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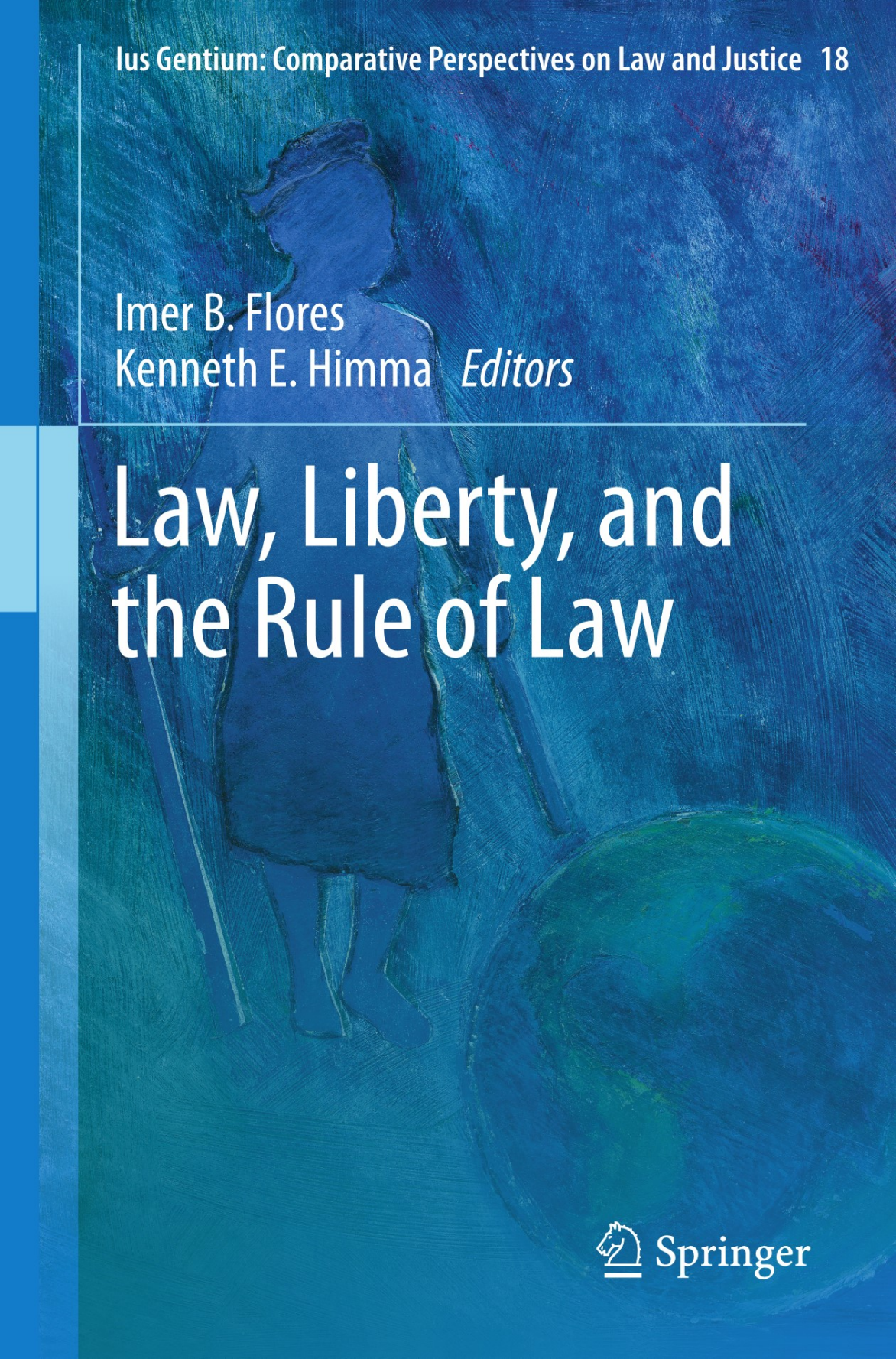

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Chapter 9
The Rule of Law and Human Rights Judicial Review: Controversies and Alternatives

Tom Campbell

9.1 Introduction

This contribution presents an overview of some of the core considerations relating to the institutional compatibility and practical efficacy of combining electoral democracy and human rights-based judicial review. Its distinctive emphases are on the relevance of competing notions of the rule of law to this debate and the suggestion that the compatibility and efficacy problems can be addressed by having a bill of rights that serves the purpose of legislative rather then judicial review (Campbell 2006, 332–7). These themes are developed principally in the context of the UK and Australian constitutional systems.

The American model for "constitutional democracy", which includes a constitutionally entrenched Bill of Rights with "strong" judicial review (that is, following *Marbury v. Madison* 1 Cr. 137 (1803), courts having the power to override legislation that they deem to be in conflict with the Bill of Rights), has become something of a benchmark for the constitutional arrangements of contemporary liberal democracies (Thayer 1893; Dworkin 1996; Tushnet 2007). In the United Kingdom, under the Human Rights Act 1998, there is a rather weaker, and constitutionally unentrenched, version of this model in which it is technically possible for Parliament to reject a finding of the courts that an act of Parliament is "incompatible" with the European Convention on Human Rights (Gearty 2004; Kavanagh 2009). A rather stronger, entrenched, version exists in Canada where a court decision that legislation is in conflict with the Canadian Charter of Rights and Freedoms, can, in theory,

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be nullified only by further legislation that is passed 'notwithstanding' its incompatibility with the Charter (Hogg and Bushell 1997). However, Australia, a country whose representatives were closely involved in drafting the United Nations' Universal Declaration of Human Rights, is an almost solitary exception to this constitutional trend (Galligan 1995).

As a result of Australian "exceptionalism" over bills of rights, which is, perhaps, more an historical accident than anything else, bills of rights are a controversial topic in that country, despite attempts over the past few decades to introduce such a bill at the federal level. There is little likelihood that this will succeed in the foreseeable future (Galligan and Morton 2006) although there are Human Rights Acts on the UK model in the state of Victoria (Williams 2006) and in the Australian Capital Territory (ACT) (Charlesworth 2006), and in 2009 there was a government initiated consultation process which received more than 35,000 submissions, concluded that "An Australian Human Rights Act that is broadly consistent with the Victorian and ACT legislation could provide a resilient thread in the federal quilt of human rights protection" (Commonwealth of Australia 2009, 377). However, there is a persistent if fluctuating campaign for doing something about what some human rights advocates see as a human rights stain on the Australian polity, which keeps the controversy over bills of rights going (Byrnes et al. 2009).

Australian exceptionalism over bills of rights is important. It provides an experimental control against which to test comparative claims that human rights judicial review makes a significant difference to human rights outcomes. It also provides an opportunity to consider novel approaches to human rights institutionalisation in the light of persistent critiques of human rights judicial review. In other jurisdictions, it is the question of how to implement their bills of rights rather than the question of whether to have one that is hotly debated. Thus, in the United States, while it is almost unheard of to recommend the abolition of strong human rights-based judicial review, there is considerable controversy over how the US Supreme Court should exercise its powers with respect to its bill of rights. Some experts see the purpose of strong judicial review as upholding the original intention of the framers of the constitution (Scalia 1997). There are those who commend interpretation which protect democratic process (Ely 1980). Others look to the courts to use the bill of rights to intervene on behalf of oppressed minorities (Dworkin 1996). While others urge the Supreme Court should to use the Bill of Rights to promote controversial moral and political causes in relation to such matters as abortion, or capital punishment, or campaign finances. These controversies persist mainly because of the great difficulty that there is in reconciling strong judicial review with basic democratic principles, a challenging issue with a long history and a vast literature (for instance: Thayer 1893; Waldron 1993; Sadurski 2002; Bellamy 2006), some of which emphasises the role of political institutions in promoting human rights (Tushnet 1999).

In this context, the essay revisits, through the perspective of the rule of law, two closely related and relatively neglected critiques of human rights judicial review that may be classified under the general criticism that court-based human rights judicial review of legislation is in conflict with the fundamental principle of democracy that law-makers should be accountable to their people. Section 9.2, "Human Rights

Judicial Review: the Controversies", presents these two critiques: (1) a (formal) rule of law objection, that the bills of rights on which human rights judicial review is based are contrary to the principle that rules of law which courts are called upon to apply should be specific and clear as to what they require and permit, thereby reducing the accountability of elected governments, and (2) a practical objection: that human rights judicial review is largely ineffective in promoting human rights goals. Both objections involve the controversial nature of the decisions that courts are called upon to make when "interpreting" the abstract moral principles which make up the characteristic content of bills of rights.

Section 9.3, "Bills of Rights: Alternatives Approaches", goes on to argue (1) that the weaker "Dialogue" or "Commonwealth" versions of court-based human rights judicial review do not successfully evade either the rule of law or the efficacy critiques, and (2) that a better alternative is to institutionalise bills of rights as part of political constitutions involving mechanisms such as legislative review of existing and prospective legislation in order to promote and protect human rights in ways which are politically more effective and more in accordance with the twin democratic doctrines of the rule of law and the separation of legislative and judicial powers.

9.2 Human Rights Judicial Review: The Controversies

The prime and perennial objection to judicial review of legislation and government action in general on the basis of the constitutionalised requirements of a bill or charter of rights is the inherent contradiction of enshrining the right to political equality through a process that substantially restricts the citizens' right to have an equal say with respect to all the most fundamental political issues which arise within their society. Here, this democratic deficit is approached, first through the idea of the rule of law, in order to demonstrate how conflicting conceptions of the rule of law affect the debate, second in terms of the inefficacy of human rights judicial review in a democratic political culture.

9.2.1 The Rule of Law Objection

The rule of law case against bills of rights is based on the assumption that the rule of law is a necessary although not a sufficient basis for effective democratic control of government (Campbell 1996, 32–36; 2000). However, most arguments in favour of the rule of law present it as a way of limiting the power of government, in both its political and judicial forms, so as to protect the individual. It is said that the rule of law achieves this in two very different ways, the first of which deploys a formal conception of the rule of law, and the second of which deploys a substantive conception of the rule of law (Raz 1977; Craig 1997). Formal rule of law criteria relate solely to properties which can be stated independently of the content of the law,

such as generality, specificity, and prospectivity. Substantive rule of law criteria relate to what it is that the law requires, permits or prohibits (Schauer 1988).

The first way in which the rule of law is said to protect the individual is by requiring governments to rule through the medium of general rules (rather than particular commands) that are couched in sufficiently specific and objective language to make it clear to the subject what is required, prohibited or permitted. In this way the formal conception of the rule of law restricts arbitrariness and brings a degree of clarity and certainty to the exercise of government power. This, it is contended, promotes efficiency, through making the legal rights and obligations of citizens clear, practicable and enforceable. At the same time it provides an element of fairness by giving citizens advance warning of their enforceable obligations and making it more difficult for governments to target particular individuals (Fuller 1969).

The second way in which the rule of law is said to protect individuals is by identifying those things which governments must or must not do for or to its citizens, even through the enactment of general and specific rules, thus restricting the scope of legitimate government power. This second function involves a substantive conception of the rule of law which is dependent on it meeting certain basis moral requirements, usually expressed in terms of fundamental human rights (Craig 1997; J. Allan 2001; T.R.S. Allan 2001; Christiano 2008, 172–6).

Both of these conceptions (the formal and the substantive versions of the rule of law) can, in theory, operate within societies which are non-democratic in the sense that that they do not have electoral accountability along with freedom of the press and freedom of association. However, in democratic polities, the rule of law has the further function of serving as a tangible focus for the assessment of the performance of government. This may be seen in the way in which legislative programs feature in political manifestos during election periods and the focus of political debate in general on the legislative achievements and commitments of competing political actors and organisations. Here the function of the rule of law is to serve as a basis for promoting democratic accountability through the popular critique of and ultimate electoral control over the enactment of the laws that are applied to members of the polity.

To serve this democratic function legislative manifestos and enacted laws must have clarity and precision that makes them amenable to rational criticism and endorsement. According to this rule of law function within democratic institutions, it is not enough that electorates can choose governments, they must also be able to exercise significant control over these governments, and this can be achieved in part through their being assessable in terms of their legislative programs and their predicted and actual outcomes. This democratic function of the rule of law requires a particular view of the separation of powers according to which elected legislatures should make laws, and judges should apply them. The aspect of separation of powers enables the government to be held accountable as the officials responsible for the outcomes of their laws, something that only makes sense if these laws are being accurately implemented. In this way, accountable government requires an operative political constitution in which elected governments makes the ordinary laws of the jurisdiction while judges are confined to applying those laws in the light of their

findings of fact in particular cases (Barendt 1995). Here the generality requirement of the rule of law, which promotes efficiency and fairness, overlaps with the democratic requirement that accountable government must operate be via the medium of law, in that all these goals necessitate a model of laws as rules that are clear rather than obscure, specific not vague, and prospective not retrospective.

On the other hand, there is a conflict between the substantive version of the rule of law, which requires that legitimate laws have a particular content, and the formal conception which excludes reference to content. It is the latter, not the former, conception of the rule of law that features in the democratic function ascribed to the rule of law. This ambiguity renders unanalysed propositions about the rule of law which do not distinguish between its formal and its substantive versions inherently obscure, not only with respect to the role of law in promoting democratic accountability, but also with respect to its compatibility with human rights judicial review. Thus, on the American model of strong judicial review, human rights are seen as part of a substantive conception of the rule of law which renders unconstitutional legislation whose content is incompatible with the content of the bill of rights in force. Moreover, bills of rights are characteristically expressed in terms which are so vague and imprecise as to violate the formal conception of the rule of law which requires precision and clarity as standards of good law independently of its content.

The choice between conflicting conceptions of the rule of law and their associated conceptions of law and legality cannot be based on common usage or any one established tradition. Conceptual analysis reveals that there is no single idea of law that commands general agreement, as the history of legal philosophy amply illustrates (Raz 1977). In these circumstances, the important thing is to make it clear which conception of the rule of law is being utilised and what bearing this has on any argument for or against human rights judicial review. As presented here, the competing conceptions of the rule of law point to very different moral considerations representing two different moral views as to the significance of law in human affairs. The moral outlook associated with the formal conception of the rule of law is graphically presented in Lon Fuller, *The Morality of Law* (1969), where Fuller identifies eight formal requirements for good law-making and legal adjudication that produce effective, fair and liberating government. However, it should be noted that Fuller goes on to suggest, erroneously in my view, that formally good law, leads to a measure of substantively good law, and that he does not include in his analysis the democratic function of formally good law outlined above or consider its incompatibility with human rights judicial review.

Historically, the emphasis on formally good law derives from the work of Jeremy Bentham, the founder, albeit in the tradition of Thomas Hobbes, of legal positivism. Bentham's legal positivism does not rest simply on the fact that we can distinguish between law as it is and law as it ought to be, the so-called "separability thesis" (Hart 1961, 185–6), but is a form of legal positivism that sets out a blue-print for what law ought to be like, not in its content, but in its form. This may be called "ethical legal positivism", or "prescriptive legal positivism" (Campbell 1996; 2004), to emphasise that it is a legal theory that rests on moral foundations and requires an

ethical commitment to the rule of positive law on the part of judicial officials. In the context of the bill of rights debate, it may also be called 'democratic positivism', since from Bentham's approach to democratic accountability we can derive the thesis that government ought to be conducted via authoritative rules than can be understood, followed and applied without recourse to controversial moral or other speculative judgments. Thus, Fuller's arguments from efficiency and fairness, can be supplemented by the further consideration, which can also be traced to Bentham, that formally good positivist laws empower citizens to achieve greater control over their elected governments, The particular point made here is that, if the people or their representatives make rules that are unclear and have to be made specific by those who interpret and enforce them, then the rules which are actually applied are not those made by the elected government. To the extent that this is the case, the polity in question is less like a democracy and more like a juristocracy, *i.e.* a government by judges (Hirschl 2004). We may call such a system a "constitutional democracy" but it is, in extreme cases, no more a democracy than a UK style "constitutional monarchy" is a monarchy.

Lawyers and other caught up in the study and implementation of law, rightly point out that actual laws are inevitably vague to some extent and in some respects, and frequently unclear in unexpected ways that require the attention of courts. When this happens, the moral opinions and political assumptions of judges inevitably seep into the content of the judicial reasoning that is said to be only a matter of 'interpretation'. Nevertheless, it is evident that, within a particular culture considerable measure of consensual public meaning can be attained. In such societies there are palpable differences between formally good and formally bad law, and, given an attainable measure of formally good legislation, judiciaries are in practice able to understand the laws they are meant to apply in terms of the manifest intentions of the law-makers and the precedents available to them. Inevitably, rule by means of formally good positive law is an ideal which cannot be fully realised, but that does not mean that political systems cannot approximate to it most of the time and should not strive to do what they can to implement the formal conception of the rule of law. One context in which this is evident is in the relative formal inadequacies of most of the content of typical bills of rights which have the form and content of moral principles that cannot be turned in to concrete legal decisions without the exercise of considerable, and usually controversial, moral judgments. This, Ronald Dworkin, the most distinguished contemporary advocate of the rights-based judicial review, concedes, and indeed welcomes, in his "moral reading" of the American constitution (1996).

It is evident from the rule of law objection that these difficulties with strong judicial review on the basis of bills of rights do not apply equally to all bills of rights, some parts of which can be quite precise, intelligible and clear. For instance, instead of a prohibition of "cruel and unusual punishments" or of "inhumane treatment", which are unacceptably vague and dependent on the moral beliefs of their interpreters, there may be a constitutional prohibition on capital punishment, which is reasonably precise and empirically applicable. There are, of course, other democratic objections to such entrenched provisions, particularly where constitutions are

very difficult to amend, but by and large, and whether good or bad in content, they are acceptable as formally good positive law.

Despite these exceptions, the process of the rendering precise the vague moral ideals expressed in the standard bills of rights, such as the free speech, freedom of contract, or the sanctity of life itself, so as to arrive at rules which are clear and specific enough to decide issues of defamation (in the case of free speech), duress and misleading advertising (in the case of freedom of contract), or abortion and euthanasia (in the case of life), is ultimately a matter of moral rather than legal reasoning. Such judgments raise competing moral intuitions and involve complex social and economic factors for which courts are empirically ill equipped and lack moral and political authority. Moreover, in this process, the lines between politics and law become blurred and the separation of powers between law-making and law-application breaks down, so that the advantages of the rule of law, namely the limitation of government power by the requirement that it be exercised through and under the law, are seriously diminished.

These considerations are not lost on courts when they are involved in human rights judicial review. Indeed, it is because courts are acutely aware of the democratic deficit of human rights judicial review and the danger that its use will bring courts into disrepute by exposing the controversial political nature of their judgments in such cases, that they are in general reluctant to override the law-making powers of elected governments. What then, it may be asked, is all the fuss about? If courts are reluctant to be "activist" by revising or negating the laws enacted by democratic governments then no great harm is done through human rights judicial review. One response to this is to say that the democratic deficit of judicial review must be constantly brought to our attention to ensure that judicial deference to legislatures continues to be the norm. That apart, the routine deference of courts to political authority is a central factor in the second objection to human rights judicial review: namely its ineffectiveness in terms of realising substantive human rights values.

9.2.2 The Ineffectiveness of Human Rights Judicial Review

Those, in Australia, who argue for a Federal bill of rights, try to, but cannot, make much of a case in terms of Australia's human rights record on the basis of comparable social realities, a fact which should give pause to those who think that human rights based judicial review is a vital part of a successful human rights regime. Australia is far from perfect in human rights terms (Charlesworth 2002; Williams 2007). It has disadvantaged minorities, particularly with respect to its indigenous population. There is a degree of racial prejudice, there is some corruption in its police forces, and a clear advantage to the wealthy in legal disputes and political campaigning. Currently, there is a renewed harsh regime for dealing with asylum seekers and illegal migrants, and Australia is marginally involved in an arguably illegal war. Nevertheless, in general Australia come out near the top of comparative

tables which attempt to quantifying human rights outcomes, and its citizens do not believe that their human rights are under threat (Commonwealth of Australia 2009, 384–91). Often, it is argued that not having an entrenched bill of rights is in itself a human rights deficit, but this rather begs the question as to whether bills of rights promote or retard conformity with human rights goals. Nevertheless, it is argued that all this is at risk because the human rights of Australians are not explicitly guaranteed in human rights language and through judicial review mechanisms. Parliament, it is said, can take these rights away at any time. So, even if Australia does have reasonably fair trials, habeas corpus, freedom of speech; and considerable welfare provisions, without a bill of rights these, it is argued, are at considerable risk (Charlesworth 2002).

Is this really the case? Does the security of human rights depend on giving courts the power to override or reinterpret legislation in accordance with statements of fundamental values? Clear examples are hard to find. In fact, over the long term, the norm is for courts to reflect rather than ignore majority opinion (Tushnet 1999; Waldron 1999; Bellamy 2006, 40–1). One contemporary test case is the world-wide development of anti-terrorist measures which diminish civil liberties. We can compare the extent of the restrictions on traditional civil liberties that have been introduced in so many jurisdictions as a response to terrorist incidents. In liberal democracies throughout the world there are new provisions, introduced in response to terrorist incidents which have occurred in places that were hitherto thought to be exempt from such outrages, provisions that make significant inroads into civil liberties relating to such matters as preventive detentions, and burdens of proof, secrecy and availability of evidence to the defence in criminal trials. As elsewhere, there are in Australia provisions for preventive detention, intrusive surveillance, closed tribunals without due process and further limitations on free speech. Such rights have been reduced or removed from the citizens of very many countries, but this has happened whether or not they are ‘protected’ by bills of civil rights and powers of strong judicial review (Williams 2006; Tomkins 2011).

Now, of course, it is arguable that such limitations of civil and political rights are justified in such emergency situations, and are not therefore violations of human rights at all, a point which illustrates just how variable the implications of vaguely worded constitutional rights may be. Nevertheless, the fact that there is no significant difference between jurisdictions with or without bills of rights, in situations which are precisely those that minority populations need protection from panicking majorities, is an example of how courts in times of crisis have not taken a strong line in favour of civil rights. If these are the rights we value and the aim of a bill of rights is to protect minorities in times of stress, then, quite simply, they do not work. Indeed it is arguable that some of the most extreme violations of human rights arising from recent terrorist incidents have occurred in the home of strong judicial review, the United States of America.

A better case for bills of rights with strong judicial review is that they can be a source of progressive decisions in constitutional cases deriving from bills of rights. These do not relate to the protection of universally applauded fundamental freedoms, but advance the cause of progressive social movements which promote social

change relating to cutting edge issues of considerable controversy, like abortion, euthanasia, capital punishment, and same sex marriages. These may or may not be admirable in content, but they are certainly not in the category of protecting existing rights from untrustworthy governments. However, the incidence of this type of reform Australia is not markedly different from jurisdictions with justiciable bills of rights.

There are, of course, many justifying objectives that can be associated with bills of rights that are deployed through judicial review. One of these objectives is the introduction of controversial social policies which democratic politicians find too risky. This can take give appropriately greater weight to the convictions of intense minorities than to the views of less zealous majorities. Another justifying objective is to provide a basis for political cohesion in federal structures with weak central governments, as in the European Union. A third is simply to provide human rights with a higher profile. Certainly, one way to make governments take human rights seriously is to institutionalise a mechanism for overturning their decisions. These rationales can provide support for human rights judicial review in particular political circumstances, although the outcomes in terms of distinctively human rights values is normally very limited. Even if these objectives are to some extent achieved in certain places at certain times, we still have to weight up to the long-term damage done to the democratic process and to public support for human rights generally when significant matters of great moral concern are removed from the political domain on the dubious grounds that they are better served through legal rather than political mechanisms and movements. Further, there is the particular danger that governments can use the endorsement of courts for legislation which is highly questionable from a human rights point of view to head off criticism from human rights activists and organisations.

Overall, for whatever reasons that are given to justify human rights judicial review, there is little evidence that it is in fact an effective protection against government abuses of civil and political rights, and even less evidence that it has a significant impact on social and economic rights (Hirschl 2004). If anything, such constitutional provisions provide an unfortunate de facto legitimation of systematic human rights failures (Waldron 1999, 288; Bellamy 2006, 34). In these circumstances it makes sense consider alternative ways of giving effect to bills of rights as vehicles for the realisation of human rights.

9.3 Bills of Rights: Alternative Approaches

In response to the sort of democratic and rule of law arguments outlined above, there have emerged alterative models for human rights protection and promotion (Hirschl 2004; Hiebert 2006, 7–8). This section, first considers some of the weaker forms of human rights judicial review which are put forward as responses to the alleged democratic deficit critique of human rights judicial review, concluding that weak forms of human rights judicial review do not avoid either the rule of law or the

ineffectiveness objections. After that, a more radical alternative is introduced which replaces judicial with legislative human rights review, and it is suggested that this is likely to be more compatible with democratic institutions and more productive of human rights outcomes.

9.3.1 The "Dialogue" Model

The democratic critique of human rights strong judicial review has been responded to in a number of ways. Thus, it is sometimes argued that any system is democratically legitimate if it has been adopted by a democratic process or has the support of the majority of the relevant population. This contention comes immediately up against the difficulty that a decision to abandon or weaken democracy, whether or not it is the outcome of as democratic process, does have the outcome of abandoning or weakening democracy, just as people who choose to become slaves become slaves even when their choice is of their own making. A second, more persuasive, argument, is that bills of rights are primarily for the purpose of maintaining democratic institutions, and the political equality that underpinnings, so that it cannot be perceived as being in conflict with democratic ideals. This may be countered either by pointing out that actual bills of rights go far beyond seeking to guarantee certain political processes, or by asking to whom the those exercising the powers of judicial review are accountable with respect to the actual outcome rather than the justifying intentions of the constitutional mechanism in place.

Another more historically favoured approach is to suggest a weaker, compromise model of human rights judicial review which has democratic safeguards built in. The suggestion is that there is a type of human rights judicial review that meets the democratic objection head on by subsuming the mechanism itself under the banner of democratic process. Thus a democratic version of human rights judicial review may be present it as a deliberative process within the normal confines of democracy in which the final authority remains with the populace as exercised through its elected representatives (Hiebert 2006, 9; Gardbaum 2001).

Although the dialogue label was used first in relation to the Canadian human rights regime, the UK Human Rights Act 1998 is the paradigm of the dialogue model of human rights protection that has been adopted in one of the eight states and one of the two territories within Australia, and a version of which is favoured by the recent, Australian, *National Human Rights Consultation* (Commonwealth of Australia 2009, 241). The core provisions of the UK Human Rights Act are that courts are required to interpret legislation so as, if possible, to make it in accordance with the European Convention on Human Rights, and, if this is not possible, they may issue a 'declaration of incompatibility' which does not invalidate the legislation but enables the government to initiate a fast-track process to amend the legislation in order to make it compatible with the courts understanding of the European Convention on Human Rights. The dialogue model, in its UK version, is distinguished by the fact that the elected legislature has the power to override the courts

when the courts give what they regard as a human rights interpretation of a legislative provision and may ignore the findings of courts which declare that a piece of legislation is incompatible with its understanding of the bill or convention of rights in question. The Australian state and territory versions of these sections of the UK Act vary the formulations but retain the general import of the provisions, neither of which are thought to negate the "sovereignty of Parliament" as the ultimate law-making authority and both of which are held to counter the tendency of elected legislatures to ignore the interests of minorities as they seek to gain the support of the majority of voters (Byrnes et al. 2009, 59–60; Williams 2006, 93; Gardbaum 2001, 748).

The chief advantage claimed for this apparently rather neat compromise is the added political prominence which such Human Rights Acts give to human rights considerations and the public acknowledgement of the need to be mindful of the tendency of elected governments to undervalue human rights in the pursuit of electoral advantage. However, 10 years on from the UK Human Rights Act, there is considerable dissatisfaction with it on the part of both its supporters and its detractors. Critics point out that dialogue between courts, legislatures and executive government has not been the outcome. In the first place, when courts use the interpretive power they do not simply to resolve ambiguities but change the evident meaning of the legislation in question (Campbell 2001; J. Allan 2001; T.R.S. Allan 2001; Debeljak 2007, 38–9). This is not done after discussion with government, nor is it something for which governments have a fast-track mechanism for correcting or countering. Indeed the process of amending the law to counter radical re-interpretations of legislation which negate their view of the intention of Parliament is rarely a practical option, so that the apparently innocuous power of interpretation becomes a de facto legislative power (Allan 2006, 914; Hiebert 2006, 18). Given these practicalities, it turns out that the use of the interpretive powers given to courts by the Human Rights Act 1998 places the courts in a position that is comparable to that enjoyed by courts in systems of strong judicial review. Consequently the formal rule of law objection and the associated problems over the separation of powers, applies equally to both systems.

Further, UK governments have responded to requirements of the Human Rights Act by bringing forward legislation that has been "Convention-proofed" by drawing on legal advice is designed to anticipate possible declarations of incompatibility by courts. This is an unwelcome complexity for governments intent on implementing legal changes and is considered to generate bad publicity for government policies and to be avoided on this account. The result is that governments adopt a largely legalistic approach to basically moral questions as to what is and what is not in conflict with the moral ideals set out in the European Convention on Human Rights (JCHR 2006; Bellamy 2006, 37). This is not a political dialogue on fundamental issues but a process of second-guessing the courts' responses to legislation on the basis of legal precedent and prediction.

All this, of course, can be presented as being precisely what the UK Human Rights Act 1998 was intended to achieve, namely to oriented legislation more towards respecting the human rights which they have a tendency to neglect. However, quite apart from the fact that it is always debateable whether the altered outcomes do in fact better protect human rights as they are understood from a moral rather

than a legal perspective; the process is far removed from any exchange of views or invitation for governments to reconsider the matters in question on their moral and political merits. Government reluctance to enter into what would in fact be a dispute with the courts is based on the understandably widespread idea that the central objective of the Human Rights Act is undermined if governments and parliaments do not defer to the interpretations and declarations of courts on matters of human rights. This reflects the political reality that giving courts more say in what the law should be has brought about a transfer of political power in a way that undermines both the democratic and the efficiency benefits of that version of the rule of law which involves the separation of law-making and law-enforcing powers (Tushnet 2003, 834).

Much of this can be expressed in terms of the rule of law objection. In this context this objection points to the fact that incorporating a document such as the European Convention on Human Rights into a legal system is to introduce a considerable indeterminacy into the law which runs counter to the formal conception of the rule of law. The very idea that courts and parliaments should exchange their thoughts in a dialogue on what the listed rights might mean reveals that they are not seen as engaging in a discussion of what the law is, but about what it ought to be. Evading this by both parties to the dialogue relying on prior legal decisions, originating largely from other jurisdictions, introduces more precision but at the expense of a necessary de facto acceptance that, in the human rights sphere, the courts are the law-makers. To that extent, the separation of powers and the sovereignty of Parliament are diminished.

This analysis may be faulted on the grounds that it is expressed in terms of a dialogue or conflict between courts and government, whereas the model in question is focussed on courts and Parliament. On this theme, an important consequence of the Human Rights Act has been the creation of a Joint Parliamentary Committee on Human Rights, drawn from both Houses of Parliament, with the role of scrutinising draft legislation as it comes before Parliament, drawing the attention of Members of Parliament to relevant human rights issues, and requiring the executive to provide evidence in favour of the legislation in question. This is an important development which is considered further in the next section of this contribution. However, the short answers to the criticism that my analysis misses the mark, is that, in parliamentary systems, governments almost always control parliaments rather than vice versa. Moreover, it is clear that the Joint Committee on Human Rights has largely followed to same processes of Convention-proofing as takes place when the Ministers responsible for a bill assert, as the Human Rights Act requires them to do, whether the bill they are presenting to Parliament is in their view compatible with the European Convention on Human Rights (JCHR 2006).

If weak forms of human rights judicial review are really not so very different in practice from strong forms this may explain why British courts are largely inactive in promoting their understanding of the European Convention. While it is difficult to provide an objective account of the extent to which British courts have become ‘activist’ on human rights issues on account of the subjectivity involved in distinguishing radical from standard judicial interpretations, it seems clear that British courts are by and large highly deferential to governments. In general, with

the odd exception, courts with apparently weak powers of judicial review are only too aware of the sovereignty of Parliament and the danger to their standing and respect as exemplars of the rule of law. From the point of view of the critics of human rights judicial review, this is a welcome manifestation of judicial modesty and democratic propriety, which should encourage the critics to continue with their objections just in case the courts should routinely seek to intervene in the democratic process. However, from the point of view of those who see substantial human rights deficiencies in current government enactments and existing legislation and common law, the inaction and inefficacy or 'futility' of the dialogue model is a source of frustration and despair (Ewing and Tham 2008).

9.3.2 A Democratic Bill of Rights[1]

Despite the critical comments made the previous section, there are elements in and associated with the UK Human Rights Act, and in the Victorian and ACT human rights acts in Australia, that would appear to be in accordance with democratic assumptions. The creation of parliamentary human rights committees, the requirement that public authorities must seek to implement the European Convention on Human Rights, and the duty of government ministers to provide statements of human rights compatibility when proposing legislation, may all be seen as within the spirit of a traditional parliamentary style democratic government. The question with which this section is, very briefly, concerned is the extent to which these and similar mechanisms may be detached from the practice of human rights judicial review of legislation and yet have the sort of impact on human rights policies which those concerned about human rights violations would like to see in place (Hiebert 2006; JCHR 2006).

This alternative model, which I call a "democratic bill of rights", does not deny that there are human rights deficits of a particular type in actual democracies. Selfish majorities can unjustifiably oppress vulnerable minorities, just as powerful minorities can manipulate democratic processes and thereby disadvantage oppressed majorities. Democratic governments are motivated to some extent (as are all governments) to dissemble and lie to their people, to deprive opponents of their political rights, and to engage in short term political gain over long term national interests. Because of moral disagreement, cultural differences, economic self-interest, and limited rationality, democracy can go wrong in very many ways. All this is presupposed by the search for alternative ways of institutionalising effective and legitimate human rights mechanisms, the objective being to mitigate these deficits without unintentionally exacerbating them. Working out what is practicable and may be the most effective institutional arrangements best suited to promote a culture

[1] Since this chapter was written the Commonwealth of Australia has enacted the Human Rights (Parliamentary Scrutiny) Act 2011, along the lines proposed in this chapter. See Kinley and Ernst 2012.

in which rights can flourish depend a great deal on the nature of the society in question. The framework outlined below relate to what might be practicable and successful in the Australian context, without making any claim as to its universal applicability.

By a "democratic bill of rights" is meant a bill of rights that is institutionalised in ways that channel the legislative and governmental activities of the state, with the courts being involved only in the enforcement of such legislation as is enacted by the Parliament. The overall objective of a democratic bill of rights is to bring pressure on the system to make it more responsive to human rights considerations (Campbell 2006, 332–8). Ideally such a bill of rights would be entrenched to emphasis the depth and seriousness of the commitment to human rights. Its content would itself be a matter for democratic decision-making, but is likely to embody the existing human rights obligations that have been accepted under international law by the government in question, plus those fundamental value commitments that reflect that polity's particular understanding of what constitutes a human right. In Australia, the Report of the National Human Rights Consultation would suggest that this would mean a much greater emphasis on social and economic rights, in particular, the rights to an adequate standard of living' – including adequate food, housing and clothing, the right to the enjoyment of the highest attainable standard of physical and mental health, and the right to education' (Commonwealth of Australia 2009, 365–6).

This model involves political rather than judicial review, with the political forces in question being the Parliament and its committees working in cooperation with quasi-autonomous government bodies, human rights organisations within civil society and the operations of political parties. With a non-justiciable bill of rights the political focus of human rights would be on their moral import rather than their legal standing.

Such a bill would include an explicit obligation on governments to legislate for the realisation of human rights goals, a political obligation which is clearly present in the UN Universal Declaration of Human Rights and in the practice of most democratic governments. In particular there could be specifically identified "human rights legislation", either in separate acts of Parliament, such as anti-discrimination laws and basic health rights legislation, or in identified sections of ordinary legislation, such as a Crimes Act. This legislation, which is designed to give effect to the Bill of Rights and the human rights international treaty obligations which the state has endorsed.

While the provisions of the bill of rights would not be justiciable, such human rights legislation could have the special legal status that courts in common law countries give to fundamental common law rights, in that they cannot be repealed by implication through later legislation, only by explicitly worded amendments directly addressed to the rights in question. In addition, it is suggested that, building on existing Australian institutions, the already existing Human Rights and Equal Opportunities Commission be accorded a constitutionally protected and justiciable right to a status independent of government, a right to funding that enables the Commission to conduct enquiries into alleged human rights abuses brought to its

attention by a political party with significant parliamentary representation, and a right to be consulted on the human rights implications of impending legislation.

The prime mechanism for furthering the objectives of a democratic bill of rights is the operation of a Joint Standing Committee on Human Rights, along the lines of the existing Senate Scrutiny of Bills Committee in Australia, and the Human Rights Committee in the UK, with membership from both the House of Representatives and the Senate, perhaps with some constitutionally guaranteed and justiciable powers, such as the power to delay legislation so as to ensure that there is opportunity for its views to be heard and its arguments properly considered. Parliamentary scrutiny could be guided by debate as to the proper content of human rights untrammelled by predictions of judicial interpretations. The focus could be on getting the laws right rather than judicially full-proofed, as the UK Joint Committee on Human Rights is currently seeking to do. (JCHR 2006; Tolley 2009).

In brief, the aim of a democratic bill of rights is to highlight the political obligations of governments and place the responsibility for articulating and promoting human rights where it belongs, within a wider democratic system. The institutional framework suggested is designed to bring pressure to bear on governments at key moments in the process of policy formulation, legislative drafting and parliamentary consideration, and legislative action and so to utilise and build upon the only sound basis on which human rights can flourish, namely the support of the politically concerned citizens of a country.

The obvious sceptical view of a democratic bill of rights is that, in the absence of judicial review, it would not be taken seriously and would simply be dominated by the government of the day. Everything, on this view, depends on the political process being carried out under the shadow of the courts. This is seen as unproblematic if the very idea of the rule of law involves the substantive moral values typically expressed in human rights declarations, such as equality, non-discrimination and respect for others. We have already considered the democratic objections to this approach, but perhaps a substantive conception of the rule of law is in principle compatible with democratic values provided that parliaments rather than courts have the responsibility of legislating in accordance with such an ideal. However, in the parlance of current constitutional politics a substantive rule of law model is associated with the idea of "legality", of which the courts are the proper institutional determinants. The counter view, recommended here, is to limit "legality" within a democracy to ensuring conformity to the formally good law as enacted by the elected Parliament. This approach represents not simply an optimistic view regarding the sense of justice and humanity to be found amongst the community of voters, but a democratic scepticism concerning the reliability of courts as moral leaders.

Certainly the efficacy of a democratic bill of rights will depend on the ways in which legislators can be held accountable to the public and on the formal as well as the substantive quality of the legislation to which that accountability gives rise. That in turn depends on: the quality of public debate; the available sources of information; the strength of organisations within civil society; the responsiveness of political parties; and the integrity of judiciaries. That the adequacy of all or any of

these ingredients is often in doubt does not mean that there is a better way to go than seeking their improvement. Human rights judicial review has not been efficacious and cannot, I have argued, be expected to become so within a basically democratic culture, given its undemocratic nature. Treating courts as human rights authorities has given a false sense of moral legitimacy to often unconscionable government policies and diverted human rights from being a moral discourse with popular appeal into becoming a technical area of law divorced from ordinary political discourse. The suggestion is that human rights judicial review has been a set-back for the human rights movement, seen in broad terms as the efforts of concerned individuals and organisations seeking to moralise the often immoral outcomes of political process.

9.4 Conclusion

This essay discusses some of the key arguments concerning the legitimacy and effectiveness of bills of rights by highlighting the importance of distinguishing the different conceptions of the "rule of law" which are deployed by the contestants in this debate. Reference to the "rule of law" and "the principle of legality" feature centrally in the complex arguments as to the best means for articulating and implementing human rights. For some people, the "rule of law" means having an overriding moral duty to obey the law of the land in which we live, which means accepting what the courts understand the law to be. For others the "rule of law" means that there is no moral duty to obey a law which violates human rights. To bridge this chasm of misunderstanding, without abandoning the concept altogether, it is suggested that it is preferable to adopt a thin conception of the rule of law as having to do with governance through the medium of rules that are clear in their specification of which categories of person are forbidden, required or permitted to act in a particular way and what are the consequences to be imposed should they fail to conform.

The many advantages of such a system, which include the potential for the effective implementation of human rights, are dependent on general conformity to the law and its accurate application by impartial courts when there is nonconformity. Given that the laws in question, even if their source is a democratic process, may turn out to be seriously defective in terms of human rights, it is understandable to seek to improve on a democratic system with formal rule of law by adding an element of the substantive conception of the rule of law which incorporates the content of at least some fundamental human rights and encourages courts to exercise their moral muscle through powers of human rights judicial review. This, I have suggested, is a false promise, a threat to the human rights benefits of adhering to the formal conception of the rule of law, and an impediment to creating and sustaining an effective and democratic approach to the articulation and protection of human rights.

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