A LIVING CONSTITUTION?

by Ernest van den Haag

Britain has done well without a written constitution. Tradition took its place and still does. But Britain was unified over a long time by feudal and dynastic battles, by inheritances and negotiations; its governance evolved slowly. In contrast, the federal government of the United States was created de novo, when the former colonies ratified the conditions of unification: the Constitution. The Constitution could, therefore, articulate the nontraditional governance the founders deliberately created. The price of unification necessarily was compromise. Controversial matters, such as slavery, went unmentioned (although discussed in the constitutional convention).[1] Without compromises of the sort, the federal government could not have been created. To make it possible, the Constitution limited its power over the states as well as the power of each branch of government, and finally that of the government as a whole. Amendments to this document of institutionalized distrust (of government power and of its holders) further defined, extended, equalized, and enumerated the legal rights of individuals.

All this is quite uncontroversial. But with respect to applying the Constitution, a controversy has arisen between those who wish to conform the Constitution to judicial decisions and to legislation they regard as desirable, without going through the tiresome process of amendment, and those who wish judicial decisions and legislation to conform to the Constitution until amended. The former have seized the rhetorical high ground by speaking of a "living Constitution," as though those who actually want to follow its prescriptions were burdened by a dead one. Yet this burden, if it is a burden, is the essence of having a Constitution. In Thomas Jefferson's words: "Our peculiar security is the possession of a written Constitution. Let us not make it a blank paper by construction."[2] This is precisely what the advocates of "the living Constitution" want to do.

Not What the Framers Intended. Indeed, on closer inspection, the "living Constitution" is a document that does not restrain the judiciary from deciding whatever it thinks good. The living Constitution is not what the framers intended,

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1. This matter has often been misunderstood, or misused, by persons who should know better. Thus John Hope Franklin, quoting Article I Section 2 Clause 3, wrote that the founders "degraded the human spirit by equating five black men with three white men." Indeed the clause which apportions representatives by population states that "free persons" shall be counted and "three fifths of all other persons," i.e., slaves. If slaves were counted fully, as "free persons" were, it would have greatly increased the representation of the slave states and strengthened the peculiar institution. The slaves themselves were not allowed to vote. Ideally they should not have been counted at all. But the states compromised.

2. 8 Writings of Thomas Jefferson 247 (1892-99), P.L. Ford, ed.

nor does it even pretend to be--original intention is disparaged by its supporters--but what the judges feel they should have intended. Nor is the "living Constitution," favored by "activist" judges, an attempt to faithfully interpret and apply what the framers wrote. "Interpretation" too is disparaged. This leaves one to wonder what the purpose of constitutional authorizations and prohibitions could possibly be, if their intent is not to be followed by the judiciary. A legal document--be it a Constitution, a criminal statute, a public law, or a private contract--always is meant to reflect the intention of the authors. It is to be interpreted and applied in the light of that intention by the courts where necessary. It is meant to bind the judiciary to that interpretation. Otherwise it is hard to see why the legal document is brought into existence in the first place. Thus, the framers created a Constitution to be enforced, and interpreted by the judiciary--not to be ignored, expanded, or invented by it.

Analyzing the Text. How is the judiciary to go about its task? The Constitution is clear and specific on some matters. Anyone who said before 1920 that the Constitution does not give women a right to vote would have been right (the Constitution left it to the states), but anyone who says so after the Nineteenth Amendment cannot read. Such general phrases as "due process" are less specific and require more interpretation. And the framers did not foresee radio, or TV, or airplanes, or public schools. But such prescriptions as "due process" or "the equal protection of the laws" are as applicable to airlines and passengers as they are to coaches.

As with any legal document, one first analyzes the text and tries to understand its meaning. Take, for instance, the Eighth Amendment phrase forbidding "cruel and unusual" punishment. Note that the punishment to be forbidden must not just be cruel but also unusual, i.e., not customary. Clearly the founders wanted to prevent legislators and judges from imposing a new (unusual) punishment that was also cruel, i.e., excessive, or disproportionate to the crime punished. Thus, legislators and judges are limited in the new punishments they might invent. Did the founders mean to exclude capital punishment, or could the phrase be applied to it? Hardly. Capital punishment was not unusual. Further, the Fifth Amendment requires a grand jury indictment "for a capital...crime" and insists no one shall be "deprived of life, liberty or property without due process of law"--or that, with due process of law one might lawfully be deprived of life, liberty, or property. One may quibble about "due process of law" as the courts have done for years. But still the essential meaning is fairly clear: an orderly procedure and a trial in which the legal rights of all parties are protected by the court.

Interpretation, Not Fantasy. The specific meaning and application of other phrases too is open to interpretation. But interpretation is not fantasy. There are many possible difficulties in following the specific intent of the framers when confronting situations they did not foresee. Also, different framers and ratifiers may have had different ideas about the meaning of particular phrases; sometimes we simply cannot find out and the text permits more than one interpretation. These difficulties exist whenever one deals with general rules--laws--and tries to apply them to particular situations that the lawmakers may not have foreseen. Even the interpretation of contracts or treaties may lead to controversies, which keep courts

busy. But controversy or difficulty is not an objection. It is precisely why we need interpretation and analysis and courts to engage in it. Still, laws, contracts, or superlaws, such as the Constitution, tend to reduce what is permissible by excluding some possibilities and limiting the range of what is permitted. Lawgivers or rule makers want to prescribe some things and proscribe others. Why else make laws? It verges on the bizarre to disregard their intentions, when they are at all knowable.

No Right to Privacy. Although a rather comprehensive document, the Constitution as amended does not mention some rights that are highly desirable, such as the right to privacy. Activist courts have found such rights in the "penumbra," meaning, I take it, the general principles of the Constitution. I have not. If we want a right to privacy we can establish it by amendment or, more simply, by legislation. It is not the task of the courts to impute rights to the Constitution which clearly are not there, however desirable they are. I do not object to the sale of contraceptives in Connecticut (nobody there did either, long before Griswold v. Connecticut legitimized it). However, nothing in the Constitution deprives the citizens of Connecticut of the right to regulate, or prohibit, such sales as they see fit--although the Supreme Court discovered (i.e., invented) a constitutional principle of privacy, which allegedly prevented Connecticut from regulating the sale of contraceptives, just as, later on, the Supreme Court discovered that the Constitution authorizes abortion. Such dubious interpretations may occur and acquire the force of law. One may well doubt that the Fourteenth Amendment was meant to extend to the states all of the Bill of Rights, which originally bound only the federal government. Probably the intention was only to give blacks equal status. But once the extensive interpretation has taken hold and become part of the fabric of our society, nothing much is gained by repealing it, even if it can be shown to have been incorrect. What is important is to prevent the court in the future from making up constitutional provisions.

Reversing the Court's Excesses. Still, little can be done to curb such well-intentioned excesses by the Supreme Court other than to nominate more competent jurists, willing to interpret the Constitution and not go beyond it, however desirable it may seem to do so. Meanwhile some excesses which are not irrevocable and have proved deleterious can be trimmed and perhaps reversed.

Miranda and the exclusionary rules have diverted criminal trials from their main purpose--to establish the guilt or innocence of defendants--to another purpose: to restrain the police from acting unlawfully in procuring evidence. That purpose is better achieved by other means; guilty defendants should not be freed by not allowing juries to consider all the evidence for their guilt. Contrary to the Supreme Court ruling, there is nothing in the Constitution that obliges state and federal courts to withhold from the jury unlawfully procured evidence, although, of course, those who acted unlawfully should be liable for their conduct.

Meaningless Ninth Amendment. Let me conclude by stressing once more that the Constitution represents a compromise between diverging interests and opinions. This explains some puzzling features. Thus, the Ninth Amendment does not seem to say anything the Tenth does not say more clearly. It probably was thought necessary to satisfy those worried about an overly strong central government and those who believed that people had natural rights (such as John Locke postulated)

which exist prior to legislation. The Ninth Amendment tells us that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." In practice this means little other than that the states are free to allow anything not prohibited by the Constitution or to prohibit anything not "enumerated" as an individual right. But this would be obvious without the Ninth Amendment, which has no meaning since no individual could claim a right on the basis of the Ninth Amendment alone. But then there is no harm in affirming undescribed rights either.

Some Judges Should Resign. Courts are not meant to be political bodies. They are meant to make decisions based on law--not on their own preferences. They derive their legitimacy and authority from this restriction, and lose both when they go beyond it. Yet the decisions of the courts often have political effects. Being human, judges, no doubt, glance at these effects and are unable to disregard them altogether. Nonetheless, their decisions must be based on the laws and the Constitution as they are, even if the effects appear less than desirable. It is for lawmakers to change the law. Judges, however much they may disagree with it, must try to carry out the intent of the law as faithfully as possible. If they feel they cannot, they should resign. If they feel new laws or constitutional amendments are needed, they should not confuse the felt need with its fulfillment, nor their task with that of lawmakers.

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