UNDERSTANDING CANADA

POLITICAL LAW IN CANADA

Gregory Tardi, DJur.

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POLITICAL LAW IN CANADA

Gregory Tardi, DJur.

INSTITUTE OF PARLIAMENTARY AND POLITICAL LAW
INSTITUT DE DROIT PARLEMENTAIRE ET POLITIQUE

Political Law in Canada

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Published in 2023 by
Irwin Law Inc
Suite 206, 14 Duncan Street
Toronto, Ontario M5H 3G8
www.irwinlaw.com

Cover image: Adobe Stock

ISBN: 978-1-55221-641-5 | e-book ISBN: 978-1-55221-642-2

Cataloguing in Publication available from Library and Archives Canada

Title: Political law in Canada / Gregory Tardi, DJur.
Names: Tardi, Gregory, author.
Description: Series statement: Understanding Canada | Includes bibliographical references and index.
Identifiers: Canadiana (print) 20230209033 | Canadiana (ebook) 20230209262 | ISBN 9781552216415 (softcover) | ISBN 9781552216422 (PDF)
Subjects: LCSH: Law — Political aspects — Canada. | LCSH: Public law — Canada.
Classification: LCC KE4120 .T37 2023 | LCC KF4482 .T37 2023 kfmod | DDC 342.71—dc23

Canada

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Printed and bound in Canada.
1 2 3 4 5 27 26 25 24 23

To my doctoral mentor and family friend
University Professor Emeritus Ian Greene, BA, MA, PhD

We share the search for better understanding.

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Foreword

Nearly thirty years ago, Francis Fukuyama proclaimed the "end of history," reflecting his belief that liberal democracy had become universalized as the final form of human government.[1] Three decades later, his confidence in the global triumph of liberal democracy appears increasingly open to question. As the Economist Intelligence Unit reported in its *Democracy Index 2020: In Sickness and in Health?*, democratic political institutions globally have come under increasing pressure in recent years, and less than 10 percent of the world's population now lives in what the Intelligence Unit regards as a "full democrac[y]."[2]

The lifeblood of liberal democratic government is the rule of law — the principle whereby all persons and institutions are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated. The rule of law has long been regarded as an "unqualified human good," even by those who acknowledge that few functioning political systems have lived up to the full aspirations of this noble ideal.[3] But as with liberal democracy, the principle of the rule of law has itself has faced significant challenges in recent years, none more pressing that the chaotic outcome of the 2020 US presidential election and the continued baseless efforts by the former president to pressure public officials to overturn the results.

It is for this reason that Gregory Tardi's new book is so timely and important. This book elaborates and further develops Gregory's long-standing scholarship on political law, showing how rule-based government and the maintenance of civic and political rights remain attainable. He provides his readers with a precise and thorough understanding of the interaction among law, public policy, and politics as instruments of governance. In so doing, he demonstrates how political power can be exercised and channelled in accordance with principles of legality and legitimate authority. It is essential reading for those concerned over the need to defend and improve the functioning of democratic political institutions worldwide in the third decade of the twenty-first century.

Honourable Justice Patrick J. Monahan
Ontario Superior Court of Justice
October 2021

Preface

I have developed the study of political law and I write and teach about it because I have lived my life at the intersection of two lines of conflict that have engendered several interests in me.

First, at a young age, in my country of birth, I experienced foreign and domestic oppression, revolution, and emigration. As a result, in adulthood, I came to realize that the only path to justice is through Democracy incorporating the rule of law and a regime of genuine, enforceable, and living and evolving rights. (I explain later the use of capitalization in the word Democracy.)

Second, and in parallel, an early interest in history, then in politics, and finally in law, enabled me to focus my curiosity on the role of the state, and especially on that of its leadership in providing, maintaining, and fostering citizenship and justice through legality.

These two strands of my life and of my life interests are indeed inseparable. Justice for the people, for the citizenry, and for the electorate requires statecraft that is firmly grounded in Democracy. The view raises two questions: What is Democracy? How does legality help to ensure Democracy?

I consider the core of Democracy to be the rule of law. This implies rule-based government and governing, and the development and the maintenance of a people's civic and political rights, in the

face of a sovereign's unbridled search for power and authority. Only the force of legality can contain oppression and injustice. Such a lofty goal requires a more thorough understanding of the state and of statecraft. Hence, the need arises for an ever-more precise and thorough understanding of the interactions among law, public policy, and politics as instruments of governance. This understanding is necessary for citizens to see and to appreciate how their sovereigns and governments rule, to express themselves about consent, and to enable them to either limit or channel their leaders' use of public power and authority when they believe that is necessary.

History, politics, and law, along with public administration, shed light on the aims and various aspects of current and evolving statecraft. In this context, this book will explain that political law is interdisciplinary, and is a combination of the elements of statecraft. Political law is thus a new form of analysis, and necessary to a better understanding of the modern Democratic state. Political law can inform citizens, more thoroughly than other disciplines can, about the state and about the processes that render and maintain it Democratic. Further, application of the lessons of political law can enable citizens to safeguard the rule of law and the Democratic and rights-based nature of their jurisdictions. Consider that the struggle for Democracy is enduring; political law provides necessary knowledge and initiative for this struggle.

Thus, I invite the reader to engage with me in the following steps that make up political law analysis:

- Take a comprehensive and interdisciplinary view of the subject matter of law and politics that recognizes the integration of the two domains.
- Define Democracy (capital) as a form of political regime and distinguish it from democracy (lower case) meaning the right to vote and a set of rules on voting. (The two notions together are here written as D/democracy.)
- Establish and define the legal components of Democracy and demonstrate that the rule of law is at its core.

- Set out that the instruments of Democratic governance are, respectively, legal, policy-based, and political in nature.
- Establish that the legal instruments of Democratic governing amount to a domain of public law, namely the law of public institutions and administration, distinct from, though related to, constitutional law and administrative law.
- Use the law of public institutions and administration to shed light on inadequately studied legal aspects of Democratic government and governance.
- Use the three-way relationship among the law of public institutions and administration, policies, and political instruments to shed light on the role of law and on the rule of law in various aspects of Democratic government and governing.
- Develop the concept of accountability to the law in respect of the state, state institutions, and state officials.
- Establish, through the prism of the law–policy–politics relationship, how citizens have a right to D/democratic governing, and that the state has an obligation to govern D/democratically.
- Offer to practitioners and to students of statecraft new ways to strengthen rule-of-law-based D/democracy.

Greg Tardi, DJur.

Acknowledgements

In introducing me to his son over a cup of coffee, a colleague in the legal profession once described me in the following terms: "This is Gregory Tardi, whom I have known for a long time. For years, he has been dissatisfied with the accepted classifications and analysis in public law, so he has added his own." Many of my colleagues, friends, and students, as well as others who have read my writings, have known for a long time the truth kindly expressed in that introduction. Indeed, I have devoted considerable attention to developing a more profound understanding of the motivations for the actions of states, their institutions, and their public officials. This has turned into a lifelong interest, which I continue to exercise here, and which I will endeavour to pursue in the future. Public life provides an infinite well of material, and there is no greater challenge for the observer and analyst than to hold every action, every instrument, up to the standard of Democracy. I have found that political law helps in this regard. I hope the reader will agree with me.

Among my professional colleagues, I am indebted to several who have guided my thinking over the years, and helped in the preparation of this book: Richard Balasko, Kathy Brock, Yan Campagnolo, Steve Chaplin, Lou Davis, Wendy Gordon, Andrew Heard, Gaston Jorré, Hoi Kong, Suzanne Legault, Marc Mayrand,

Melanie Mortensen, Harry Neufeld, Warren Newman, Gary O'Brien, Stéphane Perrault, Kim Poffenroth, Jason Reiskind, Gail Sinclair, Yvon Tarte, and, of course, Rob Walsh.

Considering that the subject matter of this book profoundly affects all citizens and electors and not only those practising the professions encompassed in political law, I have also sought advice and comment from Peter Hoffman, Jena Karim, John Romvary, and Esther Wahlberg, as well as Margaux Watine.

I am grateful to all!

The expression traditionally used by authors of such texts is to the effect that the subject matter of the book in question has been discussed with various individuals, but that the author alone takes responsibility for the definitive version. That is certainly true in this instance.

I conclude by informing the reader that this book is the first of the new Understanding Canada Collection, initiated by the publisher Irwin Law, based in Toronto. While discussing an earlier project with them, I mentioned that the French publisher Presses universitaires de France produces the *Que Sais-je?* collection. A similar and more recent collection published in Britain by Oxford University Press, entitled *A Very Short Introduction*, is also flourishing. We quickly agreed that Canada should reflect the intellectual ferment of this country with its own collection. Thus, in due course, other titles will follow.

Gregory Tardi, DJur.
Ottawa
August 2021

CHAPTER ONE

The Need for Better Understanding of Government and Governing

Introduction: Understanding Government and Governing

The modern state, its institutions, mechanisms of governing, and the officials who act on its behalf, all amount to a complex set of structures and processes. Government and governing are not easily understood. Citizenship denotes the existence of a community, indeed of a community of interests, not only among the members of society but also between the state and its society. Society is more than passive claims by individuals to a number of rights, entitlements, and various forms of assistance, but is also the active participation of individuals in the conduct of public affairs and contribution to the general welfare. One cannot be a good citizen without knowing and understanding their own place in society, and equally importantly, the construct of one's own society and state. A broader vision, a 360-degree perspective also involving at least some historical awareness, would result in a general understanding of society and the modern state. A perspective on one's own state is, of course, helpful in effective participation in government and public affairs more generally.

Passive citizenship is equivalent to belonging legally to a country without making any contribution to the polity. Wilful abstinence

from public life may be a societal problem. At best, the inactivity of citizens engenders political risks and damage. At worst, it puts the very legitimacy of the state into question. To counter such structural difficulties, the achievement of active participation by a large number of citizens can result only from a progressive response, in which each step results from the cooperation of citizens and their state. The path of this response comprises the following steps: interest in government and public affairs on the part of individuals, in tandem with the fostering of such interest through campaigns of information about the major issues of the day by appropriate organs of the state; the development of ongoing awareness through the media; and increasing education about the state and statecraft. All these steps should lead to greater understanding of government and governing. The ultimate result would be more intensive participation by citizens in public life, which may mean voting, but may also be other forms of public activity. Realistically, government and governance will be of greater interest for some citizens than for others. Thus, the explanations set out hereafter will be of particular interest for students and practitioners of the social disciplines: law, political science, public administration, along with fields such as journalism. This book is also particularly intended for those professionally engaged in the practice of law, in politics, and in public service. For these, no amount of information can ever be sufficient.

Once it becomes apparent that more knowledge of, and attention to, public affairs is needed by a greater number of citizens, we must address the twin questions of what knowledge ought to be disseminated and how such information is to be cast.

The various forms of study have developed over the centuries to explain the structure and the functioning of the state. Political science aims to analyze politics systematically. Public administration seeks to examine the inner workings of statecraft. Even more pertinently, public law sets out the legal rules that underlie both political science and public administration. Most specifically, constitutional law deals with the establishment and architecture of the state and enshrines the fundamental rights of individuals that the state is

bound to respect. Each of these subject areas approaches statecraft from a specific, limited perspective. In order to understand the modern state and statecraft, and in order to exercise citizenship to its full extent, citizens observing the state and statecraft need a more comprehensive and integrated, indeed a more interdisciplinary approach than what the prevailing studies offer. Therefore, I propose to be concerned here not only with politics, political science, and public administration, but with the interaction among them, as well as with the link between them and public law. The proposed new study needs to be grounded on the idea that legality is the indispensable factor in the functioning of the state. Such a vision avoids partisanship; it reflects an interest in sound government independent of ideologies and persuasions.

Various states function in different ways. Only one type of state is based on the requirement of a linkage between politics and legality — that is the democratic state. The first step of the proposed new study is thus to define democracy and democratic government.

The Focus on Democracy

Political law is focused particularly on the study of democratic jurisdictions. Democracy is a form of government that originated in ancient Greece and withered in the Middle Ages. During the Age of Enlightenment, a more modern version of the concept was revived. Since the mid-nineteenth century, and particularly since the end of World War II, democracy has gained favour as the preferred, indeed as the ideal, form of government in the western and post-colonial world. During this same period, democracy has become a term of broad use in the conduct of public affairs, so pervasive and nebulous as to render precise definition difficult.

In modern times, and in the broadest and hence most vague sense, democracy is perceived to be a synonym for good or virtuous government; it serves as an ideal. Another and related connotation for democracy is fairness and equity in governing that aims at the progress of society. Most recently, democracy is a way to describe

rational government based on facts, truth, and objectivity, including the transparency of governing processes and the accountability of public institutions and public officials. The mélange of these diverse meanings has, to a considerable extent, reduced "democracy" to meaning any government and governing that the user of the word agrees with, regardless of the actual circumstances, components, and characteristics of the dialogue. Similarly, the label "undemocratic" becomes attached to any government or governmental action a user of the term disagrees with. Moreover, in several countries, the notion of democracy has wilfully become confused with patriotism. Such subjectivity is thoroughly unhelpful to clear understanding.

A more precise perspective on democracy as one of the modern forms of government is grounded upon the following general principles:

- Democracy, as a system of constitutional self-government, is based on the conduct of public affairs in accordance with the will of the majority of the people, supported by freedom of political choice and expression, the rule of law, and respect for minorities.
- Democracy is a fundamental and inherent value and benefit in constitutional and political culture, best suited to provide just and equitable government for the people.
- Democracy cannot be assumed to prevail; it must be both safeguarded and strengthened in order to protect it from the misuse or abuse of public power.
- Democracy, its values and benefits, are the supreme entitlements of citizens and electors; correspondingly, citizens and electors have a civic obligation to know, understand, and defend democracy, as well as to use the rights and opportunities democracy offers them; citizenship necessarily includes informed participation in society.
- Commensurate to the democratic rights of citizens and electors, the state, its institutions and its officials, both elected and appointed, have the constitutional and legal obligation to

structure government and to conduct governance in accordance with the principles and values of democracy and the rule of law.

- Constitutional democracy is inherently legitimate; that legitimacy can be undermined by the practice of government contrary to the will of the majority of the people, or by disregard for the rule of law. Public confidence in democracy must be assured and restored.
- Governing consistently and continually in an undemocratic manner, and contrary to the rule of law, deprives those governing of the right to govern.
- The principles of democracy are expressed in the rule of law; questions pertaining to the actions of government or to constitutional governance, with reference to democracy, the rule of law, and minority rights, are to be determined by an independent judiciary.

Were democracy but a compendium of abstract founding principles, it would be a political philosophy, but could not function as an actual form of government. In fact, democracy is much more than mere abstraction, in that the foregoing principles are linked to the people they both serve and guide. In an organic interpretation, the principles amount first to a philosophy of government. This philosophy is, in turn, nurtured by popular belief in the benefit of democracy. The belief of citizens in democracy leads government to act according to the principles and to put in place specific instruments of governance that translate the principles into concrete action, focusing on the public interest. Finally, such instruments comport with various types of state obligations and duties, as well as accountabilities for actions, that define the principles and the people's belief in them. Throughout all of this, there is a correlation between rights and obligations, both on the part of the state and on that of citizens.

The discussion of democracy would not be complete without a note of caution on the distinction between democracy as an outward

form and genuine democratic rules and norms, comprising rights equal for all citizens and state obligations equal toward all citizens. A system of politics and law consisting of paper rights, administered with deliberate differentiation between classes of citizens, is not a genuine democracy, no matter how it seeks to designate itself.

The consequence of the reasoning set out in the previous paragraphs is that the modern understanding of democracy means governing in the substantive public interest. While the idea of public interest is just as complex to unravel as democracy itself, a shorthand translation of this maxim is that democracy implies governing in conformity with the wishes of a majority of the population that expresses itself on the issue in question.

As the practice of democracy continues to evolve, there are two recent significant developments in its theory and practice that deserve mention. The first is that democratic theory is gradually giving rise to a doctrine of a right to democracy. Until recently, democracy entitled citizens to rights set out in declaratory texts or assured through the judgments of courts. Now, legal scholars are extending the conceptual limits and indicating that democracy itself is a right. Until such a right is better defined, its enforcement through legal, legislative, or litigious means may be somewhat problematic. The second development is the emergence of an ideal, namely that there is on the part of some states an obligation to govern democratically. This obligation is emerging out of the very recent political practice of the European Union (EU). The conformity of member states, and hence of applicants for EU membership, to the democratic ideals and goals of the Union is a requirement. Where democratic backsliding occurs and is not corrected, the obligation to govern democratically has been invoked in legal documents and in pleadings in litigation. To date, the invocation of this doctrinal position has not produced political results, nor has it actually affected membership in the European Union.

Linguistic Precision

Beyond the foregoing general difficulties of defining democracy, the current usage of the term in public law, political science, the practice of politics, and in public administration has generated further confusion that requires clarification. The term "democracy" is often used to convey related meanings, especially in conjunction with other terms that may be related to but are distinct from the actual notion of democracy. Each of the expressions "constitutionalism," "the rule of law," "legality," "legitimacy," "human rights," "freedom," "constitutional freedoms," "civil liberties," "*Charter* rights," or even "due process" has precise connotations. In particular, there is often a convergence between the concepts of democracy and freedom. The meaning of the former is set out above. By contrast, we should understand freedom to mean the ability of individuals to do, without state intervention, anything that is not specifically prohibited by law; this should be understood to contrast with systems in which individuals have the ability to do only that which is specifically allowed by law.

The ideas all these related terms embody are all either linked to democracy or to some degree overlap with democracy. However, they are not synonymous with democracy. The use of the foregoing terms is more complex because several of them have different meanings attributed to them in Canadian practice, in American usage, and in the custom of the various European states that deal with democratic matters. There is need for clarity of language because use of the above terms in conjunction with "democracy," as if they were one and the same, only leads to confusion. For our purposes, only the term "democracy" comprehensively designates a form of government.

Evolution of the Meaning of Democracy in Canada

Canada is one of the countries in which democracy is both the prevailing political philosophy and the long-standing political practice. It is on this country that we will focus attention. The analytical

focus on political law necessitates an authoritative Canadian definition and understanding of democracy. In Canada, as in other countries, many uses of the term can be found throughout scholarly writings and in popular usage. However, the requirement for authoritative meaning necessitates search of the relevant constitutional and legal sources.

The *Constitution Act, 1867* includes in its Preamble a reference to the similarity in principle of Canada to the United Kingdom.[1] Beyond that somewhat laconic reference, the text does not actually spell out that Canada is a democracy, nor what that entails. Moreover, no statute used the term "democracy" to characterize the Canadian political system. This gap was only very slowly filled by the Supreme Court of Canada. It was in its 1938 decision in the *Reference re Alberta Statutes* that the Court first merely expressed that, as the United Kingdom was a democracy in 1867, no further definition seemed necessary.[2] In the context of that decision, the Court discussed only freedom of public opinion. This minimalist trend was continued in several cases that mentioned freedom of discussion.[3] This was the era of the so-called implied bill of rights, without any broader conceptualization of the term "democracy."

In was only in the period 1978–1982, under the inspiration of Prime Minister Pierre Trudeau, that the word "democracy" genuinely gained currency in the statutory context. In Part 1 of Bill C-60 of 1978, which, had it been enacted, would have been entitled *The Constitution of Canada Act*, the expression occurs in two contexts.[4] Section 5 refers to "a free and democratic society," while section 10 uses the term "free and democratic elections."

The direct descendant of this Bill, the *Constitution Act, 1982*, which was in fact enacted, refers to Canadian society at section 1 as being "free and democratic."[5] We may surmise that this implies the democratic nature of the state, but there is no clear indication and no further explanation. The consequences of sections 3–5 of the *Charter* are somewhat more indicative. The title above these provisions that deal with the constitutional right to vote and the functioning of Parliament and the legislatures is "Democratic Rights."

We may thus be permitted to believe that the modern constitutional conception of Canada is that of a democratic country. Unfortunately, that is where the constitutional explanation ends. No statute elaborates on this vital point; even the *Canada Elections Act* interprets voting as an electoral right, rather than more formally or broadly designating it a democratic right.

The deliberate explanation, so long omitted from Canada's political legal vocabulary, was made clear only 131 years after the *Constitution Act, 1867*, in the *Reference re Secession of Quebec* (*Quebec Succession Reference*).[6] The Supreme Court of Canada told us, *per curiam*, that democracy has always been a baseline from which the framers of the Constitution, and later on the elected representatives of the people, have operated. It added that the democratic nature of Canadian political institutions has always been assumed. On this point, the *Quebec Secession Reference* relied especially on the *Ref re Remuneration of Judges of the Prov Court of PEI*,[7] but also on a number of earlier cases.[8]

A more detailed examination of the *Quebec Secession Reference* is necessary, as it set out the first deliberate effort to explain systematically what the legal system understands the notion of democracy to be. This case is important because it lists federalism, democracy, and constitutionalism and the rule of law, followed by the protection of minorities, as the four pillars of the Canadian body politic. For purposes of the present discussion, the additional importance of this case is that it includes a more elaborate listing than any other judgment of the component elements of the specifically Canadian variant of democracy. This listing includes majority rule, representative political institutions, responsible government, universal suffrage and effective representation, promotion of self-government, respect for the inherent dignity of the human person, faith in social and political institutions that enhance the participation of individuals and groups in society, election by popular franchise, the right of citizens to participate in the political process as voters, the holding of regular elections, the inapplicability of the notwithstanding clause to section 4 of the *Charter*, the legitimacy of majorities in different provinces and territories and at the federal level, the variation of

political goals at federal and provincial levels, the continuous process of discussion, the commitment to consideration of dissenting voices, and finally, the right of each participant in Confederation to initiate constitutional change. It is clear from the context that the Court believes all the enumerated components to be political characteristics of a system of political democracy. In fact, we could add diffusion of power among institutions to this list.[9]

The most recent major judicial analysis of the concept of Democracy was conducted by the Supreme Court of Canada in the case of *Toronto (City) v Ontario (Attorney General)*.[10] The issue the justices faced was to determine whether the intrusion of a provincial legislature into an ongoing municipal election could be considered constitutional. By the narrowest of margins (5:4), the highest court affirmed the validity of the relevant statute. The majority relied, in part, on the ruling of the Court of Appeal for Ontario, which had, among other things, adopted the reasoning that "the concept of democracy ... ha(s) no canonical formulation(n)."[11] Based on this, and other reasoning, the Supreme Court held that unwritten constitutional principles, such as democracy, could not invalidate statute law. This decision is highly controversial.

The Rule of Law as the Core of Democracy

In the perspective of the Supreme Court of Canada, the vital relationship in the construct of democracy is that between the political factors enumerated above and their legal foundation, that is, the rule of law. The Court's own wording in this regard is irreplaceable:

> The consent of the governed is a value that is basic to our understanding of a free and democratic society. *Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation.*[12]

The significance of this paragraph cannot be diminished. A state and its government can comprise any number of institutions and processes aimed at making itself democratic. However, if those institutions and processes are not inextricably joined through the rule of law, democracy is absent. This is so, no matter how many political components of democracy are present in a state and how prominent they are. Without a political system based on legality, no state can be genuinely democratic. Indeed, many states have built their constitutional framework and institutional arrangements on the outer trappings of political democracy, without living by the rule of law. In the present perspective, they are not genuinely democratic. The rule of law, as the thread that connects the political institutions and processes of a state, is the *sine qua non* of genuine democracy.

There exists both scholarly and authoritative support for this fundamental proposition. The most well-known recent book on the rule of law in the English-speaking and common law world is Lord Tom Bingham's work, aptly entitled *The Rule of Law*. Bingham focuses the issue in the following terms: "The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."[13]

In the Supreme Court of Canada, the principle embodied in the rule of law, namely that if government is to be democratic, it must be carried out in accordance with legal rules and norms, rather than on the basis of arbitrary, that is, political, criteria, has been upheld on numerous occasions. The most well-known such case is *Roncarelli v Duplessis.* The key citation in that ruling, from Justice Rand, is worth repeating:

> The injury done by him [Maurice Duplessis, Premier of Quebec] was a fault engaging liability within the principles of the underlying public law of Quebec . . . and under art. 1053 of the *Civil Code.* 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.[14]

This view that democracy requires government and governing according to legal norms and standards was reinforced more extensively and more explicitly in the *Re Manitoba Language Rights* case:

> The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.... Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. "The rule of law in this sense implies ... simply the existence of public order." (W. I. Jennings, *The Law and the Constitution* (5th ed. 1959), at p. 43.) As John Locke once said, "A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society" (quoted by Lord Wilberforce in *CarlZeissStiftung v. Rayner and Keeler Ltd. (No. 2)*, [1966] 2 All E.R. 536 (H.L.), at p. 577). According to Wade and Phillips, *Constitutional and Administrative Law* (9th ed. 1977), at p. 89: "... the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions."[15]

More recently, the Supreme Court was called upon by reference to determine whether a newly enacted provision in the Quebec *Code of Civil Procedure*[16] separating the monetary jurisdiction of the Court of Quebec from the Superior Court of Quebec was constitutionally valid. As part of its analysis, the Court examined the notion of the

rule of law and held that this principle comprised the elements of "equality of all before the law, the creation and maintenance of an actual order of positive laws, and oversight of the exercise of public powers."[17] These characteristics should be understood to form intrinsic parts of the law-based nature of a Democratic society.

In the most important decision of its history, namely the *Quebec Secession Reference*, the Supreme Court, following on from its discussion of democracy, considered the rule of law in conjunction with Canada's fundamental characteristic of constitutionalism. In reaffirming simply that the rule of law principle requires that all government action, including the Constitution, must comply with the law, the Court accomplished two goals.[18] It followed through on the above-mentioned analysis of the rule of law in its earlier jurisprudence, and it affirmed the rule of law as being the principle that was indispensable to democracy.

In effect, the Supreme Court of Canada has created the indissoluble symbiosis between democracy and the rule of law. Such a view would be mirrored in the various jurisprudence of the highest constitutional courts of the United Kingdom, the United States, France, as well as in a number of like-minded countries. This link is vital to the present study.

The Distinction Between "Democracy" and "democracy"

The complete understanding of democracy requires one other semantic distinction that colloquial use of the word does not make. In popular language and in the media, the term "democracy" is used on occasion to refer to a type of regime of government, while in other instances, it is used to mean the rules specifically dealing with elections. The listener or viewer is left to sort out the meaning intended by the user. Similarly, in scholarly literature and even in legal documents, the onus for clear understanding is placed on the reader. The distinction between the two meanings is substantial. Such confusion is thus unhelpful. In the present text, therefore, in the context of comparison and contrast between various types of regimes of

government, the word will be capitalized, as Democracy. Where the subject of discussion is more limited to the rules governing elections, the lower case will be used, the reference being to democracy. In instances where both meanings are intended, the double usage D/democracy is adopted. This distinction rests on solid precedent of legislative drafting: the two divergent uses were included in Bill C-60 of 1978, mentioned above. It finds more explicit grounding in the ideas expressed in a different manner by then Chief Justice Beverley McLachlin in her 2005 Lord Cooke Lecture, where she said:

> Modern democratic theory, as espoused by most developed western democracies, combines two inherently contradictory doctrines. The first is what is often identified as the Diceyan doctrine that it is for Parliament and Parliament alone to establish the law, and, by implication, the fundamental norms upon which it rests. The second is the belief, widely accepted in developed modern democracies since World War II, that legal systems must adhere to certain basic norms. At a minimum they must allow citizens to vote for those who rule them.[19]

Despite the admonitions of scholars that the term "democracy" has several specific but distinct meanings, it continues to be used indiscriminately in popular discourse. For the sake of clarity, the basic norms mentioned by Chief Justice McLachlin should be taken to mean those that fall into the category of Democracy, whereas simple voting rules only relate to democracy.

Democracy Among the Various Forms of Government

In the perspective of this study and on the basis of the classification of states set out below, the need for better understanding of law in government can arise only in respect of D/democratic states. It is only in countries with such regimes that the link between political institutions and processes of government seeking to be D/democratic and the rule of law exists. Therefore, only systems in D/democratic countries can be analyzed. As was demonstrated in the summer of 2021

in Afghanistan, not every state wants to adopt the path of D/democracy. Indeed, those events clearly show that D/democracy can be built primarily, perhaps only, on a Euro-Atlantic philosophical pedestal, and that no amount of strategic interest, exported nation-building, or messianism can transplant a desire for D/democracy in infertile ground. Although this study concentrates only on D/democracies, it is worthwhile setting out the various types of regimes of government. The drawing of distinctions among them will enable comparison between Canada and other states in respect of the degree of D/democracy of each, and in respect of the analysis that political law can offer.

D/democratic states have evolved various political institutions and an intrinsic link between such institutions and the rule of law. There is significant variety in the architecture of D/democratic states. Some are monarchies. Others are parliamentary republics with various forms of presidency and government; yet others are presidential–congressional in nature. The important common factor is that to varying degrees and in diverse ways, they all espouse D/democracy. They all have free, fair, and transparent elections, and, despite occasional difficulties, they all subscribe to the rule of law. This latter characteristic enables them to forge the politics–legality link that is the core of D/democracy.

Within the ambit of D/democracy, there is also a wide range of relationships among law, public policy, and politics. Among the states that are considered to be the most D/democratic, there is extensive conformity between the rule of law and the exercise of power. These are the liberal D/democracies. There are other states that espouse variations of D/democratic doctrine and practice, such as militant D/democracy, great-power D/democracy, and, more recently, illiberal D/democracy, which portrays itself as more forceful than a customary D/democracy, but not as an authoritarian state. Classifications of the various degrees of D/democracy are set out in appraisals done by *The Economist*, as well as groups such as Freedom House and Human Rights Watch.

A second group of states can best be described as authoritarian. These are states that have many of the outward signs of Democracies

or democracies, or of both, but in which the rule of law is replaced by resort to power, to the detriment of legality. Some authoritarian states are oligarchies, where there is a ruling class or elite. States in which there is a single strongman or autocrat are designated autocracies. In such states, the presence of a political, ideological, ethnic, or religious national purpose can entail reliance on the language and the outer symbolism of D/democracy while, in fact, the substantive political and legal elements of D/democracy are suppressed. In authoritarian regimes, as distinct from D/democracies, the real purpose of statecraft is the exercise of power unencumbered by the rules or the rule of law. For oligarchies and autocracies, power is its own reward. Some states oscillate markedly between their adherence to genuine D/democracy and temporary conditions of authoritarianism.

The law itself recognizes authoritarianism and equates it with an absence of D/democracy. This distinction arises not from statute or other form of legislative declaration, as the characterization of one state by the parliament of another would not be in line with comity. Rather, it is a matter of judicial finding by an international court. Indeed, the most fundamental judicial decision regarding the definition and nature of D/democracy is the case of *Refah Partisi (The Welfare Party) and others v Turkey*, decided in 2003 by the European Court of Human Rights (ECHR).[20] The judgment dealt, in essence, with the analysis of the criteria that rendered a political party democratic or otherwise. It was through this prism that the Court looked at the very nature of Democracy as a system of government and governance. Among a number of factors, the Court held that the most foundational elements of Democracy are acceptance of the rule of law and of pluralism within society.

The characterization of D/democracy has continued to preoccupy the ECHR. On several occasions it tightened the linkage between D/democracy and elections. In *Mathieu-Mohin and Clerfayt v Belgium*, it held that the foundations of any D/democracy are free elections, freedom of expression, and in particular freedom of political debate.[21] Further, in *Selahattin Demirtaş v Turkey (No 2)*, the Court linked the notions of a "democratic system" and of a "democratic

society" to the rights guaranteed by Article 3 of Protocol No. 1 of the European Convention on Human Rights, comprising the right to free elections.[22]

States in a third group are best described as dictatorships. These are states that either do not espouse the rule of law or practice rule by law instead. In many cases, they are led by a public official unincumbered by Democratic norms or restraints, who instead rules by force. Such states often subscribe to a clear ideological motive, such as Communism, or to a form of theocracy. In such states, D/democracy is a mirage, even though several such states falsely avow themselves to be D/democracies or to engage in D/democratic practices. There are some states that openly reject D/democracy, often maintaining that it is but a Western invention that is alien to them or not aligned with their system of beliefs. In authoritarian states, dictatorships, and those that outrightly reject D/democracy, the cult of personality is most likely to arise.

Authoritarian states, dictatorships, and those that reject D/democracy present D/democratic states with two fundamental and permanent problems. The first is that the refusal of such states to allow, or even to enable, regular changes of government within their boundaries produces domestic tensions that accumulate over time. The consequences of long-term internal repression sometimes spill over onto the stage of international relations. The second, and perhaps even more globally harmful problem, is that unD/democratic or outright anti-D/democratic states tend to perpetuate their regimes by exporting their political philosophy, most often through the use of arms. The states that neighbour unD/democratic regimes tend to be the most frequent recipients of such sorties. It is possible to argue that D/democracies are also expansive, notably through colonialism.

Finally, there are a few states where chaos reigns and where no system of government is apparent. These are usually designated as failed states. The quality of a "failed" state changes with the vagaries of history. Some decades ago, Somalia was thought to belong to this category. Today, Yemen may qualify.

The law–public policy–politics relationship can be of interest only in genuinely D/democratic countries. The focus of attention in this study is Canada, but this focus calls for an element of comparison. In assessing whether any particular state is D/democratic in the sense that Canadian usage can be assigned to that term, or merely pays lip-service to the expression, it must be noted that D/democracy has acquired an aspect of emotional attractiveness in international public life. For a state to consider itself D/democratic, and for others to consider it so, has become politically and diplomatically desirable. Yet, if one considers D/democracy in the Canadian sense, applying an objective and analytical standard, numerous jurisdictions that designate themselves as being D/democratic on the basis of an understanding of D/democracy that is different than Canada's are in fact not so from a Canadian perspective. The criteria and standards for justifiably calling oneself D/democratic are evolving, but they are not subjective and cannot be merely self-serving. A state is not rendered actually D/democratic merely by so designating itself.[23]

FIGURE 1.1 | THE MAP OF DEMOCRACY

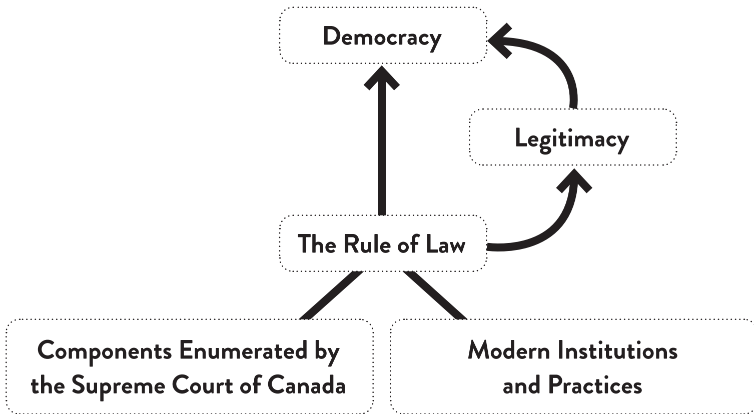

FIGURE 1.1 | THE MAP OF DEMOCRACY

Components Enumerated by the Supreme Court of Canada	Modern Institutions and Practices
Historical • self-government • expression of the sovereign will of the people • political system of majority rule • representative political institutions and government • freely elected legislative bodies at federal and provincial/territorial levels • responsible government • executive accountable to the legislature Electoral • right of citizens to participate in the political process • right to vote and to be candidate • freedom to establish political parties • election by popular franchise • universal suffrage and effective representation • obligation of House of Commons and legislatures to hold regular elections Federal • different and equally legitimate majorities at federal and provincial/territorial levels	Foundations • consensus on the political / legal regime • agreement on the monarchical form of government • separation of powers and constitutional equilibrium • diffusion of state powers and functions Electoral • multi-party system • separation of government and political parties • alternance of political parties forming government Legal System • integral legislative system • independent institutions of legality • particular role of the minister of justice / AG • judiciary independent of politics • bar independent of political influences • apolitical criminal law • bi-juralism • separation of church and state

FIGURE 1.1 | THE MAP OF DEMOCRACY

Constitutional
- freedoms of thought, belief, speech, association, assembly, and religion
- each participant in Confederation has the right to initiate constitutional discussions
- corresponding duty to engage in constitutional discussions
- diffusion of powers

Values and Principles
- respect for the inherent dignity of the human person
- commitment to social justice and equality
- accommodation to a wide variety of beliefs
- respect for cultural and group identity
- faith in social and political institutions that enhance the participation of individuals and groups in society

Public Sector
- non-partisan public service and armed forces
- rules on candidacy of public servants for office
- public access to state records and proceedings
- institutional tolerance and neutrality
- bilingualism
- multiculturalism
- separation of government and business

Indigenous
- inclusion of the Indigenous in Canadian statehood
- recognition of Indigenous legal systems and land rights

Media
- news media impartial and unfettered by the state

Foreign Relations
- foreign relations based on popular legitimacy
- recognition of the common standards of democracy among states

Values and Principles
- pluralism