

## **UNWRITTEN CONSTITUTIONAL PRINCIPLES: What is Going On?**

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A few years ago, a new subject emerged on the hot list of legal academe – unwritten constitutional principles. It was greeted with interest and optimism by some, but puzzlement and scepticism by others. What were these principles? Was the phrase “unwritten constitutional principles” not an oxymoron, given that constitutions are generally understood to be written documents? And if one surmounts these difficulties, how and by whom are these so-called unwritten constitutional principles to be discovered? The judges, you say? But what gives the judges the right to set forth constitutional principles capable of invalidating laws and executive acts, when Parliament has not seen fit to set these principles out in writing in the nation’s constitution?

Yet despite these inauspicious murmurs, the subject has engaged judges, parliamentarians and academics in countries as far flung as Israel, Australia and the United States. It has been debated both in countries that have written constitutions and countries that do not. In fact, many political scientists and legal scholars observe that participation in the “rights revolution” may be less about the precise wording of constitutional texts - or even about bills of rights at all - but instead a reflection of a certain kind of supportive legal and political

culture.<sup>1</sup> Whatever the cause, it is certainly clear that the post-Second World War period can properly be called the “age of rights.”<sup>2</sup> Clearly something is going on here; something that cannot be dismissed with a wave of the judicial hand. Tonight I would like to explore that question. Hence the title of my address: “Unwritten Constitutional Principles: What is Going On?”

I will suggest that actually quite a lot is going on, and that it is important. What is going on is the idea that there exist fundamental norms of justice so basic that they form part of the legal structure of governance and must be upheld by the courts, whether or not they find expression in constitutional texts. And the idea is important, going to the core of just governance and how we define the respective roles of Parliament, the executive and the judiciary.

Lord Cooke, for whom this lecture is named, has played a key role in the debate about these principles in New Zealand and more broadly in the common law world. In his decision in *Taylor v. New Zealand Poultry Board*, he identified an inherent limit in the capacity of Parliament to enact enforceable laws: “I do not think,” he wrote, “that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.”<sup>3</sup>

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<sup>1</sup>See Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago, 1998).

<sup>2</sup>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.

<sup>3</sup>[1984] 2 N.Z.L.R. 394.

He elaborated on this sentiment in an article in 1988 written for the *New Zealand Law Journal*, where he concluded that

Within very broad limits Parliament has the constitutional role of laying down policy, and undoubtedly there is a corresponding duty on the Courts to uphold and respect Parliament's role. But...one can no longer talk about 'some vague unspecified law of natural justice' or resort to similar anodynes. One may have to accept that working out truly fundamental rights and duties is ultimately an inescapable judicial responsibility."<sup>4</sup>

This understanding of the role of judges in relation to fundamental rights did not depend on a written bill of rights, although it is not surprising that Lord Cooke also supported the constitutional entrenchment of rights protection, based on the model of the *Canadian Charter of Rights and Freedoms*.<sup>5</sup>

In his prescient way, Lord Cooke put his finger on a question that would come to more and more preoccupy the common law world in the years that followed: do judges have the right to invoke fundamental norms to trump written laws? And in his usual forthright way, he staked out his turf on the issue in no uncertain terms. He argued that an independent judiciary is the safeguard of parliamentary democracy, and urged courts not to be afraid to assume their role in

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<sup>4</sup> "Fundamentals," [1988] N.Z.L.J. 158 at 164-5.

<sup>5</sup> *Ibid.*

protecting certain fundamental principles as essential to the rule of law and the expression of democratic will, even if these “deep rights” were not in written form.

Not everyone, of course, accepted the position that Lord Cooke had so eloquently defended. Critics argued that the invocation of unwritten norms cloaks unelected and unaccountable judges with illegitimate power and runs afoul of the theory of parliamentary supremacy propounded, as they see it,<sup>6</sup> by the venerated legal scholar, Dicey.<sup>7</sup> It is for Parliament, and Parliament alone, they argued, to set out the fundamental constitutional principles of the nation. Some went so far as to suggest that the idea of unwritten constitutional principles was a barely concealed power grab by activist judges.

So who is right? Lord Cooke, who asserts that upholding fundamental norms, even those that have not been written down, is an inherent and legitimate aspect of the judge’s role? Or the critics, who assert that the judges have no business going beyond the written word of the constitution?

But I’m getting ahead of myself. The proper outcome of this debate depends on the answer to more profound questions. What do we mean when we speak of unwritten

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<sup>6</sup>This view of Dicey’s constitutionalism is not universal. Some academics have attempted to re-cast it by noting his discussions of “judicial legislation” and seeking to reconcile them with his conception of a supreme Parliament. For this proposed “more plausible reading,” see T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Clarendon Press, 2001) at 13.

<sup>7</sup> See generally, A.V. Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, 1959).

constitutional principles? Are there some principles or norms that are so important, so fundamental, to a nation's history and identity that a consensus of reasonable citizens would demand that they be honoured by those who exercise state power? What do we mean by a constitution? Is the idea of unwritten constitutional principles really a new idea, or is it merely a new incarnation of established legal thought?

To these questions I would answer as follows. First, unwritten constitutional principles refer to unwritten norms that are essential to a nation's history, identity, values and legal system. Second, constitutions are best understood as providing the normative framework for governance. Seen in this functional sense, there is thus no reason to believe that they cannot embrace both written and unwritten norms. Third - and this is important because of the tone that this debate often exhibits - the idea of unwritten constitutional principles is not new and should not be seen as a rejection of the constitutional heritage our two countries share.

The contemporary concept of unwritten constitutional principles can be seen as a modern reincarnation of the ancient doctrines of natural law. Like those conceptions of justice, the identification of these principles seems to presuppose the existence of some kind of natural order. Unlike them, however, it does not fasten on theology as the source of the unwritten principles that transcend the exercise of state power. It is derived from the history, values and culture of the nation, viewed in its constitutional context.

As Professor Walters has argued in the Canadian context:

Insofar as unwritten fundamental law is regarded as an assertion of the supremacy of natural law, right reason or universal principles of political morality and human rights over legislation, it is part of a rich intellectual tradition that had informed common law thinking from medieval times, through the English and American revolutionary ages, and into the high Victorian era of empire out of which Canada's written constitution emerged.<sup>8</sup>

If the Professor is right, and I think he is, then this idea is neither American nor British, but is shaped by both legal traditions and a common heritage that goes back much further.

This "rich intellectual tradition" of natural law seeks to give the law minimum moral content. It rests on the proposition that there is a distinction between rules and the law. Rules and rule systems can be good, but they can also be evil. Something more than the very existence of rules, it is argued, is required for them to demand respect: in short, to transform rules into law. The distinction between rule by law, which is the state of affairs in certain developing countries, and rule of law, which developed democracies espouse, succinctly captures the distinction between a mere rules system and a proper legal system that is founded on certain minimum values. The debate about unwritten constitutional principles can thus be seen as a debate about the nature of the law itself and what about it demands our allegiance.<sup>9</sup>

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<sup>8</sup> M. D. Walters "The Common Law Constitution in Canada: Return of *Lex non Scripta* as Fundamental Law" (2004), 51 U.T.L.J. 91 at 136.

<sup>9</sup>The Hart-Fuller debates are, of course, a particularly striking manifestation of the dividing lines in the discussion. See H.L.A. Hart, "Positivism and the Separation of Law and

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, and they must not kill any (or many, depending on the state) of their citizens. This much we insist on since the Holocaust. Beyond this minimum, there is a variance, although still a solid core of agreement. States, most hold, should not torture their citizens. States should not discriminate on the basis of gender, race or religion. Finally, at the developing fringes of the new natural law, which goes by the name human rights, are other assertions. Not only should states not directly kill their citizens, they should avoid killing them indirectly by famine, medical neglect, and degradation of the environment.

Although cast in the language of religion, early natural law theories saw the manifestation of the divine in something that became the foundation of the Western world's conception of itself: human rationality. For Thomas Aquinas, it was human reason that allowed individuals to access, in some form, a deeper understanding of justice. Natural law was, he wrote, "something appointed by reason."<sup>10</sup> And yet the limits of that reason made written law

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Morals" (1958) in *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983) and *The Concept of Law* (Oxford: Oxford University Press, 1961); Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969).

<sup>10</sup>*Summa theologiae* I-II, Question 94, First Article. Cited from William P. Baumgarth and Richard J. Regan, eds., Thomas Aquinas, *On Law, Morality and Politics* (Indianapolis: Hackett, 1988) at 45.

incomplete in two important ways. On the one hand, lawmakers may abuse their power by deviating from reason and enacting unjust laws. On the other, because lawmakers can never imagine all possible circumstances under which their laws apply, just laws will become unjust in certain circumstances.<sup>11</sup>

Today's fundamental norms are cast more clearly and exclusively in terms of reason that take at their heart the notion, in some form, of basic human dignity. There is no doubt that the norms I mentioned earlier - government by consent, the protection of life and personal security, and freedom from discrimination - can all be advanced by moral argument. It is worth noting, however, that they can also be supported by a democratic argument grounded in conceptions of the state and fundamental human dignity that we have developed since John Stuart Mill.

If the state, as we believe, exists as an expression of its citizens, then it follows that its legitimacy and power must be based on the citizens' consent. Hence, citizens must be given the right to vote their governments into and out of office. Similarly, as Canada's *Secession Reference* illustrates, transitions from one form of citizenship to another must be premised on democratic norms<sup>12</sup>. This is so whether the right is written down or not; it flows from our conception of the democratic state. Similarly, if one agrees that the *raison d'être* of the modern state is to promote the interests of its citizens, it follows that states should not be allowed to

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<sup>11</sup>*Summa theologiae* I-II, Question 96, Sixth Article. "Since, then, the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore, if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed." *Ibid.* at 75.

<sup>12</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*").

exterminate entire sectors of the society. And if we accept equality based in the fundamental dignity of every human being, then it follows that states should not be able to single out innocent groups or individuals for torture or death. These precepts can be seen as the expression of unwritten constitutional principles based on the structure of democracy itself.

Thus the legitimacy of the modern democratic state arguably depends on its adhesion to fundamental norms that transcend the law and executive action. This applies to all of the branches of state governance – Parliament, the executive and the judiciary. For example, the *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, which were based on the Latimer House Guidelines of 1998 and endorsed by heads of government in 2003, state in Article 1:

Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.<sup>13</sup>

Rule of law. Human rights. Good governance. Principles that all branches of government, including the judiciary, must seek to uphold. Principles that may be written down, in some

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<sup>13</sup>*Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government* (Commonwealth Secretariat et al., 2004).

measure in some countries. But principles that the Commonwealth countries have asserted should prevail everywhere.

One way to confirm the link between fundamental norms and our understanding of statehood and the law is by examining the work of courts operating in systems with no written constitutional bill of rights. Even without clearly written constitutional powers of enforcement, courts have found ways to ensure fundamental justice.<sup>14</sup>

In Canada, decades before the *Charter*, Rand J. of the Supreme Court alluded to enforceable – if unwritten – norms of fairness, stating that “[i]n public regulation of this sort there is no such thing as absolute and untrammelled discretion” and good faith must always be presumed.<sup>15</sup> To do otherwise, he wrote, “would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.”<sup>16</sup> Nearly eighty years before Justice Rand, the courts of British Columbia struggled with a series of anti-Chinese provincial and local laws and used the division of powers in our constitution to strike them down.<sup>17</sup> Members of the Supreme Court of British Columbia - a court on which I would serve a hundred years later, at the time of the introduction of the *Charter* - relied on the text of the

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<sup>14</sup>Charles R. Epp, *supra* note 1, at 201. He concludes that a bill of rights “may be only a secondary effect” in the empowerment of judiciaries given that these “seem capable of deriving legitimacy from sources other than a bill of rights; and constituencies of support for judiciaries have not always been oriented toward a bill of rights.”

<sup>15</sup>*Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140.

<sup>16</sup>At 142.

<sup>17</sup>*Tai Sing v. Maguire* (1878), 1 B.C.R. (Pt. 1) 101 (S.C.); *R. v. Wing Chong*, (1885), 1 B.C.R. (Pt. 2) 150 (S.C.); *R. v. Mee Wah* (1886), 3 B.C.R. 403 (Cty. Ct.); *R. v. Gold Commissioner of Victoria District* (1886), 1 B.C.R. (Pt. 2) 260 (Div. Ct.); and *R. v. Corporation of Victoria* (1888), 1 B.C.R. (Pt. 2) 331 (S.C.).

constitution, but also on the principles of English law that underlay that text.<sup>18</sup> In 1938, in the *Reference re Alberta Statutes* case<sup>19</sup>, in the absence of a written guarantee, the Supreme Court held that freedom of political expression must be recognized as inherent in the nature of democracy.

At this point, you will not be surprised to hear me declare my position. As a modern natural law proponent, I believe that the world was right, in the wake of the horrors of Nazi Germany and the Holocaust, to declare that there are certain fundamental norms that no nation should transgress. I believe that it was right to prosecute German judges in the Nuremberg Trials for applying laws that sent innocent people to concentration camps and probable deaths. I believe that the drafting and adoption of the Universal Declaration of Human Rights in 1948 was a giant step forward in legal and societal thinking. And I believe that judges have the duty to insist that the legislative and executive branches of government conform to certain established and fundamental norms, even in times of trouble. In short, I am with Lord Cooke on this issue.

The real debate, it seems to me, is not about whether judges should ever be able to rely on basic norms to trump bad laws or state action. At least in some circumstances they must be able to do this. If a state were to pass a genocidal law, for example, I think it would clearly be the duty of the judges to deny the law's validity on the ground that it offended the basic norm

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<sup>18</sup>See John McLaren, "The Early British Columbia Supreme Court and the 'Chinese Question': Echoes of the Rule of Law" (1991), 20 Man. L.J. 107.

<sup>19</sup> *Reference re Alberta Statutes* [1938] S.C.R. 100 at 133-135 *per* Duff C.J., at 145 *per* Cannon J.

that states must not exterminate their people. If we agree on this – and I suspect most of us would – then the debate is not about whether judges should ever use unwritten constitutional norms to invalidate laws, but rather about what norms may justify such action.

The argument I have been advancing may dispose of the suggestion that, as a matter of principle, it is inherently wrong for judges to rely on unwritten constitutional norms, if constitutional is understood here in the sense of an overriding principle that can invalidate laws and executive acts. However, it does not dispose of the contradiction alluded to earlier between the theory that sees Parliament as the source of all law, and the idea that the law may include principles that Parliament has not made. Professor David Dyzenhaus calls this a central contradiction in modern democracies, and he articulates it in terms referable to judges:

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 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, so they run the risk of appearing to usurp the legislative role...<sup>20</sup>

Either way, judges lose.

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<sup>20</sup> David Dyzenhaus “The Unwritten Constitution and the Rule of Law” (2004), 23 S.C.L.R. (2d) 383 at 401.

The same conundrum is described by Professor Benjamin Berger, who observes that since the adoption of the Canadian *Charter* in 1982, “[r]ightly or wrongly...when Canadians hear the word “Constitution” they hear the promise of a just society. The post-*Charter* Constitution is held out as a justice-seeking document.”<sup>21</sup> What Berger makes clear is that if Canadians have embraced their constitution as a means to achieve justice, they have not yet established a consensus on where that justice comes from and on what it’s based. As he notes:

But if this symbolic change is clear, we are not at all resolved on our sense of the rightful source of justice in our political structure. Is a just society the fruit of reason or will? Our commitment to democratic institutions that represent the views of the populace – a deep commitment grounded in our history of Parliamentary supremacy – suggests that justice is a question of the authentic representation of will. By contrast, our modern faith in human rights (of which the *Charter* is our national manifestation) suggests that justice is not a matter of majoritarian or popular debate, but an expression of a reasoned commitment to the dignity of all human beings.

What we are seeing in the debates ... is an expression of this tension.

The answer to the conundrum between justice as an expression of Parliamentary will and justice as an expression of fundamental principles, sometimes unarticulated, lies in the answer

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<sup>21</sup> Benjamin L. Berger, “Judicial Appointments and Our Changing Constitution,” *The Lawyers Weekly*, 16 September 2005 at 3.

