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edited by
András Sajó & Renáta Uitz

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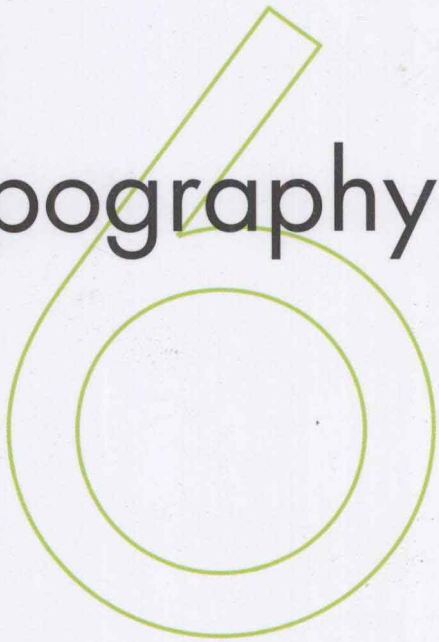

values and
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CONSTITUTIONAL TOPOGRAPHY: VALUES AND CONSTITUTIONS

Edited by

ANDRÁS SAJÓ & RENÁTA UITZ

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Preface*

Is there anything behind or above the constitution? What is the relation between the constitutional order and the ethical order of values? These questions lie at the heart of political theory at least since Plato. Constitution-makers and courts repeatedly refer to social value judgments; constitutions and their application reflect selective and biased value choices. Indeed, there is no agreement among judges and scholars on the significance, nature, and extent of textual commitment to values for the purposes of constitutional adjudication.

Constitutional commitment to certain values is not without precedent, yet even this does not seem to be a prerequisite for courts to infuse the constitutional text with value choices. To take a clear example, it is worth recalling that commitment to dignity, equality and the advancement of human rights and freedoms as fundamental values is enshrined in several provisions of the South African Constitution (prominently in the Preamble, Section 1 and Section 7(1)). Yet we should note that the South African Constitutional Court did not require such a strong textual affirmation for human dignity as a foundational constitutional value when it reinforced dignity and equality under various, seemingly unrelated provisions of the interim Constitution. In an attempt to give a purposive interpretation to the new Bill of Rights, the Constitutional Court resorted in its death penalty decision both to a rich comparative jurisprudential analysis, and the consideration of an indigenous conception of dignity, *ubuntu*.[1] Thus, the text of the final South African Constitution bears the imprint of the deeply unjust and inhumane regime that preceded it and the attempts of the newly established South African Constitutional Court to redefine the function of a constitutional text in an emerging democratic society.

The German Federal Constitutional Court is often quoted for having established in its *Lüth* decision of 1958 that the "Basic Law is not a value-

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* Earlier versions of the papers collected in this volume were presented in Budapest in 2008 at the 16th *The Individual v. the State* conference. The conference was hosted by the Legal Studies Department of the Central European University. The Open Society Institute in Budapest provided generous funding for the conference. Special thanks are due to Jim Tucker for native-language editing, Vasily Lukashevich for his translations from the Russian, Mónika Ganczer and Gábor Kajtár for research assistance, and Zsuzsa Kovács for editorial support.

[1] *See, e.g.*, S *v.* Makwanyane (CCT/3/94; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)). Under the interim Constitution human dignity was protected as a right under Sec. 10, while *ubuntu* was mentioned as a principle of national unity and reconciliation in Chapter 16.

neutral document."[2] Although human dignity as an unalienable right is mentioned in the German Basic Law (Article 1), the concept that dignity stands at the center of the objective order of values is not set forth in the text. In an effort to emphasize the supreme value of human dignity, when invalidating an anti-terrorism statute which made it possible to shoot down an aircraft taken over by terrorists, the Constitutional Court was deeply concerned about the government's treatment of innocent passengers and crew members. It was in this latter respect that the Constitutional Court invoked the language of values, saying: "Their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake."[3]

The Canadian Charter of Rights and Freedoms explicitly requires in Section 27 that it "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." While respect for multiculturalism features highly in Canadian constitutional jurisprudence, the Supreme Court is open to acknowledging the significance of other values not expressly mentioned in the text. When the Supreme Court found that the purpose of the Charter's equal protection guarantee (Section 15) was the protection and preservation of human dignity, the justices referred to a value (i.e., dignity) which was not explicitly mentioned in the Charter's text. The European Court of Human Rights – also lacking an explicit textual reference point to this effect – acknowledged that the "very essence of the Convention is respect for human dignity and human freedom."[4]

Even such a brief exposition illustrates the profound difficulty in locating the source and function, the need for and evolution of value arguments vis-à-vis the text of constitutional provisions. This volume seeks to explore the potential locations of constitutional values, their relationship with the text of the constitutional text, their function in judicial reasoning and beyond the confines of court proceedings. Covering a wide range of perspectives from lawyers (including judges, former advocates, and law professors) to philosophers and political scientists, offering an interesting combination of methodologies and exploring numerous national and international contexts, this collection of essays aspires to provide further insight into the ongoing rich and intense interdisciplinary exchange on constitutional axiology.

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[2] BVerfGE 7, 198. Available in English *in* D. P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 363 (1997).

[3] 1 BvR 357/05. 115 BVerfGE 118. Available in English translation on the website of the Constitutional Court at <http://www.bundesverfassungsgericht.de/en/decisions/rs20060215_1bvr035705en.html>.

[4] Pretty *v.* the United Kingdom, ECtHR Application no. 2346/02, judgment of 29 April 2002, at Para. 65.

Chapters in the first part of the book reflect on the fundamental premises of the relationship between constitutional text and judicial reasoning. Will Waluchow elucidates the connection between value arguments and constitutional reasoning, explaining the legitimate place of such arguments in this context. András Szigeti puts value arguments and value-based reasoning in the broader context of value theory. Approaching the problem from the perspective of the constitutional text, Tom Ginsburg responds with a rich empirical analysis of written charters, providing an account of what constitutions say. Also from a textual perspective, Otto Pfersmann forcefully argues that value arguments do not belong in judicial reasoning, condemning any such attempt as per se inimical to the very concept of a written constitution. Finally, rounding off the first part of the volume, Grazyna Skapska and Nenad Dimitrijevic shed light on how constitutional value considerations are also shaped by their difficult, sometimes unforgiveable past.

Chapters in the following part of the volume provide adjudication-oriented answers to the theoretical positions outlined above, while also struggling with further complexities this exercise brings. These essays tackle the formation and shaping of constitutional and social values as a process that takes place in the context of particular cases. Authors in this part set out to explore thorny issues of both national and international context: Are constitutions and courts referring to a specific social value system when they refer to values? Is axiological consistency sustainable in law? What is the axiological relevance of legal references to 'values embedded in our traditions' or 'Christian / Jewish / European / Asian (etc.) values?' Are such references ornamental? Is there a uniquely legal (constitutional) value system that reflects legal normative concerns?

With the internationalization of constitutional law a new dimension of value conflict emerges. Nations and cultures have very different values, and constitutional law operating in a transnational setting must respond to conflicts generated by value pluralism. The debates concerning European values in the European constitution-making process are representative of this problem. The European Court of Human Rights tends to rely on common European values to determine the limits to national margins of appreciation. Clashes between local and European values are unavoidable in such a setting.

Courts are not simply arbiters in a conflict of values but are also vehicles of change in a longer process framed by the national constitution, where terms are dictated by international actors. The result is increasingly a visible or even fundamental transformation of a domestic constitutional regime, even in the face of resistance from key national actors. Eva Brems optimistically forecasts that it is indeed possible in certain contexts for the European Court to lead the formation of an emerging European consensus despite occasional resistance from member states. Approaching European demands from the perspective of domestic actors Michel Troper gives a sobering account on how European

Union membership triggered the emergence of a new constitutional principle which – characteristically – draws on the constitutional identity of France. Also speaking from a national perspective, Chief Justice Valery Zorkin reveals how international trends and universal human rights norms resonate in domestic constitutional jurisprudence in times of intense constitutional conflict in Russia. As the last contribution of this section, Theunis Roux reflects on the South African Constitutional Court's role as constitutional interpreter and arbiter of deep social conflict across the interim, and the final Constitution.

Contributions in the closing section of the volume tackle specific values and value arguments in constitutional adjudication across jurisdictions, focusing on particular problems, with an eye to the impact and indirect consequences of contestation over values in the judicial arena. These chapters highlight and reinforce our understanding of how, in contemporary pluralistic societies, courts performing constitutional review act within increasingly divided value systems which are sustained and furthered by existing social stratification and social conflicts. In this context a further layer to the complexity of the relationship of constitutional text and the multiplicity of competing values is added by the fact that reference to local values has recently become the foothold for challenges to the universality of human rights, and to several assumptions concerning the structure and operation of constitutional government.

The simple passage of time within an otherwise uncontroversial constitutional framework may trigger claims for the reconsideration of certain values, calls for rethinking certain interpretations and for inserting understandings never imagined by the drafters of a constitution. The metaphor of the 'living tree' is the best-known judicial expression of this struggle, yet the scope, content and consequences of any such judicial metaphor need to be accounted for much more carefully.

Responding to these and similar problems, the authors in the last part of the volume explore in a wide range of contexts how to determine the *real* value preferences of constitution makers, legislators or constitutional courts. Is the relevant social value – one that serves as orientation for the judge – to be found in public opinion polls? Is it reflected in legislative trends? Or is what emerges through the filter of judicial precedents the only relevant factor? How do institutional and procedural frameworks select and conserve value preferences? What follows when constitutional or supreme courts are split and frozen along the lines of sheer value preferences instead of focusing on legal reasons? On a more pragmatic level the problem of values in constitutional adjudication is one of defining the applicable values. A related concern targets the sphere of applicability of value references: is this a matter of pure interpretation? From a socio-legal perspective, is the congruence or conflict of societal value systems a relevant factor? And most fundamentally: should

liberal constitutionalism hold to its individualistic orientation even where a changing society opts for communitarian values, or at least where such claims are made with strong political support?

Secularism or state neutrality in matters of religion is among the most contested (or at least indirectly questioned) fruits of the Enlightenment. As a contribution to the debate on secularism Guy Haarscher reflects on how much room should be left for the protection of religious sensitivities, while Matthias Mahlmann offers a passionate defense of secular reason in constitutional adjudication. As if to highlight many of Mahlmann's key points, Susanna Mancini and Michel Rosenfeld take the example of litigation over abortion to trace the force of hidden or open moral argument in constitutional reasoning. To further elucidate the importance of hidden factors in the negotiation about conflicting values in morally-charged conflicts, Suzanne Goldberg reflects on the impact of intuition in gay rights litigation. Her analysis is complemented by Renáta Uitz and Orsolya Salát who argue that claims for the protection of individual autonomy as a constitutional value usually do not come to the rescue of less-than-mainstream understandings of individual liberty. Murray Wesson focuses on the contested 'interpretive concepts' of equality and dignity in South African and Canadian jurisprudence. Finally, in order to demonstrate that a disagreement over values may arise even without deep moral conflict, Justice Gadis Gadzhiev explains how social and economic policy triggered a value-infused contestation between political actors and the Constitutional Court in Russia.

As our volume demonstrates, the inquiry into judicial value preferences in constitutional litigation is multi-dimensional, and doubtless takes the examiner beyond the confines of particular judicial decisions and academic circles. In order to get a sense of how real the conflict is, one need only recall that the quest to identify (or at least to surmise) the real or potential value judgments of particular individuals is at the center of nomination procedures for high judicial and constitutional seats. Although experience teaches that constitutional justices are not necessarily faithful to the political or moral leanings of the administration which appointed them, an acceptable candidate has to display (at least for the time being) a comforting level of allegiance to the value preferences of the political majority of the day.

A search for values on the bench, nonetheless, is more than an exercise in political analysis. Ultimately, the question about the relationship of the constitutional text and values (be they behind or above it) is transformed into a question about the nature of legal reasoning. As Professor Bernhard Schlink, a former judge of a *Land* constitutional court remarked to a radio audience, "[...] of course judges bring their values, personal values, political values; they also bring their moods and their tempers and their anger. [...] Once it

translates into good legal reasoning, it doesn't matter whether it was a good value, bad value, temper, mood, whatever – what really matters is does it translate into good legal reasoning."[5]

Renáta Uitz

[5] ABC's 'Today's Law Report' program, an edited version of a forum held at the University of Sydney Law School on 27 August 2009 involving contributions from Justice Michael Kirby and Bernhard Schlink. The transcript is available at <http://www.abc.net.au/rn/lawreport/docs/20091006_e1.pdf>.

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Part I

Theoretical Perspectives – The Wide Angle

WILL J. WALUCHOW

Constitutional Morality and Judicial Review

1. Introduction

One of the perennial questions of legal philosophy is whether there is any sort of necessary connection between law and morality. Traditionally, legal positivists have been thought to deny necessary connections between the two, but have been keen to stress connections of other kinds, mainly of a causal and historical nature. No positivist denies, for example, that a community's law typically reflects its basic moral values, or that moral norms furnish a legitimate basis for citizens to evaluate the demands placed upon them by their legal system. Among contemporary legal positivists a significant debate has arisen concerning the possibility of a quite different kind of connection between law and morality.

Some legal positivists, among them Joseph Raz, Leslie Green and John Gardner, maintain that consistency with moral norms can never, under any conceivable conditions, serve as a test or criterion for the validity of positive law.[1] To suppose that it could serve this role would be to violate a cardinal tenet of positivism: Austin's famous separation thesis, that the existence of law is one thing, and its moral merits or demerits another. On this view, which is now usually called Exclusive Legal Positivism, (ELP for short) consistency with moral norms is excluded from the conceptually possible grounds for legality or legal validity.

Other positivists, including H. L. A. Hart, Jules Coleman, Matthew Kramer and myself, have argued for the contrary position: that there is nothing in the nature of law which rules out the possibility that conformity with moral norms

[1] *See, e.g.*, J. Raz, The Authority of Law (1979); J. Gardner, *Legal Positivism: 5½ Myths*, 46 Am. J. Jurisprudence 199, at 222-223 (2001); L. Green, *Legal Positivism*, *in* E. N. Zalta (Ed.), The Stanford Encyclopedia of Philosophy (2003), available at <http://plato.stanford.edu/archives/spr2003/entries/legal-positivism/>.

A. SAJÓ & R. UITZ (EDS.), Constitutional Topography: Values and Constitutions, 3-20.

can serve as a necessary (and possibly sufficient) condition for legality or legal validity.[2] I have argued that this latter position, now generally referred to as Inclusive Legal Positivism, is both consistent with the nature of law and better able than Exclusive Legal Positivism to provide a theoretical account of many common legal practices. Among the practices to which I have drawn attention are challenges to validity under legal instruments such as the Canadian Charter of Rights and Freedoms, the American Bill of Rights, and the European Convention on Human Rights.[3] Such instruments appear to hold that consistency with certain specified norms of political morality – e.g., the principles of equality (Section 15) and fundamental justice (Section 7) of the Canadian Charter – is a fundamental test for legal validity. In so doing, they appear to make legal validity in the societies in question dependent on conformity with the relevant moral norms. Any legislative enactment or judicial ruling which flouts the specified moral norm is, for that reason alone, considered a nullity, i.e., of no validity or force and effect. In other words, for better or for worse, many constitutional charters of rights appear to render legal validity dependent on conformity with moral norms, a possibility easily recognized and accounted for by Inclusive Legal Positivism, but not so easily by Exclusive Legal Positivism.

In this chapter I wish to take these important questions about the role of moral norms in legal practice in a somewhat different direction. I will assume, for the sake of argument, that constitutional charters often do, as a matter of contingent legal practice, bring morality and legality together in the ways described above. With this assumption in place, I wish to ask the following question: What exactly *is* the morality to which these constitutional charters direct our attention in assessing legal validity? Must (or should) it be what we might call *Platonic morality*, the supposedly objective or true morality which philosophers, theologians and students in neighbourhood pubs have long attempted to discover or articulate in developing their philosophical theories? Or could it be something else entirely, perhaps what the early legal positivists called *positive morality*, that is, the moral values, beliefs and principles widely endorsed and practiced by members of a community? Perhaps it is neither of these things but some other kind of morality, say one which is somehow embedded in the legal practices of a community in the way in which legal principles are embedded in law according to Ronald Dworkin's interpretive legal theory.

So in asking my question I am not interested in determining whether, for example, Aristotle's moral theory provides a better account of the moral

[2] *See, e.g.*, H. L. A. Hart, The Concept of Law (1994); J. Coleman, The Practice of Principle (2001); M. Kramer, Where Law and Morality Meet (2004); W. J. Waluchow, Inclusive Legal Positivism (1994).

[3] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950. Henceforth, the phrase 'constitutional charter' will be used to refer to such instruments.