

offend the constitution unless the constitution is itself changed by a process of amendment beyond the reach of ordinary legislation. At most, constitutional rights are the rights that can be implied into such text, hence the label of “implied bill of rights” for Justice Rand’s constitutional judgments, many of which relied on his understanding of the *Constitution Act, 1867*, and can thus be understood as premised on a constitutional text, even though he found more in the text than had been explicitly stated by its drafters. The common law of judicial review is then not akin to constitutional law, because an omnipotent or supreme legislature - one not subject to a written constitution - can always use legislation as a blunt instrument to override even the boldest common law judge.

It is this prejudice that I want to explore in my lecture. I will argue that judicial review in public law is best understood as based on fundamental constitutional values on a continuum, ranging from the ordinary situations of common law judicial review to the most striking judicial interventions on the basis of an entrenched bill of rights. Just this continuum is revealed by Rand J.’s public law judgments. To see that there is a continuum we must start where it starts - in administrative law - precisely because in administrative law judges have to rely on the idea of the unwritten constitution.

In order to appreciate what is at stake here, focus for a moment on the very careful choice of words in the titles of Mullan’s lectures to you and to the Faculty of Law at Auckland University. In both, Mullan talks about “underlying principles”, as opposed to “unwritten principles” and his reasons for the choice are even clearer in the Auckland lecture. There he says that critics of the legitimacy of what I will refer to as the Randian project - the project wherein judges articulate and rely upon unwritten constitutional value - use the term “unwritten” pejoratively. They use it to point out what in their view is inappropriate judicial activism, “part of the conspiracy of judicial imperialism, anti-democratic, and just downright ignorant”.¹⁷ The term “underlying”, in contrast, evokes a “link between the text of the constitution and the claim being made in that it invites inquiry as to the principles on which the text is based with a view to

¹⁷ See Mullan, “Bill of Rights World” *supra* note 6, and note 84 and accompanying text.

recognition of subsidiary or additional norms or rules of constitutional law which enhance the operation or effectiveness of the text".¹⁸

So, according to Mullan, the use of "underlying" helps because it anchors the values articulated by judges firmly in the text and requires that they accept the burden of showing how those values must be invoked in order to make sense of the text. Thus it provides a useful middle ground on which to meet those who have the prejudice I mentioned since it concedes that constitutional controls on the legislature are appropriate only when there is an entrenched constitution. The difference between the Randians and the positivists is then perhaps only about the scope of those controls; and so the stage is productively set for an argument that the Randian project "can be located within a coherent and defensible version of a country's constitutional arrangements".¹⁹

I do not wish to deny the force of Mullan's claim, at least in so far as it describes the stakes in this debate. Consider, for example, Justice La Forest's remarks in the *Provincial Judges Remuneration Reference*²⁰ in response to Chief Justice Lamer's reasoning about the unwritten constitution. The issue between them was whether the *Constitution Act, 1867* implicitly provides a constitutional protection of judicial independence. Lamer C.J. reasoned that the independence of the judiciary is "definitional to the Canadian understanding of constitutionalism" and that such independence "reflects a deeper commitment to the separation of powers"²¹:

[J]udicial independence is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins can be traced to the *Act of Settlement of 1701*, is recognized and affirmed by the preamble to the *Constitution Act, 1867*. The specific provisions of the *Constitution Acts, 1867 to 1982*, merely "elaborate that principle in the institutional apparatus which they create or contemplate": *Switzman v. Elbling* [1957] S.C.R. 285, at p. 306, *per* Rand J.²²

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *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 S.C.R. 3 [Reference re Remuneration of Judges].

²¹ *Ibid.* at para. 108.

²² *Ibid.* at para. 83 (emphasis in original).

He went on to say that the interpretation of sections 96 and 100 of the *Constitution Act, 1867* “has come a long way from what those provisions actually say” and that the only way to explain this phenomenon is “by reference to a deeper set of *unwritten* understandings which are not found on the face of the document itself.”²³ On a cautionary note, he stated that there were reasons to prefer a written constitution over an unwritten one, such as “the promotion of legal certainty and through it the legitimacy of judicial review”, because it is “of the utmost importance to articulate what the written source of those unwritten norms is”.²⁴ This he found in the preamble of the *Constitution Act, 1867*, which, again quoting from Rand J., he said articulates “the political theory which the Act embodies”.²⁵ This theory, Lamer C.J. found, includes the ideas of the rule of law, of constitutional democracy, and of judicial independence.²⁶

The relevant sentence of the preamble says simply that the *Canadian Constitution* is “similar in Principle to that of the United Kingdom.” But Lamer C.J. said, “[t]he preamble identifies the organising principles of the *Constitution Act, 1867*, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.”²⁷ Thus he acknowledged that the appeal to “written source” is of little help when that source is then taken to stand for large unwritten principles. In conclusion to this part of his judgment he stated “[j]udicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*.”²⁸

In his response, La Forest J. took the positivist anxiety about the legitimacy of judicial review in the absence of “express written authority” to its logical conclusion. “The consequence of parliamentary supremacy”, he said, is that “judicial review of legislation is not possible”.²⁹ Such review is legitimate only when it “involves the interpretation of an authoritative constitutional instrument.”³⁰ Its legitimacy is “imperiled ... when courts attempt to limit the

²³ *Ibid.* at para. 89(emphasis in original).

²⁴ *Ibid.* at para. 93.

²⁵ *Ibid.* at para. 95.

²⁶ *Ibid.* at para. 96-108. In support of the claim about constitutional democracy, at para. 100 he cites Rand J.’s judgment in *Saumur*, *supra* note 12 at 330.

²⁷ *Reference re Remuneration of Judges*, *ibid.* at para. 104.

²⁸ *Ibid.* at para. 109.

²⁹ *Ibid.* at para. 309.

³⁰ *Ibid.* at para. 315.

power of legislatures without recourse to express textual authority.”³¹ Thus, he rejected the idea outright that the preamble to the *Constitution Act, 1867* “contains implicit protection for judicial independence”.³² In his view, the express provisions of the Constitution should not be seen as elaborations of unwritten principles to be found in the Preamble: “On the contrary, they *are* the Constitution. To assert otherwise is to subvert the democratic foundation of judicial review.”³³

My disagreement with Mullan starts with his apparent claim that one should concede to Justice La Forest and others the middle ground that requires that text is the only legitimate basis for judicial review. I will argue that one should not concede that middle ground because it concedes the very assumptions behind the prejudice and thus gives up on the Randian project. It will take this whole lecture to set out a sketch of this argument, but here is a hint as to its content.

In the course of his justification for “underlying” over “unwritten”, Mullan offers this side remark about the virtues of “underlying”: “[m]ore radically, of course, [underlying] may leave open the possibility of recognition of principles which have an existence independent of the explicit text of the constitution”.³⁴ Moreover, in the lecture to you, he suggested that in the rare exceptional cases where a supreme court faces a constitutional crisis and text is of no help, there, judges must accept a responsibility to articulate an answer, even though by definition they are thus required to take their stand on unwritten constitutional principles. Finally, in the very last lines of his Auckland lecture, he declared his support for a position which states that the rule of law responds to “moral imperatives”. “Primary” among these, he says, is a “conception of equality or mutual respect from which it is appropriate to move in striking down legislation that strikes at core human rights values”.³⁵

My argument is that Mullan cannot at the same time rely on the idea of underlying principles in order to establish a middle ground with positivists like Justice La Forest and recognize unwritten constitutional values with the caveat that these should be confined to the exceptional situations of constitutional crisis. Rather, as his support for a moral understanding of

³¹ *Ibid.* at para. 316.

³² *Ibid.* at para. 318.

³³ *Ibid.* at para. 319 (emphasis in original).

³⁴ Mullan, “Bill of Rights World”, *supra* note 6.

³⁵ Mullan, “Bill of Rights World” *supra* note 6.

the rule of law suggests, the Randian project starts with unwritten constitutional principles. Indeed, Mullan at times says something very much like what I want to say, which is why my disagreement with him might seem so tendentious.

For example, at one point in his Rand lecture, Mullan says that when critics of the Randian project speak of it as the “promotion of ‘unwritten’ principles”, they are not only “mis-speaking but also covering up the fact that ‘written’ and ‘unwritten’ are not in reality sharply differentiated concepts but rather function on a spectrum”.³⁶ That the situations in which either kind of principle, unwritten or underlying, is asserted are on a spectrum is almost the argument I will later make. However, for reasons that will become clearer, I prefer the metaphor of a continuum - of a progression of constitutional situations - to that of a spectrum, which connotes a set of diffused or decomposed situations.

THE ENEMY WITHIN

Roncarelli is primarily and rightly remembered as a case about abuse of discretion and I will focus on that legal aspect of the case. But it is important to have some sense of the context in which the abuse happened, something Justice Rand was keen to emphasize. More than half of his judgment is devoted to just this issue.³⁷

Frank Roncarelli owned a successful restaurant in Montreal, but his business was ruined when Edouard Archambault, the Chairman of the Quebec Liquor Commission, cancelled his liquor license. Roncarelli is portrayed in Rand J.’s judgment as an upstanding citizen – a man of good education, who ran a superior sort of restaurant in an exemplary fashion. But, you will recall, he was also a Jehovah’s Witness during the era when the Premier of Quebec was Maurice Duplessis, and Duplessis with much popular support, was determined to stamp out the aggressive proselytizing of the Witnesses. Roncarelli drew the attention of the government not because he took any part in missionary activities himself, but because he posted surety bail for around 383

³⁶ *Ibid.*

³⁷ I rely here on the Factum F.R. Scott prepared for argument to the Supreme Court, materials for which I thank Lorraine Weinrib, and on William Kaplan, *State and Salvation: The Jehovah’s Witnesses and Their Fight for Civil Rights* (Toronto: University of Toronto Press, 1989), F.R. Scott, *Civil Liberties and Canadian Federalism* (Toronto: University of Toronto Press, 1959), and Berger, *supra* note 8.

Witnesses in Montreal who had been charged with municipal infractions for distributing and peddling materials without a license. These infractions were of by-laws passed by the City of Montreal in an attempt to crush Witness missionary activity.

In all of these cases, Roncarelli offered his restaurant as security for the release of a Witness. So trusted was he that he would often sign blank bonds for the Prosecutor's office when he traveled outside of Montreal. On 12 November 1946, the Chief Attorney of the Recorder's Court in Montreal refused to accept Roncarelli's sureties, since a cash bail requirement had been instituted for Witnesses and Roncarelli then ceased to post bail.

The Witnesses responded to this and other signs of government intent to stamp out their activity with a pamphlet entitled "Quebec's Burning Hate for God and Christ and Freedom is the Shame of all Canada", which Rand J. described in his judgment as "a searing denunciation of what was alleged to be the savage persecution of Christian believers."³⁸ The Chief Crown Prosecutor in Montreal decided to take measures to prevent the distribution of the pamphlet, and police seized a cache located in a Witness's hall, which Roncarelli had leased to the congregation. Shortly thereafter, the Chief Crown Prosecutor advised Archambault of Roncarelli's "involvement" with the Witnesses. Archambault phoned Duplessis, who was

³⁸ See *Roncarelli*, supra note 4 at 133. In *Boucher v The King* [1951] S.C.R. 265, Kellock J. summarized the publication at 301:

The title of the pamphlet here in question is, "La haine ardente du Québec pour Dieu, pour Christ, et pour la liberté est un sujet de honte pour tout le Canada." The opening paragraph proceeds to plead for a calm and sober consideration of the evidence presented in the pamphlet in support of the title. It is clear that the author identifies the sect (and I do not use the word in any offensive sense) of Jehovah's Witnesses with the servants of Christ. His point is that the experiences of members of the sect in the province, as detailed in the pamphlet (which the defence proposed to prove by evidence to which the Crown effectively objected) establish that those who were instrumental, directly or indirectly, in bringing about the occurrences described, must be considered, as the title states, as hating Christ because, notwithstanding any lip-service to Him, such conduct towards His servants (the Witnesses) speaks louder than words.

The pamphlet recites at considerable length instances of destruction of Bibles, mob violence, even on private property, unrestrained by the police, who, instead of arresting the mobsters, arrested the unoffending Witnesses engaged in distributing Bibles or Bible leaflets. It is alleged that the latter were subjected to heavy fines, prison sentences and delay in the disposition of these charges, as well as to the exaction of exorbitant bail. The pamphlet concludes on the note that the 'force behind Quebec's suicidal hate is priest domination. Thousands of Quebec Catholics are so blinded by the priests that they think they serve God's cause in mobbing Jehovah's witnesses'.

In *Berger*, supra note 8, he reproduces substantial excerpts from the pamphlet at 172-4.

Attorney General as well as Premier, to seek advice on the matter. After learning about Roncarelli's "involvement" with the Witnesses, Duplessis recommended that Roncarelli's existing liquor license be cancelled "definitivement et pour toujours". On 4 December 1946, Roncarelli was given a copy of the cancellation permit while police raided his restaurant during the lunch hour and seized approximately \$5,000.00 worth of liquor. Six months later, he was forced to close his restaurant.

In the days that followed, Duplessis gave a number of press conferences to explain his decision. The following excerpt from the *Montreal Gazette* (5 December 1946) reflects his view on the matter:³⁹

In a statement to the press yesterday, the premier recalled that 'two weeks ago, I pointed out that the provincial government had the firm intention to take the most rigorous and efficient measures possible to get rid of those, who under the name of Witnesses of Jehovah, distribute circulars, which in my opinion, are not only injurious for Quebec and its population, but which are of a very libelous and seditious character.' 'The propaganda of the Witnesses of Jehovah cannot be tolerated and there are more than 400 of them now before the Courts in Montreal, Quebec, Three Rivers and other centers', the Premier continued, stating that he ordered that charges of conspiracy and libel be lodged against any sect member found distributing Quebec's *Burning Hate*. Turning to Roncarelli's case, Mr. Duplessis stated that: 'A certain Mr. Roncarelli has supplied bail for hundreds of Witnesses of Jehovah. The sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious, manner is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice. He does not act, in this case, as a person posting bail for another person, but as the mass supplier of bails, whose great number by itself is most reprehensible', he continued. The premier then recalled that in 1939, when he was Premier and Attorney General, he had cancelled the liquor license of the *Harmonia Club* where a Nazi propaganda film had been shown in the presence of the German consul. The film was seized by provincial police and the sponsors heavily fined. 'Today, Roncarelli is identifying himself with the odious propaganda of the Witnesses of Jehovah and as a result, I have ordered the Liquor Commission to cancel his permit for the restaurant he operates at 1429 Crescent Street'. 'The Communists, the Nazis as well as those who are the propagandists for the Witnesses of Jehovah, have been treated and will continue to be treated by the Union Nationale government as they deserve for trying to infiltrate themselves and their seditious ideas in the Province of Quebec"', he concluded.

³⁹ Reproduced at pp. 12-13 of the Appellant's factum.

As this newspaper article shows, for Duplessis the danger the Witnesses posed was on a par with communism and the Nazis. Keep in mind that this was 1946 and that the Witnesses, along with the Communist Party, had been banned under wartime regulations during the war. Moreover, it was English-speaking Canadians, including J.W. Estey (at that time Liberal attorney general of Saskatchewan and a future Supreme Court justice), who had urged successfully that the Witnesses be included on the list of proscribed organizations.

However, the opposition of these English-speakers to the Witnesses had mostly to do with concerns that the Witnesses would undermine the war effort. Not only did the Witnesses lump together the Nazis and all their enemies - the forces of secularism and all other established religions were just different parts of the great army of Satan - but they also opposed conscription.⁴⁰ Mixed in with this kind of hostility was the hostility from Quebec to do with a different kind of subversion, not of the war effort, but of the Roman Catholic religion of the majority of Quebec's inhabitants. It was that hostility which continued to fuel legal and political repression of the Witnesses after the war. Indeed, such repression continues to this day.⁴¹

Put differently, we have to see that there are two kinds of internal enemy - the enemy who aims at subversion of the political status quo and the enemy who aims at subversion of the moral status quo. The Witnesses were clearly engaged in moral subversion as they avoided politics entirely, while communists were engaged in both. For many in Quebec, the government was entitled to use the full force of the law to combat such enemies. So it is no surprise that of the cases mentioned above, three came out of Quebec. Moreover, the decision in *Roncarelli* was the last of these, as it took thirteen years for Roncarelli to achieve finality because of the initial obstacles in his way.

Roncarelli's legal team, which included Frank Scott, law professor at McGill, eminent poet, socialist and civil libertarian, had first tried to sue Archambault in terms of the *Liquor Law*

⁴⁰ See Kaplan, *supra* note 37 for the history of the wartime ban.

⁴¹ See *Ville de Blainville c. Beauchemin*, [2003] J.Q. no 10048 (Q.C.A.) (QL), a judgment of the Quebec Court of Appeal given on 27 August 2003, where the Court invalidated municipal regulations which extended a license requirement, and raised the fee for the license, so that Witness missionary activity was caught within the scope of a measure which had previously restricted itself to commercial activity. Note that W. Glen How, who was one of the lead lawyers for Witnesses in the 1950s, appeared for the Witnesses in this case.

of Quebec.⁴² However, that law required that they obtain the permission of the Chief Justice of the Quebec, a position to which Archambault had been elevated. Archambault refused two petitions. (The second was made because the team had thought from his response to the first that he was willing to entertain a second, which made a clearer case.) The next avenue available was to sue the Liquor Commission as a whole - but here the consent of the Attorney General was required and Duplessis not only refused to give his consent but indeed gave no response at all, thus delaying the legal process. The team then decided to try relying on the principle of English common law which seemed to allow a suit against Duplessis personally as long as it could be established that he had acted wrongly. The action itself was principally advanced in delict under Article 1053 of the Quebec Civil Code. Here, Quebec law seemed to provide an insurmountable obstacle. Article 88 of the Quebec Code of Civil Procedure required that notice be given one month before the issue of a writ of summons against an official for damages "by reason of any act done by him in the exercise of his functions" and the team had failed to issue such a writ in time because of the delays that had initially plagued them. Despite these obstacles, Roncarelli not only had his day in court, but won.

THE CONSTITUTION OF LEGALITY

It might seem that the Court's decision in *Roncarelli* is "no big deal"; not only was it the last of the implied rights cases, but the other decisions had paved the way and had been about either analogous or more dramatic situations. Thus in *Smith*, the Court had decided that a Labour Relations Board could not refuse to certify a trade union on the basis that the secretary-treasurer was a member of the Communist Party. In *Saumur*, in issue was a by-law of the city of Quebec which required a permit from the chief of police for the distribution of any publication and it was clear that the by-law was enacted to suppress Witness publications. The Court held that the by-law was invalid. Four of the judges, with Justice Rand at their head, reasoned that the by-law was legislation in relation to freedom of religion and freedom of the press, which were not provincial matters and so the City could not be authorized by the Province to enact the by-law. In *Switzman*, the majority of the Court held invalid the "Padlock Act", a Quebec statute which

⁴² *An Act Respecting Alcoholic Liquor*, R.S.Q. 1941, c. 255. See the account in Sandra Djwa's biography of Scott, *The Politics of the Imagination: A Life of F.R. Scott* (Vancouver: Douglas & MacIntyre, 1987) at chapter 18: "Jehovah's Knight Errant".

made illegal the propagation of communism in Quebec, and which gave to the Attorney General the authority to order that such houses be padlocked. Rand J. along with two other judges reasoned that provincial legislation could not interfere with a constitutional right to freedom of expression. One of the two, Abbott J., ventured that perhaps the federal Parliament was similarly constrained, though Rand J. explicitly declined to commit himself either way on this point.⁴³

In short, after these victories, *Roncarelli* might seem like no big deal. The Supreme Court with some recurrent dissenters⁴⁴ was unwilling to tolerate provincial interference with the freedoms of religion, speech and association. Moreover, in 1950 the Court had made clear its disapproval of government action against alleged moral subversion. Aimé Boucher was charged in 1946 with sedition for distributing copies of “Quebec’s Burning Hate”, but in *Boucher v. The King* the majority of the Supreme Court held that the common law offence of sedition was confined to the incitement of violence against government or constituted authority.⁴⁵

It is important to note that in all of the implied rights cases, not only was there significant dissent, but the majority of the judges in the majority reached their conclusions without relying on an idea of implied rights. Like these cases, *Roncarelli* was a sharply contested decision with three dissents,⁴⁶ and it followed a Court of Appeal decision which went against *Roncarelli* with only one dissent. As I will now argue, the constitutional significance of Rand J.’s judgment emerges when we appreciate that the decision was so contested because its jurisprudential basis was the unwritten values of the common law constitution.

⁴³ *Switzman*, *supra* note 13 at 307 and 328.

⁴⁴ In *Smith*, Taschereau, Cartwright and Fauteux JJ. dissented, the same three plus Rinfret C.J. dissented in *Saumur*, while in *Switzman* only Taschereau J. dissented.

⁴⁵ *Boucher*, *supra* note 38. This case was complicated by the fact that it was heard twice by the Supreme Court. At the first hearing, the court was unanimous that Boucher had not received a fair trial and that the trial judge had not adequately summed up the law for the jury. The question then arose whether Boucher should stand trial again. Rand J. held that he should not and, after a second hearing, the majority of the Supreme Court held that he should be acquitted. Rinfret C.J., Taschereau, Cartwright, and Fauteux JJ. dissented; Rinfret C.J. on the basis that it was for the jury to decide whether the accused was guilty of the offence. The others, keenly aware of the fact that the document inveighed against the Quebec judiciary for its part in the suppression of the Witnesses, held that an intention to vilify the administration of justice could constitute a seditious intention and that the document did afford a basis for a jury to decide that there was such an intention. Further, in *Chaput v. Romain* [1955] S.C.R. 834 and *Lamb v. Benoit* [1959] S.C.R. 321, the Supreme Court awarded damages against policemen who had acted without legal authority in harassing Witnesses.

⁴⁶ In *Roncarelli*, *supra* note 4, Taschereau, Cartwright and Fauteux JJ. were again in dissent.

The obstacle which Article 88 of the Quebec Civil Code posed did not bother Justice Rand for more than a moment. He held that the abuse of discretionary authority was such that the act which constituted it so far exceeded the authority of the official that it was “one done exclusively in a private capacity”.⁴⁷ But, I agree with Mullan; I do not think that the significance of the case lies in this issue, nor in the interesting issue which I shall not deal with at all - the complexity of the award of damages - nor even in the claim that Duplessis had unlawfully usurped a statutory power. Rather, the judgment’s deep significance lies in Rand J.’s discussion of the “purposes for which public power or authority may be exercised legitimately”.⁴⁸ It is that discussion which reveals Rand J.’s understanding of the substantive content of the rule of law and thus of what one might call the constitution of legality.

One way of understanding the legal wrong in the exercise of authority in *Roncarelli* is that Archambault had sought Duplessis’s advice and had received what Duplessis regarded, and Archambault accepted, as an order. Since Duplessis, whatever he himself thought, was not entitled to give orders to Archambault, the wrong consisted in the fact that Duplessis acted illegally in applying this pressure on Archambault. Just this understanding is offered by Peter Hogg, who summarises the holding of the case as “the principle of validity – that every official act must be justified by law”. Hogg says: “Duplessis could not rely on his high office, nor his judgment as to the public interest, as justification for his act. Only a statute would suffice to authorize the cancellation of the license, and the statute which did authorize license cancellations gave the power to another official, not the Premier.”⁴⁹ A similar view of the case was articulated by Bora Laskin in 1959 in his article, “An Inquiry into the Diefenbaker Bill of Rights”.⁵⁰

There are two problems with this view. The first is that it invites disagreement about whether Duplessis had as a matter of fact dictated Archambault’s decision. While at trial Mackinnon J. had found as fact that there had been such dictation, the majority of the Quebec Court of Appeal denied that there had been, as did the dissenters in the Supreme Court. Here it is important to recall that Archambault had *asked* for Duplessis’s advice. Whether or not

⁴⁷ *Roncarelli*, *supra* note 4 at 144.

⁴⁸ Mullan, “Defining the Limits” *supra* note 7 at 74.

⁴⁹ Peter W. Hogg, *Constitutional Law of Canada*, 3rd edition (Toronto: Carswell, 1992) at 768-9.

⁵⁰ (1959) 37 Can. Bar Rev. 77 at 99.

Duplessis himself regarded what he had said as constituting an order which Archambault had to follow, it was not totally implausible to understand the situation as one in which, from Archambault's perspective, Duplessis had merely strongly confirmed the correctness of a course of action which Archambault was in any case contemplating. Imagine, for example, that Archambault had consulted Duplessis about the propriety of canceling the licence because diners in Roncarelli's restaurant regularly drank to excess and then created a public nuisance once they left the restaurant. In those circumstances, however strongly Duplessis couched his instruction to cancel the license, I for one doubt that there would have been a case against either him or Archambault.

The second problem is more significant. Hogg and Laskin, together with the majority of the Quebec Court of Appeal and the dissenters in the Supreme Court, seem committed to the view that had Archambault taken the decision without consulting Duplessis that the decision would have satisfied what Hogg calls "the principle of validity – that every official act must be justified by law".

The difficulty that arises here is illustrated best by Cartwright J.'s dissent in *Roncarelli*. While Cartwright J. held the view that Duplessis had not influenced the decision to cancel the license to any great degree, he was prepared to assume that Duplessis's instructions to Archambault constituted a "determining factor" for the purposes of the legal discussion. But after reviewing the statutory framework, he observed:

On a consideration of these sections and of the remainder of the Act I am unable to find that the Legislature has, either expressly or by necessary implication, laid down any rules to guide the commission as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted. In my opinion the intention of the legislature, to be gathered from the whole Act, was to enumerate (i) certain cases in which the granting of a permit is forbidden, and (ii) certain cases in which the cancellation of a permit is mandatory, and, in all other cases to commit the decision as to whether a permit should be granted, refused or cancelled to the unfettered discretion of the commission. I conclude that the function of the commission in making that decision is administrative and not judicial or quasi-judicial.⁵¹

⁵¹ *Roncarelli*, *supra* note 4 at 166-67.

He also invoked Masten J.A., speaking in *re Ashby et al.*,⁵² saying that the legislature intended such administrative discretion “to be a law unto itself.”⁵³

The second problem, then, is that the Hogg and Laskin view of the rule of law is substantively empty. It holds that if the legislature has delegated authority to an official, the only controls on the official are those controls explicitly stated in the legislation. Of course, an official whose authority is to issue and cancel liquor licenses is limited to just those tasks; he cannot start making decisions about immigration matters. But as long as he stays within the limits of his authority he can act as he pleases. For judges to impose controls beyond what the legislature has explicitly stated is for them to usurp the law-making role which in a democracy is reserved to the legislature.

In other words, Cartwright J. subscribes to the *ultra vires* doctrine as the legitimating basis of judicial review. That doctrine holds that the rule of law is maintained by judges seeing to it that the administration does not act arbitrarily or “beyond its powers”, where powers means the authority delegated by Parliament.

The *ultra vires* doctrine presupposes a particular version of the separation of powers in which the legislature makes law, judges interpret the law, and the executive administration implements the law.⁵⁴ When judges articulate this doctrine in their judgments, they deploy it as a political account of the legitimacy of judicial review. At the same time, it is an account of the rule of law in which judges are seen and see themselves as the guardians of that rule. Law in the modern state is legitimately made by the institution with the mandate of the people to make law. The legitimacy of the other institution - the judiciary and the administration - derives from that democratic legitimacy.

To use terms coined by Paul Craig to describe A.V. Dicey’s influential articulation of the rule of law in the late nineteenth century, the vision of democracy here is “unitary”. There are two pillars to the rule of law: the first being the sovereign, legally unlimited legislature, an

⁵² [1934] O.R. 421 at 428 (C.A.).

⁵³ *Roncarelli*, *supra* note 4 at 167.

⁵⁴ Here I rely on my “Formalism’s Hollow Victory” (2002) 4 N.Z.L. Rev. 525 [Dyzenhaus, “Hollow Victory”].

institution with a “monopoly” on making law. The second pillar is an independent staff of judges who also enjoy a monopoly – their monopoly is over interpretation of the law. The administration is delegated authority to implement that legislation and can be said to enjoy its own monopoly over that task, but the administration is not a pillar of the rule of law since it has no inherent authority to make or to interpret the law. The rule of law is maintained by judges seeing to it that the administration does not act outside the limits which Parliament set.⁵⁵

This package of beliefs about the nature of democracy, the separation of powers, and the basis of judicial review makes up a complete account of the rule of law, which I will call the “formal” account. It is formal both because of the very distinct roles it sketches for the different institutions of legal order and because it does not build any moral values into its structure. Judicial review is legitimate not because it protects moral and political values, but because it maintains the integrity of the separation of powers, as formally understood. There are no legitimacy gaps in the formal account of the rule of law, no problems in accounting for the tasks performed by each institution, as long as each institution sticks to its clearly defined role.

The formal account of the rule of law is a powerful one. Indeed, if we hark back to the exchange between Chief Justice Lamer and Justice La Forest, La Forest J.’s response to Lamer C.J.’s claims about the unwritten constitution articulates just this account of the rule of law. It is the many proponents of that account, who come from all parts of the political spectrum, that Mullan wishes to placate by reliance on the idea of “underlying” rather than “unwritten” principles of constitutionality. However, my contention is that it is just that account that Justice Rand opposes, with no attempt at placating his opponents.

Notice in this regard how different was Rand J.’s own understanding of the legal issues in *Roncarelli*. He did view Duplessis’s intervention as sufficient to make the cancellation a wrongful act and so he could have rested his judgment on this point. I want to highlight this aspect of this reasoning because of the tendency (which accompanies the worry about stirring up the foes of unwritten constitutional principles) to suggest that judges should confine themselves to the minimum foundation necessary to sustain their conclusion in controversial public law

⁵⁵ P.P. Craig, *Administrative Law*, 4th ed. (London: Sweet & Maxwell, 1999) at 4-7.

cases. Thus in *Switzman*, Kerwin C.J. said that “in cases where constitutional issues are involved, it is important that nothing be said that it unnecessary” and he stuck resolutely to a division of powers basis in the text, a stance in which he was joined by Locke, Nolan and Cartwright JJ.⁵⁶ And Mullan, in his lecture to you, indicated his agreement with the American constitutional scholar Cass Sunstein’s view that an essential ingredient of good adjudicative practice in constitutional law is that judges should aim to achieve only “incompletely theorized agreements” about constitutional norms, lest they be perceived as arrogating democratic power.⁵⁷

Justice Rand, however, found it important to stress that even if Archambault had acted on his own initiative, he would have considered this an abuse of discretion. Fundamentally at stake, in his view, was the purpose which lay behind the cancellation, not the question of whether that cancellation had been dictated by someone who had no authority to do so. Indeed, in Rand J.’s view, if Archambault was not entitled to cancel for a prohibited reason then Duplessis had no competence to issue an order on the basis of the same reason.

To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be ‘forever’. This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and *a fortiori* to the government or the respondent ... There is here an administrative tribunal which, in certain respects, is to act in a judicial manner ... [W]hat could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the *Liquor Act*? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.⁵⁸

Notice how Rand J. here ups the stakes. The issue for him is not just that there is an abuse of discretion, but that the kind of abuse is one that undermines the appropriate relationship between citizens of a democracy and their state. Citizens have certain rights, for example,

⁵⁶ *Switzman*, *supra* note 13 at 288.

⁵⁷ Mullan, “The Legacy of Justice Rand”, *supra* note 5. He refers to Sunstein, *Developing Democracy – What Do Constitutions Do?* (New York: Oxford University Press, 2001) at 55-66.

⁵⁸ *Roncarelli*, *supra* note 4 at 141.

freedom of expression and freedom of religion, and it is beyond the scope of the government's authority in making decision about the allocation of public resources to allow those decisions to be swayed by views about the actual exercise of these rights.

Rand J. is not therefore distracted, as Cartwright J. was, by the claim that discretions are by and large unreviewable if their subject matter is a privilege not a right and the decision about allocation was not subject to any statutorily prescribed controls. Put differently, he does not work within the formal categories of the day which divided the administrative world between quasi-judicial and administrative authority, a distinction which left vast tracts of the administrative state virtually uncontrolled by either the procedural controls of natural justice or by judicial scrutiny of the actual decision. Just how prescient his decision is, is revealed by the fact that it was not until *Nicholson*⁵⁹ in 1979 that the Supreme Court began to subject such discretions to requirements of natural justice or fairness. And it was not until *Baker*⁶⁰ in 1999 that the Court recognized that discretionary authority is not substantively different from authority to interpret the law, and so should be subject to the control of the pragmatic and functional test developed by the Court to evaluate such interpretations.

One way of describing Rand J.'s approach is to say that it is functionalist (a term which is supposed to contrast with the formalism of categories). A functionalist judge looks to the reality of the exercise of discretion rather than its form.⁶¹ Certainly, Rand J. was concerned with the actual impact of the administrative decision on Roncarelli. What makes the decision susceptible to judicial scrutiny, or "judicial", is not some prior formal category but its effect. However, Justice Rand measures effect not just physically but also normatively, against the backdrop of a conception of the appropriate political relationship between citizen and state.

Once one sees this, it might also seem that what I described as the emptiness of Cartwright's formal understanding of the rule of law is not a problem but a virtue. It is precisely

⁵⁹ *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311.

⁶⁰ *Baker v. Canada (Minister of Immigration)* [1999] 2 S.C.R. 817.

⁶¹ See Andrée Lajoie, "The Implied Bill of Rights, the Charter and the Role of the Judiciary", Ivan C. Rand Memorial Lecture, (1995) 44 U.N.B.L.J. 337 at 340. At 354 Lajoie moves to describing Rand "at the risk of caricature" as a judge who "values freedoms against the State, and puts individual rights above social structure". There is a tension between these descriptions and, as I try to indicate in the text, Lajoie is right to identify the potential for caricature.

that quality that reserves to the legislature the authority to fill the law with content and prevents judges from imposing their own views both on statutes and administrators. Trailing these problems is usually the spectre of judges like Lord Hewart, whose hostility to the administrative state prompts them to try to hold it back under the guise of the rule of law.⁶²

However, this view of the rule of law departs dramatically from the rationale that has been offered down the centuries for its virtue, that the rule of law is worth having because it also us to escape the arbitrary rule of men. Rand J. articulated just this rationale in one of the two most famous passages from his judgment:

The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. ... That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.⁶³

Rand J.'s premise here is that the requirement that public officials act in accordance with the rule of law, or non-arbitrarily, is a constitutional requirement: "a fundamental postulate of our constitutional structure". He is also saying that if this requirement is interpreted as the formal understanding of the separation of powers requires, the result will be that the rule of law disintegrates. For on that understanding, officials may do as they like, they are a law unto themselves, as long as they do not bump against the explicit constraints of the statute.

⁶² See Lord Hewart, *The New Despotism* (London: Ernest Benn Limited, 1929). I found in the University of New Brunswick Law Library a book of Hewart's occasional essays, which came from Lord Beaverbrook's personal library—*Not Without Prejudice* (London: Hutchinson and Co., undated). In one of these essays, "The Mischief of Bureaucracy" at 92, Hewart rails against what he calls the "administrative lawlessness" of the administrative state, and at 151, in an address to the "Juridical Society of Johannesburg" in 1936, he revisits this theme. How astute an observer of politics and justice he was is shown by his account of his trip in 1936, "A Visit to South Africa". At 137 he says: "The white population in town or country, whether it goes back to British or Dutch origins, lives in perfect amity and good will, while the happy and smiling faces of the natives speak of contentment and security".

⁶³ *Roncarelli, supra* note 4 at 141-2.

As Justice Rand makes clear, there is more to a statute than its explicit constraints. In the other famous passage from the judgment, he says:

In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion', that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The legislature cannot be so distorted.⁶⁴

The direction of argument here is very important. Logically, the formalist should not permit review even when there is fraud or corruption. Once one allows in fraud or corruption, one has put a foot firmly onto a slope where in principle there are other values that have to be taken into account if the exercise of discretion is to be in good faith. Here one should note that Rand J. is particularly sensitive to the vulnerability of the person whose life and livelihood is subject to administrative decisions - but he is sensitive to this factor without evincing any hostility to the administrative state. His point is only that in an era when our lives have become increasingly subject to public regulation, such regulation should not be arbitrary:

The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that

⁶⁴ *Ibid.*, at 140.

means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.⁶⁵

Justice Rand's conception of the rule of law, then, is one that seeks to remove the elements of bad luck or arbitrariness that are endemic in the administrative state - the bad luck of having one's fate turn on the discretion of officials who are pursuing ends that undermine the citizen's status as equal before the law or who are failing to take into account considerations that have to be taken into account in order to sustain that status. It is an affront to the dignity and equality of the citizen if his or her fate turns on the luck of the draw of executive officials. But, as I will now show, if judges are to guard us against such arbitrariness, they have to depart quite dramatically from the formal account of the rule of law.

LUCK AND THE RULE OF LAW

[T]he common law acknowledges no limitation to legal sovereignty nor any outside juridical order which can impinge upon it. In a practical sense, it does not contemplate action by legislature which is nugatory by reason of its contradiction of the natural environment. But, however, independent courts may be, they are bound by the declared law; and the accountability of the legislature is to the electorate.⁶⁶

In one sense, Roncarelli was lucky, as Mavis Baker was some forty years later, in that just as Baker was given the notes of the front line immigration officer who dealt with her case, Roncarelli had the record of unabashed government. Rand J. was very aware of this element of the case, and conceded that it was often "difficult if not impossible in cases generally to demonstrate a breach of this public duty in the illegal purpose served" and that there might have been "no means of compelling the Commission to justify a refusal or revocation or to give reasons for its action".⁶⁷

There is nothing in Rand J.'s judgment that indicates a readiness to find a duty to give reasons, a duty which was not announced until *Baker*. But, in my view, speculation as to

⁶⁵ *Ibid.*

⁶⁶ Rand, "Independent Judiciary", *supra* note 2 at 5.

⁶⁷ *Roncarelli*, *supra* note 4 at 141.

whether Rand J. would have found such a duty in an appropriate case is not very fruitful. More interesting is that such a duty is necessary in order to fill out the conception of the rule of law to which he was committed.

Recall that in *Baker* the front line immigration officials had made the decision that Baker, an illegal “overstayer” in Canada, should not be permitted to stay in Canada on “Humanitarian and Compassionate Grounds”.⁶⁸ As the notes which were given to Baker’s lawyers revealed, the fact that she had four Canadian-born children seemed to these officials an extra reason to get rid of her rather than a humanitarian and compassionate ground which should weigh heavily in favour of permitting her to stay. Indeed, the notes reeked of prejudice and stereotype to the extent that the Supreme Court, as Madam Justice L’Heureux-Dubé conceded, could have decided the case on the ground of bias. But had the Supreme Court overturned the decision solely on the ground of bias, the message it would have sent to the executive was not to be foolish in the future. Thus, if the Court wanted to face up to the arbitrariness that had been brought to its attention, it was necessary that it took the extra step and articulated a general duty to give reasons when an official decision affects an important interest of the individual. One way, then, of understanding L’Heureux-Dubé J.’s judgment is that she wished to remove the element of luck or arbitrariness which made it improbable that most applicants for review of discretion would be successful even when the facts cried out for review, just because the facts would hardly ever be disclosed.

However, there is a deeper issue about luck. The language which L’Heureux-Dubé J. used to describe the basis of the duty to give reasons makes it clear that one of the values - perhaps the main value - which the duty serves is the dignity of the individual. It would be an affront to the dignity of the individual if her fate (literally meant) depends on the luck of the draw of executive officials.⁶⁹ It is not enough that the officials who make decisions affecting important or fate-affecting interests of the individual disclose their reasons, in case they are acting in bad faith or in a biased fashion etc. For a duty to give reasons is rather ineffective if the

⁶⁸ In this section I rely heavily on my chapter “*Baker: The Unity of Public Law?*” in my edited collection, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) as well as on my “The Unwritten Constitution and the Rule of Law”, in Grant Huscroft, ed., *Constitutionalism in the Charter Era* [forthcoming]. [Dyzenhaus, “Unwritten Constitution”].

⁶⁹ *Baker*, *supra* note 60 at para. 43.

message heard by the executive is that officials should in the future be very careful not to disclose reasons which provide evidence of bias etc., even if these are the real reasons. It would not be very difficult to recraft the notes in *Baker* so as to reach the same result without the stink of prejudice and stereotype. So a general duty to give reasons does not remove sufficiently the element of luck, which is why yet another step is necessary.

This additional step is the link L'Heureux-Dubé J. established between the reasons for the decision and the review of those reasons, and she held that these reasons should be reviewed on a reasonableness standard - the decision-maker must display a reasonable justification for the decision. This step might not look like a big deal in most common law jurisdictions, but it is. I think it is important to see that that step had already been taken by Justice Rand in *Roncarelli*. For, as I have indicated, Rand J. was not distracted by the distinction between quasi-judicial and administrative acts. For him discretions are controlled by the rule of law in a legal order which is committed to constitutionalism, whether or not there is a written constitution in place. He therefore had no trouble arguing, as we have seen, that there was a range of considerations which an official has to take into account and which have to be weighed.

My claim is that in a constitutional state, one that is committed to government under the rule of law, judges have to put in place three elements or constitutional fundamentals. First, they have to be committed to the view that the rule of law has content - law is not a mere instrument of the powerful. Rather it is constituted by values that make government under the rule of law something worth having. Second, judges are entitled to review both legislative and governmental decisions in order to see whether these comply with the values. Third, the onus is on both the legislature and the executive to justify their decisions by reference to these values.

All these three elements are present in Rand J.'s judgment in *Roncarelli*. Missing is only a component of the third - the duty to give reasons - which is the way in which the executive will justify its decisions so that the individual subject to the decision can know that, among other things, his dignity as an individual and his equal status before the law, has been respected, not only because the official has made the decision free from bias and bad faith, but also because the decision has been based on considerations appropriate to the particular statutory regime. The

“perspective within which a statute is intended to operate” is constituted not only by the statute. As L’Heureux-Dubé J. put it in *Baker*, discretion must be “exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.”⁷⁰

I want to focus on the way in which these last two elements relate to each other and in particular on the issue of the intensity of review of reasons for decision and the apparent oddness of the claim that legislatures are required to justify their decisions. When it comes to intensity of review, recall that Rand J. said that a “decision to deny or cancel such a privilege lies within the ‘discretion’ of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.”⁷¹

Justice Rand is not saying directly that the judge must reweigh the weighing, only that a process of weighing must take place. It is important to be aware that the Supreme Court of Canada is now rather preoccupied with the idea that whatever judges do, they should not “reweigh” the factors officials have to take into account in order to demonstrate that their decisions are reasonable.

Weight is, however, just a metaphor for a proper inquiry into the balance of reasons. It became part of the Canadian discussion because in *Baker* the majority was clearly influenced by the fact that Canada had ratified, though had not incorporated by legislation, the *Convention on the Rights of the Child*, which in Article 3 required that in administrative decisions affecting children, the “best interests” of the children had to be “a primary consideration”.⁷²

⁷⁰ *Ibid.*, at para. 56.

⁷¹ *Roncarelli*, *supra* note 65.

⁷² Iacobucci and Cory JJ. issued a partial dissent, which claimed to object only to this aspect of the majority’s reasoning and put the objection on classic dualist or positivist grounds – if the Charter is not directly involved, parliament is the sole source of legal value. Thus the dissent claimed not to object to the majority’s holding that the statute itself, as well as ministerial regulations, required that the children’s interests be given “substantial weight”, nor that judges should check to ensure that officials had been “alert, alive and sensitive to” the issue of whether appropriate weight had been given (at para. 75). As I have argued elsewhere, these grounds should also have led the dissenters to object to the finding of a general duty to give reasons as well as to the merging of categories of substantive review. See Dyzenhaus and Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v. Canada*” (2001) 51 U.T.L.J. 193.

But, at the Federal Court of Appeal (which upheld the decision to deport), Justice Strayer was clear that the most that a judge can do is check whether a relevant factor, like the children's interests, has been taken into account. For a court to evaluate how that factor was taken into account is to reweigh, which is illegitimate.⁷³ Since *Baker*, the Supreme Court has retreated from its position expressed therein, and has adopted the view, more like that of the Federal Court of Appeal, that judges must never evaluate the way that relevant factors figure in the official's reasoning. They can check that the right reasons were taken into account, but may not go into the balance of reasons, which is to say, reweigh the reasons.⁷⁴

Similarly, at both the Federal Court Trial Division and the Federal Court of Appeal in *Baker*, the judges found that the immigration officials had weighed the children's interests because they had taken into account that Baker had children. Thus, they seemed to understand that the officials' view (that the existence of Baker's Canadian-born children was a kind of aggravating circumstance or reason to get rid of her) could not be adopted without first considering the children's interests. This is of course a rather Pickwickian sense of taking interests into account: since the children had interests and since the children were considered, therefore their interests must have been considered. It can only be justified by the thought that for the judges to decide how the interests should be considered involves the illicit practice of assigning the interests weight.

However, my contention is that Rand J.'s conception of the rule of law, as well as L'Heureux-Dubé J.'s in *Baker* require such reweighing.⁷⁵ Moreover, I want to suggest that Rand J.'s conception of the rule provides an early example of what today goes under the title of

⁷³ [1997] 2 F.C. 127 at paras. 12 and 31.

⁷⁴ It is hardly an accident that this apparent retreat from *Baker* took place in the first major decision in the national security area given by the Supreme Court after 11 September 2001, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

⁷⁵ For further dispute in the Supreme Court on this issue, see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 [*C.U.P.E.*] where Binnie J for the majority relied expressly on *Roncarelli* but adopted the official line that he was not involved in reweighing the considerations which he thought the government had failed to take into account: As I argue in Dyzenhaus, "Unwritten Constitution", *supra* note 68, Binnie has to be wrong on this score as the government had to have weighed these considerations in order to reject them as a basis for future decision making. Indeed, it was precisely because the majority adopted a more intrusive standard of review, one which required reweighing, that three judges dissented.

dialogue. While I have no special liking for this title, it does give us some important pointers about the issue of the onus of justification which I claim both governments and legislatures bear.

When a court finds that an administrative process is procedurally defective it will usually avoid micromanagement of the future, leaving it to the agency to tailor the procedural requirements to its particular context. Similarly, a decision that is found to be substantively tainted will usually be remitted to the agency for a new decision, one which avoids whatever problems led to the taint. In doing this, courts adopt a stance of deference which complements the stance they already purport to adopt to the agency's initial determination.⁷⁶ Of course, there will be occasions when courts do not think that such deference is appropriate and so will more or less dictate the procedural requirements the agency should follow or substitute their decision for that of the initial decision maker.⁷⁷

Whichever course is followed, it is open to the legislature to respond by setting out its own understanding of how the decisions are to be made following the court's prescriptions. Alternatively, the legislature might choose to make it clear that its intention is that the officials should be free of the prescriptions. Notice that the privative clause - a clause that says no review - is one device a legislature can adopt in order to try to preempt any dialogue between courts, administration and legislature about the reach of the rule of law over a class of decisions. Judges

⁷⁶ The Supreme Court has generally suggested that such first time deference is not appropriate for procedural determinations but *Baker* might signal a change of mind.

⁷⁷ See, for example, the debate within the Supreme Court in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 where the issue arose out of the *Canada Elections Act*, which in section 51 (e) denied the right to vote to persons in a correctional institute serving a sentence of two years or more. (This section replaced an earlier provision which had denied the right to vote to all prison inmates, regardless of the length of their sentences and which the Court had in 1993 found unconstitutional -- *Sauvé v. Canada (Attorney General)*, [1992] 2 S.C.R. 438.) In a dissent in which three others joined, Gonthier J. recognised that the protection of the right to vote in section 3 of the Charter had been limited, but argued that that the limitation could be justified because Parliament had responded in its earlier dialogue with the Court in a morally reasonable fashion. Since the issue of how best to educate people in the value of the franchise is a controversial one, and since Parliament's response was reasonable, the Court should now defer. (See especially paras 108-121). McLachlin C.J., speaking for the majority, reasoned that the right to vote is so fundamental to democracy, deference is not appropriate. Lorraine Weinrib has suggested to me that Gonthier J.'s judgment is of a piece with the dissents to the implied bill of rights cases of the 1950s, that is, it preserves an idea that when it comes to protection of core moral values, the legislature reigns supreme.

See further the division in the Supreme Court in a matter which has occasioned yet another debate about judicial activism, because the majority of the Court upheld a trial judge's order which allowed him to retain jurisdiction to oversee implementation by a province of his order to provide French language education. *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62. See the dissent of LeBel and Deschamps JJ., Binnie and Major JJ. concurring, at paras. 110-111 and 118-124.

in the common law world have generally found a way to avoid interpreting such clauses literally. Indeed, even judges whose leanings are distinctly formalist find it difficult to countenance the thought that their Parliament could have intended officials to have a discretion that in effect is without legal limit.

More interesting, though, is what I call the substantive privative clause - a provision in a statute which either preemptively or reactively precludes the courts from reviewing on the basis of values that a judge thinks the official should take into account because the values are fundamental or constitutional. For example, consider a legislative response to the decisions in *Baker* which stated that the official could henceforth make decisions about humanitarian and compassionate considerations unreasonably, in a biased fashion, in bad faith and without giving any weight to the interests of the deportee's children.

I had once thought such a provision to be unrealistic, until I encountered the Australia's *Migration Act* 1958 (Cth), which provides in section 427 that the Federal Court of Australia has jurisdiction to review decisions made by immigration officials on very specific grounds, set out in subsection (1). For example, subsection (1)(f) says that the Court can review if "the decision was induced or affected by fraud or by actual bias". (That is, it would not be sufficient to show that the official made remarks during the hearing or gave reasons that smacked of racial stereotyping, one would need the official to say something like "Ordinarily I would let you stay in the country but I hate Jews and so I'm ordering that you be deported".) Subsection (1) is explicitly made subject to subsection (2) which says: "The following are not grounds upon which an application may be made under subsection (1): (a) that a breach of the rules of natural justice occurred in connection with the making of the decision; (b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power." Subsections (3) and (4) seek to specify and narrow some of the grounds of review listed. For example, (1)(d) permits review for an "improper exercise of power" but (3)(f) says that this does not permit review for "an exercise of power in bad faith".⁷⁸

⁷⁸ Compare the *Back to School Act (Toronto and Windsor)*, S.O. 2001, c. 1, s.11(4), which gave a conservative government the authority to appoint an arbitrator who "has no previous experience as an arbitrator", "has not previously been or is not recognized as a person mutually acceptable to both trade unions and employers", "is not a

In my view, this statute is crazy, or at least close to being crazy, in the same way as Robert Alexy, a distinguished German philosopher of law, argues that a constitutional provision which dedicates a country to the pursuit of injustice is crazy.⁷⁹ That judges might not have any choice but to abide by the statute does not undermine this claim. For the claim does not depend on whether or not judges can always enforce a common law conception of the rule of law. Rather, it depends on our judgment that there is a violation of the rule of law when a domain of government action should be governed by the rule of law, but the positive law of the legal order makes it clear that the domain is not so governed. Moreover, one should not infer from the fact that common law judges are sometimes helpless in the face of legislative craziness that the common law model has no implications for practice.

To the extent that a government is unwilling to make its desire to be unconstrained by the rule of law entirely explicit, judges are given toeholds in the law to impose rule of law constraints, if they are minded to do so. That is, since such judges operate on the assumption that government under the rule of law aspires to realise the values of the rule of law, they will interpret legislation on the basis that it shares that aspiration until they are forced by very explicit language to abandon that assumption.

At that moment, conversation between the judiciary, the legislature and the administration about how the rule of law should govern administration ceases.⁸⁰ Moreover,

member of a class of persons which has been or is recognized as comprising individuals who are mutually acceptable to both trade unions and employers”.

⁷⁹ Robert Alexy, “A Defence of Radbruch’s Formula” (translated by David Dyzenhaus), in Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999) at 27-8. Alexy’s example is as follows. A minority of the people in a country suppresses the majority but are honest about the injustice of their rule. So they decide to enact a constitution which has as its first provision: “X is a sovereign, federal and unjust Republic”. As he points out, the oddness of this provision goes beyond its immorality; it seems somehow “crazy”. And that craziness stems from a contradiction – “a claim to correctness is necessarily bound up with the act of giving a constitution, and in such cases it is above all a claim to justice”. Once we see this, we can no longer understand law as the “commands of the powerful”. I discuss Alexy’s claim in detail in “The Dilemma of Legality and the Moral Limits of Law” in Austin Sarat, ed., *The Limits of Law* [forthcoming], and in “The Juristic Force of Injustice”, in Dyzenhaus and Moran, eds, *Calling Power To Account: Law’s Response To Past Injustice*, [forthcoming], a collection of essays on the Chinese Head Tax litigation.

⁸⁰ Of course, that there is no way of exerting control over the administration does not mean that the administration is uncontrolled. There might well be a vigorous internal conversation within the administration about the rule of law and policy memoranda and regulations might constrain official discretion very effectively. Here it is worth noting that the phrase “a law unto themselves” comes from the New Testament: “For when the Gentiles, which have not

although that conversation ceases, this does not mean that political conversation is stopped. The decision by government to use Parliament to take the administration outside of the reach of the rule of law might well spark public outrage. My claim is not then that judges can always maintain the rule of law in the face of an assault by a powerful and determined government. Rather, it is that they can at least force government into an explicit declaration of its determination to govern outside of the rule of law. That judges can do this is sufficient, in my view, to show that the values in terms of which they control are constitutional. Whether the judges also think, as for example Abbott J. did in *Switzman*, while Rand J. was unwilling to declare his hand, that the values are constitutional in that they cannot be overridden by Parliament is not the crucial point. The crucial point is that judges cannot understand their place, nor the place of Parliament and the administration in legal order, other than in terms of a commitment to these values. When push comes to shove, the only check on government might be the sense of decency among the country's citizens. But if that check works, it works in part because what will outrage the citizens is the threat to the rule of law. What is so important about Rand J.'s judgment in *Roncarelli* is then is that it articulates the idea that the rule of law is a constitutional concept that operates whether or not there is a written constitution in place.⁸¹ It is that idea which puts Rand J.'s judgments at the head of the class of great constitutional judgments given by common law courts in the 1950s and, I also want to claim, *Roncarelli* at the head of the class of his judgments. His judgment in *Roncarelli* shows that the controls of the rule of law are triggered just by the fact that a society desires to live by the rule of law and has in place the institutions necessary to sustain that rule. A society may choose to state its commitment in documents which entrench the values of the rule of law, and much else besides, in various ways. While these documents do make a difference, sometimes a dramatic one, to the role of judges, they make a difference along a continuum which starts with ideas like the idea that judges are entitled to check whether the administration has acted in good faith.

the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves." Romans, 2:14. Here the suggestion is that the officials do the right thing but perhaps not for the right reason. I do not think that judges mean to pay the administration a compliment when they use this phrase. For discussion, see Dyzenhaus, "Hollow Victory", *supra* note 54.

⁸¹ As he put it in his Oliver Wendell Holmes Lecture at Harvard Law School:

[W]e have been able to draw implicit judicial support for some part at least of those fundamental rules and principles that with you are constitutionally explicit. We are at an early stage in the formulation of answers to questions which today in a legal aspect reach to the conditions of social cohesion, to the solidarity of free men under the Rule of Law (Rand, "Canadian Constitutionalism", *supra* note 3 at 136).

Notice here that even the barest attempt to set out a federal structure for a colony will usually require that assumptions that have been taken for granted in the home country might have to be articulated in textual form, notably, the role of the federally appointed judiciary. The existence of this text gives to judges a resource to question the validity of legislation that explicitly violates rule of law values. But the difference it makes is but one step along the continuum from the starting point in control of executive action and it is that starting point that is all important. *Mutatis mutandis*, one can make the same point about statutory bills of rights and entrenched bills of rights. I must mention here the view that the genius of the Canadian *Charter of Rights and Freedoms* resides in the way it preserves the methodology of the common law of judicial review, both through section 1, which allows government the opportunity to justify its understanding of how best to particularise rights, and section 33, which permits legislative override.⁸²

I do not want to deny that judges will experience certain tensions as they seek to give content to their constitutional standing as the independent guardians of the rule of law. On the one hand, if they fail to give the rule of law substantive content, they will appear to be more concerned with upholding their sense of their role than with doing the job that explains why they should have that role. On the other hand, as they give the rule of law content, they run the risk of appearing to usurp the legislative role, whether this be by their claim to discern fundamental legal values that stand free of any legislative texts and which control the legislature, or by their use of the same interpretative process to find controls on the authority of the administrative delegates of the legislature.

My contention is that they have no choice but to deal with these tensions if they are to uphold the rule of law. They have to adopt a regulative assumption that Parliament, the executive and judges are committed to a rule of law project which is about the realization of fundamental constitutional values, whether written or unwritten. Judges should thus try to find that legislation is legislation which seeks to achieve its particular objectives in the light of a wider legal project. Thus legislative meaning is not a top down communication - a "one way

⁸² For sustained argument in support of this claim, see Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

projection of authority”, as Lon L. Fuller described the positivist view or formalist view. Rather, as Fuller preferred to put it, law is the product of a relation of reciprocity between ruler and ruled.⁸³

I want to suggest further that the positivist or formalist account of the rule of law is not really available to judges in the human rights era. That account is best understood as a tradition, ranging from Thomas Hobbes through to Jeremy Bentham, which made political arguments for reducing the role of judicial interpretation as much as possible in legal order, because tradition saw this role as inherently competitive with the monopoly on lawmaking power that it thought should reside in one sovereign body. While I cannot go into this issue here, I think it might be the case that these distinguished philosophers would agree that judicial review of administrative decisions is not only on the continuum of situations of constitutional review, but the very starting point of that continuum. However, they would agree only in order to argue as vehemently against that starting point as they would against a fully entrenched bill of rights.⁸⁴

These arguments survive only in rather pallid forms, for example, in what I called earlier the prejudice that the important part of public law is constitutional law where constitutional law means an entrenched written bill of rights. Pallid as these forms might be, they still can and do exert a significant influence on adjudication and, moreover, in situations where the protections of the rule of law are both most fragile and most needed. This is the topic of my final section.

JUSTICE RAND'S IMPORTANCE TODAY

Great executives, by nature of their gifts and their own internal compulsions, drift to domination. They are now essential to government; democracy must avail itself of their abilities; but it must, at the same time, maintain counterbalancing agencies against their tendency. The most immediate of these is the court in its duty to keep executive action within the boundaries of the country's laws.

The consideration of these rights influences the interpretation of statutes generally. The judgment of Lord Atkin in *Liversidge v. Anderson* is a striking

⁸³ Lon L. Fuller, *The Morality of Law*, revised edition (New Haven and London: Yale University Press, 1969, revised edition) at 207.

⁸⁴ I explore these issues more fully in “Aspiring to the Rule of Law”, in Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone, eds., *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press, 2003) 195 and in “The Genealogy of Legal Positivism”, (2004) 24 *Oxford J. Legal Stud.* 39.

recognition of that fact. Although he was in dissent, his powerful protest against committing the liberty of the subject, even in time of war, to the decision of the Home Secretary regardless of the sufficiency of the grounds will long remain a warning against acquiescence in such encroachments.⁸⁵

As in all things, Rand J. is way ahead of his time in his discussion of citizenship. Lorraine Weinrib has suggested that one has to understand Rand J.'s judgments as part of the postwar wave of constitutionalism which reacted to the horrors of World War II. As she points out, that wave, a reaction to the horror at what authoritarian regimes had done to their own citizens and to the people whose territories the regimes occupied, also provoked some soul-searching about the injustices endemic in the societies who had gone to war to fight the injustice of racism.⁸⁶

Recall here that Japanese Canadians had been abominably treated by the Canadian government during the war. They had been evacuated from their homes and their property had been confiscated. While in 1944, around 4,000 had been relocated east of the Rockies, most of them remained in camps within the interior of British Columbia. Mackenzie King then forced them to choose between relocation to the east, where they knew that they would not be well received, and "agreeing" to be "repatriated" to Japan. Almost 10,000 chose the second option. But as Thomas Berger points out:

This was not repatriation. Japan was not their homeland; it was a country the majority of them had never seen. Their consent was obtained by foreclosing any other possibility. Thousands of persons – two-thirds, in fact, of those who signed applications for 'repatriation' -- later applied to cancel them.⁸⁷

After the Japanese government surrendered unconditionally in 1945, the question arose of what would happen to Japanese Canadians. The *War Measures Act*, under whose cover the government had conducted its oppression of this group, was supposed to apply only in case of "war or insurrection, real or apprehended". Since the war was over, the government had Parliament enact the *National Emergency Transitional Powers Act*, which among other things

⁸⁵ Rand, "Independent Judiciary", *supra* note 2 at 10.

⁸⁶ 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 Can. Bar Rev. 699 at 710-20.

⁸⁷ See "The Banished Canadians: Mackenzie King and the Japanese Canadians" in Berger, *supra* note 8, at 112-13.

declared that the orders made under the *War Measures Act* would continue to have the force of law “as the Governor General may prescribe”. Among these orders were several orders-in-council which provided for the deportation of all individuals of Japanese descent who had “requested” “repatriation” in 1944 and for, where relevant, their loss of citizenship. 10,347 Japanese Canadians, three quarters of whom were Canadian citizens and half of whom were Canadian-born, were subject to this order, which Mackenzie King justified by claiming that their “agreement” to “repatriation” proved their disloyalty to Canada.

When a campaign began against the deportations, Mackenzie King agreed to refer the legality of the orders-in council to the Supreme Court. But the majority of the Supreme Court held that the *War Measures Act* conferred the authority on the government to take such measures.⁹¹ Chief Justice Rinfret, joined by two of the majority judges, reasoned that because the orders-in-council could have been adopted by Parliament, and since the *War Measures Act* authorized the Governor in Council to adopt any measures that Parliament could have adopted, and since the Governor in Council was the “sole judge of the necessity or advisability of these measures” it was “not competent to any Court to canvass the considerations which may have led the Governor in Council to deem such orders necessary or advisable for the objectives set forth”.⁹² It took until 1947 for Mackenzie King to relent, by which time almost 4000 people had been deported.

Rand J. was one of two judges who dissented, saying that he could not conclude that the *War Measures Act* gave the government authority to deal with Japanese Canadians in this way any more than he could conclude that it had the authority to deport an English Canadian who agreed with Mosley, or a French Canadian who supported Pétain, or an Irish Canadian who supported deValera.⁹³ He outlined his understanding of the control by law of discretionary power in a passage that lays the basis for much in his later judgments:

⁹¹ *Reference re: Persons of Japanese Race* [1946] S.C.R. 248, confirmed by the Privy Council in *Cooperative Committee on Japanese Canadians v. Canada (A.G.)* [1947] A.C. 87 (H.L.). I rely heavily here on, at times paraphrasing, Berger, *supra* note 8 at 114-18.

⁹² *Reference re: Persons of Japanese Race*, *ibid.* at 277.

⁹³ *Ibid.* at 290.

I think that Parliament in enacting the *War Measures Act* must have contemplated, as a fundamental assumption underlying the statute, the delegation of legislative power of a strictly legal character only, and must have intended to restrict the Governor in Council to measures or actions in which full juridical quality would inhere: that power without recognized legal character would be excluded. What is proposed here is not juridical: it is an act envisaging the violation of the sovereign rights of another state by an invasion of its territory and an affront to its dignity as represented by the occupying power. This quality, of course, is not present in the case of an alien: there the authority of expulsion is a necessary corollary to that of the right to exclude ... but the fundamental distinction between the two cases is, I think, unquestionable. As a further illustration of the principle invoked, I mention the presumption against the power to make retroactive orders, which I suggest would bind the Governor in Council, though there is no such restriction on Parliament.⁹⁴

Rand J. was here protecting citizens against an executive measure that would strip them of their citizenship. Not only does he make it clear that the restraint he has in mind is a restraint on the executive, though not on Parliament, but he also seems to concede that the executive would have an unfettered discretion if the potential deportees were not citizens.

In the last section, I suggested that the first point does not undermine a conception of the rule of law as long as one understands that government might use Parliament to take the administration outside of the reach of the rule of law. In this section, I want to suggest that Justice Rand's focus on citizenship does have some costs.⁹⁵

You will have noticed that as I used *Baker* to draw out the lesson of *Roncarelli*, the individual as human rights bearer replaced Rand J.'s citizen as the description of the legal subject. I like to think that Rand J.'s concern for the status of the marginal and the marginalized

⁹⁴ *Ibid.* at 290-1.

⁹⁵ Here it is worth noting that in *Roncarelli* Rand took the last part of Scott's *factum* which Scott added as "Special Considerations" and made it the basis of his judgment. At 80-2 of the *factum*, Scott makes bolder claims about judicial duties where fundamental rights are at stake. He argues that the rules of statutory interpretation should be strictly applied in such situations so as to preserve those rights. He further states "[t]his [interpretive] duty is of particular importance in Canada since our Constitution does not contain a formal bill of rights. The judges are guardians of the liberties of the subject." Applying that idea to the case at hand, Scott argues that the cancellation was a "grievous invasion of his religious and civil liberties" and invites the Court to proscribe the use of public power towards such ends. Generally speaking Rand's jurisprudential vision is far more profound than the one articulated by Scott. But there is one aspect of the *factum* in which Scott has the edge. Scott made it clear that this last part was about the protection of human rights., saying that the case "raises grave questions of fundamental freedoms and human rights".

would have led him to welcome this replacement. For it is only when the relationship between ruler and ruled is thought of in these terms, and not confined to citizenship, that Rand J.'s vision of the rule of law can be fully realized. Only then can one maintain a keen awareness of what my colleague Audrey Macklin calls "law's role in producing the alien within",⁹⁶ the law's ability to move people in and out of the status of those who deserve the protection of the rule of law.

There are three different devices which governments might adopt through legislation in order to give them the authority to move individuals in this way. First, there is direct legislative fiat, as for example, would have been the case had the federal Parliament directly stripped Japanese Canadians of their citizenship. Second, there is the device in fact adopted by the federal Parliament, which purported to give authority to the executive to perform the fiats. Finally, there is a device which invites abuse of the rule of law, without so clearly targeting particular individuals or groups.

This last device is the hardest to deal with. The problem is that it invites arbitrariness, but one has to specify in what way it does so without turning one's criticism into a wholesale attack on the administrative state. For example, there was, Justice Rand rightly thought, nothing inherently wrong with the delegation to the Quebec Liquor Commission of the authority to issue and cancel licenses; the problem arose out of the particular circumstances of Roncarelli's case. So the question is how to distinguish that kind of delegation of discretion from one that somehow invites arbitrariness, thus tainting the very fact of delegation from the point of view of the rule of law.

I was led to this train of thought when, in looking for material for this lecture, I came across the 1993 book by Gary Botting, *Fundamental Freedoms & Jehovah's Witnesses*.⁹⁷ Botting is a Jehovah's Witness who went to Law School at age 43. He was concerned that the Witness cases of the 1950s were being replayed in Canada in the 1980s because of the prosecutions of James Keegstra and Ernst Zundel. As a convinced free speech libertarian he

⁹⁶ Audrey Macklin, "Borderline Security", in Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 383 at 398.

⁹⁷ (Calgary: University of Calgary Press, 1993).

applied for articles with Doug Christie, the lawyer who has made a career of representing Holocaust deniers as well as other anti-semites and racists. Botting recounts how he was, with Christie, “lambasted” despite the fact that he says that he was “unambiguous” about his “disavowal of the validity of the ideas held by some of [Christie’s] clients”. He compares Christie to W. Glen How, one of the lawyers who defended Witnesses and thus, he says, like Christie became “black sheep” of the legal profession. “Both men”, were, he says, “counsel, thirty years apart, in what I firmly believe to be among the central civil liberties cases of this century”.⁹⁸

Now this book contains a rather good account of how a Canadian conception of the rule of law emerged from the cases in which the Supreme Court intervened to prevent the oppression of the Witnesses. But as you can already tell, the book is in some respects very curious. Further to this point, Botting’s entry for the Holocaust in the index is in quotation marks. He manages to drift quite close at times to suggesting that whether the “Holocaust” happened is a matter of faith, saying that “it has become a central icon of the contemporary Jewish faith”.⁹⁹ He also suggests that Keegstra and Zundel ran afoul of a “Jewish lobby”, because they had the “temerity to persist in expressing opinions that diverge from the establishment view”.¹⁰⁰ When he distances himself from anti-semites, he cannot bring himself to say that that Nazis murdered millions in gas chambers, preferring to say that there “is little doubt that millions of Jews disappeared during the Second World War, and ample evidence to show that most of the missing died in abominable conditions in concentration camps such as Auschwitz, ... as part of the Nazi ‘Final Solution to the Jewish Problem’”.¹⁰¹

Perhaps Botting would think differently today, as there is a letter available on various Internet sites in which he claims to have realized that Christie is not a great fighter for civil liberties, but rather someone who uses the law to defend views he finds sympathetic.¹⁰² But whether or not one feels, as I do, more than a sense of unease about the more curious parts of the book, as well as about the fact both that the manuscript received federal funding after a review

⁹⁸ See *ibid.* at the Preface, especially at xvi-vii.

⁹⁹ *Ibid.* at 188.

¹⁰⁰ *Ibid.* at 194.

¹⁰¹ *Ibid.* at 196.

¹⁰² See e.g., Anti-Racist Action Alberta Announcements, online: <<http://www.connect.ab.ca/~plawiuk/ara.html>>.

by a Social Sciences and Humanities Research Council panel, and that it was published by the university press of a public university, one should perhaps recognize that what Botting has to say contains at last two important insights.

First, it is often the case that those whose oppression leads to great constitutional decisions have trouble finding representation just because lawyers who take up unpopular causes will be often be vilified along with their clients. Roncarelli and other Witnesses had just this trouble, which is why Sandra Djwa in her biography of F.R. Scott entitles the chapter on Scott's appearances before the Supreme Court on behalf of the Witnesses, "Jehovah's Knight Errant".¹⁰³

Second, I do not think that anyone who regards Rand J.'s judgments as an achievement of the highest order for a society that values the rule of law can feel entirely comfortable with the Supreme Court's jurisprudence on freedom of expression and hate or pornographic speech. I say this despite the fact that my first citation in a Supreme Court judgment, something of which I am still inordinately proud, came in a decision, *Butler*,¹⁰⁴ where the Court extended its holding in *Keegstra*¹⁰⁵ in order to uphold the obscenity provision of Canada's Criminal Code.

As *Butler* made its way up to the Supreme Court, I had argued that the obscenity provision is in principle justifiable in light of some feminist-inspired claims that pornography undermines the equality rights of women.¹⁰⁶ Sopinka J.'s judgment for the majority of the Court slips constantly between that kind of argument and the kind of argument put by Lord Devlin that a society is entitled to use the law to protect its core moral values.¹⁰⁷ In other words, Sopinka J. is often tempted by just the sort of argument relied upon by Duplessis and other Quebecois in their bid to protect their society's moral identity from the subversion of the Witnesses.¹⁰⁸

¹⁰³ Djwa, *supra* note 42.

¹⁰⁴ *R v. Butler*, [1992] 1 S.C.R. 452 [*Butler*].

¹⁰⁵ *R v. Keegstra*, [1990] 3 S.C.R. 697 [*Keegstra*].

¹⁰⁶ Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality", (1991) 1 C.R. (4th) 367, "Should Community Standards Determine Obscenity?" (1990) 72 C.R. (3d) 49.

¹⁰⁷ Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).

¹⁰⁸ It is not, I believe, a coincidence that it was Sopinka J. who gave the judgment in *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, where he stated that the most fundamental principle in immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.

If Sopinka J.'s judgment could be explained wholly by the fact that he was a deeply conservative judge, so that another judge would not have permitted that slippage to happen, *Butler* would not be so troubling. What makes it troubling is that it might be the case that whatever argument is used to sustain the obscenity provision, that slippage is likely to occur.

The obscenity provision, like the idea of seditious libel, has its roots in a time when the common law conception of the enemy invited judges and legislators to protect themselves from the kind of internal enemy whose speech threatens the moral status quo. So it was predicted at the time *Butler* was decided that those who would be targeted by officials who took comfort from the constitutional legitimacy the Court had imparted to the obscenity provision would not be those who ran the heterosexual pornography industry, but the more marginal groups in our society.

And so it came to pass, as the *Little Sisters* litigation revealed.¹⁰⁹ For Customs officers, following a Customs Operation Manual, used their discretion under the *Customs Act*¹¹⁰ to identify and seize "obscene" materials to target gay and lesbian publications. In his judgment for the majority of the Court, Justice Binnie agreed that the administration was acting in an "oppressive" way,¹¹¹ but he refused to grant the section 52(1) remedy sought which would have struck down the obscenity provision in the *Customs Act*. Binnie J. reasoned that the Manual was not law, and so did not satisfy the "any law" requirement that has to be met before section 52(1) becomes relevant.¹¹² In other words, the oppression was caused not by the legislation but by the exercise of discretion. So the only remedy available was under section 24(1), which in the circumstances amounted to a declaration that the customs officials had in the past understood their discretion in a manner inconsistent with the *Charter*.

¹⁰⁹ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 [*Little Sisters*]. I am deeply indebted in my account to Lorne Sossin's argument in "The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion", in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 87 at 91-8, and to Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2002) 41 *Osgoode Hall L.J.* 1.

¹¹⁰ *Customs Act*, R.S.C. 1985, c.1.

¹¹¹ *Little Sisters*, *supra* note 109 at para. 40.

¹¹² *Ibid.* at para. 85.

Notice the legal conundrum posed by this reasoning - the circularity in the claim that the Manual is not law because its production is not subject to law and so should not be subject to control by law.¹¹³ That same circularity was posed by the distinction between quasi-judicial and administrative decisions which supposed that administrative decisions were not subject to legal controls because they were not subject to legal controls. So I want to question why Justice Binnie (who has subsequently invoked *Roncarelli* to justify a rather bold assertion of judicial control on a subjectively framed ministerial discretion)¹¹⁴ was so reluctant to find that the requirement of an infringement by law had been met.

I think that one has to see that the problem Binnie J. confronted is inherent in the idea of obscenity, which perhaps goes to show that that idea cannot be cut down to constitutional or rule of law size. Some ideas are just sow's ears - no silk purses, try as one might. Indeed, in *Little Sisters* both the majority and the dissent had to contend with the fact that the *Criminal Code* idea of obscenity had been upheld by their own Court in *Butler* as one that is justifiable under the *Charter*, and so the occurrence of that idea in other legislation seemed similarly justifiable. However, Iacobucci J., joined in dissent by two other judges, was willing to grant a section 52(1) remedy because he saw the problem as systemic and such problems, he said, "call for systemic solutions".¹¹⁵

It might be that Iacobucci J.'s willingness to grant a section 52(1) remedy and strike down the obscenity provision significantly undermines the basis of *Butler*. While he stressed that part of the problem lay in the fact that administrative officials, rather than judges, were making the initial determinations as to obscenity¹¹⁶ (the kind of detailed regulatory structure that he thought would be appropriate to guard against unconstitutional application of the idea of obscenity, and which he thought could be secured only by forcing the government to respond to

¹¹³ I will not deal with the tensions that come about because judges are prepared to attach legal significance in other contexts to the "soft law" of departmental directives and memoranda, most notably through the doctrine of legitimate expectations. See Sossin's incisive analysis, *supra* note 109.

¹¹⁴ See *C.U.P.E.*, *supra* note 75.

¹¹⁵ *Little Sisters*, *supra* note 109 at para. 253. He ignored the problem posed by *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. See Choudhry & Roach, *supra* note 109 at 20.

¹¹⁶ *Little Sisters*, *supra* note 109 at paras. 237-83. Note that Iacobucci J. suspended the declaration of invalidity for 18 months to allow the government time to craft the remedial option he had sketched.

invalidation of the obscenity provision), illustrates that there is a profound problem in the very idea of obscenity.

Another contender for this class of ideas is the idea of terrorism and national security. To frame criminal law offences in terms of these ideas, to permit the proscription of organizations by executive decision on their basis, and to permit the executive to detain and deport non-Canadians on their basis, is to create the same kind of problem that is inherent in the idea of obscenity. For this reason, there has been some debate in Canada about the extent to which discretion will be exercised in the kind of discriminatory fashion that is captured by the idea of racial profiling, that is, that those who will be targeted will be picked out because of race, religion or ethnicity. Thus Sujit Choudhry and Kent Roach have argued that despite the obstacle that the decision in *Little Sisters* poses, section 52(1) is the politically most appropriate reaction to evidence of racial profiling since only section 52(1) can provoke the kind of clear statement by Parliament of its objectives in way that ensures democratic accountability.¹¹⁷

Their point is not that judges should have the last word in these matters. Rather it is that the government must take responsibility for its objectives through legislation that states them explicitly. The Court might find that these objectives are justified in the state of permanent emergency in which we are alleged to live, or section 33 might be invoked to override a judicial determination of invalidity, but at least the government, acting through Parliament, will have told Canadians explicitly that as a society we no longer believe in equality before the law.

It is important here to hold onto the idea which regards the separation of powers as premised on a claim about the innate right or dignity of every human being. If the right is cast as one of citizens of a democracy it becomes all too easy to reserve the rule of law for the citizenry, consigning the others to the legal “black holes” that have been devised in recent years, the Guantanamo Bays of the new world order.¹¹⁸ Citizens might not be too concerned, as those caught in the net cast by terrorism statutes are more often than not the “other” or the “alien” – the

¹¹⁷ Choudhry and Roach, *supra* note 109.

¹¹⁸ See *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department* [2002] EWCA Civ. 1598, which in “Intimations of Legality Amid the Clash of Arms”, (2004) 2 Int’l J. of Const. L. 244, I describe as a potential ray of light in the current rule of law gloom.

illegal immigrants or the refugees who had opposed the political regime of their native land, people with a different skin colour, homegrown political dissidents, or anyone else who is already marginal or whom powerful groups would prefer to be marginal. Those who take comfort in their homogeneity should recall that such legislation shifts the category of alien enemy out of the legal arena in which it often goes unnoticed because we don't care much about those who have fragile legal status in our societies, or even want them out as soon as possible--refugee claimants and people subject to deportation because they are not yet citizens. Instead, it shifts the category of the "alien" into the ordinary law of the land, where the ineliminably vague and political understandings of "terrorist" and "national security" give to the executive a wide scope for dealing conveniently with those it considers to be its enemy.

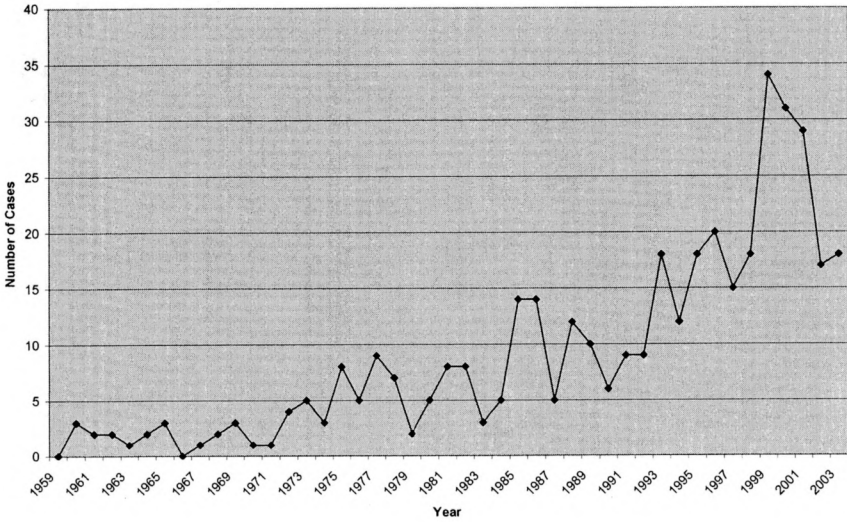
Rand J., as we know, thought that valid delegations of discretion could be abused, and had to be controlled by the rule of law, the unwritten constitution of legality. But he was also aware of the problem that I have identified in this last section, the situation where the terms of legislation invite, even necessarily incur, violations of the rule of law as those charged with implementing and interpreting the law go about their task. It seems fitting to me at this point to leave the last words to Justice Rand, words taken from his judgment in *Boucher*, the case in which the Supreme Court held that the common law offence of sedition was confined to the incitement of violence against government or constituted authority:

The crime of seditious libel is well known to the Common Law. Its history has been thoroughly examined and traced by Stephen, Holdsworth and other eminent legal scholars and they are in agreement both in what it originally consisted and in the social assumptions underlying it. Up to the end of the 18th century it was, in essence, a contempt in words of political authority or the actions of authority. If we conceive of the governors of society as superior beings, exercising a divine mandate, by whom laws, institutions and administrations are given to men to be obeyed, who are, in short, beyond criticism, reflection or censure upon them or what they do implies either an equality with them or an accountability by them, both equally offensive. In that lay sedition by words and the libel was its written form.

But constitutional conceptions of a different order making rapid progress in the 19th century have necessitated a modification of the legal view of public criticism; and the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountably to the public. The basic nature of the Common Law lies in its flexible process of

traditional reasoning upon significant social and political matter; and just as in the 17th century the crime of seditious libel was a deduction from fundamental conceptions of government, the substitution of new conceptions, under the same principle of reasoning, called for new jural conclusions.¹¹⁹

Judicial Consideration of Roncarelli v Duplessis



¹¹⁹ Boucher, *supra* note 38 at 285-6.

Judicial Consideration of Roncarelli v Duplessis

