THE PREAMBLE, JUDICIAL INDEPENDENCE AND JUDICIAL INTEGRITY

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Australian voters were recently asked not only whether Australia should become a republic, but also whether a new preamble should be added to their Constitution.[1] The proposed new preamble was part of a package that included a new section 125A, which provided that the preamble "has no legal force and shall not be considered in interpreting this Constitution ..." This provision was included to dispel fears that activist judges might otherwise misuse the preamble, which expressed commitments to abstract principles of political morality. It was feared that they might claim authority to enforce their own understanding of those principles by invalidating laws enacted by a parliament. They might enforce the principles not only indirectly, by using them to creatively "interpret" (change the meaning of) other constitutional provisions, but also directly, on the ground that they have independent constitutional status.

That this was a very real and not a merely fanciful danger is graphically demonstrated by the reasoning of the Canadian Supreme Court in *Reference re: Public Sector Pay Reduction Act (P.E.I.) ("the Provincial Judges' Salaries case")*.[2] In a judgment of Lamer C. J., with which five other Justices concurred, the Court used — or rather, misused — the Preamble of Canada's *Constitution Act, 1867* as a rationalization for inventing a sweeping new constitutional principle of judicial independence. The Court then held that principle to prohibit provincial governments from reducing judicial remuneration, even as part of a general reduction of public sector remuneration for budgetary reasons, in the absence of advice from an independent judicial remuneration tribunal.

The question I propose to discuss is not whether that result is good or bad as a matter of public policy. It is whether the Court's reasoning was good or bad as a matter of law. Only the most extreme sceptic would deny that there is any difference between legal reasoning and arguments about public policy.

The *Constitution Act, 1867* and the *Canadian Charter of Rights and Freedoms*[3] contain some express provisions that help to protect judicial independence but, as the Court pointed out, their scope is limited. First, they apply to inferior provincial courts only when exercising criminal jurisdiction.[4] Secondly, they do not prohibit legislatures from reducing judges' remuneration. Indeed, section 100 of the *Constitution Act, 1867*, by providing that Parliament shall fix and provide the salaries of superior, district and county court judges, appears to positively authorize such reductions.[5] The Supreme Court observed that because of these "large gaps" in their coverage, the express provisions did not comprise "an exhaustive and definitive code for the protection of judicial independence."[6]

But surprisingly, the Court did not conclude that therefore, the Canadian Constitution did not contain such a code — that in true British spirit, the United Kingdom Parliament, which enacted those provisions, entrusted the full protection of judicial independence to the wisdom and democratic accountability of elected legislators. The Court dismissed this possibility, without argument, as "untenable."[7] It concluded, instead, that such a code could be derived from "an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*."[8]

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1 Both proposals were defeated at the referendum held on 6 November 1999.

2 [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577 [hereinafter *the Provincial Judges' Salaries case*, cited to D.L.R.].

3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c.11.

4 Sections 96–100 of the Constitution Act do not apply to inferior provincial courts at all, and s. 11(d) of the Charter applies only to the exercise of criminal jurisdiction: *supra* note 2 at para. 82–85.

5 *Ibid.* at 618–19.

6 *Ibid.* at 617–18.

7 *Ibid.* at 617.

8 *Ibid.* at 617.

To establish that such an unwritten principle existed, the Court relied heavily on a clause in the Preamble providing that the 1867 Act was intended to establish "a Constitution similar in Principle to that of the United Kingdom." But there are at least three powerful objections to basing such a principle on this clause. Indeed, each one of them in itself appears to be fatal to the Court's conclusion.

First, it had previously been held that the Preamble had "no enacting force," and the Court purported to accept this, observing that "strictly speaking, it is not a source of positive law, in contrast to the provisions which follow it."[9] But the Court immediately proceeded to adopt a contradictory understanding, without acknowledging the contradiction. It said that the Preamble nevertheless had "important legal effects." It could be used to identify the purpose of the Constitution and thereby assist the interpretation of ambiguous provisions. More importantly, it "recognizes and affirms" the "organizing principles" that the provisions of the Constitution were intended to effectuate, and it therefore "invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law."[10]

It is not clear why the Court believes that this understanding of the effect of the Preamble is consistent with the established rule that it is not a source of positive law. It could be argued that the Preamble merely "recognizes and affirms," but does not itself enact, the "organizing principles" underlying the Constitution's express provisions. On this view, the Preamble is not itself the source of those principles, which exist independently of it: it merely assists in identifying them. Indeed, the same principles could be identified and enforced even if the Preamble did not exist. But in this case, this is an unconvincing and artificial distinction. If there was some evidence of the existence of the principle apart from the Preamble itself — if, for example, the substantive provisions of the Constitution themselves suggested the existence of such an underlying principle — the Preamble could be regarded as corroborating that evidence. But here there is no evidence of the existence of the supposed principle other than the Preamble itself. The substantive provisions that partially protect judicial independence are not evidence of an underlying principle of complete judicial independence, precisely because their protection is only partial. Indeed, they are more plausibly regarded as evidence for the opposite conclusion, that the Constitution is based on an underlying principle that judicial independence warrants only partial constitutional protection. But if the Preamble amounts to the only evidence of the existence of the supposed principle, there is little if any difference between "recognizing and affirming" that it exists and positively enacting it.

Perhaps for this reason, the Court does not press the distinction between "recognition" and "enactment." Indeed, that distinction is inconsistent with many passages in the Court's reasoning. For example, it says that the Preamble is "*the means* by which the underlying logic of the [Constitution] Act can be given the force of law;"[11] that "the *existence* of many of the unwritten rules of the Canadian Constitution can be explained by reference to the preamble of the *Constitution Act*;"[12] that it was able to "infer this general principle [of parliamentary democracy] *from* the preamble,"[13] and it later refers to "the underlying, unwritten and organizing principles *found in* the preamble."[14] Finally, it declares that: "In fact, it is in the preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located."[15] So the preamble is both "the true source" of a judicially enforceable principle and also "not a source of positive law!"

The second objection to the Court's reasoning is that the Preamble refers to the British Constitution, but as the Court itself acknowledges, the *Act of Settlement* of 1701 only protected the judges of superior courts from dismissal by the Crown.[16] It offered no protection for inferior courts. In his devastating dissent, La Forest J. pointed out that "[t]he independence and impartiality of inferior courts were ... protected through the superintending functions of the superior courts. They were not protected directly under the relevant British 'constitutional' principles."[17] "The overall task of protection sought to be created for inferior courts in the present appeals ... [is] in no way similar to anything to be found in the United Kingdom."[18]

The Court managed to brush aside this second objection in two sentences:

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9 *Ibid.* at 621.
10 *Ibid.* at 621–22.
11 *Ibid.* at 621–22 [italics added].
12 *Ibid.* at 621 [first italics added].
13 *Ibid.* at 624.
14 *Ibid.* at 627 [italics added].
15 Ibid. at 628.
16 *Ibid.* at 627.
17 *Ibid.* at 713–14.
18 *Ibid.* at 710.

> However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country."[19]

"In the same way"? Hardly — there is a world of difference between the adoption of new constitutional principles by formal enactment and the spontaneous "evolution" of unwritten principles. So the objection is dismissed by a vague reference to "evolution," combined with a plainly false analogy.

The idea that the meaning of constitutional provisions can spontaneously "evolve," so that the content of those provisions can change without constitutionally prescribed methods of amendment being employed, is extremely dubious at the best of times.[20] Applied to unwritten "underlying" principles, it confers on judges an unbounded authority to find whatever they like in a constitution. I mean this in a strict and literal sense. In the case of written provisions, there is at least a fixed text that limits the extent to which their meaning can supposedly "evolve." The text itself must be formally amended and cannot spontaneously "evolve." In the case of unwritten principles, there is no such limit. They can be held to expand or mutate according to the judges' confidence in their ability to divine "contemporary values" — which in practice means their own values. Indeed, the Court could have used this strategy even if judicial independence had been completely unknown to British constitutionalism in 1867. The Court could have argued that the most fundamental principle of the British Constitution was "good government," that this principle was incorporated within the Preamble and that it had so "evolved" that by 1997 it required total judicial independence! The difference between that imaginary argument, and the one the Court actually employed, is merely one of degree.

The third and most powerful objection to the Court's argument is that the British constitution has never included any judicially enforceable constitutional principle of judicial independence, let alone one that prevents Parliament from reducing judicial remuneration. As La Forest J. observed, "[a]t the time of Confederation (and indeed to this day), the British Constitution did not contemplate the notion that Parliament was limited in its ability to deal with judges."[21] A statute interfering with judicial independence might be condemned in Britain as "unconstitutional," but that would mean "in breach of constitutional convention," not "ultra vires and invalid."[22] The Court's conclusion is therefore based on "an historical fallacy."[23] Moreover, it is not a fallacy whose exposure requires recondite historical knowledge — the first and most elementary fact that anyone investigating the question would learn is that the British Parliament in 1867 was deemed to be legally sovereign.

The most extraordinary, and reprehensible, aspect of the Court's reasoning is that it chooses to simply ignore this obvious and fatal objection. La Forest J., in dissent, is compelled to anticipate a counter-objection to it: namely, that it "is merely a technical quibble."[24] He treats this counter-objection far too respectfully. It would be absurd to describe the difference between a constitutional principle that is judicially enforceable, and one that is not as "merely technical." It would amount to saying that the difference between the British and the American constitutional traditions with respect to the protection of basic constitutional principles is "merely technical." In fact, the difference is plainly one of very great substance, amounting to a radically different allocation of decision-making authority. And remember that the crucial provision in the preamble declares that the Constitution is to be similar in principle to the British — not the American — Constitution.

Curiously, the Court did not reiterate its response to the second objection. It could have said that although, in 1867, the Preamble referred to a principle that was not judicially enforceable, "our Constitution has evolved over time" and it has "grown into a principle" that is now judicially enforceable.[25] As previously explained, when applied to unwritten principles, the "evolving constitution" gambit can be used to surmount any obstacle!

To summarize, the Court employed the following stratagems to avoid the three obvious and fatal objections to its misuse of the Preamble: a self-contradiction, a vague reference to "evolution" combined with a plainly false analogy, and an evasion.

The Court's reasoning exemplifies a style of constitutional interpretation that is becoming increas-

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19 *Ibid.*

20 See J. Goldworthy, "Originalism in Constitutional Interpretation" (1997) 25 Federal Law Review 1, esp. at 35–9.

21 *Supra* note 2 at 707.

22 *Ibid.* at 709.

23 *Ibid.* at 709.

24 *Ibid.* at 710.

25 *Ibid.*

ingly popular in common law jurisdictions. Constitutional provisions are said to serve deeper, more general principles, such as representative democracy and judicial independence. Those principles are then treated not only as aids to the interpretation of the enacted provisions, but as independent and directly enforceable, even though this means going far beyond those provisions. Several members of the High Court of Australia, for example, derived an implied freedom of political speech from the principle of representative democracy that underlies the electoral provisions of the Australian Constitution.[26]

The traditional approach of the courts was to hold unwritten principles to be judicially enforceable only if and insofar as this was "necessarily implied" by the written provisions. The High Court of Australia at least attempted to follow that traditional approach: it argued, albeit unpersuasively, that the electoral provisions of the Constitution could not achieve their intended purpose without the assistance of a judicially enforceable implied freedom of political speech.[27] But the Canadian Supreme Court makes no attempt to demonstrate that a general principle of judicial independence is "necessarily implied" by the Canadian Constitution. It claims that the Preamble gives legal force to the "underlying logic" of the *Constitution Act, 1867*,[28] without making the slightest effort to justify that claim. No doubt that is because the claim could not possibly be justified. As the example of the British Constitution demonstrates, it is possible to value judicial independence while relying on extra legal methods of protecting it. This may be unwise, but cannot plausibly be described as "illogical." *A fortiori*, it is not illogical to enact a constitution that offers partial legal protection for judicial independence — one that protects the independence of some courts from some kinds of interferences, but not of all courts from every conceivable interference. As La Forest J. points out, there is nothing illogical in confining the constitutional protection of judicial independence to superior courts, which are able to review and correct the decisions of unprotected, inferior courts. Neither logic nor practical necessity requires that protecting judicial independence is a matter of "all or nothing."

One problem with ignoring the limited scope of the constitutional provisions that have been enacted, by directly enforcing more general principles that supposedly underlie them, is that it ignores the constitution-makers' decision to give effect to those principles only by particular means and to a limited extent. It elevates or privileges some principles and upsets the balance struck by the constitution-makers between them, and other, competing principles. It treats the written provisions as inadequate expressions of more general principles, rather than as deliberately chosen accommodations of competing principles.[29] In so doing, it substitutes the judges' political judgment for that of the constitution-makers. In addition, it risks making the written provisions redundant. If their precise terms and limited scope can be exceeded whenever the judges deem them unable to fulfil their underlying principles, then they serve little purpose. Why bother with them at all? Why not in all cases go straight to the underlying principles? By *reductio ad absurdum*, the Court's reasoning is in danger of collapsing the *Constitution Act, 1867* into a single norm: the general principles of the British Constitution, as the judges deem them to have 'evolved' in Canada since 1867.

I suspect that judges are increasingly attracted to the idea of enforcing general principles that supposedly "underlie" particular legal rules, partly because of the influence of Ronald Dworkin's legal philosophy. Dworkin has made a powerful case for thinking that the common law is ultimately based on general, underlying principles that guide judges in applying, developing and changing more particular rules and doctrines. But the same is not true of statutory and constitutional law. Dworkin's theory must be shown to fit the facts of legal practice, rather than the facts distorted to fit the theory. It is not an *a priori* truth that every legal rule in every legal system is subordinate to deeper legal principles that are judicially enforceable. In so far as it is true of particular legal systems or parts of legal systems, it is a contingent truth, which depends on the practices of legal officials. Dworkin himself presents his theory as the best "interpretation" of how judges in common law jurisdictions do in fact decide cases at common law, and claims that it is confirmed by the way they themselves describe their reasoning.[30]

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[26] In a later case, the Court disapproved of this reasoning, while reaffirming the existence of the implied freedom: *Lange* v. *A.B.C.* (1997) 189 Commonwealth Law Reports 520.

[27] For criticisms of the Court's reasoning, see J. Goldsworthy, "The High Court, Implied Rights, and Constitutional Change" *Quadrant*, March 1995, 46, and "Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue" (1997) 32 Monash U.L. Review 362 at 371–74.

[28] *Supra* note 2 at 622.

[29] J. Goldsworthy, "Implications in Language, Law and the Constitution" in G. Lindell, ed., *Future Directions in Australian Constitutional Law* (Sydney: Federation Press, 1994) 150 at 178–81.

[30] R. M. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) c. 4 at 86–7, 112 and 115–16, and R. M. Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986) c. 1, 3 and 7.

But there are substantial differences between the common law and statute law in terms of judicial interpretation and application. In the former case, general principles can legitimately be extracted from particular decisions by a kind of inductive reasoning, and then extended to novel circumstances. But in the case of statutes, the courts have consistently disapproved of this approach. Dworkin himself acknowledges this. He describes common law precedents as exerting a "gravitational force" on later cases that is not limited by the linguistic meaning of any particular verbal formula.[31] But statutory provisions possess only "enactment force:" they consist of "a canonical form of words ... that set limits to the political decisions that the statute may be taken to have made."[32] Those words "provide a limit to what must otherwise be, in the nature of the case, unlimited." A legislature (or, we might add, a constitution-maker) "has no general duty to follow out the lines of any particular policy" and it would be "plainly wrong" for a judge to suppose otherwise. It is permissible to argue "that the legislature [or constitution-maker] pushed some policy to the limits of the language it used, without also supposing that it pushed that policy to some indeterminate further point."[33] Judges attracted to Dworkin's jurisprudence should underline these words.[34]

There is a famous scene in the film *The Paper Chase*, in which Professor Kingsfield informs his first-year law students that they will be taught to clear their heads of "mush" and think like lawyers. In the *Provincial Judges' Salaries* case, the Supreme Court seems to have undergone something like the same process in reverse. But there is a difference: the Supreme Court's mush is calculated — it is mush in the service of an agenda.

As a rule, prudence and courtesy require that criticisms of poor judicial reasoning be couched in respectful terms. But strong language is justified in rare cases of extremely poor reasoning. Frankly, I cannot see how the reasoning I have criticized can be explained as anything other than a disingenuous rationalization of a result strongly desired by the judges on policy grounds. How could six judges of a respected Supreme Court have put their names to it? Has the inherently political task of interpreting and enforcing the abstract moral principles of the *Charter* somehow corrupted their ability to perceive, or their willingness to accept, the constraints of legal reasoning? If so, the case may provide an even more important warning for constitutional reformers in Australia than the danger of constitutional preambles.

Modern judges are prone to solemnly invoke "the Rule of Law" to justify inventing or expanding limits to the authority of other governmental institutions. They should reflect on the fact that they too are subject to the rule of law and that, ultimately, the only practical mechanism for ensuring that they abide by it is their own scrupulous intellectual honesty. If that cannot be trusted, the rule of law is in peril.

The rationale for judicial independence relies on judges applying the law in a politically neutral way, rather than changing it to advance their own political goals.[35] In a democracy, officials who exercise political power should be accountable to the electorate, directly or indirectly, rather than independent. Judges who usurp political power therefore undermine the case in favour of their independence. The final irony is that the judges exceeded the limits of their judicial authority in order to add to the Constitution a principle whose rationale depends on their strictly observing those limits.❑

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31 *Taking Rights Seriously*, *ibid.* at 111.

32 *Ibid.* at 110.

33 *Ibid.* at 109–110.

34 The reasoning of the Court in *Reference re: Secession of Quebec* [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 may be open to this (and other) criticisms, but that must be a subject for separate discussion.

35 This is true, at least, when the law is both clear and not subject (as the common law is subject) to legitimate judicial amendment.