

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.¹ Whatever the cause, it is certainly clear that the post-Second World War period can properly be called the "age of rights".² 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?"

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

2 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.

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."³

He elaborated on this sentiment in an article in 1988 written for the New Zealand Law Journal, where he concluded that:⁴

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.

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.⁵

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 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.

3 *Taylor v New Zealand Poultry Board* [1984] 2 NZLR 394, 398 (CA) Cooke J.

4 Rt Hon Sir Robin Cooke "Fundamentals" [1988] NZLJ 158, 164–165.

5 Cooke, above n 4.

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, by the venerated legal scholar, Dicey.⁶ 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 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.

6 See generally A V Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan, Basingstoke, 1959). 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* (Clarendon Press, Oxford, 2001) 13.

As Professor Walters has argued in the Canadian context:⁷

[I]nsofar as the theory of 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 has 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.

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.⁸

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.

7 Mark D Walters "The Common Law Constitution in Canada: Return of *Lex non Scripta* as Fundamental Law" (2001) 51 UTLJ 91, 136.

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

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."⁹ And yet the limits of that reason made written law incomplete in two important ways. On the one hand, law-makers may abuse their power by deviating from reason and enacting unjust laws. On the other, because law-makers can never imagine all possible circumstances under which their laws apply, just laws will become unjust in certain circumstances.¹⁰

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.¹¹ 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 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*

9 Thomas Aquinas *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* (Hackett, Indianapolis, 1988) 45.

10 Thomas Aquinas *Summa Theologiae* I–II, Question 96, Sixth Article, cited from Baumgarth, above n 9, 75:

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.

11 *Reference re Secession of Quebec* [1998] 2 SCR 217 (*Secession Reference*).

Government, which were based on the Latimer House Guidelines of 1998 and endorsed by heads of government in 2003, state in article 1:¹²

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.

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 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 to examine 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.¹³

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.¹⁴ To do otherwise, he wrote, "would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure."¹⁵ Nearly 80 years before Rand J, 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.¹⁶ Members of the Supreme Court of British Columbia – a court on which I would serve 100 years later, at the time of the introduction of the Charter – relied on the text of the constitution, but also on the principles of English law that underlay that text.¹⁷ In 1938, in the *Reference re Alberta Statutes* case,¹⁸ in the absence of a

12 *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government* (Commonwealth Secretariat and others, April 2004) <<http://www.thecommonwealth.org/>> (last accessed 19 September 2006).

13 Epp, above n 1, 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."

14 *Roncarelli v Duplessis* [1959] SCR 121, 140.

15 *Roncarelli v Duplessis*, above n 14, 142.

16 *Tai Sing v Maguire* (1878) 1 BCR (Pt 1) 101 (SC); *R v Wing Chong* (1885) 1 BCR (Pt 2) 150 (SC); *R v Mee Wah* (1886) 3 BCR 403 (Cty Ct); *R v Gold Commissioner of Victoria District* (1886) 1 BCR (Pt 2) 260 (Div Ct); and *R v Corporation of Victoria* (1888) 1 BCR (Pt 2) 331 (SC).

17 See John McLaren "The Early British Columbia Supreme Court and the 'Chinese Question': Echoes of the Rule of Law" (1991) 20 Man LJ 107.

18 *Reference re Alberta Statutes* [1938] SCR 100, 133–135 Duff CJ, 145 Cannon J.

written guarantee, the Supreme Court held that freedom of political expression must be recognised 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 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:¹⁹

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

Either way, judges lose.

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

19 David Dyzenhaus "The Unwritten Constitution and the Rule of Law" (2004) 23 SCLR (2d) 383, 401.

justice-seeking document."²⁰ 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:²¹

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 to three more particular problems that arise from the concept of underlying unwritten constitutional norms. The first is the problem of how unwritten norms can be squared with the precept that law should be set out in advance of its application. The second is the problem of how to identify these fundamental unwritten principles that are capable of trumping laws and executive action. The third is the problem of judicial legitimacy. I now turn to these problems, dealing with each in turn. It will quickly become apparent, however, that all three are related to a central issue: the legitimacy of unwritten constitutional norms.

I turn first to the precept that the law must be known in advance of its application, and the problem that – on their face – unwritten constitutional norms violate this principle. One of the foundational concepts in law, it is said, is the importance of the "law on the books". The rule of law signifies that all actors in our society – public and private, individual and institutional – are subject to and governed by law. The rule of law excludes the exercise of arbitrary power in all its forms. It requires that laws be known or ascertainable to citizens, and ensures that laws are applied consistently to each citizen, without favouritism, thus ensuring the legitimacy of state exercise of power.

This is a greater problem in some jurisdictions than in others. Many countries have adopted written bills of rights, which may be seen as an attempt to provide clarity, both to citizens and other jurisdictions, about the law of the land. The Magna Carta of the 13th century can in many ways be seen as the first of what we would recognise as a bill of this sort, and of course the 18th

20 Benjamin L Berger "Judicial Appointments and Our Changing Constitution" (16 September 2005) *The Lawyers Weekly Canada* 3.

21 Berger, above n 20, 4.

century revolutionaries of the United States and in France produced impressive documents that sought to capture the essence of the values of their political movements and mechanisms to express them. In the United States, the constitutional texts have achieved mythical status as embodying not only the limits on government, but the basic values of the state. Renewed interest in setting out basic principles in written form emerged last century out of the horrors of the Second World War and the perceived need for clarity about basic principles that would not be violated. Even in countries with strong common law traditions, the need to set out basic principles in writing increasingly gained currency among both elites and the masses.

The desire to reduce legal principles to writing is significant, but it should not be used to oversimplify the complex issue of the place of unwritten norms in our constitutions. Two points are relevant here.

First, in common law countries, it is distinctly *not* the case that all law must be "on the books". England's attitude to the importance of writing down the law is at best ambivalent. On the one hand, the Magna Carta is a foundational text designed to provide written guarantees of fundamental principles. On the other, the common law fleshed out and supplemented these principles by a catalogue of largely judge-made rules. The presumption of innocence, the rejection of the state's power to use violence against citizens implicit in the common law confessions rule, and the principle of freedom of political expression are but examples of fundamental constraints on executive power articulated by judges. While Parliament theoretically had the power to attenuate and perhaps reverse these judge-made rules, the fact that it by and large chose not to shows a relaxed attitude to the need to set laws down in writing for the citizen's guidance. Indeed, the ability of the common law to develop *ex post facto* responses to new situations is frequently cited as its genius.

Not everyone, of course, thought this lack of written laws a good thing. Jeremy Bentham decried what he saw reflected in the common law of crimes. In 1792, he wrote that it amounted to "dog law". "When your dog does any thing you want to break him of," he explained, "you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the Judges make law for you and me."²²

The second point that should be made about the view that all laws should be in writing is that even when the legislature takes the trouble to write down laws, the result is almost always incomplete. Laws are necessarily stated in general terms. They are intended to apply to a wide variety of situations. Law-makers cannot conceivably foresee all the situations to which a legal provision may apply, nor how it should do so. Judges must reduce the legislative general to the situational particular. The result is that even where laws are written down, it is often impossible to

22 Jeremy Bentham *Truth Versus Ashhurst; or, Law as it is, Contrasted with What it is Said to be* (T Moses, London, 1823) 11.

predict precisely how the law will apply in a particular situation in advance of a judicial ruling on the matter. This is as true for civil code countries where all laws are reduced to writing, as it is for common law countries. In this sense, much of the law is never "on the books".

This is also true of constitutions. Benjamin Berger, writing about the Canadian constitution, has this to say:²³

When we think about what counts as constitutional law, we generally look exclusively to two sources: the text of the Constitution and the decisions of the Supreme Court of Canada. As any first-year student will learn in constitutional law, this gaze is an under-inclusive one.

Since Confederation, many of the arrangements central to the shape and functioning of our government have taken the form of convention and political construction.

In other words, even inclusive, written constitutions leave much out, requiring us to look at convention and usage. In addition, the broad, open-textured language used in constitutional documents admits of a variety of interpretations. In order to resolve the interpretational issues that may arise from this language, judges may need to resort to conventions and principles not articulated in the written constitution itself.

What then do we mean when we say law should be "on the books"? We mean, it seems to me, that applications of the law should be connected to generally accepted rules. It is not necessary that the law foretell precise results. It is sufficient that the law provide a general idea of what kind of result may ensue, and that the result, once established by judicial rulings, be justifiable in terms of what is written on the books and legal convention or usage.

Fundamental constitutional principles, whether written or unwritten, meet these requirements. Unwritten common law constitutional norms, such as the right not to be punished without a trial, to retain and instruct counsel, or to enjoy the presumption of innocence, are so fixed in convention and usage that judicial rulings based upon them will be understood and accepted as just. I conclude that while it is useful to articulate fundamental constitutional norms insofar as we can, the fact that a principle or its application does not take written form does not provide a principled reason for rejecting judicial reliance on it.

This brings us to the second problem: identifying those unwritten constitutional principles that can prevail over laws and executive action. At least three sources of unwritten constitutional principles can be identified: customary usage; inferences from written constitutional principles; and the norms set out or implied in international legal instruments to which the state has adhered.

Traditionally at common law, unwritten fundamental principles of constitutional or quasi-constitutional significance have been identified by past usage, chiefly the cases that have been

²³ Berger, above n 20.

decided by judges in the past. Judgments identifying or clarifying constitutional norms are typically supported by a culture in which Parliament and the executive accept the appropriateness of the norm and permit it to stand. Occasional exceptions, such as states of emergency, do not negate the general acceptance of these norms. As Dean Palmer of this Faculty of Law notes in a recently published paper, bureaucratic and political actors not only respond to constitutional interpretation, but they also engage in it themselves when they acknowledge and respect the legitimate constraints on their spheres of decision-making.²⁴ Usage is thus not only about how judges view the constitution, but how decision-makers more generally understand their function in a broader system of governance.

The recourse to usage for constitutional guidance is clearly understood in post-colonial countries, such as Canada and New Zealand. Thus the preamble to Canada's 1867 constitutional text stipulates "a Constitution similar in principle to that of the United Kingdom,"²⁵ contemplating reference to unwritten constitutional norms derived from British history.

This brings me to the second source of unwritten constitutional principles – inference from the constitutional principles and values that have been set down in writing. While they may interpret their written constitutions, courts are never free to ignore them. Confronted with a new situation requiring a new norm, judges must look to the written constitution for the values that capture the ethos of the nation. In Canada, the 1998 *Secession Reference*²⁶ provides an instructive example of how courts may draw unwritten constitutional principles from the written provisions of the constitution. The background was a provincial referendum ten years ago in which citizens in Quebec defeated the proposition that Quebec secede from Canada, but did so by a margin of just over one per cent. Shocked, the Canadian government referred the question of the legality of unilateral secession to the Supreme Court.

The texts of Canada's constitution are silent on whether a province can secede from the federation. No written principles set the legal framework that would govern an attempt to secede. In order to answer the question before it, the Supreme Court turned to Canada's history and conventions, as well as the values that Canadians, through their governments, had entrenched in their written constitution. It examined these in the light of a long-recognised treatment of Canada's evolving constitution as a "living tree".²⁷

24 Matthew S R Palmer "What Is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-holders" (2006) 17 PLR 133, 152–153.

25 Constitution Act 1867 (UK), 30 & 31 Vic, c 3, preamble (reprinted in RS C 1985 App II, No 5).

26 *Secession Reference*, above n 11.

27 *Edwards v Attorney-General for Canada* [1930] AC 124 (PC) 136; *Secession Reference*, above n 11, para 52.

The Court identified four "fundamental and organizing principles of the Constitution"²⁸ which were relevant to the question: federalism; democracy; constitutionalism and the rule of law; and respect for minorities. Although unwritten, the Court found that "it would be impossible to conceive of our written structure without them"²⁹ and found that they were "not merely descriptive, but ... also invested with a powerful normative force, and are binding upon both courts and governments."³⁰ By exploring both the foundations and implications of each of these principles, the Court provided the answer to the question posed by the government: under Canadian law, unilateral succession by a province was not possible. However, the Court went on to state that these same organising principles imposed an obligation on the federal and provincial governments to enter into negotiations if the citizens of Quebec were to provide "a clear expression of a clear majority"³¹ on the question of secession. By examining constitutional texts in light of the principles that underlay them and gave their content meaning, the Court ensured that an important legal gap was filled. This permitted the Court to suggest concrete steps that would have to be followed in a process that would provide the certainty, stability and predictability that are cornerstones of the rule of law.

The third source that may suggest and inform unwritten constitutional principles is international law. Customary international law has been accepted as a legitimate part of the common law without controversy, largely because it is based on both usage and on an acceptance of a sense of obligation: what we call *opinio juris*. As for treaties signed by the Crown, however, the traditional "dualism" of the common law has generally required the explicit incorporation of international norms into domestic law. Yet as British barrister Rabinder Singh has recently noted, judgments in the United Kingdom seem to reveal an increasing acceptance that even unincorporated treaties can be used not only to resolve ambiguity, but may establish a "presumption of compatibility" in the absence of express statutory language to the contrary.³² As courts continue to struggle to understand the precise legal effect of a country's international commitments,³³ it surely must be the case that these can inform our understanding of the basic

28 *Secession Reference*, above n 11, para 32.

29 *Secession Reference*, above n 11, para 51.

30 *Secession Reference*, above n 11, para 54.

31 *Secession Reference*, above n 11, para 92.

32 Rabinder Singh "Globalisation of Human Rights and International Norms" (Paper Presented at UK-Canada Legal Exchange, London, 30 September 2005) (on file with the New Zealand Journal of Public and International Law). He points in particular to Lord Bingham of Cornhill in *A v Secretary of State for the Home Department* [2005] 2 UKHL 71 and Lord Steyn and Lord Nicholls in *Kuwait Airways Corporation* [2002] 2 UKHL 19.

33 For a discussion of the Canadian context, see Jutta Brunnée and Stephen J Toope "A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford, 2004).

values that the state publicly and formally embraces. Where a country adheres to international covenants, such as the United Nations Convention Against Torture³⁴ or the International Covenant on Civil and Political Rights,³⁵ it thereby signals its intentions to be bound by their principles. This may amplify indications from usage and convention and the written text of the constitution and help to establish the boundaries of certain unwritten principles.

I return to the question: how can unwritten constitutional principles be identified? The answer is that they can be identified from a nation's past custom and usage; from the written text, if any, of the nation's fundamental principles; and from the nation's international commitments. Unwritten principles are not the arbitrary or subjective view of this judge or that. Rather, they are ascertained by a rigorous process of legal reasoning. Where, having regard to convention, written provisions and internationally affirmed values, it is clear that a nation and its people adhere to a particular fundamental principle or norm, then it is the court's duty to recognise it. This is not law-making in the legislative sense, but legitimate judicial work.

Having examined whether unwritten constitutional principles violate the idea that laws should be written, and having identified three sources from which these principles can be ascertained, I turn now to the final problem: the problem of judicial legitimacy.

Here we face another apparent contradiction. On the one hand, the legitimacy of the judiciary depends on the justification of its decisions by reference to a society's fundamental constitutional values.³⁶ This is what we mean when we say the task of judges is to do justice. Judges who enforce unjust laws – laws that run counter to fundamental assumptions about the just society – lose their legitimacy. When judges allow themselves to be co-opted by evil regimes, they are no longer fit to be judges. This is the lesson of the Nuremberg Trials. It is also a lesson, however, that should embolden judges when faced with seemingly more mundane manifestations of injustice.

However, matters are not so simple. As judges give content to unwritten constitutional principles, they may be accused of usurping the functions of Parliament; of making the law rather than interpreting and applying it; in short, of judicial activism. We should not lightly dismiss this concern – a concern that troubles many who sincerely care about just democratic governance. They argue that unelected judges cannot be trusted to determine issues of fundamental significance to citizens. They say that unwritten constitutional principles are not anchored in a text arrived at through a democratic consensus. There is therefore no safeguard to ensure that judges do not

34 The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 UNTS 85) was adopted in 1984. Canada signed it in 1985 and ratified it in 1987; New Zealand signed it in 1987 and ratified it in 1989.

35 The International Covenant on Civil and Political Rights (999 UNTS 171) was adopted in 1966. Canada acceded to it in 1976; New Zealand signed it in 1968 and ratified it in 1979.

36 Dyzenhaus, above n 19, 412.

merely express their personal preferences about important political issues. In the words of one American scholar, "When judges look outside the Constitution" – and here he means the written constitution – "they ultimately look inside themselves."³⁷ Moreover, even if one could trust the judges to get the right answer, asking unelected appointees to do so would be wrong on principle because it depends not on the will of the people but of the individual. In a word, it is undemocratic, the critics contend. These arguments are sometimes supplemented by the concern that as members of elite groups, judges may import unwritten constitutional principles to undermine the protection of minorities and the vulnerable or to advance narrow interests.³⁸

The question of judicial legitimacy returns us to the conundrum I alluded to at the outset. To be legitimate, judges must conform to fundamental moral norms of a constitutional nature. But when they do, they risk going beyond what would appear to be their judicial functions. How is the conundrum to be resolved? The answer, I would suggest, is that the conundrum is a false one; that judges must be able to do justice and at the same time stay within the proper confines of their role.

The role of judges in a democracy is to interpret and apply the law. The law involves rules of different orders. The highest is the order of fundamental constitutional principles. These are the rules that guide all other law-making and the exercise of executive power by the state. More and more in our democratic states, we try to set these out in writing. But when we do not, or when, as is inevitable, the written text is unclear or incomplete, recourse must be had to unwritten sources. The task of the judge, confronted with conflict between a constitutional principle of the highest order on the one hand, and an ordinary law or executive act on the other, is to interpret and apply the law as a whole – including relevant unwritten constitutional principles.

This presupposes that the constitutional principle is established having regard to the three sources just discussed – usage and custom; values affirmed by relevant textual constitutional sources; and principles of international law endorsed by the nation. Determining whether these sources disclose such principles is quintessential judicial work. It must be done with care and objectivity. It is not making the law, but interpreting, reconciling and applying the law, thus fulfilling the judge's role as guarantor of the constitution.

How does the judge discharge this duty? First, it seems to me, the judge must seek to interpret a suspect law in a way that reconciles it with the constitutional norm, written or unwritten.

37 Ronald D Rotunda "Interpreting an Unwritten Constitution" (1989) 12 Harv JL & Pub Pol'y 15, 17.

38 In Canada, these democratic and social class arguments come from both left and right. For examples, see Michael Mandel *The Charter of Rights and the Legalization of Politics in Canada* (rev ed) (Thompson Educational Publishing, Toronto, 1992); Allan C Hutchinson *Waiting for Coraf: A Critique of Law and Rights* (University of Toronto Press, Toronto, 1995); F L Morton and Rainer Knopf *The Charter Revolution and the Court Party* (Broadview Press, Peterborough (ON), 2000); and Patrick James, Donald E Abelson and Michael Lusztig (eds) *The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada* (McGill-Queen's University Press, Montreal and Kingston, 2002).

Usually, this will resolve the problem. But in rare cases, it may not. If an ordinary law is clearly in conflict with a fundamental constitutional norm, the judge may have no option but to refuse to apply it.

In the 1961 film *Judgment at Nuremberg*, Judge Dan Haywood – played by Spencer Tracy – delivers a powerful set of justifications for punishing those who not only had violated the law, but who had done so under the cover of their own allegiance to the state and its positive law. The judge rules as follows:³⁹

But the Tribunal does say that the men in the dock are responsible for their actions, men who sat in black robes in judgment on other men; men who took part in the enactment of laws and decrees, the purpose of which was the extermination of human beings; men who in executive positions actively participated in the enforcement of these laws – illegal even under German law.

By this, I take the judge to mean that these laws and decrees were unconstitutional under the higher principles as affirmed by Germany's history, culture and constitution. Moments later the judge notes that what is shocking about the atrocities is the degree to which they were normalised. Had the defendants been "degraded perverts" or "sadistic monsters and maniacs, then these events would have no more moral significance than an earthquake, or any other natural catastrophe." Judges must resist this normalisation – this making "law" out of what cannot be just, and hence, in a profound sense, cannot be legal. To do otherwise is to allow injustice to hide itself under the cloak of false legality.

Critics often concede the point, but suggest that this duty is narrow and limited. Professor Jeffrey Goldsworthy's landmark critique⁴⁰ of the judicial enforcement of unwritten principles, for example, allows that it may at times be proper, morally, for a judge to contradict Parliament in the face of injustice. At the same time, he argues that to turn this kind of moral obligation into a legal one is to confuse morality and legality.⁴¹ He goes on to argue that a view of the law that affirms its moral content is one that shows insufficient concern for the democratic consequences of this kind of judicial role.⁴²

In a healthy democratic society, cases of clear and extreme injustice are rare; in most cases, whether or not a law violates some basic right is open to reasonable arguments on both sides. The whole point of having a democracy is that in these debatable cases the opinion of the majority rather than of an unelected élite is supposed to prevail.

39 Stanley Kramer (director/producer) and Abby Mann *Judgment at Nuremberg* (Roxton Films, USA, 1961).

40 Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999) 277.

41 Goldsworthy, above n 40, 263–272.

42 Goldsworthy, above n 40, 269.

Goldsworthy's refutation, however, is a partial one. It applies only in a "healthy democratic society", where cases of "clear and extreme injustice are rare", and only to "debatable cases", where it is easy, and arguably right, to say that judges should leave the final resolution to the legislature or the executive. But what of unhealthy societies, less debatable cases?

Interpreting and applying constitutional principles, written and unwritten, requires that the judge hold uncompromisingly to his or her judicial conscience, informed by past legal usage, written constitutional norms and international principles to which the nation has attorned. But judicial conscience is not to be confused with personal conscience. Judicial conscience is founded on the judge's sworn commitment to uphold the rule of law. It is informed not by the judge's personal views, nor the judge's views as to what policy is best. It is informed by the law, in all its complex majesty, as manifested in the three sources I've suggested.

In Robert Bolt's drama, *A Man For All Seasons*, we encounter a scene in which Cardinal Wolsey, seeking to advance the King's interests, confronts the conscience of Sir Thomas More, not yet Lord Chancellor, who serves as a symbol of the law and the constitution in the face of arbitrariness and the demands of politics. The Cardinal presents arguments of expedience, personal and public, for assisting the King, who requires a divorce. Appeals are made to More's "common sense" and he is implored to abandon the blinders of his "moral squint" to better see the political picture.⁴³ But Thomas More cannot forsake a conscience grounded in deeper legal principles. He states his creed this way: "I believe, when statesmen forsake their own private conscience for the sake of their public duties ... they lead their country by a short route to chaos."⁴⁴

While Bolt's More speaks of "private conscience", it is clear that what he means is the legal conscience of a jurist who has considered the nature of the law. Indeed, the historical Thomas More viewed conscience as the foundation of law precisely because he did not see it as an expression of personal feeling or passion. Instead, what he termed "conscience" was what allowed all individuals, even traitors and tyrants, to access justice if they applied their reason.⁴⁵ Never advocating open resistance by the masses in the face of unjust laws, and expressing concerns about lawlessness, More nevertheless understood that the positive laws did not define the boundaries of law. His correspondence with his daughter while imprisoned – in what would be his final days – reveals a man burdened by his own reasoned legal conscience. In what has been called More's

43 Robert Bolt *A Man For All Seasons* (Irwin, Toronto, 1963) Act I, Sc II, 10.

44 Bolt, above n 43, 12.

45 See Gerard B Wegemer *Thomas More on Statesmanship* (Catholic University of America Press, Washington, 1996) 73.

"Dialogue on Conscience",⁴⁶ he takes some comfort, even in prison and facing death, from his certainty that his conscience was clear and was the product of good faith, reason and diligence.⁴⁷

It is a similar conscience, grounded and schooled in custom and the law, that is the surest guide to upholding the fundamental principles upon which justice and democracy rest. Modern judges may not be called upon to exercise the courage of Thomas More, who described his choice as lying between "beheading and hell".⁴⁸ But I do suggest that a judge, if he or she is to take seriously the duties of the office, must apply his or her judicial conscience and reason, and that this may at times mean making decisions that are difficult or unpopular.

Lest I be accused of advocating "dog law", let me say again that the principles that guide these difficult decisions are not those of individual judges, but those implicit in the very system that gives the judges their authority. Ignoring one's judicial conscience is not about staying within one's role, but instead about abdicating one's responsibility to the law. There do indeed exist unwritten principles without which the law would become contradictory and self-defeating, and it is the duty of judges not only to discover them, but also to apply them. To forsake them, in Robert Bolt's phrase, is indeed to take the short route to chaos.

46 Wegemer, above n 45, 210–211.

47 In More's letter of 3 June 1535 to his daughter, Margaret Roper, only a month before his execution, he writes of his certainty about the correctness of his rejection of the King's positive law:

And whereas it might haply seem to be but small cause of comfort because I might take harm here first in the meanwhile, I thanked God that my case was such in this matter through the clearness of mine own conscience that though I might have pain I could not have harm, for a man in such case lose his head and have no harm. For I was very sure that I had no corrupt affection

Further, he notes

. . . I said that I was very sure that mine own conscience so informed as it is by such diligence as I have so long taken therein may stand with mine own salvation. I meddle not with the conscience of them that think otherwise; every man *suo domino stat et cadit* [stands and falls as his own ruler].

James J Greene and John P Dolan (eds) *The Essential Thomas More* (Mentor-Omega, New York, 1967) 277, 279.

48 Greene and Dolan (eds), above n 47, 278.

