"Objective Jurisprudence: Does Political Science Have Something to Teach Court Jurisprudence"

Introduction

More objective and less ideological or subjective judicial approaches are now issues of interest throughout the world.

Does political science have something to teach court jurisprudence? Surprisingly, the answer is yes.

In every country, a system of government exists. Every system of government is authoritative, knowable, based on law, and State power holders may only act according to law, within the bounds of their jurisdiction, and never inconsistently with the basic rules of that system. These basic rules can only be changed by legal means as set out in the Constitution. These basic rules are a measure against the actions or decisions of legislature, executive, and courts.

It is objective, and ill-equipped to achieve any particular political agenda, unlike some common subjective approaches.

These basic rules are largely discoverable through the work of political science focussed in a relevant way, such as political theory, for example, concerning sovereignty; tracing and describing the foundational stages of development of government institutions, particularly parliament and courts; and, the jurisdiction/legal powers and legal limitations of these institutions. Other disciplines are involved in this study, such as law, jurisprudence, legal history, and International Law. On the other hand, there are areas of political science which have no relevance to describing the System of Government, which is a legal or juridical concept rooted in sovereignty, and its basic rules. Also, political scientists may use terms or concepts, such as sovereignty or 'unconstitutional', in a way that does not accord with its legal meaning or significance.

This approach fits well with the Conference themes of speaking truth to power (judges in this case), and to empower people to judge judges and 'democratize' our Charter of Rights and Freedoms – a process they are largely left out of due to the 'mystique' of judicial decision making.

The system of government approach, and from it objective jurisprudence, provides a more secure basis for rights.

This article is based on a book on the British System of Government and a study of approximately 160,000 words to date, as well as another volume to be completed. The complete evidence and argument cannot be covered in this article. It can only provide some highlights or points. The reader is encouraged to consult the more detailed studies.

I Importance

In a practical sense, a Constitution, as with any law or even Rule of Law itself, holds good as against state power holders, if they actually act within the law and follow its dictates, which is a purpose and legal effect of the law. Or, at the very least, state officials acting contrary to the law are criticized and put in their place. There are fashionable ideologies or approaches today, even expressed by judges, which view law as whatever one can get some decision-maker to accept or impose as law.

We are now at a time in which many of those appointed to uphold the law and Constitution no longer see themselves as bound by its words or Sovereign Intentions or to observe the legal limits of their authority, but instead 'interpret' or vandalize it according to their own ideological preferences. Some of us observers and scholars have been watching with increasing alarm these occurrences unfolding.

Some may cheer that their political agenda and ideology has been imposed or achieved. But, it is a dark day when a Constitution and what was clearly intended by the Sovereign to be protected can be so easily (albeit illegally) set aside by judges and bureaucrats marching to the beat of other ideological views or agendas, or that executive appointments to Bench and bureaucracy can be used to ideologically stack these institutions.

I have never been so afraid for fundamental rights in Canada than now, and others are as well. In today's practice, these rights are often not treated as underpinned on the firm rock of the rule of law, but on a certain kind of jurisprudence and ideological quicksand.

Some of you may not have the foggiest idea of what I am talking about. There is indeed a challenge to explain to ordinary Canadians, for example, how the Charter business really works, and for Canadians to understand Charter decisions and the ideologies they reflect. However, it is absolutely necessary for Canadians to become more knowledgeable and to participate, especially in Charter debates. It has long been recognized that the price of liberty is eternal vigilance.

The System of Government approach is well suited to both educate Canadians to identify the basic rules in a given country, and to be able to apply those basic rules to determine when State power holders have contravened them. The knowledge of citizens and the power that this knowledge itself can have in keeping governments to honest and prudent paths should not be underestimated.

It also provides authoritative guidance to judges themselves in the act of interpretation in arriving at correct answers, and eliminating wrong decisions or lines of reasoning which are impermissible.

The System of Government and Objective Jurisprudence provides the most secure basis for rights. It guarantees our liberties are not subject to judicial appointments and the current fashions of judicial or bureaucratic policy preferences, interpretations, ideologies, and biases. Indeed, recent cases and events such as *Trinity Western University* have demonstrated the fragility of even the most fundamental core rights notwithstanding an entrenched Charter. Fundamental rights are even more fragile when the philosophical roots underpinning those Constitutional rights (based on philosophical liberalism/conservative liberalism) are replaced by new ideologies, portrayed as liberalism, tolerance and "progressive," but in reality illiberal and intolerant demanding acceptance and not tolerance toward those living according to or expressing contrary and diverse ideas. Fundamentally important issues are raised concerning the Rule of Law.

Another important aspect of knowing the system of government is understanding a country's history. The danger of losing this knowledge, or having it re-written by those holding incompatible or hostile political ideologies, is that a country's future can be more easily re-written in ways that undermine the underlying philosophies, structures, values, and ideas which not only sustained the system of government, but brought a country to prosperity and liberty. Such attempts have been occurring in various forms, particularly since the last half-century and accelerated since 1982 with the purpose of changing government and cultural values, and to put

them on a new basis. Ideas have life. They animate the development and workings of laws and state institutions. It is a dangerous mistake to think otherwise.

These sorts of revolutions can occur by force or fraud, either consciously and openly, or imperceptibly. They can occur due to any of a number of state and non-state actors, such as judges, bureaucrats, academics, the media, teachers, foreign influences, including states and individuals, interfering with our domestic affairs, including through funding interest groups in Canada, cultivating divisiveness through social media, to influencing elections, and so on. If such changes are to occur, they should at least be done openly and subjected to rigorous scrutiny and debate.

II System of Government

As stated, in every country a system of government exists. It is a judicial system, authoritative, knowable, based on law, and State power holders may only act according to law, within the bounds of their jurisdiction, and never inconsistently with the basic rules of that system. These basic rules can only be changed by legal means as set out in the Constitution. Stated in another way, the system of government describes the totality of sovereign power legally exercisable in a country, by which state institutions or officers, and the extent of that respective authority. The system of government rooted in sovereignty and law makes it the legally authoritative basis to scrutinize and hold its state power holders to account. This statement is no less true of a country, such as Britain, which lacks a formal, pre-eminent written Constitution.

The research outlines the foundational elements and traces the main building blocks in the development of the Canadian System of Government, including the interrelationship among its components, the rules deducible from that system, and its implications for state institutions. The system of government not only provides the basis for objective jurisprudence, in which judges and other executive government decision makers decide cases divorced from their personal preferences and biases consistent with the law, but its dictates are often mandatory. Identifying the main features of one's system of government, the interrelationship among its components, the rules deducible from that system, and its implications for state institutions are generally not difficult to do. Surprisingly, these tasks are not commonly done.

The term 'system of government' is used instead of 'constitution' as the latter term is usually used in various countries, such as in Canada or America, to mean the written Constitution. The actual legal authority and composition of legally created bodies, including courts, are also sometimes termed their 'constitution', and their jurisdiction can be established and determined by various sources of law, including legislation and prerogative, and need not be necessarily created by a pre-eminent sovereign body or by a written Constitution. It also deals with the legal status of the elements involved in the system of government and their legal relation to each other more precisely.

From this description of the Canadian System of Government, various authoritative and incontrovertible rules are evident or immediately deducible, which can only be changed by legal means as set out in the law of the Constitution. These basic rules of the system of government can be employed as a measure against the actions or decisions of legislature, the executive, and courts to determine their consistency or inconsistency with those basic rules. In so doing, many will be astonished to learn how often one can demonstrate whether state actions or decisions are consistent or inconsistent with those basic rules.

The Theoretical and Legal Basis of the System of Government

The theoretical and legal basis of the system of government (1) is rooted in sovereignty, and (2) the system of government is a juridicial or legal concept. The system's rooting in sovereignty is evident in terms of sovereignty theory, practice and history; as well as, International Law.

In every country in the world today, a system of government exists and can be described. The only exception is a territory over which there exists no sovereign government. A system of government is a legally based system which is rooted in sovereignty and provides the pre-eminent legal rules for that State, including the jurisdictions and authority of its main state institutions. Speaking of a system of government, which is rooted in sovereignty, as opposed to the concept of sovereignty itself, naturally incorporates the benefits of sovereignty theory without any of its difficulties.[1]

The sovereign system of government signifies the legally humanly unlimited power of legislation and government over a particular geographical territory, which is sovereignty. At the same time, it provides the content for the incidents and exercise of sovereign power, which may be dispersed among one or more legal persons or bodies exercising the totality of sovereign powers. The system of government may legally limit powers making void any action outside that jurisdiction or limitation of power. In so doing, the State sovereign legally limits the full sovereign exercise of its power, but only to the extent that it intended to do so.

The recognized grounding of sovereignty is an established political organization – a system of government – exercising exclusive formal authority over a given geographical territory.

State sovereignty, as the greatest extent of human power exercisable within the State's territory, also coincided and reflects International law. Sovereignty is the fullest rights over territory known to the law. With the rise of the modern state and international relations, the doctrine of sovereignty emerged and covered the entire globe.

The omnipotent state needed a political theory to explain it. Early on, Bodin's theory of sovereignty became important. It was not just a new theory of the state, it was a new theory of sovereignty. The sovereignty of its ruler, be it a person or body, was the essence of the state. There was also the idea of sovereignty as being absolute, and could not be fettered by merely human laws (as laws depends on his willingness), by coronation oaths, or by any conditions.[2] The sovereign alone could make and repeal law and impose taxes. The subjects could have no legal rights against the sovereign, nor the sovereign legal duties to them. The sovereign was bound by natural and Divine law, however, was accountable for breach to God alone.[3] The sovereign can only be limited by what it explicitly chooses to be limited by (self-limitation or autolimitation), which also follows from International law.

States are the primary actors which create International law, such as through treaties and custom. International laws to which a state agrees or is bound does not undermine its essential state sovereignty.

International law concerning state sovereignty covers the entire world today, and was applicable to the times of New World discovery and claims of sovereignty. Most parts of the world have come under the sovereignty of State members of the community of nations.

Sovereignty signifies exclusive competence of a State regarding its own territory. Territorial sovereignty belongs to one State to the exclusion of others; only one State can possess title, and therefore sovereignty, to the exclusion of all others.[4] The title to that property is good against the world.[5]

International law is based on the concept of the State. The State is sovereign which expresses internally the supremacy of the governmental institutions and its law, and externally the supremacy of the state as a legal person. Sovereignty is founded upon the fact of territory, without which a legal person cannot be a state.[6]

Therefore, to attempt to say that International law is "Western law" or "European law" and thus does not apply to the world is nonsensical. Also, this kind of particularism under the guise of cultural relativism is used by countries, such as based on socialist marxism/communism and other dictatorships, as a justification to deny basic human rights free from international supervision or criticism, citing them as "Western" or "European"[7] as a strategy to confuse and to obscure its universality, and to assert they therefore need not be followed if inconvenient to the political ideology or agenda. Marxism-Leninism, based on certain "historical laws" governing the development of society (now proven to be wrong especially in terms of the particular rise and the fall of marxism in the world), denied the existence of rights outside the legal order. The source of human rights principles for them is the State, not the individual. The nature or 'social construction' and "context" of those rights would vary between States, depending upon the social system and socio-economic advancement of the State. Its partisans stress rights dealing with economic and social matters, and minimized the importance of the traditional civil and political rights.[8]

People of advanced and civilized countries should be wary when courts or bureaucrats use the term "context" or "social context," other than meaning how a word is used in a sentence, examining an entire statute, considering the plain meaning or understanding of the words used, what mischief the legislation aims at solving, what Parliament actually intended by its legislation as expressed in the Parliamentary Record, or what Parliament specifically voted as not in the legislation or the Constitution. It is often a subterfuge for a judge's political ideology dispensing with the necessity of proof and evidence, and without consideration of the legality, legitimacy or accuracy of judges pronouncing on social realities of which Judicial Notice may not be properly taken. In Canada, it is often influenced along the lines of relativism and postmodernism/cultural marxism (or "progressive" ideology), usually radical feminism and gender ideology. In essence, it is a tool for revolution conducted under judicial robes.

III How to Determine the System of Government and Its Basic Rules

The goal is to describe the Canadian System of Government as it is established today, its main building blocks and development, the jurisdiction of its main institutions and their legal status and relation. The necessary approach is to examine history, politics, and law, together with a suitable analytic jurisprudence, particularly in relation to sovereignty and the system of government. The approach extracts the relevant elements and events which make up the foundations of the System of Government, particularly with respect to the exercise of sovereign power.

The approach is different from the work of the historian although shares some similarities. The study draws on the works of historians, historical documents, and historical actors, which detail the historical events, intellectual influences, and legal developments that establish the main building blocks. The approach is not a full-scale inquiry into every period and event of Canadian history, but extracts only the relevant elements and events.

This study does not assume that powers exercised by any institution are or were within its jurisdiction.

Objective jurisprudence, divorced from a decision-maker's personal preferences and biases, is not only possible and readily achievable, but its dictates are often mandatory. These propositions are authoritatively established and flow from the basic rules of the Canadian System of Government. Objective jurisprudence is also a sure guarantee of our liberties and rights.

A system of government is a complete legal and jurisdictional system rooted in sovereignty, which governs the legal extent and usage of the sovereign power of a State within its territory. The basic rules of the Canadian System of Government are authoritative and mandatory, which no State official or institution may contradict, and breaches of which are often illegal, and at the very least wrong in law.

The Canadian System of Government provides what is and is not a law in Canada, and the legal hierarchy in the status of that law as well as among State officials or institutions. In terms of the hierarchy of laws, for example, the Constitution trumps the next highest laws – legislation, and beneath that delegated legislation, which trumps the common law, or other judicially created policies or even techniques of interpretation (including trumping any techniques or interpretations that lead to a pronouncement or result that contradicts the Canadian System of Government's rules). Law is not anything that springs forth from the lips of a judge or bureaucrat in the act of interpretation. That which is not law within the Canadian System of Government is not law, be it policy preference or values of any person, including judges or bureaucrats or institutions, and may not be imposed as such.

In terms of hierarchy of status, under the Canadian System of Government, in large part inherited from the British System of Government, including a parliamentary supremacy model, all other state institutions and officials are legally inferior to Parliament (and Legislatures), such as courts, executive government, the Queen or Queen's representative, and so on. Parliament is supreme and unrestricted except insofar as it has specifically enacted to limit itself through the Constitution. The only limitation to parliamentary sovereignty brought into Canada, and recognized in the Preamble of the *Constitution Act, 1867* of a 'constitution similar in principle to the U.K.' is based on natural law or Divine law giving rise to a right to disobey a law or decision contradicting this higher law, which is void, or in more extreme circumstances of oppression or tyranny gives rise to a right of rebellion.[9]

Courts in Britain dating from pre-Conquest times or in Canada have never had the legal authority to employ unwritten principles to override the Constitution or legislation, including to compel Parliaments to do anything, nor would such an asserted power be legally possible under a parliamentary model of government.

A clear Parliamentary Intention concerning its enactment must be obeyed by all inferior bodies and officials, including courts, tribunals, administrative bodies, and other bodies exercising a statutorily granted power of decision.[10] Courts and other inferior bodies may not

contradict, interpret inconsistently with, or subvert a clear Parliamentary Intention. It is particularly egregious when judges purport to do so on a matter that Parliament took an explicit vote and, for example, specifically rejected adding something as being in the Charter or legislation. This sort of illegal action involves the judge usurping power by purporting to act as Sovereign in Canada and amending the Constitution.

In this way and within the Canadian System of Government, the Rule of Law operates, and its supremacy legally reigns over all State officials and institutions. None may legally act in contradiction to it. Important formulations of the Rule or Supremacy of Law are that all State officials must act according to the law and only have such authority as the law gives to them under the Canadian System of Government, and no more. These two formulations are part of the basic rules of the Canadian System of Government

IV Describing the Canadian System of Government

Britain

The first stage to understanding the Canadian System of Government is to understand the British System of Government, which was the system of government over Canadian territories in pre-Confederation times, and carried into Confederation except as specifically modified in actual Constitutional documents. Furthermore, in Canada, at Confederation, the *Constitution Act,* 1867 did not treat the judiciary and its powers comprehensively. The Constitution was framed against a backdrop of existing court powers. Thus, absent Canadian legislation or Constitutional provisions, the powers and jurisdiction of Canadian courts were legally set from the British legacy as at that date.

A relevant examination in order to determine the British System of Government and its foundational developments would include the pre-Conquest period, including the Witan and courts; the Conquest of 1066, and nature of government; early important constitutional settlements, including differentiation within government, in which Parliament and its sovereignty are become separate from courts, and nature of courts and their jurisdiction; as well as later foundational constitutional settlements focusing on Parliament and the establishment of parliamentary supremacy, including its development into a true legislative assembly from the 13th century onwards, parliamentary control over court decisions; the 16th century Reformation; the Great Rebellion and the Revolution of 1688.

The post-Conquest political order was governed by the Curia Regis. The Curia exercised undifferentiated jurisdiction, including legislative, administrative and judicial functions, with a legal power and status above ordinary or customary law, and other courts.

The original writ was not the assertion of the jurisdiction of the court, but rather a royal commission conferring on the judges the power to try the matters contained in it. The barons, and later Parliament, understanding that the power to make new writs was in substance a power to make new law, limited the king's discretion to invent new remedies. Courts understood that it was not for them to make new law or to change it. Thus, the system of common law tended to become rigid and technical.

As distinction in government grew, including between Parliament (legislature) and Council (the executive), discretionary crown powers, which was the privilege of the king's closest advisers, ceased to be exercised through common law courts. Judges ceased to be equal to

other members of Council. They were no part of Parliament. Smith refers to the judges sitting on woolsacks only to answer or advise upon the law when asked, if doubt arose.[11] They had no voice, but were mere advisers whenever called upon, which advice could be followed or not.

This is a *foundational point* in the jurisdiction of Courts. Court jurisdiction became substantially limited in comparison to the time it was part of Council because it no longer shared in the power of the Council when it became separate from it. Common law courts began to regard their function as carrying out its duties along prescribed lines. This entails and gives rise to statements such as courts cannot change ancient usages, statutes are to be interpreted strictly exactly as they stand, they are not suggestions of policy that within those broad limits the court can exercise a wide discretion, and distinctions are drawn between strict law and equity.[12] The separation into two functions of legislating and establishing text, and adjudicating and interpreting the text emerged. Until perhaps very recently, judges accepted their absolute legal submission to the intention, word and letter of the legislature. The common law is not boundless, and under judicial authority alone it is not expandable, at least significantly, nor is it even capable of dealing with all disputes. Rather, the common law became a bounded and limited jurisdiction as the courts become independent and separated from Curia or Council.

The highest court became Parliament, where "doubtful points of law are determined, new remedies for new wrongs created, and justice distributed according to every man's deserts."[13] The common law courts had no authority to create new remedies. This high court of Parliament was above all other courts and that court was the king in Parliament and its sessions were parliaments.[14]

The practice later developed that interpretation would be left to the court. This pattern came about because of parliamentary history, and the concentration of parliamentary activities in politics and legislating made it inconvenient for Parliament to become a permanent organ for the interpretation of statutes, although those who considered the issue admitted to the inherent reasonableness of the principle that the legislator was the best interpreter.[15]

Courts cannot go against legislative intention. This description is accurate even during periods when Parliament was supreme but not sovereign because it lacked jurisdiction to exercise the fullest extent of sovereign powers.

The rise of Parliament has *foundational* significance for the organs and sources of law. The Civil War and Revolution of 1688 completed the main foundations of the British System of Government. The end of this period legally established parliamentary sovereignty, and the supremacy of law.[16] The work of political science (political theory) in describing the System of Government is evident. A determining factor is that throughout the period it was always maintained that there was a sovereign. All agreed that the king's authority was highest in Parliament and controllable by none. War conclusively determined legally the location of sovereign power in the constitution. The main question was whether royal prerogative or parliamentary sovereignty was the sovereign power. Whitelock was the first to elaborate a complete theory of parliamentary supremacy complementary to the supremacy of law.[17] Others of the parliamentary party, such as Hooker, Prynne and Parker, forwarded theories of parliamentary sovereignty. That inferiors should respect and obey their superiors was generally held as the law of nature, and was used to reinforce the authority of the community as represented in Parliament. Thus, a higher body could not appeal to an inferior, but could only be

reversed by another later Parliament.[18] Parliament, not the courts, was regarded as the principal guardian of the liberties of the subject. Freedom is in the law and not in the judges, who apply a different reasoning and their own reason. Some common law theories and leading persons of the parliamentary party, such as Parker and Pym, who helped lead the nation to civil war, asserted that parliamentary sovereignty came from the ancient common law or ancient constitution.[19] Whitelocke's 1610 speech in the Commons reflected the view that the sovereignty of the king in Parliament was not incompatible with fundamental law. He thought of fundamental law as the constitution itself, which decided the location of sovereignty. He thought of the constitution as 'natural', and an important part of it was the law that guaranteed the fundamental right of property.[20]

It is of foundational significance that the Bill of Rights[21] and Act of Settlement[22] were designed to stop any future king from relying on the expedients used between 1660 and 1688 to, in effect, make himself and his prerogative the supreme or dominant power in the state. Whitelocke's theory became the accepted theory of the constitution, and in the eighteenth century the growth of constitutional conventions made it workable. The nature of legislative, executive and judicial powers assumed the legal position at that time which they now hold in modern law.

The second great achievement is that the supremacy of law was established, and Coke's view wins out in this respect. Coke's writings set out the mediaeval doctrine of the supremacy of law, in which law, Divine in its origin and sanction, is the basis upon which civil society is built, and that this law is supreme above the king and people equally.[23] Insisting on the rule of law and the executive being under the law, is insisting on Christian principles.

The idea of a fundamental law limiting parliamentary sovereignty within the domestic legal system is impossible, and wholly contradictory to parliamentary supremacy. This point is determinative legally. It was even more unthinkable that courts as inferior institutions, with judges as their officers, could use the idea of fundamental law to review and strike down legislation made by the superior body, Parliament. Furthermore, Parliament's laws were dominant over those executing of the law – both crown and courts.[24]

The two key elements in understanding the British System of Government are Parliament and courts, together with their respective natures and jurisdictions within that system. The British system is characterized by parliamentary sovereignty, in which Parliament may legislate anything except that which is impossible, and aside from manner and form of legislating, one Parliament may not bind a future one. Blackstone describes Parliament as the sovereign, uncontrollable authority to make, repeal, modify and expound laws on all possible matters.[25] The basic maxim in law is that it requires the same strength (or status) to dissolve as to create an obligation. Parliament can make or unmake any law whatsoever. It follows Whitelocke's view and others of the parliamentary party leading to the Glorious Revolution of 1688 which established parliamentary sovereignty in a manner omnicompentent that Parliament is the place where absolute despotic power resides as entrusted by the constitution. Thus, an Act of Parliament is the highest authority Britain acknowledges on earth. It has the power to bind every subject, even the king. It cannot be altered, amended, dispensed, suspended or repealed, but by the same form and authority of Parliament.

These limitations on Parliament are legal limitations, and not otherwise, be they moral rights, unwritten principles, or common law principles. In turn, courts have no legal authority to invalidate statutes thought to be contrary to fundamental legal or moral principles or constitutional "values", let alone their own policy preferences.

Courts are State institutions created by and which can only operate according to applicable law, with judges as their officers. They exercise a legally delegated jurisdiction, primarily by legislation, and originally by prerogative. There is a narrow jurisdiction of inherent powers based on necessity to enable the institution to function in a procedural sense, that is to provide for the efficacy of the exercise of the power delegated to the court to deal with the matter before the court, and no inherent substantive jurisdiction exists. This is the highest case for inherent jurisdiction.

Furthermore, it is also telling in terms of the status between legislature and courts that the court jurisdiction can be changed or even abolished by parliamentary legislation, as can their decisions be declared to be incorrect, overridden or modified. Indeed, legislation could require courts to do certain things in the course of their judicial duties in order to achieve justice and overcome the unlawfulness of judicial decisions.

Courts and judges are inferior institutions and officers to supreme Parliament. As inferiors, judges and courts are bound by the Intentions of their superiors – supreme Parliament – which is also a principle of natural law.

Natural Law and Divine Law and Christian Influences

One further foundational element is that the only limitation to parliamentary supremacy is based in natural law or Divine law giving rise to a right to disobey a law, or in more extreme circumstances of oppression or tyranny a right to rebellion. This species of higher law is not a law or legal right that can legally limit Parliament's jurisdiction within the British sovereign state's System of Government, unless such principles have been incorporated into its domestic law. Nor does it confer any legal jurisdiction within a state, including upon judges, although natural law is often appropriately used by judges as an aid to interpretation. In effect, natural law within the British System of Government constitutes morally existing higher rights.

Divine law and natural law are fundamental pillars within the British System of Government, which also includes their direct and indirect influences on the law.[26] Christian and Church influences have been remarkable and enduring upon the substance and procedure of the law, as well as for the development of Parliament.

Natural law had a real impact on the laws and decisions, in Britain and later in Canada, for example in developing natural rights before state decision makers. Furthermore, natural laws could and were used in judicial decisions with real effects on the common law. Indeed, it was from ancient times recognized that the law of nature is part of the Law of England which, for example, was recognized unanimously by the Exchequer Court in *Calvin's Case* (1608)[27] and in *Forbes v Cochrane* (1824).[28] An interesting and illuminating modern account of the Christian influence on the law is provided by Lord Denning, in *The Influence of Religion on Law.*[29] Denning confirms that many of the most fundamental principles of law were derived from Christianity.

The individual is the unit that carries worth being created in the image of God, while society is simply a creature of the collective decisions of individuals. States have no ultimate authority of their own, but derive all their authority from God.[30] This is reflected in the notion that the king is under God and the law.

Canada

The nature of legislatures and courts remained in pre-Confederation and with Confederation. Confederation is the main foundational point in the creation of the Canadian System of Government.

The System of Government in pre-Confederation times is the British System of Government based on its sovereignty and the exercises of its sovereignty over North American territory. Later, Canadian sovereignty and title over its territory were well established at Confederation and the later incorporation of all territory into Canadian territory. These claims of sovereignty are reinforced by and indeed made incontrovertible with the international recognition of that sovereignty and international instruments. The colonial legislatures were supreme within their spheres of authority, subject to the limitation of not being repugnant to British statues intended to apply to the colony. They were superior institutions in the colony, including to courts and judges.

There was also the gradual development of legal independence, including the *Colonial Law Validity Act, 1865* confirming that no colonial law is inoperative on the ground of repugnancy to the law of England, other than a Parliamentary Act applying to a colony by express words or necessary intendment, and only to the extent of the repugnancy. (ss. 2, 3).

Important developments of the Canadian System of Government system include Confederation, the road to independence (including the Statute of Westminster), and the *Constitution Act, 1982* achieving final independence.

The intention of the Preamble to have a constitution similar in principle to the United Kingdom meant parliamentary and responsible government, and no other kind of government. The Canadian System of Government is characterized by a model of parliamentary supremacy, with modifications as stated specifically in written Constitutional documents. That System of Government, including the parts inherited as legacies of the British System of Government and governance, establishes that Parliaments are sovereign and supreme within the spheres of legislative competence set by the written texts of the Constitution. Stated as a negative proposition, Parliaments are only limited by specific provisions as contained in Constitutional instruments that define or limit state power. Federalism neither decreased the totality of sovereign powers, nor made Parliament or Legislature any less supreme within their respective spheres of power. To say that the model of parliamentary sovereignty in Canada entails legal limitations, which may very well in effect comprise noteworthy constraints on the exercise of the totality of sovereign power, is not to be confused with the *nature* of that government system. These limitations are legal limitations only, and not of any other nature, including moral rights, unwritten principles, the common law, or common law principles. The debate about Parliament's prescribing binding requirements with respect to procedure or matter and form in legislating is settled on its modern basis. According to this modern settlement, sovereign Parliament can create legal conditions or impediments to the exercise of its sovereignty. Courts have no legal authority

to invalidate statutes as contrary to fundamental moral or legal principles, or Charter "values" as opposed to Charter provisions.

The courts are State institutions that are created by and can only operate according to applicable law, with judges as their officers. In the Canadian System of Government, the essential nature of their jurisdiction was established prior to 1867, which was incorporated into the *Constitution Act, 1867*. This period and Constitutional document mark a *foundational* point in the jurisdiction of courts and judges. Subsequently, that jurisdiction could be changed or even abolished in accordance with the *Constitution Act, 1867* primarily by legislation, except for a very narrow range of matters which would require Constitutional amendment. Courts can never legally go against a clear intention of Parliament.

An important provision is s. 129 providing for the continuance of existing laws, courts, officers etc.:

> Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act. [emphasis added]

The nature of court jurisdiction was an important legacy of the British constitution, and enshrined in s. 129 of the *Constitution Act, 1867*, which also confirmed Parliament can override the common law, and change court jurisdiction.

The legislatively delegated jurisdiction of courts is also reflected and established in Canadian legislation. For example, prior to Confederation, the *Act to establish a superior court of civil and criminal jurisdiction, 1794*, provided for a court of King's Bench for the colony having "all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction."[31] Typical legislation today, such as the Ontario *Courts of Justice Act*, tends to be written in the same sort of language of jurisdiction incident to a superior court of law and equity.

The only exception to parliamentary supremacy is the limitation based in natural law or Divine law giving rise to a right to disobey a law, or in more extreme circumstances of oppression or tyranny a right to rebellion. It is not a law or legal right within a sovereign state's system of government, nor does it confer any legal jurisdiction within a state, including upon judges, although natural law is often used by judges as an aid to interpretation. In effect, natural law within the particular system of government constitutes morally existing higher rights.

The Canadian Framers intended to establish a country with Parliamentary Supremacy as the basis of Government for the exercise of sovereign authority. Canada as a State in its own

right acted to expand and realized sovereignty and title over all territories now within Canadian territory, and displayed effective sovereignty.

The Fathers of Confederation accepted the notion of sovereignty during Confederation, including as understood and established in the British law of the constitution at 1688, and with respect to its government and the constitutional conventions that arose. Although the historical evidence and the *Constitution Act, 1867* itself establish this fact, further evidence of this statement is revealed in the importance of sovereignty in discussions about federalism and Confederation. The Fathers of Confederation accepted the notion of sovereignty, and Blackstone's notion was very influential among them.[32]

The Fathers of Confederation asked for and in fact obtained a country in its own right and a system of government based or modeled on parliamentary supremacy, only limited by the terms of the Confederation Settlement they largely drafted as specifically stated in the *Constitution Act, 1867*. The UK Parliament had plenary power and sovereign status to sanction or recognize the creation of a State on any terms.

As the Judicial Committee of the Privy Council (JCPC) held, when Imperial Parliament granted power to colonial legislature for 'peace, welfare, and good government', it granted them power of the same nature, plenary and absolute.[33]

The road to full Independence is also examined in this study building upon parliamentary supremacy in the colonies and its superiority over unwritten constraints, to building on the *Colonial Laws Validity Act, 1865,* with the *Statute of Westminster, 1931*, in which UK Parliament could not legislate for Canada without Canada's request and consent.

The final step toward the full exercise of sovereign powers was completed in 1982. Canada became a sovereign nation in law, and given international recognition well before 1982, but for greater certainty, the *Canada Act, 1982*, s. 2 explicitly terminated UK legislative authority in Canada. The *Constitution Act, 1982*, which was enacted by the *Canada Act* as a schedule to it, completed the full incidence of Canadian sovereign power. This was the meaning of Patriation. Patriation and the Charter should not be confused. Patriation was accomplished with the domestic amending formula.

Although the *Constitution Act, 1982*, particularly the Charter, did not change the nature of the Canadian System of Government, there were two principle changes brought about affecting that System of Government. First, the full incidence of the exercise of Canadian sovereign power was realized. In legal terms, no limitation on Parliamentary Supremacy is possible other than by its own autolimitation. Also, any legal provision, Constitutional or otherwise, could be abolished or amended as permitted by the law or Constitution, and only in that way.

The second significant change is that the Canadian sovereign[34] decided to limit the full extent of its sovereign powers legally exercisable. It did this through Constitutional rights, particularly the Charter, although maintained its ultimate parliamentary sovereignty of having the last say with the s. 33 Notwithstanding clause to preempt or to override judicial decisions that have gone too far off base or are deemed wrong as a matter of law, as well as through Constitutional amendments albeit impractical to achieve.

As for the Judiciary and Courts, only a few provisions were added in 1982.

The 1982 Constitution Act does not change the essential nature of court jurisdiction, although it expands that jurisdiction significantly including due to the Charter and the proliferation of legislation and growth of the vast and deep administrative state after World War II. Courts are inferior in legal status to supreme Parliament.

The System of Government, including court's jurisdiction, defines the scope of legal powers and legal role, and at the very least defines and constrains that role. The Charter narrowed the scope of legislative power and empowered the court to interpret and apply these limitations. In this manner, subject to s. 33, it has changed the balance of power between the branches of government given that the Courts may be called upon to rule on whether laws and government acts are invalid under the Charter. It has legally done nothing more. The nature of court jurisdiction remains the same, but its scope expanded. Legislative power remains exclusively with legislatures, as does Constitutional amendment.

Nothing in the Constitution gives the Courts legislative ability, nor the power to amend the Constitution, a point reinforced particularly by the amendment formula. Indeed, in the Canadian case, section 52(3) states specifically that amendments to the Constitution shall be made only in accordance with the authority contained in the Constitution of Canada.

Sometimes scholars speak of the court's role having been changed with the Charter, or as a result of the written Constitution generally as with, for example, federalism. However, this use of the word 'change' is misplaced. Debates about the court's role are often really about achieving the speaker's political agenda, particularly in pushing for postmodernist ideologies and agendas. "Living trees" or "changing conditions" do not provide legal authority for judges to override legislation or amend the Constitution or otherwise act inconsistently with the Canadian System of Government, including clear Parliamentary Intention.

Courts must obey and follow in their decisions the basic rules of the Canadian System of Government, including a clear Parliamentary or Framer Intention. Under the Canadian System of Government and Canadian State sovereignty, Parliament's power (in the exercise of sovereign powers) can only be autolimited by legal exercise of sovereign authority according to its intention, only within the scope so intended by it, and that intention can be expressed on matters or scope it intended not to be limited. Indeed, the authoritative imperative for courts to obey the Intention of Parliament is particularly and irresistibly strong when that Intention is expressed as the highest legal sovereign act of Parliament: a vote of Parliament. Parliamentary or Framer Intention on the Constitution or legislation can be readily known in a great many cases, notwithstanding the bald assertions of judicial poppycock to the contrary, as well as hypocrisy in only referring to the Parliamentary Intention when it suits their desired result.

The authoritative and mandatory rules established and derived from the Canadian System of Government can determine right and wrong answers in cases, provide real guidance and clarification to State decision makers, and eliminate wrong answers. Failing to follow its dictates can result in illegal decisions.

One important result of illegal judicial behaviour purporting to amend the Constitution is that it has led to the further illegality of judges, such as in essence imposing taxation and disbursements upon Canadians in order to achieve their self-interested or postmodernist policies. The illegal imposition of judicial taxes has cost Canadians at least hundreds of Millions of dollars. For example, despite judges being the highest paid profession at the time, they were

unsatisfied and massively increased their salaries even in the middle of a global recession by 60-80%, through their illegal constitutionalization of judicial compensation committees from "unwritten constitutional principles". These self-serving decisions overrode legislation as well as the Constitution itself which granted the sole authority of fixing judicial salaries to Parliament for superior court judges and to Legislatures for provincially appointed judges. In essence, these salary increases are an illegal tax imposed by judges on Canadian taxpayers, which judges required of Parliament and Legislatures against their will to collect and pay to them—the 'judicial privilege and emoluments tax'. These illegally imposed taxes or disbursements constitute a theft of labour of Canadians, upon which their taxes are paid, and violated natural law, including the fundamental natural law principle of 'no taxation without representation'. The illegal judicial imposition of tax or disbursements have also occurred other areas as well.

It would take a separate book to examine in detail the numerous violations by the court those basic rules rendering the decisions illegal. Canadians will be surprised to know that numerous things the Supreme Court of Canada (SCOC) said were in the Charter, but are not.

In so doing, these judges have acted illegally in purporting to usurp Canadian sovereign powers, including engaging in extensive purported amendments to the Canadian Constitution. In light of the evidence, it is evident that these judges have acted in a lawless manner and will not obey the law, or the limits to their delegated powers and legal constraints put on them. The Rule of Law has been badly damaged, and the secure basis of our legal rights and freedoms and our ancient liberties have been greatly undermined. The stage is set for further undermining of our rights and liberties in service of ideology.

Conclusion

In commencing this article with the question of whether political science has something to teach court jurisprudence. It is perhaps less surprising now that the answer is yes.

In every country, a system of government exists. Every system of government is authoritative, knowable, based on law, and State power holders may only act according to law, within the bounds of their jurisdiction, and never inconsistently with the basic rules of that system. These basic rules can only be changed by legal means as set out in the Constitution. These basic rules are a measure against the actions or decisions of legislature, executive, and courts.

These basic rules are largely discoverable through the work of political science focussed in a relevant way, such as political theory, for example, related to sovereignty, tracing and describing the foundational stages of development of government institutions, particularly parliament and courts; and, the jurisdiction/legal powers and legal limitations of these institutions. Other disciplines are involved, such as law, jurisprudence, legal history, and International Law.

Some will object because this study concludes there can be right and wrong answers authoritatively and objectively determined on a whole range of political and legal questions. On the contrary, the approach is not immodest at all. It is objective and relatively simple to apply. Another strength of this analysis is that it does not depend on the author's or any political or ideological preference, but is independently, authoritatively and objectively verifiable. By analogy, even if it is possible to disagree with the concept of mathematics, one cannot disagree

that 2 + 3 = 5, whether based on one's feelings, perspective, or otherwise. Accurately describing the system of government is accomplished through examining that system from several angles (or non-ideological perspectives), and if the answer(s) are consistent, there must be a true or accurate description. Even on complicated, hard or unclear matters, the system of government can provide correct answers, and at least eliminate wrong answers if not pointing to the best answer. I have shown elsewhere the utility of this approach to judicial review in administrative law, including to cases in which legislative intention of a statutory provision may not be clear.[35]

On the other hand, the objection of immodesty should be re-directed to those who, for example, encourage judges to change the Constitution or interpret it according or the judge's political agenda, as long as it agrees with their own, or encourage judges to interpret it according to a judge's ideology or what the judge believes will bring about the 'best results' as they think they know better than Canadians. If anything, such positions are themselves arrogant as substituting one's own personal and political opinion for: the system of government and rule of law, the laws as intended by the lawmakers, as well as parliamentary democratic government.

The findings of this study question the assumption in an influential stream of contemporary scholarship that there can be no correct answers to legal questions, which is a relativistic philosophy or assumption. If the conclusions in this study are robust, then this relativism must be rethought.

Not all, or even most, cases need necessarily engage the most fundamental rules of the system of government. This study, therefore, does not state that there will always necessarily be one uniquely correct legal answer for every case. However, court or other state actors ignore these foundational elements at their peril, in which their decisions may be incorrect or illegal as being outside of the system of government or their jurisdiction, and may lose the benefits of considering the basic rules and imperatives of the system which would otherwise provide real guidance for their decision-making.

END NOTES

1. Bodin is often thought to be the father of sovereignty theory. Jean Bodin. *Six livres de la republique* (Paris: Chez lacques du Pays, 1579). For an overview of sovereignty theory, see Hymen Ezra Cohen, *Recent Theories of Sovereignty* (Chicago: University of Chicago Press, 1937).
2. Jean Bodin, *Six livres de la republique*, Book I, ch. viii, 90, 93, 96-100.
3. Ibid, 91, 97.
4. See, also, *Island of Palmas* arbitration (Netherlands, USA) Vol. II RIAA (1928) 829, 838.
5. Sometimes termed a *jus in re*, which once acquired in property or territory, is good as against the world (*erga omnes*) and prevails over *de facto* possession.
6. For example, in the *Island of Palmas Case*, Judge Huber held that sovereignty in relation to a particular territory is the legal condition necessary for including it in the territory of a State.
7. See, for example, Malcolm Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2012), 42. For a discussion on the relativist claim concerning rights, see also Sarah Joseph et. al., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2000), 24-5.

8.See, for example, Shaw, *International Law*, 267-8.

9.See, for example, Christopher Edward Taucar, *The British System of Government and Its Historical Development* (Montreal and Kingston: McGill-Queen's University Press, 2014). In terms of the dissolution of government, Locke's *Second Treatise of Government* uses contract theory to explain and justify the Revolution settlement. However, Natural Law theory extends far earlier.

10.Taucar, *British System of Government*.

11.Thomas Smith, *De Republica Anglorum: A Discourse on the Commonwealth of England*, edited by L. Alston (Cambridge U.K.: Cambridge University Press, 1906), 51.

12.Y.B. 16 Edward III (Roll Series), i. 90 (1342); Y.B. 17 Edward III (Roll Series), 142 (1343); Y.B. 17 & 18 Edward III (Rolls Series), 446; Y.B. 18 Edward III (Rolls Series), 131; Y.B. 17 Edward III (Rolls Series), 370 (1343); Theadore F.T Plucknett, *A Concise History of the Common Law*, 5th ed. (Boston: Little, Brown and Company, 1956), 332-33.

13.See Fleta ii 2, I, cited in William Holdsworth, *A History of English Law*, (London: Methuen & Co. and Sweet and Maxwell Ltd., 1966), 1:352; and is also reflected in the Parliamentary Roll of 1305.

14.Edward Coke, *Fourth Part of the Institutes*, 27-8 in *The Selected Writings of Edward Coke*, edited by Steve Sheppard (Indianapolis, IN: Liberty Fund Inc., 2003); Maitland, *Parliamentary Roll*, lxxxii; cited in Charles Howard McIlwain, *The High Court of Parliament and Its Supremacy: An Historical Essay on the Boundaries Between Legislation and Adjudication in England* (New Haven, CT: Yale University Press, 1919), 20-1.

15.See, Plucknett, *Common Law*, 330-1.

16.For an overview, see, for example, Taucar, *British System of Government*, ch. 4.

17.The theory was stated in debate on impositions in 1610. See 2 ST 482; Parliamentary Debates in 1610 (C.S.) 103-9; Holdsworth, *English Law*, 6:84.

18.Supporters of such views would include Petyt, Prynne, Parker, and Pym, and their opinion is reflected in *Streater's Case* (1653).

19.See, for example, Herle, Pocock, Nenner, Hill, Parker, Pym; cited in Jeffrey Goldsworthy, *The Sovereignty of Parliament* (New York: Oxford university Press, 1999), 109. J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century – A Reissue with a Retrospect* (Cambridge, UK: Cambridge University Press, 1987), 49, 234.

20.J. W. Gough, *Fundamental Law in English Constitutional History* (London: Oxford University Press, 1961), 58-9.

21.1 William and Mary sess. 2 c. 2.

22.12, 13 Wm. III c. 2.

23.Coke, *Part Three of the Reports*, in Sheppard, ed., 59-60; Plucknett, *Common Law*, 49.

24.G.R. Elton, *The Parliament of England 1559-1581* (Cambridge, UK: Cambirdge University Press, 1986), 39, 32.

25.William Blackstone, *Commentaries on the Law of England: In Four Books*, with the last corrections of the author and notes and additions by Edward Christian (New York: E. Duychnick, 1822), I:185-6, 160.

26.For example, as Holdsworth observes: "... the foundations of the systems of law of Western European states were laid in a world governed partly by remnants of Roman law, but chiefly by [tribal] custom tempered by Christian theology, and by those political and legal ideas of Roman lawyers which the Church perpetuated." Holdsworth, *English Law*, 2:5.

For other discussion on the Christian influences on the British System of Government, see Taucar, *The British System of Government*, e.g. ch. 1; Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Massachusetts: Harvard University Press, 1983); Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2003); Plucknett, *Common Law*, 8, 301. For

valuable accounts of the general influence of both Roman and Christian Church, see Meynial, *Roman Law*, and Le Bras, *Canon Law*, both cited in Crump and Jacob, *Legacy of the Middle Ages.*

27.(1608), 7 Co. Rep. 1a, 12b-13a.

28.2 B & C 448, 471.

29.Rt. Hon. Lord Denning, "The Influence of Religion on Law" (1997) by the Lawyers' Christian Fellowship (U.K.).

30.Denning cites Church teachings, and Paul's letter to the Romans.

31.34 Geo. III., c.2 (UC).

32.G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (Autumn, 1985) Vol. 3, No. 2 *Law and History Review* 219, 222, 238, 241, 255.

33.See, for example, *R. v. Burah* (1878), 3 A.C. 889; *Hodge v. R.* (1883) 9 A.C. 117; *Powell v. Apollo Candle Co.* (1885), 10 A.C. 282. See, also, Goldsworthy, *Parliament*, 1.

[34] Executed through sovereign UK parliamentary legislation.

35.Christopher Edward Taucar, "Standards of judicial review of administrative bodies: The consideration of citizen participation" (March 2010) Vol. 53, No. 1 *Canadian Public Administration* 67.