EMERGING CONSTITUTIONAL STRATEGIES

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I INTRODUCTION

The papers presented by Butler, Lester QC and Saunders (the Panellists) at the "Roles and Perspectives in the Law" conference on human rights analyse the disadvantages, advantages, and potential of constitutional human rights protections in various Commonwealth jurisdictions. Butler advocates a methodology for the interpretation and application of section 5 of the New Zealand Bill of Rights Act 1990 (BORA), which permits the courts to subject rights and freedoms to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Lester QC highlights the ingenuity (or magnetism) of the United Kingdom's Human Rights Act 1998 (UKHRA). Saunders compares rights protections in common law constitutional systems that have rights charters: Canada, New Zealand, South Africa and the United Kingdom to one that does not: Australia.

The Panellists also comment positively on the evolution of remarkable constitutional strategies that have the potential to resolve the much lamented tension between protecting human rights, which safeguard minorities, on the one hand and democracy, which gives effect to majoritarian will, on the other. The significance of these strategies, which involve ingenious institutional checks and balances, is that they have the potential to transform what have often been considered mutually exclusive values into complementary ones.

My intention here is simply to isolate examples of how the authors, and the rights systems they discuss, could revolutionise thinking on the best means to protect rights. They have the potential to turn debate away from circular arguments of where the ideal balance is struck between human rights and democracy to more constructive strategies to protect both democracy and human rights in the future.

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II THE TENSION BETWEEN RIGHTS PROTECTIONS AND DEMOCRACY

The tension between constitutional rights protections and democracy arises principally from judicial review of legislation for consistency with specified human rights. There are two sides to the coin. Democracy is hampered when the judiciary, an undemocratic entity, has the power to review the majoritarian view as reflected in legislation on the grounds that it is contrary to rights and freedoms. It is aggravated, of course, when the judiciary has the power to strike down that legislation. Conversely, unfettered legislative power means that the majority has the power to pass legislation that abridges rights and freedoms. While it is possible that the majority would enact legislation that jeopardises its own rights and freedoms, it is unlikely. As a result, it is usually minorities that most require protection of their rights and freedoms.

This tension between human rights and democracy has plagued (and in some cases consumed) scholars, constitutional strategists, government officials and ordinary citizens for a number of centuries, not least in Commonwealth jurisdictions. As Saunders illustrates:[1]

> The most important issue for Canada, New Zealand, the United Kingdom and South Africa in devising human rights charters was the tension between the democratic credentials of Parliaments and the governments that drew authority from them on the one hand and the alteration of constitutional ground rules so to expand the jurisdiction of the courts.

Too often, it seems, attention is distracted by normative assessments of whether democracy or minorities' rights should be prioritised – where on the continuum the balance between these competing objectives should be struck - rather than on the resolution of the tension altogether.[2] In relation to above-mentioned rights charters, Saunders concludes "common to all four instruments, however, is the goal of balancing a

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1 Cheryl Saunders "Protecting Rights in Common Law Constitutional Systems: a Framework for a Comparative Study" in (2002) 33 VUWLR, 507.

2 Saunders makes a similar point in her original conference paper "Too often the debate is incomplete. Critics of specific rights protection overlook the range of options for meeting standard concerns or idealise the alternative. Advocates of rights protection, for their part, may underestimate the long-term effect of changing the institutional balance though positive statements of rights, coupled with judicial review" (at p 2). She also refers to the New South Wales Parliamentary Standing Committee on Law and Justice, which recommended against a statutory Bill of Rights "on the general ground that it was ultimately against the public interest for Parliament to hand over primary responsibility for the protection of human rights to an unelected judiciary." Saunders (2002) 33 VUWLR, 522.

new rights regime, coupled with judicial review, against the decision making capacity of elected representatives."[3]

The common law constitutional systems of Canada, New Zealand and the United Kingdom reflect a choice to prioritise democracy over rights relative to, say, the United States and other countries informed by the United States' Constitution. However, this choice was, no doubt, influenced as much by the common law tradition of parliamentary sovereignty as the value placed on democracy in those countries.[4] In each of the rights charters in these three countries, the legislature retains the ultimate power to enact and give effect to legislation that abridges individuals' rights and freedoms. It is not surprising that the South African Constitution prioritises, comparatively, rights and freedoms.

III RESOLVING THE TENSION

There is a growing number of "judicial review sceptics". What is particularly interesting is that some are questioning not simply the priority judicial review affords to rights and freedoms over democracy but whether the tension cannot be resolved by constitutional mechanisms that simultaneously protect rights and democracy. One example is Tushnet who argues that the United States should adopt "populist constitutional law".[5] He[6]

> explores the extent to which the Constitution can be understood as an incentive-compatible or self-enforcing arrangement. The idea is the economists': We have some goals we want to achieve – here, advancing constitutional values – and we want to devise self-enforcing institutional arrangements. If we can, we take the Constitution away from the courts and still advance the Constitution's values.

As Tushnet suggests, the best means to resolve the tension between democracy and rights and freedoms is to devise a method to make them complementary objectives rather than competing ones. The ideal outcome is an "incentive compatible arrangement" that while enhancing the protection of rights and freedoms also enhances democracy. In more

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3 Cheryl Saunders "Protecting Rights in Common Law Constitutional Systems; a Framework for a Comparative Study" in (2002) 33 VUWLR, 514.

4 Saunders comments in the "lasting effect" of Dicey's theory of parliamentary sovereignty. C Saunders "Protecting Rights in Common Law Constitutional Systems; a Framework for a Comparative Study" in (2002) 33 VUWLR, 510.

5 Mark Tushnet *Taking the Constitution Away From the Courts* (Princeton University Press, Princeton, 1999). He concludes at 186 "Populist constitutional law returns constitutional law to the people, acting through politics".

6 Tushnet, above, 96.

concrete terms, this would involve incentives for democratic institutions to protect minorities' rights and freedoms and minorities not hampering majoritarian will.

What would the features of a democracy and rights incentive compatible constitution be? The following is by no means an exhaustive answer but simply a few suggestions.

First, democratic institutions would have to structured to be as *inclusive* as possible. In particular, minorities must be ensured an effective voice to advance their interests in majoritarian fora. The introduction of proportional representation electoral system in New Zealand, for example, has enhanced the opportunity for greater minority involvement in New Zealand's Parliament.[7]

Second, institutional or constitutional mechanisms would create incentives for greater public dialogue about rights and freedoms and justifiable limits upon them. Waldron is right: any disagreement about rights should be viewed as positive as it, at the very least, illustrates people are taking rights seriously.[8] On that note, Tushnet is of the opinion that judicial review in fact debilitates public consideration of rights and freedoms, describing that phenomenon as follows:[9]

> [I]t occurs when the public and their democratically elected representatives cease to formulate and discuss constitutional norms, instead relying on the court to address constitutional problems [...] [that] may diminish the public's attachment to [...] the norms they might themselves find in the Constitution.

Third, constitutions and institutional mechanisms should encourage the public to consider rights and freedoms in the long-term rather than short-term. As Tushnet points out: "Give the government the power to aggressively investigate domestic terrorism [...] and you might find that the people in charge of government think that you are a domestic terrorist because of your views".[10] A long-term approach ensures that members of the

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7 Similarly, Tushnet suggests that a group that is a 10% minority in the population "can get quite a bit of what it cares about" if the leaders pick an issue on which the majority is closely divided and then say to both sides, "We will deliver our votes on that issue to whichever side votes for our issues". Tushnet, above, 159.

8 Jeremy Waldron states "We do disagree about rights, and it is understandable that we do. We should neither fear nor be ashamed of such disagreement, not hush and hustle it away from the forums in which important decisions of principle are made in society. We should welcome it. Such disagreement is a sign – the best possible sign in modern circumstances – that people take rights seriously." Jeremy Waldron *Law and Disagreement* (Clarendon Press, Oxford, 1999) 311.

9 Mark Tushnet "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty" (1995) 94 Mich L Rev 245, 250.

10 Mark Tushnet *Taking the Constitution Away From the Courts* (Princeton University Press, Princeton, 1999) 125.

majority will give greater consideration to the consequences of rights infringing legislation. In addition, the majority is more likely to appreciate the potential that it will be a minority in relation to another issue if a longer-term approach is taken. In turn, it is likely that the majority would exercise greater caution before limiting the rights of others.

Finally, the role of the court should be limited to that which creates as little democratic deficiency but the greatest protection of rights as possible. There would be a related benefit of a constitutional regime with minimal judicial review but enhanced rights protection. The justification for including economic, social and cultural rights in rights instruments would strengthen. With minimal judicial review, the courts' ability to influence economic, social and cultural policies, matters thought to be best resolved by democratic institutions, would be undermined.[11]

IV THE PANELLISTS' PAPERS

Some may be sceptical about the potential to evolve mechanisms that protect both human rights and democracy. Sceptics might argue that it defies logic, not to mention centuries of constitutional thought, and is simply utopian rubbish. Democracy is premised on majoritarian rule and rights and freedoms protect minorities from the excesses of majoritarian rule - and never the twain shall meet.

However, as the Panellists illustrate, relatively new human rights charters in Canada, New Zealand and the United Kingdom fly in the face of scepticism about the possibility of "incentive-compatible" constitutions. It is clear that these new human rights charters do, to some extent, reflect the age-old balancing exercise between the competing values of democracy and rights and freedoms. However, what is important is that institutional mechanisms have been set up around them that provide incentives for democratic institutions such as Parliament to protect rights. It may be that the common law constitutions are paving the way of the next step in constitutional evolution.[12] As Saunders comments, "In the end, this new and rather more constructive form of checks and balances, bearing with it potential for greater inter-branch respect, may be the most enduring legacy of these developments."[13]

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11 Butler comments briefly on economic, social and cultural rights in his paper and says that they are less appropriate for judicial review "for reasons such as lack of judicial expertise, the polycentric nature of the issues and interests involved, the need to recognise space for domestic process, etc." Andrew Butler "Limiting Rights" in (2002) 33 VUWLR, 562.

12 As Mark Tushet comments "The examples of Great Britain and the Netherlands show that it is possible to develop systems in which the government has limited powers and individual rights are guaranteed without having US style judicial review." Tushnet, above, 163.

13 Cheryl Saunders "Protecting Rights in Common Law Constitutional Systems; a Framework for a Comparative Study" in (2002) 33 VUWLR, 530.

The following analysis simply isolates a few examples from the Panellists' papers of "democracy and rights incentive compatible" mechanisms and their discussion of them.

A Andrew Butler "Limiting Rights"

As stated above, Butler analyses section 5 of BORA, which provides that "the rights and freedoms in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Arguably, section 5 does not achieve the ideal "incentive-compatible arrangement" because it vests the principal power of assessing what are reasonable limits justified in a free and democratic society in the court. Surely, democratic entities are better placed to assess what can or cannot be justified in a free and democratic society?[14]

However, in a couple of important respects, Butler illustrates that section 5 can enhance both the exercise of democratic will and rights and freedoms. First, it stimulates government consideration, a democratic entity, of rights and appropriate limits on them. Butler refers in particular to Crown Law Office and Ministry of Justice advice to the Attorney General as part of the section 7 BORA vetting process.

As a related point, Butler maintains that section 5 analysis contributes to a culture of justification, which he defines as follows:[15]

> By culture of justification I mean a society in which citizens are entitled to call upon the provision of reasons for measures that affect their rights, are entitled to challenge those reasons, and, in a sense more importantly, are entitled to expect that in advance of impairment thought will be given to the reasonableness of a particular limit. The culture of justification contributes to principles of good government such as transparency, accountability, rational public policy development, attention to differing interests and so on.

The culture of justification is a result, according to Butler, of the state being required to justify a limitation on a right on the basis of section 5. Saunders echoes Butler's sentiment, describing the positive effect of the equivalent section to section 5 BORA in the Canadian Charter of Rights and Freedoms, as one that "encourages public reflection on the nature and meaning of a democratic society at the turn of the twentieth century and on the extent

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14 Saunders summarises this criticism in relation to the equivalent section on the Canadian Charter on Rights and Freedoms in her paper, stating "[s]ometimes criticism is directed at the very engagement of courts in an inquiry into whether the goal of a law is "pressing and substantial, and the law enacted to achieve that goal...proportional in the sense of furthering the goal, being carefully tailored to avoid excessive impairment of the right, and productive of benefits that outweigh the detriment" to the right. Saunders, above.

15 Andrew Butler "Limiting Rights" in (2002) 33 VUWLR, 554.

of the limitations on a wide range of rights and freedoms that can properly be imposed in its name."[16]

It can also be imagined that the potential that the state might be required to justify a limitation on rights in public proceedings before a court could compel the legislature to exercise greater caution when enacting bills that potentially conflict with rights and freedoms guaranteed in BORA.

Finally, Butler comments on courts' practice to recognise limits on their own expertise to evaluate what limitations to rights are reasonable and justified in a free and democratic society. Butler quotes Lord Hope who observes in *R v DPP, ex parte Kebilene* that:[17]

> in some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body [...].

While there is no guarantee that courts will always accept limitations on their own expertise, deference to democratic entities in appropriate circumstances is consistent with a constitutional mechanism that promotes democratic deliberation of rights.

B Anthony Lester QC "The Magnetism of the Human Rights Act 1998"

1 Legislative scrutiny

As Lester QC points out, the UKHRA goes much further than the BORA in its requirements for scrutiny of legislation for consistency with human rights. In essence, section 19 of the UKHRA requires the Minister in charge of a bill to make a statement as to the compatibility of that bill with the European Convention on Human Rights (the Convention). Importantly, the Guidance to Government Departments requires the Minister to give an outline "of the arguments which led him or her to the conclusion reflected in that statement."[18]

However, it is the role of the Parliamentary Joint Committee on Human Rights (the Joint Committee), from Lester QC's perspective, that gives the legislative scrutiny process its "political potency".[19] It provides a non-partisan report of its views on the compatibility of bills with the Convention to each House of Parliament. Most importantly, however, the Joint Committee invites interested individuals and members of civil society to comment on

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16 Saunders, above, (2002) 33 VUWLR, 515.

17 *R v DPP, ex parte Kebilene* [2000] 2 AC 326, 381 (HC).

18 As cited by Anthony Lester QC "The Magnetism of the Human Rights Act 1998" (2002) 33 VUWLR, 501.

19 Lester QC, above, (2002) 33 VUWLR, 500.

the rights and freedoms implications of bills and publishes its reports. Lester QC has this to say:[20]

> It may be fairly claimed that [...] the Committee has made its mark in Whitehall and Westminster, significantly influencing the preparation and content of legislation, and improving Parliamentary scrutiny to secure better compliance with the Convention rights, and the principles of legal certainly and proportionality.

The relatively transparent legislative scrutiny coupled with the inclusion of members of civil society and, presumably, representatives of minority groups in the Joint Committee's reporting provides enormous potential for deliberation of rights in the most democratic arm of government; the legislature.[21] From the perspective of attempting to uphold rights in a democratic fashion, this is a considerable feat. Further, because of the structure of each mechanism, both the Minister in charge of a bill and the Joint Committee are required to publicly explain why and how legislation does not breach human rights. There is a clear impetus, then, to ensure that legislation does not undermine rights and freedoms. Saunders makes a similar point with regard to legislative scrutiny: "At the very least, this makes it likely that rights standards will be taken into account during policy formation. In some cases it may minimise the impact of particular policies on rights."[22]

2 Declarations of inconsistency

The UKHRA confers the express power on the judiciary to make declarations of inconsistency where legislation breaches the rights and freedoms recognised in the UKHRA. However, offending legislation is not struck down as a result. Instead, legislative amendments are required to remedy the legislation of its rights offending provisions.

At the very least, a judicial declaration of inconsistency provides a catalyst for a very democratic process. It could provoke serious discussion among the people of the importance of the right in question or, alternatively, of whether there are other factors that outweigh the importance of the protection of those rights. This is especially true given that

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20 Lester QC, (2002) 33 VUWLR, 503.

21 "The Government argued, when the Human Rights Act was enacted in 1998, that a debate in Parliament provides the best forum in which the person responsible can explain his or her thinking on the compatibility of the provisions of the Bill with the Convention rights. As Lord Williams has explained "we believe that the best forum in which to raise issues concerning the compatibility of a Bill with the Convention rights is the Parliamentary proceeding on the Bill". Lester QC, (2002) 33 VUWLR, 502.

22 Cheryl Saunders "Protecting Rights in Common Law Constitutional Systems; a Framework for a Comparative Study" in (2002) 33 VUWLR, 518.

there is "enhanced Parliamentary scrutiny" of legislation if it is declared incompatible with the rights in the UKHRA.[23] While the courts play an important role in the protection of rights, democracy remains intact, in principle, because "the people" can express the outcome of their deliberation through the legislative amendment process under section 10 of the UKHRA.

C Cheryl Saunders "Protecting Rights in Common Law Constitutional Systems; A Framework for a Comparative Study"

From the preceding analysis, which draws significantly on Saunders' paper, it is clear that she is very conscious of the balancing between democracy and rights protections underlying the common law constitutions she discusses. Further, Saunders directs her attention to how those constitutions advance greater democratic deliberation of the protection of rights, a result Saunders views as positive.

Saunders highlights one mechanism in particular that can facilitate greater protection of, or interest in, rights by the public: the very enactment of an explicit rights charter either legislatively or constitutionally. Following her consideration of the common law constitutions with human rights charters, Canada, New Zealand, South Africa and the United Kingdom, she concludes:[24]

> The human rights instruments and the debate associated with their operation in practice have the potential educative effect on the community as a whole, with consequential benefits for the development of civil society.

To the extent that a set of express rights and freedoms facilitates discussion of rights by the public, it will positively influence the willingness of democratic arms of government to consider rights critically when enacting legislation.[25]

V CONCLUSION

The developments in rights protections touched on by the Panellists have the potential to revolutionise debate on rights protections from analysis of where the ideal balance is

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23 Lester QC states "the democratic imperative is well served when the government takes remedial action, under section 10, with the remedial order being scrutinised by the Parliamentary Joint Select Committee on Human Rights and by both Houses under the affirmative resolution procedure". A Lester "The Magnetism of the Human Rights Act 1998 in (2002) 33 VUWLR, 501.

24 Saunders, (2002) 33 VUWLR, 520.

25 Saunders also comments: "In a positive sense it can also be seen that charters of rights have other advantages for governance, including clarity, transparency and rationality. They also have the potential to stimulate debate on the nature of democracy and to increase levels of civic awareness at a time when concern about both are real and growing; in Australia at least as fast as in comparable countries elsewhere." Saunders, (2002) 33 VUWLR, 519.

struck between democracy and human rights to the evolution of a coherent theory that seeks to advance both. It may also provide the impetus for gathering good empirical evidence of those institutions and strategies that are, in the words of Tushnet, "incentive-compatible". As all the Panellists illustrate, by comparing aspects of common law constitutions, comparative analysis is likely to provide the greatest source of inspiration.[26]

It remains unclear whether it is possible to create the perfect constitution and institutions capable of enhancing both the protections of rights and freedoms and democracy.[27] However, given the fundamental value of both democracy and rights and freedoms, together with progress made in some Commonwealth jurisdictions, it is certainly worth pursuing.[28]

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26 See Lester QC states at the very end of his paper "In your country and mine, a new body of jurisprudence is arising to reflect our changing constitutions. We shall surely continue to be enriched by the experience of each other in translating our constitutional guarantees of human rights into practical reality." Lester QC, above, (2002) 33 VUWLR, 505.

27 Tushnet asks "Will we get a better enforced Constitution if we rely on self-enforcing structures than if we rely on judicial enforcement, acknowledging that neither self-enforcement nor judicial enforcement leads to perfect enforcement." Mark Tushnet *Taking the Constitution Away From the Courts* (Princeton University Press, Princeton, 1999) 96.

28 Saunders observes "it is now evident that the standard concerns about constitutional or legislative charters of rights can be met or ameliorated in a variety of ways." Saunders, above, (2002) 33 VUWLR, 536.