CHAPTER 36

CONSTITUTIONAL VALUES AND PRINCIPLES

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I. Introduction

Values and principles are a familiar part of the landscape of constitutional adjudication, yet their jurisprudential status is a subject of considerable contestation, and their meaning and significance for courts vary markedly across national boundaries. Much of the controversy surrounding these terms relates to concerns over their potential abuse by judges in the interpretive process and the resulting impact this experience could have on the legitimacy of the judicial function. Another point of contention is entwined in a specifically terminological quandary; thus in one account invoking values and principles is mainly redundant, whereas alternatively the two references might be seen as implicating quite different constitutional lines of inquiry. Moreover, the meaning and significance of values and principles to the constitutional enterprise display additional variation when viewed against the broad panorama of comparative possibilities.

However contentious values and principles may be within the context of scholarly debate, they function in important ways to affect the shape and substance of constitutional outcomes. Constitutions incorporate them formally or informally, judges invoke them liberally or grudgingly, and political actors respond to their deployments negatively or positively. In India and Ireland, for example, principles are explicitly enumerated within the constitutional text to serve as a directive source for political and social development. In South Africa the elevated status of constitutional principles is traceable to that nation's unique constitution-making process, in which the adoption of a final document was contingent on the Supreme Court's certification that a set of mandated principled commitments had been scrupulously followed

in establishing a code of governance. In Germany the operative assumption of post-war constitutional jurisprudence has been that there exists an 'objective ordering of values' according to which the Constitutional Court's adjudication of cases will culminate in rulings supportive of the country's constitutive obligations.

This chapter considers some of the ways in which values and principles have influenced contemporary constitutional law and discourse. Although the two terms are often used interchangeably, the discussion proceeds on the basis of a distinction in their meanings that highlights certain key areas of dispute surrounding the enterprise of constitutional adjudication. The distinction is one that may be gleaned from the numerous textual invocations of the words in constitutional documents. Indeed, inspection of such documents reveals a ubiquitous designation of values and principles in a great variety of provisions that are subject to judicial interpretation. While many of these references do not help much in providing definitional clarity, a number of them point to a criterion for distinguishing these terms that is concerned with the contrast between general and particular concerns. Thus, constitutionally inscribed mentions of principles are associated more often with matters that are less culture-bound than one usually finds in the citation of values.

For example, the Costa Rican Constitution refers to 'the history and the values of the country'.[1] A provision in the East Timor document speaks of 'the culture and traditional values' of that nation.[2] The Egyptian Constitution mentions the 'character of the Egyptian family—together with the values and traditions it embodies'.[3] Rwandan constitutional language requires the 'promo[tion of] positive values based on cultural traditions'.[4] Turkey's Constitution invokes 'Turkish historical and moral values'.[5] Uganda's recognizes 'cultural and customary values which are consistent with fundamental rights'.[6] And in Venezuela there is a constitutional provision that details 'the duty of assisting in the dissemination of the values of folk traditions and the work of artists'.[7]

Other constitutional references to values are focused on more universal themes. The Argentina Constitution, for example, calls for 'the fostering of democratic values',[8] a theme often found in passages in many constitutions where one finds specific allusions to principles. Similarly, Brazil's Constitution marks 'equality and justice as supreme values of a fraternal, pluralist and unprejudiced society'.[9] Such assertions are consistent with an aspirational human rights agenda whose substantive commitments are not mainly determined by the indigenous conditions of particular constitutional polities. This more universally framed commitment is observable in a great many of the constitutions' enunciations of principle. Typical of such references are: Algeria, 'The State is based on the principles of democratic organization and social justice';[10] Croatia, 'universally accepted principles of the modern world';[11] Iraq, 'No law may be enacted that contradicts the principles of democracy';[12] and Lithuania, 'Lithuania shall follow the universally recognized principles and norms of international law'.[13]

Then there are the invocations of principles that are not really universal in scope but are seemingly less culture- and tradition-bound than is generally the case for the textual articulations of values. In this category are appeals to state-specific principles, principles that give expression to commitments that manifest critical aspects of a nation's constitutional identity.[14]

[1] Tit II, Art 15. [2] Tit II, s 59.
[3] Ch II, Art 9. [4] Ch II, Art 51. [5] Preamble.
[6] National Objectives and Directive Principles of State Policy, s 24.
[7] Ch VI, Art 101. [8] Ch IV, s 75, para 19.
[9] Preamble. [10] Ch III, Art 14.
[11] Preamble. [12] Section 1, Art 2B.
[13] Ch 13, Art 135. [14] On constitutional identity, see Chapter 35.

The precise substance of these principles is not always obvious from the immediate textual context; the ambiguity surrounding meaning constitutes an implicit invitation to engage in constitutional interpretation. Indonesia's Constitution requires compliance with 'the principles of the Unitary State of the Republic of Indonesia'.[15] The Russian document voices similar dependence on 'the basic principles of the constitutional order of the Russian Federation'.[16] In Venezuela 'the principles of Bolivarian thought' are to provide criteria for observance of constitutional obligations.[17] In such instances, principles have been assigned constitutive prominence in order to underscore the importance constitutional framers attached to precepts of political morality that possess a certain sovereign distinctiveness. Presumably they could be identical with principles of justice that transcend sovereign borders, or they could overlap tradition-based sources more familiar to the discussion about values.[18] An example of the first might be the United States, whose Constitution (which does not explicitly mention principles) is often thought to embody the universally applicable self-evident principles of the Declaration of Independence that are the basis of 'US exceptionalism'. Examples of the latter are those constitutions—for instance, Afghanistan, Egypt, Ireland—that point to the existence of certain religious principles as privileged sources for the resolution of constitutional questions.

While the categorical boundaries separating these different types are anything but precise, the distinctions drawn are necessary to inform the analysis of values and principles in the following sections. The first discusses the vexed nature of principles as sources of constitutional interpretation. While the claim often made on their behalf, that they are the cornerstones of the very concept of constitutionalism, provides a powerful adjudicative resource for jurists, the ease with which such principles are amenable to interpretive manipulation offers a counter-rationale to those troubled by the discretionary excesses they afford these actors. The next section is similarly concerned with the uses and abuses of values, which are distinguishable from principles by their association with the local environment and the traditions and histories that give definition to the constitutional identity of a given polity. Sometimes these different associations produce jurisprudential tensions, but the resulting dissonance may as easily lead to creative and productive results as dysfunctional ones. The concluding section further elaborates on the distinction by situating the contrast within the debate over the appropriateness of foreign law as a source for resolving constitutional disputes.

II. Principles: Universal Aspirations and Practical Accommodations

The status of principles as legitimate legal sources for judicial interpretation in constitutional adjudication is a hotly and long-contested issue. Consider, for example, this strong statement by the former President of the Israel Supreme Court, Aharon Barak: 'The interpretation of legal texts is dictated by fundamental principles, since they constitute the objective purpose of every legal text.'[19] That there might be disagreement about the substance of these fundamental principles is not excluded in this account, but that their deployment by judges deciding cases is an inevitable and necessary component of the judicial task is taken here as a given. Not everyone, however, sees it that way, and so it has been with equally strong conviction affirmed

[15] Ch VI, Art 18B. [16] Ch III, Art 77. [17] Ch VI, Art 107.
[18] On the constitution and justice, see further Chapter 16.
[19] Aharon Barak, *The Judge In a Democracy* (2006), 57.

that, 'the invocation of legal principles is misguided'.[20] Again, it is not the application of the wrong principles that is per se problematic, rather it is that there is no justification for the judicial use of any such principles.[21]

The disagreement over the use and appropriateness of principles in constitutional law has figured prominently in the jurisprudential literature, inspired to a great extent by Ronald Dworkin's famous critique of legal positivism. Directed mainly at H.L.A. Hart's version of legal positivism, it provocatively laid out the case for broadening the fundamental test for law to include, in addition to the legal rules of a sovereign community, standards that function differently than rules and that generically can be subsumed under the rubric of principles.[22] As Dworkin explained, a principle is 'a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.'[23] Principles, according to his account, are necessary for the correct judicial resolution of legal questions, although their application does not require a particular result in a given case. A dimension not present in regard to rules sets them apart, namely the weight these principles carry in the legal order within which they function. Another way of expressing this phenomenon is to claim, as Lawrence Tribe does, that principles in constitutional law 'go beyond anything that could reasonably be said to follow simply from what the Constitution expressly *says*.'[24] Thus, in the US case, there are postulates—for example, the anti-secession principle—whose importance is unrelated to the absence of any explicit mention in the text of the Constitution. In deciding cases a judge must, therefore, give due weight—which may of course be deemed considerable—to such constitutive principles.

As we have seen, however, explicit textual references to principles are very common in constitutional documents; they need not, in other words, appear to the observer as fundaments of an 'invisible constitution'. Many of these specific inscriptions—for example, Ireland's 'principles of social policy' (Art 45)—suggest that another attribute of principles in the Dworkinian model—their special connection to individual rights rather than collective goals—is not a universal fixture in the constitutional domain.[25] This empirical reality—the nexus between principles and things other than rights—need not be fatal to Dworkin's argument as long as we hold to the idea that the pursuit of collective or policy goals can proceed along a justice- or morality-based line of march, that they need not, as Dworkin's rights thesis contends, be grounded in purely utilitarian calculations. Indeed, the inclusion of sections on 'directive principles' in a number of constitutions is predicated on the idea that the governing institutions of these societies have a constitutional responsibility to create law and policies consistent

[20] Larry Alexander and Ken Kress, 'Against Legal Principles' in Andrei Marmor (ed), *Law and Interpretation: Essays in Legal Philosophy* (1995), 279.

[21] A less categorical rejection of principles has been articulated by the philosopher Joseph Raz, who allows that there is a comparative dimension to such an assessment.

> Some of the reasons for preferring rules to principles in the direct regulation of human behavior have to do with the particular conditions of various countries.... But at least one general reason for this preference is fairly obvious. Principles, because they prescribe highly unspecific acts, tend to be more vague and less certain than rules.
> Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823, 841.

[22] Ronald Dworkin, *Taking Rights Seriously* (1977).

[23] Ibid 22.

[24] Lawrence H. Tribe, *The Invisible Constitution* (2008), 28.

[25] 'Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal', Dworkin (n 22), 90.

with the animating principles of the regime. Inasmuch as the attainment of the goals established by these directive principles is necessarily an incremental, cumulative process, there are sure to be political and economic trade-offs along the way, which, if the strict distinction between principles and policies is adhered to, means that the achievement of such non-individuated goals would technically be lacking a principled basis. When a constitutional decision is taken expressly to improve the average welfare of members of the community it is not, in the strict sense of Dworkin's model, a principled act, even if it manages to succeed in securing its policy objectives. Perhaps that explains why Justice Barak, otherwise an admirer of Dworkin's jurisprudence, 'do[es] not insist on this distinction'.[26]

A clear distinction between principles and policies may, however, provide some useful cover against the charge of judicial activism. Policymaking is conventionally viewed as an activity done by politicians within the executive and legislative branches and subject to the constraints of electoral accountability. To the extent that the application of principles is recognized as a distinctly judicial task, it may enhance the legitimacy of an institution whose standing in the democratic community depends in part on its perceived commitment to dispassionate justice. Even so, this may prove a difficult sell; witness Richard Posner's critique of the Dworkinian distinction to the effect that in practice a principle is nothing more than a policy with which we are in agreement.[27] Yet more difficult is the challenge faced by nations transitioning from authoritarian rule to democratic constitutionalism. For example, Iraq's new Constitution mandates that 'No law may be enacted that contradicts the principles of democracy'. One measure of how well the new regime succeeds in convincing its people that fundamental change has indeed occurred will be popular acceptance of the idea that Iraqi courts are both committed to such principles and able to enforce them against the policies of entrenched interests. Given the extended dismal history that preceded the new constitutional arrangements in that country, achievement of this acceptance will doubtless not be easy.

Those for whom the invocation of principles is a misguided judicial exercise will not be persuaded that a principled approach to constitutional adjudication can immunize judges from the accusation that their use of non-rule-based interpretive methodologies necessarily furthers the prospect of a result-oriented judicial abuse of authority. Consider in this connection the so-called 'level of generality' problem. As Mark Tushnet has pointed out, 'different interpreters will specify the principles underlying particular constitutional terms differently, some at an abstract level of generality, some at a more concrete level.'[28] Far from being an objectively grounded decision detached from the social and political realities of a given time and place, particular specifications are, a critic might say, surely to involve calculations mainly focused on attaining the judicially desired policy or ideological outcome. 'The fact is that all adjudication requires making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral.'[29]

To see this process at work one need look no further than the aforementioned Justice Barak. The unresolved dilemma in Israel's constitutional predicament is highlighted in that nation's

[26] Barak (n 19), 58.

[27] Richard Posner, *The Problems of Jurisprudence* (1990), 22.

[28] Mark Tushnet, 'The United States: Eclecticism in the Service of Pragmatism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006), 37.

[29] Paul Brest, 'The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship' (1981) 90 *Yale Law Journal* 1063, 1092. Robert Bork, on the other hand, believes that a particular jurisprudential approach—originalism—solves this problem.

Proclamation of Independence, with its particularist commitment to a Jewish State coexisting with a universalist promise of liberal democratic politics. The resulting—and perhaps inevitable—constitutional project is one of bringing clarity and unity of purpose to this predicament by mitigating the inner tensions of these dual aspirations. For many Israelis this means moving into a constitutional future that resembles the experience of other liberal democracies. Accordingly, judicial interpretation, in Justice Barak's view, must be 'purposive', with the goal 'of achieving unity and constitutional harmony'.[30] Mirroring the Proclamation, the Basic Law on Human Dignity (adopted in 1992) requires upholding 'the values of the State of Israel as a Jewish and democratic State'.[31] How is this to be understood from an interpretive point of view?

> The content of the phrase 'Jewish State' will be determined by the level of abstraction which shall be given it. In my [Justice Barak's] opinion, one should give this phrase meaning on a high level of abstraction, which will unite all members of society and find the common ground among them. The level of abstraction should be so high, until it becomes identical to the democratic nature of the state.[32]

For obvious reasons this approach has engendered controversy in Israel. The attempt to mute, if not eliminate, the discordant notes in the nation's revolutionary legacy has surely politicized the Court by leading many, rightly or wrongly, to conclude that the justices identify with one side of this divided legacy. But the example also reflects a dynamic that can occur when the two kinds of principles earlier cited in the texts of various constitutions clash within the adjudicative arena as part of a nation's broader struggle to instantiate a constitutional identity. Thus there are principles and values that embody precepts of political morality rooted in a nation's past, whose meaning derives from experience within a specific political and cultural context, and whose reach may not extend beyond that local context. Other principles make a claim of universality, such that the moral truths they are said to embody are precisely the ones whose recognition is required for a constitution to exist in more than name only. Sometimes the jurisprudential response to the tensions that result from the presence of these two types of principles—one of which is hard to distinguish from values—is to accept the tension as an enduring component of the constitutional predicament, a posture that incorporates the implicit understanding of a nation's constitutional identity as one that develops dialogically, thereby entailing interpretive and political activity reflective of the inevitable disharmonies endemic to the constitutional condition.[33]

> Original understanding avoids the problem of generality . . . by finding the level of generality that interpretation of the words, structure, and history of the Constitution fairly supports. This is a solution applicable to all constitutional provisions as to which historical evidence exists.

Robert Bork, *The Tempting of America* (1990), 150. There is an extensive literature that challenges such claims of neutrality that are used in support of the theory of originalism. See in particular, Mark Tushnet, 'Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles' (1983) 96 *Harvard Law Review* 781. Moreover, it is a theory that varies markedly from country to country in terms of its interpretive significance. As Jeffrey Goldsworthy points out, in places such as Canada and India, there is much less interest in the doctrine than one finds in the United States. Goldsworthy (n 28), 325.

[30] Aharon Barak, 'The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law' (1997) 31 *Israel Law Review* 3, 5.

[31] Aharon Barak, 'The Constitutional Revolution: Protected Human Rights' (1992–93) 1 *Mishpat Umimshal* 9, 30.

[32] Basic Law: Human Dignity and Liberty, s 1, 1992, SH 150 (Isr).

[33] This point is explored at length in Gary Jeffrey Jacobsohn, *Constitutional Identity* (2010).

A seemingly less accommodationist view has come to be associated with German jurisprudence. In the early landmark *Southwest Case*, the Federal Constitutional Court proclaimed: 'Every constitutional principle must always be interpreted in such a way as to render it compatible with the fundamental principles of the Constitution as a whole.'[34] Known as the principle of 'practical concordance' (*practische Konkordanz*), it requires a holistic understanding of the Constitution, in which the principled commitments of the document are to be harmonized so that none are enforced at the expense of others. As Donald Kommers has shown, 'The principle flows from the conception of the Basic Law as a structural unity'.[35] How distinguishable this approach really is from the effort in Israel to reconcile ostensibly antagonistic governing principles is debatable; an important difference, however, is the existence in the German case of a broad consensus regarding the 'objective order of values' that is to guide the interpretive process.[36] 'Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.'[37]

The practical implications of such an objective ordering extend to one of the more fascinating issues in constitutional theory: whether a constitutional court should have the authority to invalidate an unconstitutional amendment. The German Court has never issued such a ruling, but it has been in the forefront of establishing the jurisprudential rationale for doing so. In the *Southwest Case* it affirmed:

> That a constitutional provision itself may be null and void, is not conceptually impossible just because it is a part of the constitution. There are constitutional provisions that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void, because they contravene those principles.[38]

It could hardly have gone unnoticed that in the course of elaborating on the conceptual plausibility of nullifying a constitutional provision through an assertion of judicial review, the Court expressly invoked the nation's recent nightmarish past to affirm that never again would formal legal means be used to legalize a totalitarian regime.

Indeed, proximity to the abyss has a way of concentrating the mind on the essentials of constitutionalism, which is to say that there are experiences in the life of a nation that may incline one to accept substantive limits on certain kinds of formal constitutional change. If we posit

[34] *The Southwest Case*, 1 BVerfGE 14 (1951).

[35] Donald Kommers, 'Germany: Balancing Rights and Duties' in Goldsworthy (n 28), 203.

[36] In the absence of a consensus, however, the achievement of 'practical concordance' may still be an important jurisprudential goal. As Gustavo Zagrebelsky has argued,

> [Constitutional principles] do not produce a unity statically realized, but a unity to be achieved dynamically. The requisite principles come into play through their combinatory possibilities, and legal science is challenged to produce the 'practical concordance' of discordances.

Gustavo Zagrebelsky, 'Ronald Dworkin's Principle Based Constitutionalism: An Italian Point of View' (2003) 1 *International Journal of Constitutional Law* 635.

[37] *The Southwest Case* (n 34). Much the same has been said about South Africa's Constitution. Thus Justice Arthur Chaskelon has noted,

> The Constitution now contains an objective normative value system, which must permeate all aspects of the law.... The courts are obliged to develop the law to bring it in conformity with [the Constitution's value system].

Arthur Chaskelon, 'From Wickedness to Equality: The Moral Transformation of South African Law' (2003) 1 *International Journal of Constitutional Law* 608.

[38] Ibid 14.

that there are moral/political principles whose adoption and enforcement are the necessary condition for a regime to be recognized as genuinely constitutional, then the extraordinary exertion of judicial power to declare an amendment destructive of those principles invalid could understandably strike one as justifiable. Yet what if the principles under assault were not of the kind that threatened the existence of constitutional governance; instead involving a particular expression of that governance, perhaps a polity constitutionally committed to principles requiring a strict separation of church and state? Imagine, in other words, an amendment that had as its target a specific variant of constitutional identity, albeit without disturbing the fundamentals of constitutionalism. In such an instance would we not be less inclined to accept a judicial ruling nullifying an amendment than if the very identity of the constitutional project were thought to be in jeopardy?

Of course, in the face of a perceived danger to constitutional principles the distinction between state-specific principles and those possessing a more generic significance could very well pass unnoticed by political actors directly involved in an immediate controversy or crisis. Either through misapprehension or strategic calculation, people invested in the status quo are likely to exaggerate the scope and reach of a threat to the continuity of settled constitutional practice. They might, then, in their defense of principle, portray such a threat as one that placed at risk the future of constitutional government in the nation rather than what might be more plausibly the case, the maintenance of its particular expression.

For example, in the landmark Indian case, *Kesavananda Bharati v State of Kerala*, a justice on that country's Supreme Court declared: '[Our Constitution] is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains but the latter is subject to change.'[39] In this judgment the Court, fully conversant with the reasoning of its German counterpart, decided it could invalidate a constitutional amendment that was in defiance of the 'basic structure' of the Indian Constitution. Under the theory that constitutional change must not destroy what it modifies, the Court affirmed its institutional authority to annul any amendment whose adoption would, in its view, result in radical transformation of regime essentials. Left uncertain and unresolved, however, were the criteria that would enable one to distinguish basic features from circumstantial ones. When does a change portend the subversion of principles essential to constitutional government, at the core of which is the rule of law and the impartial administration of justice; and when does it undermine principles critical to the nation's self-understanding as manifested in a distinctive identity embedded in its constitution?

Thus it may have been obvious to the Court in a subsequent case involving the efforts of Prime Minister Indira Gandhi to entrench dictatorial rule in India that the nullification of her amendments to the Constitution was vital to the preservation of constitutional government. The government had argued that Parliament could do anything it wanted through the amendment power, no matter how revolutionary or destructive, a repudiation of the very fundamentals of constitutionalism that the Court felt compelled to resist. Said one of the justices, 'the Constitution is a precious heritage; therefore you cannot destroy its identity'.[40] But how should an amendatory challenge to, say, secularism be viewed? Surely it would have the potential of transforming Indian constitutional identity; however, are the principles underlying this featured constitutional commitment so vital to the generic identity of a constitution that their

[39] *Kesavananda Bharati v State of Kerala*, 1973 SC 1461, 1624 (1973).
[40] *Minerva Mills, Ltd v Union of India*, AIR SC 1789 (1980), 1798.

possible evisceration would justify a similar intervention by the Supreme Court? Indeed, secularism has been declared a 'basic structure' of the Constitution, but the accompanying disagreement over the substance of the principles that comprise this hallowed regime feature reminds us that even if we demur from the idea that 'the invocation of principles is misguided', we might still question how in the end they should be deployed.

III. Values: Finding Constitutional Meaning in 'Local Habits'

Disagreement over the substance of principles is ubiquitous, an inherent aspect of the constitutional condition. So too is dispute over the import of values in constitutional discourse, which, given the common conflation of the term with principles, can be taken as just another way of expressing the same thing. As suggested earlier, however, it will clarify matters if we maintain a distinction between the two concepts, even if this requires that the manner in which designations of this kind are officially conveyed not be taken at face value. For example, the German 'objective order of values' (*eine objective Wertordnung*) in fact refers to fundamental constitutional principles in the sense that, as the German Court once affirmed, it functions in that nation's jurisprudence 'as a yardstick for measuring and assessing all actions in the area of legislation, public administration, and adjudication'.[41] In this account an objective value is, as Donald Kommers has suggested, 'one specified by the constitutional text as informed, *inter alia*, by history and which the state, apart from any individual claim, must foster and protect.'[42] This understanding may be contrasted with the notion of 'fundamental values', as it operates, for example, in the US context, where, as Kommers points out, it appears in a more subjective role as a feature of common law jurisprudence and precedential reasoning.[43] Or, as it has been more strongly asserted, 'Values and principles are, from many points of view, antithetical to each other'.[44]

Thus, while both principles and values are always contestable, the latter has a culturally determined meaning that provides it with a particularistic significance that effectively severs the idea of values from any universalistic claims. Recall in this context the textual constitutional references to values in constitutional documents and their emphasis on history and tradition. In these constitutional settings judges must be attentive to societal values that are embedded in a nation's long-standing traditions. To be sure, this focus is not unique to those judges whose constitutions are explicit in their evocation of such values—witness the prominence given to the subject in US substantive due process jurisprudence—but their predicament displays in a sharply defined way the problem that all judges must confront in constitutional interpretation.

For example, Turkey's Constitution invokes 'Turkish historical and moral values'. How is such language to be understood? The governing Justice and Development Party's (AK Party) determined efforts to open the public sphere to Islamic influences, under the theory that a

[41] *Luth Case*, 7 BVerfGE 198 (1958).

[42] Kommers (n 35), 180.

[43] Ibid. Kommers' example for the US contrast is the right of marital privacy.

[44] Zagrebelsky (n 36), 628. Zagrebelsky makes the distinction in order to denounce the deployment of values in constitutional jurisprudence: 'he who parades values is often a cheat. The rule of values is: judge and act as seems congruous with regard to the goal you wish to reach.... [V]alues cannot be traceable to reasons subject to rational controls.' Ibid.

dominant religious tradition must not be confined to the realm of the purely personal, would no doubt identify that tradition with the people's historical and moral values.[45] But a judge inclined to accept that identification would have to address the argument that the framers of the Turkish Republic, inspired by a vision of a radical transformation of state/religion relations, also believed that their fervently held goal of Western-style modernization would not be achieved unless the impediment of traditional Islam were effectively overcome. Hence they incorporated a principle that was in essence a Western import—radical secularism—in order to ensure the ultimate success of their constitutional project.

Still, the pervasiveness of Islamic traditions in Turkish society, and the values attached thereto, strongly suggests that the content and parameters of the Constitution's secular mandate possess a mutability that varies with the relative strength of these traditions and their more worldly competitors. These values have been mainly championed in the national legislature, as when in 2008 it adopted two constitutional amendments enabling Turkish women to wear headscarves in institutions of higher learning. This was followed by the Constitutional Court's decisive ruling striking down these amendments for violating secularism, 'the basic principle of the Republic'. Unlike the Indian Constitution, the Turkish counterpart includes a provision (Art 2) that specifically immunizes certain principles (including secularism) from the amendment process. Yet much like in India, disagreement about which policies are inconsistent with the fundamental principle is an ongoing feature of the country's constitutional politics. Do the values that support a greater visibility for religion in public life in fact threaten the secular principle?

While posing the question in this way suggests that principles and values are indeed antithetical to each other, the dialogical progression unfolding in Turkey, as it has elsewhere, reveals a much more complicated relationship, in which the boundary line that separates the two concepts is not as impermeable as the oppositional characterization of the terms might lead one to believe. Principles may be distinguished by their universalistic reach, but their success or failure in concrete application will depend on how they are adapted to the circumstances and contexts of a given time and place. Such adaptation entails absorbing and integrating values from the society's dominant traditions, culminating in some modification in the scope and depth of constitutional principles without leaving them transformed with respect to their underlying and most fundamental commitments.

This process received its classic formulation with Edmund Burke, who saw constitutions as embodiments of unique histories and cultural traditions. His emphasis on particularities and prescription, and on the constitution as something that evolves to conform to the circumstances and habits of a people, is upon first glance suggestive of a moral sensibility strongly deferential to entrenched cultural norms. But the deference was not unqualified, as illustrated in Burke's rejection of Warren Hastings' main argument for his morally questionable actions in India. Hastings had framed a defense of 'geographical morality', which held that whatever happened in India was compatible with local customs and therefore could not be judged by external standards. Burke was categorical in rejecting this moral perspective, arguing in response that the governance of Indians had to respect the same universal laws of right conduct that applied to Englishmen. Necessary, for Burke, was a prudential balancing of the universal and the particular. 'The foundations of government [are . . . in the constitution] laid . . . in

[45] As Bernard Lewis has observed, 'Westernization has posed grave problems of identity for a people who, after all, came from Asia, professed Islam, and belonged by old tradition to the Middle Eastern Islamic world, where, for many centuries, they had been unchallenged leaders.' Bernard Lewis, *The Emergence of Modern Turkey* (3rd edn, 2002), xi.

political convenience and in human nature; either as that nature is universal, or as it is modified by local habits.'[46]

Two centuries later the interactive dynamic involving principles and values in independent India echoes the earlier balancing of universal and local interests in the colonial precursor. This may be seen in the various and persistent political contests between the forces of inclusive secularism seeking a transformation of traditional Indian society and those of religious nationalists in pursuit of a more culturally homogenous and dominant Hindu value system. This contestation has manifested itself in landmark constitutional rulings in which the Supreme Court has been challenged to accommodate the demands of a principled commitment to a composite, more egalitarian identity with a deeply entrenched way of life premised on a contrary vision of social ordering.[47] Burke's idea of the prescriptive constitution includes a presumption in favor of settled practice, which in contemporary India extends a measure of legitimacy to the very values that support the structural foundations of a society targeted for deconstruction by the Constitution's underlying principles. Interestingly, the judicial response to this challenge has been attacked from both ends of the political spectrum, underscoring the Court's cautious juridical strategy of selective incorporation of traditional values into the basic structure of the Constitution, while retaining the essential principled thrust behind that framing vision.[48]

The practice of selective incorporation is a staple of US constitutional jurisprudence and further illuminates the principle/value distinction, as well as the interpretive problem associated with its application. It arises in the Fourteenth Amendment context, specifically in connection with the decision about which of the rights included in the first ten amendments as protections against the national government were incorporated in the Due Process Clause as applicable to the states. For many years it had been an issue of jurisprudential concern for prominent jurists, notably Justice Benjamin Cardozo. In his most influential book, Cardozo wrote: 'A *constitution* states or ought to state not rules for the passing hour, but principles for an expanding future'.[49] Later in his most famous Supreme Court opinion, he concluded that only those liberties that were 'of the very essence of a scheme of ordered liberty' were to be guaranteed against state infringement by the Fourteenth Amendment.[50] Thus a right such as trial by jury had 'value and importance', but its abolition would not, he believed, violate 'a principle of justice so rooted in the traditions of our people as to be ranked as fundamental'.[51] Unclear, however, from Cardozo's discussion is whether we recognize something as a principle

[46] Quoted in Francis Canavan, 'Prescription of Government' in Daniel Ritchie, *Edmund Burke: Appraisals & Applications* (1990), 259.

[47] See eg *Prabhoo v Kunte*, 1 SC 130 (1996), and *SR Bommai v Union of India*, 3 SC 1 (1994). For an extended discussion of these cases, see Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (2003).

[48] In an oft-quoted observation, Alexander Bickel claimed, 'No good society can be un-principled; and no viable society can be principle-ridden'. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, 1986), 64. The lesson from this for Bickel was that the Supreme Court should avoid principled decisions when confronted by strong public opposition. In this connection, the 'passive virtues' are to be recommended. But another lesson might be that the too rigid enforcement of principle is ill-advised; and that rather than avoiding principles in fraught circumstances, courts should endeavor to lessen the severity of their implementation through prudent co-optation.

[49] Benjamin Cardozo, *The Nature of the Judicial Process* (1921), 83.

[50] *Palko v Connecticut* 301 US 319, 325 (1937).

[51] Ibid. What leads to this judgment is not clear. Thus in 1774 the Continental Congress declared,

> the first grand right is that of the people having a share in their own government by their representatives chosen by themselves, and in congruence, of being ruled by *laws*, which they themselves approve, not by *edicts* of *man* over whom they have no control.... The next great right is that of trial by jury.

of justice because it has been so validated by tradition, or whether its independent standing as a fundamental component of a scheme of ordered liberty means that it must therefore have been entwined in the habits of the people.

'Due process traditionalism'—the idea that 'long-standing cultural understandings are both necessary and sufficient for the substantive protection of rights'[52]—bears directly on the principal concern of this chapter. Thus when courts affirm or reject the existence of rights on the basis of their appearance or absence as protected interests in the dominant tradition of a society, they are in effect declaring that constitutional recognition and legitimation are to be exclusively extended to claims whose normative standing is a function of their historic validation. Or as Justice John Marshall Harlan II wrote in the landmark case of *Griswold v Connecticut*, there should be a 'continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society'.[53] But again, the absence of any guarantee that these values will be consistent with the truth of the normative claims that a judicially enforceable regime of rights might be expected to display is at the core of the interpretive dilemma. As Christopher Eisgruber has asked, 'What should it matter whether a claimed constitutional right has solid foundations in traditions? Traditional practices may, after all, be exquisitely unjust.'[54]

The question may be more difficult to answer in places where the constitutional text is explicit in its invocation of value-laden traditional sources. In the United States, where a jurisprudence of 'traditionalism' is a purely judicial construction, the suggestion that 'judges question traditions by the light of reason'[55] is surely a sensible and quite defensible approach to the problem of morally deficient values. If, for example, a question arises as to whether a particular configuration of the family warrants constitutional protection, a judge might fashion a response by assessing the 'traditional family' according to standards traceable to sources less rooted in historic practices.[56] On the other hand, a judge in Egypt might be more constrained in adopting such a course of action in light of his constitution's specific reference to the family and 'the values and traditions it embodies'. The options he faces might be further limited by theological considerations, which doubtless would be required once those constitutionally preferred values were subjected to exacting judicial scrutiny. Unlike his US counterpart, the judge would have a hard time declaring, as Justice Felix Frankfurter once did, 'Local customs, however hardened by time, are not decreed in heaven…'[57]

Of course the political reality that these and all judges confront is that heavenly prescribed values are, whatever one's theological convictions (or lack thereof), ultimately rooted in the mores of a people.[58] It was William Graham Sumner, the nineteenth-century American

Continental Congress to the Inhabitants of Quebec, October 26, 1774 in Philip Kurland and Ralph Lerner (eds), *The Founders' Constitution* (1987), 442.

[52] The phrase comes from Cass R. Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before* (2009), 93.

[53] *Griswold v Connecticut* 381 US 479, 501 (1965).

[54] Christopher L. Eisgruber, *Constitutional Self-Government* (2001), 140.

[55] Sunstein (n 52), 119.

[56] What is more likely to occur is a 'level of generality' debate over exactly which version of the family is deeply rooted in the traditions of the country. See eg *Moore v East Cleveland* 431 US 494 (1977), and *Michael H v Gerald D* 491 US 110 (1989).

[57] *Cooper v Aaron* 358 US 1, 25 (1958).

[58] As Joseph Raz has pointed out, 'In most countries one of the general principles restraining judicial discretion enjoins judges to act only on those values and opinions which have the support of some important segment of the population.' Raz (n 21), 849. With respect specifically to the religious question, it has not gone unnoticed that throughout the world there has been a 'tremendous increase of popular support for principles of theocratic governance'. Ran Hirschl, *Constitutional Theocracy* (2010), 2. The challenge this poses for judges beholden to both the values entrenched in popular mores and the principles of constitutional government is arguably one of the great challenges of the twenty-first century.

sociologist, whose classic analysis of societal mores was well known in legal circles, and whose depiction illuminates the key distinction drawn in this chapter. '[T]he standards of good and right are in the mores . . . For the men of the time there are no 'bad' mores. What is traditional and current is the standard of what ought to be.'[59] A more jurisprudential rendering can shape the judicial task to one of translating into law the prevailing standards of right conduct, irrespective of their agreement or disagreement with norms of right conduct derived from a more transcendent conception of justice. The latter may be understood to incorporate *principles* whose presence are necessary to certify the existence of constitutional government, while the former implicates those *values* that will either remain in persistent tension with these principles, or coexist with them in a reconciled state of constitutional equilibrium.

IV. Conclusion: Values, Principles, and the Debate Over Foreign Sources

Constitutional globalization is surely one of the most significant developments of recent decades. One of its many consequences has been the increased attention directed to the variety of ways in which the practice of constitutionalism can be realized. This development in turn has spawned an accelerated effort by judges to use the enlarged resources of foreign law and jurisprudence to assist in the adjudication of domestic constitutional cases. Such assistance may lead to emulation, wherein a court in one country follows the example of another in how it addresses a similar constitutional issue, or it may culminate in a heuristic exercise in which the differences between the two settings serve simply to enhance understanding of the local circumstance through comparative scrutiny of relevant alternatives.

As constitutional borders have become more permeable to the entry of foreign legal ideas and precedents, controversy has arisen over the use of these materials.[60] Although mainly a US phenomenon, the disagreement involves considerations that all judges must weigh as they calculate the costs and benefits of constitutional borrowing. Even in India, before the practice became fairly routine in that country's judicial experience, a justice warned:

> The craze for American precedents can soon become a snare. A blind and uncritical adherence to American precedents must be avoided or else there will soon be a perverted Constitution operating in this land under the delusive garb of the Indian Constitution. We are interpreting and expounding our own Constitution.[61]

All constitutional polities represent a blend of characteristics revealing what is particular to the constitutional culture as well as what are widely viewed as common attributes of a universal culture of constitutionalism. And so the Indian judge's concern was surely understandable, as is the question raised in connection with the judge most closely associated with the critique of transnational judicial activities: 'Scalia the judge roots himself in an America whose values

[59] William Graham Sumner, *Folkways* (1907), 58, 59.

[60] One close observer has noted, 'The migration of constitutional ideas across legal systems is rapidly emerging as one of the central features of contemporary constitutional practice.' Sujit Choudhry, 'Migration as a Metaphor in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (2006), 13. See also Chapter 64.

[61] *Mahadeb Jiew v Dr Sen*, AIR 1951 Cal. 563 (1951). Decades later Justice Antonin Scalia echoed this sentiment without, we must surmise, having been influenced by it. 'We must never forget that it is a Constitution for the United States of America that we are expounding'. *Thompson v Oklahoma* 487 US. 815, 868 n 4 (1988).

he purports to be able to identify. If the job of the judge is to identify and then apply these distinctive values, why would it be relevant to study how other cultures approach similar questions?'[62]

An answer to this question also connects with the main point of this chapter. That a presumption against the deployment of a comparative judicial methodology should resonate strongly in some places makes sense to the extent that the importation of foreign materials is also viewed as a threat to the integrity of the indigenous constitutional experiment.[63] If a judge believes that the correct answer to a constitutional problem is entwined in the values and traditions of her society, and that these sources are expressive of what is unique and exceptional about her political community, she might properly reject inputs from an alien culture predicated on a contrasting value system. Even if such inputs could be justified by the possible benefits of dialogical engagement with another legal culture, the risks associated with the effort might well be thought prohibitive. But suppose it were the case that much of what contributed to a nation's exceptionalism was a constitutional commitment to principles whose validity was not tethered to the cultural and historical particularities of that nation? Would it not be prudent, which is to say just plain sensible, for a judge to consider the practices of other constitutional settings, if only to confirm that the norms held to be of transcendent significance were indeed manifest in the experiences of very different societies? And would it not then be instructive to learn of any contrasting perspectives and arrangements whose purpose was to achieve the realization of commonly held principles?

Returning, then, to the written constitutional texts with which we began, we might conclude that very little advantage is to be had from looking abroad to illuminate such nation-specific language as 'positive values based on cultural traditions', or 'the duty of assisting in the dissemination of the values of folk traditions and the work of artists'. Where, contrariwise, courts attempt to interpret and apply 'the principles of democracy' or 'the universally recognized principles and norms of international law', they are likely to benefit from, or at least not be undermined by, consideration of how others have addressed these aspirations in the various structural and interpretive choices that define their unique constitutional identities. Although the distinction between values and principles is not etched in bright lines—indeed the terms, as we have seen, are sometimes used interchangeably—the linkage of the former with the local environment and the latter with a more cosmopolitan milieu both explains and determines a good bit of cross-national jurisprudential behavior.[64] If we imagine the grand antinomy between the universal and the particular as providing the backdrop against which the many narratives of constitutionalism have been and are being played out, values and principles, in conjunction with political interests and ambitions, are the instruments that have powered, and will continue to power, the corresponding constitutional storylines.

[62] Sanford Levinson, 'Looking Abroad when Interpreting the United States Constitution: Some Reflections' (2004) 39 *Texas Journal of International Law* 361.

[63] See eg Robert Bork, *Coercing Virtue: The Worldwide Rule of Judges* (2003), 22.

[64] As an example of the interchangeability of the terms, consider this observation by Justice Barak:

> In principle, judges should recognize only values that appear to be fundamental to the society in which they live and operate. The social consensus around fundamental values is usually what ought to guide judges with regard to both the introduction of new fundamental principles and the removal from the system of fundamental principles that have become discredited.

Barak (n19), 61. The argument of this chapter is captured very well by Gustavo Zagrebelsky: 'Much of the criticism directed at a "jurisprudence of values" should not be leveled against a "jurisprudence of principles". But the fact that this happens can be explained by unwarranted confusion of the two.' Zagrebelsky (n 36), 629.

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