

# Responsibility, Fraternity, and Sustainability in Law

A Symposium in honour of Charles D. Gonthier

## Fraternity in Constitutional and International Law

3:15-4:30, Saturday May 21, New Chancellor Day Hall, Maxwell Cohen Moot Court  
Chair: Mr. Paul Crowley, Manager of Social Development Programs, International Development Law Organisation, Rome

### Summary

The session explored Justice Gonthier's role in enunciating and elaborating upon the theme of fraternity as manifested in domestic constitutional as well as international law. The session was chaired by Paul Crowley, currently Manager of Social Development Programs at the International Development Law Organization in Rome, and former colleague of Justice Gonthier's at the Center for International Sustainable Development Law who spoke briefly to Justice Gonthier's leadership of the organization before introducing the panel members. The panel featured Justice Guy Canivet, member of the *Conseil constitutionnel*; Justice Ian Binnie, senior Associate Justice of the Supreme Court of Canada; and Dr. Kamal Hossein, Dr Kamal Hossain and Associates (Dhaka, Bangladesh), Professor, University of Dhaka.

### Charles Gonthier and the Unwritten Principles of the Canadian Constitution

Justice Ian Binnie, Supreme Court of Canada, Ottawa

Justice Binnie discussed the unwritten principles of constitutional law enunciated in Canada's seminal jurisprudence on these principles, most notably the *Quebec Secession Reference*, and how these compare to the concept of fraternity. Justice Gonthier described the "spirit of the law," the values a society draws upon in its development of legal rules that complement the "rule of law," whose black letter rules are often insufficient guide to the resolution of the law's most complex problems. Fraternity, "the unspoken Third Pillar of democracy," is such a value, and the *Quebec Secession Reference* was one of the most complex problems the Court has faced. The conundrum was that it required the Court to decide between contesting views of the principle of democracy itself. Simply stated, the way out of the impasse was the recognition of the history of interdependence, mutual reliance, and mutual obligation that neighbors owe to neighbors that could also be described as fraternity. Fraternity underlies the principles identified in the *Secession Reference*, including democracy, federalism, the rule of law, and respect for minorities, are fundamental to the constitution's operation. Their elaboration was an enduring and important concern of Charles Gonthier throughout his long judicial career.

The reference to "unwritten constitutional principles" remains controversial despite the fact that unwritten constitutional principles have been cited throughout the Supreme Court's jurisprudence, and have parallels to similar approaches by the High Court of Australia and the Supreme Court of India, and now even that bastion of positivism, the French Republic. Unwritten principles may be used to elucidate or elaborate on the meaning of written terms but they cannot alter the thrust of the

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explicit text. However in both constitutional language and operation, much of what the Court must interpret is vague and requires reference to these broader principles to guide interpretation, especially when principles come into conflict. Moreover, the *Preamble* of the *Constitution Act, 1867* specified that Canada will have “a constitution similar in principal to that of the United Kingdom,” one whose essential structure is also, of course, unwritten. Unwritten Parliamentary conventions borrowed from this unwritten constitution help fill the gaps the text left unaddressed.

As was noted in the *Patriation Reference*, “many Canadians would perhaps be surprised to learn that important parts of the Constitution of Canada are...nowhere to be found in the law of the Constitution.” Vagueness is inherent to the unwritten rules of constitutional conventions, but it is also found in the *Charter*, from the principles of fundamental justice to judicial independence to what constitutes an “analogous ground” for discrimination. Some decisions, notably the *Remuneration Reference*, provoked alarm from originalist critics at the *Toronto Globe & Mail* and elsewhere that the court was couching judicial policymaking in the guise of malleable principles. Criticism arose from such eminent scholars like Professor Jean Leclair that “unwritten principles may serve the courts’ instrument to impose their will on legislatures,” or from Professor Peter Hogg that “when unwritten constitutional principle is directly enforced...it is hard to avoid the conclusion that the Constitution has been amended by judicial fiat...” But these principles did not constitute a Trojan horse for judicial policymaking or constitutional amendment by judicial fiat. The Court had already ruled in *Babcock v. Canada (A.G.)* that “the unwritten constitutional principles are capable of limiting government actions.” The controversial remedy from the *Remuneration Reference* has not prevented the provinces from departing from judicial compensation commissions’ recommendations by demonstrating the simple rationality of the decision. Subsequent jurisprudence (e.g. the *Imperial Tobacco* case, and *Christie v. British Columbia*) has hardly been a record of judicial carnage of the rightful constitutional order.

Although not labeled as such, many of the decisions of the Court elaborating upon these fundamental principles are profound expressions of fraternity, not least in the case of what was perhaps the most controversial of these principles: the protection of minorities. Despite similar accusations of surreptitious policymaking, Justice Gonthier was not a “closet revolutionary.” On the contrary, the fact that the decision in the *Secession Reference* was supported by so principled and careful a jurist as he undoubtedly added greatly to its credibility. He was careful in his judgments to be inclusive of all parties affected and applicable principles of law, because he understood their importance for the rule of law. As he wisely observed, “a society that does not succeed in meeting the needs of a significant segment of the population is a society doomed to instability, no matter how many black letter laws it has.” Respect for minority peoples and cultures is not only a core value, but a necessary practice in Canada’s modern multicultural and multiethnic society, where consultation and accommodation are required to reconcile diverging interests and value systems. Yet among the Court’s most controversial rulings were those upholding the rights of ethnic, political, and religious minorities throughout its 20<sup>th</sup> century jurisprudence.

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Justice Gonthier stated that the law “adapted to accommodate these [multilingual, multiethnic, and multicultural] realities, not by using the law to enforce particular moral choices, but rather by limiting its application to cases where the community cannot tolerate a form of behaviour because it threatens the fabric of the community.” In the contentious context of the *Quebec Secession* reference, the community whose fabric was threatened was the Canadian federation, and the Court reached what was in a sense a fraternal compromise. It offered an approach that recognized the importance of being guided by a set of identifiable (albeit unwritten) legal principles that would guide the parties in a process of negotiation that would inevitably result from a vote for independence, rather than choosing to arbitrate between the right to unilateral secession despite the need to maintain a federal system and territorial integrity on the one hand, and the maintenance of the rule of law and constitutional integrity by ignoring the democratic will of the people on the other.

Justice Gonthier described fraternity as “the glue that binds liberty and equality to a civil society,” and that “the backbone of civil society rests on treating our neighbours in a fair manner and with a degree of trust.” In *De Legibus*, Cicero wrote that the welfare of the people is the ultimate law, to which Charles Gonthier would likely have remarked, had he been asked, that in this respect nothing very much has changed in the last 2000 years. However, Charles Gonthier would never have put himself on a pedestal with Cicero. His depth of learning was exceeded only by his sense of personal modesty and decorum. He was one of the most bilingual, bilingual and well-respected jurists ever to sit on the Supreme Court. Guided by his understanding of fraternity, he added immense credibility to the Court’s work at a critical juncture in its history. We are all greatly in his debt.

## De la valeur de fraternité en droit français

Justice Guy Canivet, Constitutional Council, Paris

Justice Canivet centered his presentation around four words to demark the Cartesian spirit of fraternity: incredulity, positivity, fertility, and subversion. “Incredulity” describes one’s initial reaction to Charles Gonthier’s declared faith in the in the legal power of fraternity. He saw it as a matrix for constitutional values that was indicative of the maturity of the rule of law in every democracy, rather than simply a moral ideal of universal love for one’s fellow man as is commonly understood. Justice Gonthier argued ambitiously and convincingly that fraternity was a foundational component of constitutional and international law, particularly international environmental law. At the 2002 Johannesburg Summit, he cited fraternity as the foundation for the “3<sup>rd</sup> generation” right to environment and its concomitant obligations to refrain from polluting other countries, to respect the biosphere as a common good of mankind and to leave a sustainable environment intact for future generations. His report from the 3<sup>rd</sup> Congress of *l’Association des cours constitutionnels ayant en partage l’usage du français* (ACCPUF), “*La fraternité comme valeur constitutionnelle*,” remains an anthology of the concept of fraternity, defining it, describing its operation through formal mechanisms, enunciating both its universal dimensions and its jurisdictional variability, and establishing an evidentiary record of its contributions to constitutional law jurisprudence as a record for international law. Justice Gonthier concluded in his report that there can be no hierarchy or separation between the constituent elements of the trilogy of the motto of the French Republic (Liberty, Equality, and

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Fraternity), that fraternity can only exist between free and equal men, and that liberty and equality cannot survive in a society in which fraternity is ignored.

His conclusions on the “positivism” of fraternity parallel a similar debate that animates and divides French legal and political thought on fraternity’s place within the trilogy, which has been more contested than the Republican motto itself. Doctrinaires of public order, partisans of the aristocracy, of positivism, secularism, traditionalism, Marxism, liberalism, nationalism, and fascism have all challenged the notion of fraternity as a free-standing concept during the competing periods of republican and non-republican government alike since the Revolution. Despite its absence in most modern French constitutional doctrine, the importance of its current role cannot be denied. The 1848 Constitution consciously defined fraternity as a “principle” rather than a “dogma” to preserve its juridical effect on par with the principles of liberty and equality. It cites fraternity to ensure present self-sufficiency through work, and future self-sufficiency through foresight, as well as to ensuring that the basic needs of the families of those without employment are met. Among the principles of the Republican motto are those that can be seen as juridical translations of fraternity, including the equality of women, freedom of association, right of asylum, right to work, right to development for the individual and the family, right to social protection, the right to education, and the right to retirement. From the 1970’s onwards, fraternity was included as a normative referent by the *Conseil constitutionnel*’s jurisprudence which recognized fundamental rights derived from the Declaration of 1789, the Preamble of the Constitution of 1946, and other recognized principles of the laws of the Republic. The continuity of its constitutional presence, its use as an interpretive principle and the substantive rights given succor by its normative force are all means through which fraternity manifests itself as a positive legal concept.

The “fertility” of fraternity lies in its potential as an active principle in current legislation and jurisprudence. It is a precursor to the notion of “solidarity” with which it is often compared, and from which many modern constitutional rights derive. It comprises a considerable part of French constitutional jurisprudence through two principal means: first, through the solidarity requirement flowing from the recognition in Art. 1 of the Constitution that France is a “social Republic;” second, through the implementation of the democratic values of tolerance, respect for the other, and the struggle against social exclusion. From the point of view of legal theory, nothing prevents the legislature from relying on fraternity to justify the legislative measures they consider appropriate to take, and as such, it has the potential to serve as a veritable foundation of law at the same level as the principles of liberty or equality. However, fraternity is limited by the constitutional indivisibility of the French state and unitary character of the French people, which precludes legal recognition of groups to which any specific collective rights may be attributed on the basis of ethnic, linguistic, or religious criteria.

A final understanding of fraternity worth considering is its role as a means of “subversion,” as the word is properly understood: the process by which the values and processes of a system currently in place are undermined or contradicted. In the 18<sup>th</sup> century, it was fraternity that was invoked during the abolition of the Ancien Régime’s feudal system as well as in extending asylum and French

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citizenship to all Republican revolutionaries fighting for the natural rights of man to liberty. In the 19<sup>th</sup> century its evocation led to the effective abolition of slavery in the 19<sup>th</sup> century and the beginning of recognition of collective and social rights. In the 20<sup>th</sup> century, fraternity informed the right of self-determination of peoples and decolonization. In the 21<sup>st</sup> century, it goes so far as to subvert the international order. While states interpret the extent of the obligations of fraternity within their borders, on the international level even the sovereign right of states gives way before a higher principle, the emerging duty to protect the lives and essential rights and freedoms of all peoples against the gross human rights violations of states and governments that would threaten them. Similar to fraternity, this duty has evolved from a moral obligation to one which goes so far as to justify military intervention for its enforcement. In both international human rights and international environmental law, the international community is now tasked with defining the scope and limits of this “international fraternity,” and when intervention is necessary to avert violations to fundamental human rights and threats to planetary sustainability. Justice Gonthier recognized that both fraternity, and the positive law it inspires have limits to their ability to resolve conflicts between individuals and society, as well as among nations, but also counseled that it remains incumbent upon us to ensure that the spirit of fraternity continues to come to the aid of those attempting to maintain social harmony.

## Fraternity, Responsibility, Sustainability and Law

Dr. Kamal Hossain, Dr. Kamal Hossain and Associates, Dhaka, Bangladesh

Fraternity, sustainability and responsibility are concepts critically important for progressive development of law, constitutional and international, in order to secure justice and human rights for all across the globe. Fraternity is an economic necessity in a global marketplace. It is central to sustainable development and Justice Gonthier’s visionary leadership as a jurist and as Chairperson of the Board of Governors of the Center for International Sustainable Development Law significantly advanced efforts towards a more fraternal international order. Justice Gonthier’s vision was part of the quest for an international order to create a world free from fear, from want, and whose inhabitants live in harmony as equal members of the human family. What resulted, in part, from the immediate post-World War II effort was Article 1 of the Universal Declaration of Human Rights, which declared that we are all born equal in rights and dignity, and should treat one another in a spirit of brotherhood. While the notion seems quaint today, it’s easy to forget the almost revolutionary character of declaring to the world at the time that we really *are* one human family, given we were a family divided, between victors and vanquished, colonizers and colonized, communist and capitalist; and by apartheid, by segregation and by class division. Our lack of fraternity, our inability to treat one another in a spirit of brotherhood, is a significant reason why we continue to struggle to carry into adulthood the equal rights and dignity that Article 1 declares we are born with.

The traditional responses to what economists have labeled the global financial crisis have not reflected a change in thinking that would acknowledge the interdependence and shared vulnerability of our new global economy. Those most vulnerable to the crisis still have no established mechanism of holding those responsible accountable on a global level. Neither do our problems find their

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solution in political, administrative, or economic measures; these are material solutions to systemic problems. Herein lies the power of Justice Gonthier's simple yet profound vision of fraternity, manifested across time, across disciplines, across nations, and across generations. Importing principles of reciprocal equity and participatory democracy into the discursive spaces in which law is created allows us to progress towards the global goal of political and economic freedom through economic and social change.

Are similar principles emerging to create a global order that responds to the international challenges of the 21<sup>st</sup> century that Justice Gonthier presciently urged us to consider? We must not fail to recognize our significant progress towards recognizing the importance of sustainable systems of economic development, and the contribution of Justice Gonthier in this regard. The Stockholm Declaration of 1974 emphasized the dual importance of both "natural" and "man-made" environments, whereas the Club of Rome added the element of social justice, because great disparities of wealth or privilege will breed destructive disharmony that undermine the establishment of cycles of renewal. The Brundtland Commission Report of 1987 added an element of intergenerational equity when defining sustainable development as meeting the needs of present generations without compromising future generations' ability to meet their own needs and identified guiding principles that include accepting limitations, meeting basic needs, and fairly sharing the resources necessary to develop and benefit from economic growth. The ILA Declaration on Principles of International Sustainable Development Law adopted at the 2002 Johannesburg World Summit: 1) the duty of states to ensure sustainable use of resources; 2) the principle of equity and poverty eradication; 3) the principle of common but differentiated responsibilities; 4) the precautionary principle and environmental impact assessment; 5) public participation; 6) the principle of good governance; 7) the principle of integration and interrelationship. The concept of fraternity can be seen throughout these principles.

Dr. Hossain compared these principles to the values and principles enshrined in our current institutionalized systems of global exchange, whose primary measures seem to remain GDP growth, quarterly earnings, and stock market performance. Changing our current paradigm will not be easy but we must refuse to succumb to the criticism that long-term thinking for a sustainable future is unrealistic. It is indeed the only realistic and rational solution to an unlimited growth paradigm operating on a planet of finite resources and a fragile environment. As with the 1997 Asian financial crisis, the current economic crisis was a classic example of contagion and our economies are now so intertwined that no nation is immune. Yet, the majority of global economic institutions and practices that led us to this point remain in place.

James Wolfensohn, two-term President of the World Bank, spoke to the importance not only of macroeconomics, but the "totality of change" – good governance, regulatory and institutional fundamentals, policies that foster inclusion, and objectives to ensure environmental and human sustainability to assure security in water, energy, and food. That the President of the World Bank reflects in his policy statements those of the Earth Charter reflects a widening and deepening consensus on the essential components of a "human-rights friendly" strategy for achieving

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sustainable development. An integrated approach to implement political and socio-economic rights provides a universally-acknowledged basis around which to build a normative framework for sustainable human development.

Thirty years after its 1976 prediction, the Club of Rome notes that the timing from *Limits to Growth* “looks ominously on track,” meaning we are not far from a world where a growing gap between oil supplies and energy demand will place the gas tanks of the rich in competition with the stomachs of the poor. We ignored early signs of the unreality of global finance with the collapse of giants like Enron and Lehman Brothers. Now we see similar signs in the emerging impacts of climate change in flooding, extreme drought, wildfires, and bizarre and atypical weather patterns across the globe. Our strongest hope for a sustainable future is reorientation from market fundamentalism to global framework of international law and national constitutional orders anchored in human rights principles operating in a spirit of fraternity. Let us hope that the leaders of our world will share Justice Gonthier’s vision and ability to recognize the centrality of fraternity to any international system that hopes to meet the challenges through the rule of law and recognized principles of justice.

## Conclusions

This session shed light on the heretofore subtle or hidden manifestations of the unnamed Third Pillar of democracy. Fraternity’s normative force lies in its continuity and general recognition as a moral value to which we should all aspire not only as private individuals but as citizens, as jurists, and as nations. The difficulty lies in delineating its manner of operation, the limit of its scope, and the substance of its content. In its normative aspect, fraternity provides guidance for the elaboration of constitutional principles and determining their appropriate balance in some of the most difficult issues in constitutional and international law. It is one of the few principles that applicable to the exercise of that most ambiguous right of self-determination, balancing the principles of democracy, federalism, the rule of law and respect for minorities and the need for responsible government. In international law, it is one of the few principles that is both universally extant and of relatively equal normative weight. As such, it provides continuity across divergent systems of law and a basis for recognition of international responsibilities incumbent on states by virtue of membership in the international community, rather than as a consequence of rights acquired by operation of their sovereign powers. The duty to protect is perhaps indicative on the international level of similar constitutional developments that define rights less in negative terms but recognizing the existence of positive obligations on the parts of states and public actors as necessary to ensure a just and equal world and the effective enjoyment of liberty.

The boundaries of fraternity are discoverable not so much in its presence, but in its absence. This is perhaps why its juridical manifestations are so intangible; fraternity in and of itself, divorced from any context, can be seen as inherently meaningless, devoid of substantive content. It is not the scope of fraternity or the rights it engenders that we need to identify, but the scope of the community, the individual and collective parties whose interests are at stake, and what process is most appropriate

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for the equitable reconciliation of those interests within that community, in a spirit of brotherhood. Fraternity does not mandate a particular outcome so much as it establishes processes for understanding which is the most legitimate interpretation of the law. In constitutional law and international law, it helps to balance civil and political rights with social and economic rights and to recognize the often integral and inseparable link between the two.

On a broader level, fraternity is a manner of meta-normative principle. Fraternity straddles the boundary between rights-based and duty-based legal paradigms and between civil and political rights and socio-economic rights – it is the embodiment of the inseparability of these sets of rights within the context of a defined community or a long-standing relationship. Internationally, the right to a healthy and safe environment and the right to sustainable development cannot be made effective without some minimum form of international cooperation and recognition of a corresponding duty that crosses international boundaries. For these reasons, fraternity is arguably a necessary component for defining plans of action around international issues such as climate change, equitable and sustainable economic development, and the promotion of fundamental human rights. The scarcity of universally-recognized normative precepts perhaps explains the difficulties of achieving cooperation on these issues of international concern and why it is crucially important to be able to invoke fraternity in international forums. Fraternity becomes the common value through which intransigent interests and incompatible worldviews can begin to be reconciled. Fraternity has the potential not only to guide the reconciliation of competing interests in a particular dispute, but competing principles and competing normative spaces.

The “subversive” nature of principles tied to fraternity was perhaps one area of divergence. Justice Binnie argued vigorously that the reliance upon unwritten constitutional principles “have not been deployed to subvert the Constitution,” and that they constituted universally recognized democratic values that guide the Supreme Court of Canada’s understanding of the constitution and its operation. Justice Canivet highlighted the transformative potential that fraternity has had from the 18<sup>th</sup> century to the 21<sup>st</sup>, a point echoed by Dr. Hossein in contrasting the principles it embodies against our current international economic order. Internationally, fraternity can be as subversive a notion in the 21<sup>st</sup> century as it was in the 18<sup>th</sup> only to the extent that we as a society have moved away from the principles of empathy, egalitarianism and inclusion that it embodies. In that respect, this subversion is only in service to a broader stability, the need for a just society as a necessary prerequisite to the rule of law and a stable social order in which all parties recognize that they are being treated fairly. As we attempt to find guidance to complex problems ranging from unilateral territorial secession, to the balance between political and socio-economic rights both domestically and internationally, or competing normative frameworks and global economic institutions, there is perhaps no simpler nor fundamental guiding principle than that of fraternity. As Benito Juarez, famous jurist, reformer, five-term president of Mexico and the first indigenous leader of a post-Columbian government in the Americas observed, “among individuals, as among nations, respect for the rights of others is peace.” All are agreed that Justice Gonthier’s tireless effort to bring to our attention its potential for a peaceful, lawful, and just society is perhaps his greatest legacy to us.

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