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PROBLEMA

Anuario de Filosofía
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HUMAN RIGHTS LEGISLATION AS A SUBSTITUTE FOR THE JUDICIAL REVIEW OF LEGISLATION ON THE BASIS OF *BILLS OF RIGHTS*

Tom CAMPBELL*

Resumen:

Desde una concepción positivista del derecho y su respectivo enfoque hacia la interpretación jurídica, en este artículo se argumenta que el tener un “*Bill of Rights* democrático” como base para expedir una “legislación de derechos humanos” resulta ser más legítimo y más efectivo para la promoción de los derechos humanos, que el modelo contemporáneo de “*Bill of Rights* jurisdiccionales” que sirve para modificar o invalidar la legislación promulgada.

Abstract:

In this paper I argue, from the point of view of a legal positivist conception of law and its associated approach to legal interpretation, that having a ‘democratic Bill of Rights’ as a basis for enacting ‘human rights legislation’ is more legitimate and likely to be more effective with respect to promoting human rights than the contemporary model of using ‘juridical Bills of Rights’ as a basis for modifying or overriding enacted legislation.

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SUMMARY: I. *The Contemporary Context*. II. *The Proposal*.
III. *Concluding Concerns*. IV. *Bibliography*.

I. THE CONTEMPORARY CONTEXT

Constitutional democracy would appear to be the currently dominant model of political legitimacy. The necessary ingredients of this paradigm is a more or less systematic assortment of institutions: an elected legislature (bicameral or unicameral), a directly or indirectly elected executive, an independent judiciary, and a Bill or Charter of Rights on the basis of which the judicial branch of government can nullify, modify or decline to apply legislated laws and otherwise legitimate executive orders. My concern is with the last ingredient, which I call, perhaps pejoratively, a juridical bill of rights, or more neutrally, strong human rights-based judicial review of legislation. My focus is on the problematic relationship of such judicial review to the other ingredients of constitutional democracy, in particularly electorally representative legislatures.

If this model of constitutional democracy is indeed the dominant paradigm of political legitimacy then it marks an ideological triumph of a U.S. form of mixed government over its only serious rival within the Western tradition, the British, or Westminster, model. Constitutional monarch has given way to constitutional democracy. Monarchy constrained by or refashioned into representative government has being replaced by democracy constrained by or refashioned into juristocracy. This prompts the reflection that, just as a modern "constitutional monarchy", like the UK, or Australia, or Canada, is not really a monarchy at all, since the monarch has no effective power, so, it may be argued, the emerging model of "constitutional democracy" is not a democracy at all. This is clearly an exaggeration, yet there is a case for saying that, in some versions at least, "constitutional democracy" tends to the same internal contradiction as constitutional monarchy.

The basic democratic case against a juridical bill of rights is straightforward and longstanding: it is an institution that gives the last word on some of the most important issues of state to a small group of individuals who are unrepresentative in the technical sense that they are not elected by a process of universal suffrage in a politically free society (Bickel 1986, Waldron 1999, Tushnet 1999, Kramer 2004). This mode of rule is quite simply incompatible with the universal right to self-determination, either on the part of individuals or political groupings. In practice, of course, courts are wisely constrained in their use of the judicial override, for its routine use would expose its democratic illegitimacy. Yet, to the extent that the juridical override is used it is a diminution of *de facto* democracy and the very existence of such a mechanism is a negation of *de jure* democracy.

There is, of course, a host of counter-arguments to this 'countermajoritarian' critique of the judicial override of legislation, including the most compelling argument: that democracy has to be protected against itself, for might not a democratic decision be made, for instance, to reduce or even abolish democracy? Indeed, in the terms of my own position, is this not precisely what happens when a democratic vote produces a Bill of Rights with the judicial power to invalidate such legislation as is deemed by the court to violate these rights.

The need to protect democracy against itself is one version of a type of argument that requires us to accept that the moral legitimacy of a government depends not simply on who makes political decisions but the consequences of these decisions. More particularly, legitimation depends on outcomes and not only, for instance, on consent or participation. The assumption is that, if elected assemblies produce bad outcomes they could reasonably be replaced or constrained by institutions that produce better ones.

It is tempting to respond to outcome oriented assessments of legitimacy with an affirmation of a deontological right to self-determination that is independent of the re-

sults it produces. Individuals and certain collectivities of individuals, it is argued have the right to make certain decisions as they choose, not because they will choose wisely or rightly, but because it is their right to make the choice, whether or not they make it well or badly. Indeed, is this not a basic human right, perhaps the basic right? Well, certainly, some form of deontologically based autonomy rights must feature in any plausible justificatory democratic theory, both in order to justify forbidding paternalistic intervention in the people's private lives, and as a decisive factor in the political legitimation of democratic process in the determination of controversial moral questions where there is no consensus as to what the best outcomes are.

However, there are major consequentialist inputs to the justification and delineation of most if not all rights, human and otherwise, and no political system can be legitimated entirely without reference to its consequences, even if these consequences are confined to the extent to which other rights are respected. Indeed the historically most powerful argument for universal franchise in a representative system of governance is that this is a necessary precondition of protecting and promoting the interests of the people as a whole against otherwise inevitable oppression by powerful minority groups. Therefore, we must take account, for instance, of the extent to which majority government may harm majorities, or the way in which some limitations on majoritarianism might benefit the majority itself. *A fortiori*, this analysis applies to the relevance of the outcomes of majoritarian voting systems not so much for those who voted the other way (for that is an inevitable consequence of making each vote count equally) as those who suffer unfairly as a result of the decision made.

I acknowledge, therefore, that the case for the pure democracy of the sovereignty of the people (or in effect a majority of the people) over against the limitations of constitutional democracy, with its mechanism of judicial review, is based on a mixture of the equal deontological autonomy

rights of human individual and societies, and consequentialist claims that such a system at least adequately protects the general wellbeing of a society in a manner that is fairer (more equal) than alternative systems. It follows that the attempt to justify “pure” democracy must be open in principle to the view that some limitations to democratic process might be justifiable. In particular, the democratic case against judicial review must take both the protecting democracy argument and the protecting oppressed minorities argument very seriously.

That said, the main thrust of the democratic case must be that judicial review on the basis of bills of rights is *per se* anti-democratic because its exercise is an exercise of sovereign legislative power that undermines the deontic autonomy rights of the people and limits their capacity to protect their interests, and that the strong burden of proof that falls on those who wish to limit democratic rights in this way has not been met.

So much for general background. My particular concern in this paper is that the fact that the legitimization debate outlined above is often side-stepped by the argument that strong bill of rights-based judicial review is not a usurpation of the sovereign right of the people to make law after all, because it is a matter of interpreting, not making. Bill of Rights are, let us assume, endorsed by the people, and courts are merely carrying out their duties of interpreting and applying the rights that the people have endorsed. There is, therefore, no democratic deficit and no strong burden of proof to be met in order to justify Bills of Rights. It is an uncontroversial ingredient in the model of constitutional democracy outlined above that the people, or their elected representative, make the law, while an independent (and that means, *inter alia*, not subject to the pressures of re-election) judiciary interprets and applies the laws that the people have, directly or indirectly, made. The logic of the argument, as set out in *Marbury v Madison*, is that, according to the consensual doctrine of the division of power

the courts have the right, nay the duty, to apply such rights as the popularly validated constitution contains.

This takes us to the central topic of this paper: 'interpreting' Bills of Rights. Or, more specifically, what I consider to be the false claim that the process of transforming abstract rights into concrete law is properly taken to be one of legal interpretation. I argue that Bills of rights, because of, or insofar as, they are in general constituted by vague affirmations in value-laden terms, cannot be applied to particular cases without making judgments that are primarily moral and political (and therefore ideological) rather than interpretive in the legally appropriate sense of that word.

This thesis may be dismissed as a semantic point about a word ('interpretation') whose meaning is obscure, fluid and contested. I am not, however, relying on an allegedly neutral analysis of the discourse of interpretation, although it is important that whatever sense we give to the term in legal contexts is not radically confusing to ordinary users of the terminology. What is required is a theory of legal interpretation that is derived from a particular view of the nature and purpose of law. My conclusions as to legal interpretation are not derived from any 'correct' general analysis of 'interpretation' and do not want to rest my case simply on an appeal to any of its distinctive or extended uses. In particular, I would resist attempts to use analyses of literary or musical or scientific interpretation to draw conclusions about legal interpretation. Rather, what is required is a theory of law that justifies what should count as interpretation in a legal context.

What I have in mind here is a version of legal positivism that sees law as ideally a coherent set of clear and followable rules that can be understood without recourse to speculative or contestable judgments or opinions. This positivist conception of laws is linked to an associated ideal of the rule of law whereby power ought to be exercised over other people only through the medium of such positivistically good laws. Importantly the moral arguments in fa-

vour of such a political system are not only those of fairness and efficiency outlined by Lon Fuller (1969) but also a fundamental sovereignty argument to the effect that strong unitary rule requires such a system, an analysis that explains why pure democrats espouse the rule of positive law as an essential prerequisite of democratic sovereignty. The thesis of what may be called 'democratic positivism' is that law is a system of rules expressing the will of the people as to how individuals must or may conduct themselves in their social interactions (Campbell 1996). Along with this goes the recommendations that laws ought to be framed in general but specific terms that can be understood and put into practice without requiring those concerned to make their own moral judgments as to the nature and propriety of the conduct themselves. For this to operate satisfactorily, citizens in general and those who make authoritative judgments in cases of disputes about the rules, must follow the plain contextual meaning of the rules and engage only in such interpretation of the rules as is designed to clarify and publicise agreed understandings of the rules in those minority of cases where a good faith reading of the text and accessible understanding of the context is not sufficient to engender an evident public meaning for the rules in question (Campbell 2004: 247-297). In other words, in a democracy, citizens have a right to expect that the rules which they must or may follow are properly understood in accordance with tier publicly available meaning.

"Interpretation" may, in standard discourse, have a generic connotation which may be summed up as the activity of giving a particular meaning to a text or happening that is capable of being understood in a variety of ways, but the criteria for what counts as an interpretation and what counts as a good interpretation vary considerably according to the nature of the subject matter being interpreted and the objective of the interpretation in question. While it might often be illuminating to compare what counts as interpretation in different spheres and how interpretations

are evaluated in these spheres Levinson and Mailloux), there can be no prior assumption that what holds in one sphere can be transferred to another. The process of interpreting a literary text may or may not overlap with what goes on in the interpretation of scientific data (perhaps "simplicity" might be a criterion of a good interpretation in both spheres) but the fact that a theory of interpretation holds good in science says nothing in itself about whether it has application to literature, or to law. And so, while the requirement of conventional intelligibility requires that we do not give an idiosyncratic meaning to "interpretation" in the sphere of law, we cannot deduce anything of substance from general theories of interpretation to generate a theory as to what legal interpretation is or ought to be (contra Fish 1994 and Raz 1998).

On the other hand, legal interpretation is not a purely technical matter about which we can learn by studying text books about the interpretation of statutes, cases and constitutions. Familiarity with such material is, of course, a necessary precondition of reflecting on legal interpretation but such material is not definitive either in delineating the conceptual boundaries of what is to count as "legal interpretation" or in determining what should count as a good legal interpretation. Such issues cannot be settled either by conceptual clarification drawn from the analysis of legal discourse or from a study of legal texts, text books or practice. Rather they must be seen as part of a theory of law and politics that is both descriptive of what legal systems can be like and prescriptive as to what, within these potentialities, they ought to be like. Thus both the conceptual and normative boundaries of legal interpretation will vary dramatically as between legal positivists, legal realists and natural lawyers. A legal positivist might argue that legal interpretation is about how best to understand a law when there is an ambiguity or unclarity in a legal text. As such it is different from understanding a text which is unambiguous and clear, and different from changing a text in order

to arrive at a meaning that is not one of the range of possibilities that could be given to the text in terms of the linguistic practices of its intended audience. Legal realists reject the bases on which the positivists distinction between understanding, interpretation and textual change are based, taking the position that discourse is not capable of being subjected to such categorisations since all words and sentences can be and are often understood in radically different ways by different individuals, groups and cultures, thus rendering legal and other rules and sentences congenitally indeterminate. Natural lawyers may hold, in contrast to both positivists and realists, that language relates to a deeper reality the understanding of which is a necessary part of breathing meaning into discourse so that the process of interpretation involves an understanding of nature and goodness that cannot be derived from mechanical rules of interpretive practices that are insulated from the wider role of reason and experience in understanding nature.

Choosing between such abstract theories is a difficult and complex business but the outcomes are replete with practical implications for the way in which we conceive of law and put that conception into practice. This is so, in part, because within the legal culture that is more or less shared by positivists, realists and natural lawyers, it is understood that "interpretation" is a legitimate, necessary and core activity for judges. This does not mean that legal interpretation is a practice that is confined to judiciaries. Law is addressed in the first place to all those who are subject to it and a measure of interpretation is to be expected, whatever general theory is at work. But it does mean that the interpretations of judges are authoritative when it comes to official decision-making as to the application of laws to particular circumstances. Theories vary as to whether judicial activity beyond fact-finding is confined to understanding and/or interpreting laws, but all agreed that, whatever is a matter of interpretation that is a matter as to which the judges in question have the final say, at least until such

time as the laws in question are changed. In this context, and on these assumptions, it is no wonder that the meaning of 'legal interpretation' is contested for this is caught up in the debate about what is and what is not legitimate in judicial reasoning, which in turn alters whose decisions carry most weight within that political system.

It is clear that the critique of bills of rights outlined above presupposes something like a legal positivist view of legal interpretation. It assumes the superior propriety of a system of law in which there are clear, unambiguous and reasonably specific rules that can be understood in terms of their plain meaning in standard contexts, and which citizens and in general judges may understand and follow without drawing on anything that is controversial with respect to their factual and moral beliefs. Of course legal positivism comes in a variety of forms with radically different contents. In its weaker forms all that is required is that valid laws can be identified by reference to a social source that can itself be identified without utilising moral or other speculative judgments. But the rationales for adopting this weakly positivist view of law, such as the proper functioning of sovereign power, apply not only to the identification of what valid law is but also to the understanding and interpretation of that which is so identified. The advantages of clarity, intelligibility, definitiveness, prospectivity, and so on can be achieved only if laws can be neutrally identified and neutrally understood. In other words, the logic positivist model outlined above is unequivocally exclusionary, in terms of the accepted distinction between inclusive and exclusive legal positivism (Waluchow 1994).

Now all this is too much to swallow if we regard such theories as legal positivism either as matters of detached conceptual analysis of the meaning of "law", or as having to do with empirical observation and description of what are commonly acknowledged to be some form of legal system. It is not part of the meaning of 'law' that it is strongly positivist, or part of the finding of legal social science that all or

most, or indeed any of what count as legal systems actually conform to the positivist model to any particular degree. However the mode of legal theorising that matters here are prescriptive or normative ones which, although they assume certain working definitions of terms such as "law" which are broad enough to identify a broad range of associated phenomena, are actually addressed to the question of what constitutes "good" law, not in terms of the particular substance of law, but in terms of its formal characteristics, such as specificity, clarity and consistency.

It is not my task in this paper to defend strong prescriptive legal positivism but simply to point out that some such position is presupposed in my democratic critique of court-centred bills of rights. However it is worth mentioning that, while the positivist arguments for adopting a positivist model of law do not directly invoke democracy, legal positivism does play an important part in the justification of democracy conceived of as rule by the people as it is not feasible to conceive of a situation in which a large number of people engage in self-governance unless they do so by way of positivistically good laws. Only if the laws that are adopted through democratic process match the positivist criteria of good rules and are applied by way of a type of interpretation that fits the positivist model can we say that the people actually have some control over the governance of a polity. Democracy requires positivism even if positivism does not require democracy.

II. THE PROPOSAL

That said I want now to raise the question of how a strong prescriptive legal positivist can approach the business of implementing the sort of human rights that feature in bills of rights, that is rights to life, to property, to a fair trial, to the equal protection of the law, and yes, social and economic rights, such as the right to a decent standard of living, a right to basic medical care, and so on. My thesis is

that these rights, abstractly stated, are not the material for positivistically good laws. They therefore have no place in a democratic system of law. This goes with the claim that there can be no satisfactory theory of legal interpretation in a democratic polity that can be devised to accommodate the presence of abstract statements of rights in its corpus. Hence the insoluble debates that take place to establish an acceptable judicial method of the interpretation of the U.S. Bill of rights, where the choice on offer is essentially between recommendations of overtly free ranging moral reasoning (Dworkin 1996) and unconvincing models of original intent that are simply unable to cope with translating the broad terminology of 18th. century rights to the very different context of 21st. century America. While the latter approach (Scalia 1989, Goldstein 1990) While the latter has the virtue of being appropriate, with modification, to statutory interpretation it lack plausibility with respect to typical Bills of Rights.

Nevertheless, abstract and highly general Bills of Rights can serve many useful purposes. One of these is to provide a starting point for political debate around the choice and justification of formally good laws. The right to life can aid the debate about what would constitute a positivistically good law of homicide as well as to a positivistically satisfactory health care law. That is, it is possible to utilise Bills of Rights in selecting what might be called human rights legislation, that is legislation which is designed to directly implement human rights principles. However, the process of moving from principle to rule is not a process of interpretation but of legislation and as such, is to be conducted not according to debates as to textual analysis, established precedent and legal principle, but in terms of political debate as to more precisely what it is that we value, more precisely what we think is economically and sociologically feasible, and more precisely about what we can engender a sufficient measure of agreement to satisfy at least a majority of the affected population.

The suggestion that I want to explore as an alternative to court-administered Bills of Rights I call a “democratic Bill of Rights”, not because such a Bill would be concerned only with democratic rights, although they would most certainly feature, but because of the function it could fulfil within a democratic political process. A democratic bill of rights sets forth the aims and limitations of legitimate government as endorsed by the electorate after extensive exposure and debate. To this point it can be viewed as a purely political statement of political values with no direct legal implications: a political charter, not a legal document. However, the point of having such a Bill is that it should play a part in an interrelated set of procedures that are designed to assist democracies to confront and deal with the critiques of majoritarianism that are made by those who support what may be called an undemocratic Bills of Rights. It is not my purpose in this paper to set out this scheme in any detail. The mechanisms I have in mind are (perhaps constitutionalized) obligations to enact human rights legislation, and to subject all prospective and existing legislation to the scrutiny of human rights committees drawn from the membership of elected assemblies (Kinley 200, Hiebert 1998) and to have an independent human rights commission with the resources to investigate human rights issues and the power to have them given exposure in Parliamentary agendas. The important feature about human rights legislation, apart from the fact that its content is intended to be derived from human rights principles, is that it conforms to a positivistic ideal of the principle of legality according to which political power can only be exercised through the medium of rules that can be stated, understood, and implemented without recourse to moral reasoning with respect to identifying their content. Human rights legislation is legislation in the sense that it is amenable to legal interpretation in the sense outlined above. It follows, of course, that statutory Bills of Rights are by and large not examples of human rights legislation because they do not qualify as

legislation, at least with regard to the identification of the rights contained therein.

That said, there is no reason why human rights legislation should not be given a special status within the wider corpus of ordinary legislation and the remnants of such common law as survives the development of democratic accountability. Human rights legislation can be used to give justiciable content to the idea that fundamental rights should not be subject to implied overruling by later legislation. Indeed the convention could be adopted that human rights legislation must be explicitly amended and not subject to revision by even clear and explicit provisions in ordinary legislation. In this case ordinary legislation is valid only if it is compatible with existing human rights legislation (Factortame No. 2; Eskridge and Ferejohn 2001).

Such a scheme may appear rather similar to those weaker versions of constitutional democracy that involve bills of rights principally to guide courts in the interpretation of the law, such as the UK Human Rights Act 1998 and the New Zealand Bill of Rights 1990, which encourage or require courts to interpret legislation so that it is compatible with a certain list of enumerated rights, such as, in the case of the UK Act, the European Convention on Human Rights.

However, despite some superficial similarities, the two schemes are radically different. What may be called interpretive bills of rights require courts to undertake a form of reasoning that goes far beyond the proper bounds of legal interpretation. Ascribing appropriate content to the abstract rights in question, although it can eventually be reduced to a process of following precedents, depends essentially on setting precedents by making value judgments of a sort that are only loosely related to the texts in question. Further the process of balancing the significance of these rights, so defined, against what is to count as reasonable restrictions in the pursuit of legitimate state ends, is itself essentially a political not a legal judgment. Finally the per-

mission or requirement that the legislation in question should be 'interpreted', if possible, so as to be compatible with the delineated and balanced human rights, permits or requires departing from the authorised text to an extent that goes beyond interpretation to rewriting through reading down or reading in considerations that do not follow from the much more limited range of interpretive possibilities that arise from the existence of obscurities and ambiguities.

In a system of interpretive Bills of Rights, any prelegislative scrutiny that occurs tends to be conducted in terms of anticipating what courts might say about the legislation in question. The committee debate is not therefore the sort of moral and political debate that is needed to explore the question of what our human rights are or should be. Whereas a democratic bill of rights would provide the moral basis for a legislative style debate of a very different nature in that it would not be couched in terms of legal precedent and legal prediction. A human rights scrutiny committee that is not trying to second guess what courts might say about purported legislation but is actually engaging in moral and political debate as to what particular human rights are or ought to be and how they are best implemented in practice is a very different body from one that is seeking to make legislation proof against the more legalistic but also highly political judgments of courts that may be called upon to pronounce on the validity, applicability or 'interpretation' of the legislation in question. Moreover, they would not come up against the problem, emerging as the UK Human Rights Act gets underway, of the legislation in question being effectively redrafted to make it compatible with the European Convention on Human Rights and its ever developing case law. As in New Zealand, the rather loose terminology of the statutory bills in question has encouraged courts to take liberties with the text of ordinary legislation in order to better serve the purpose of imple-

menting their understanding of fundamental human rights (Allan 2003).

The generous not to say creative ways in which courts have used what has been called 'weak' judicial review so as to turn it effectively into something akin to 'strong' judicial review (Campbell 2001) has been justified by a growing international judicial consensus that human rights instruments are 'different' in that they must be read and developed in a progressive way to better fulfil their function of promoting human rights. It has become an accepted principle of interpreting interpretive bills of rights that this is a process that should be carried out 'liberally' in order to give maximal protection to human rights (*Ng Ka Ling v Director of Immigration* [1999] 1 HKLR, 315, 339-40; *R. v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33 (8 July) 1 at 9.) This has encouraged courts to go far beyond the texts of their bills of rights, even to the point of introducing innovations that were explicitly excluded from the Bills of Rights that they are meant to be implementing. In the case of strong judicial review with an entrenched bill of rights there are also all the assumptions about constitutional interpretation generally that are brought to bear on interpreting such Bills of Rights. Constitutional interpretation is in general standardly presented as being different from ordinary law insofar as it is essentially a matter of making contemporary use of historical documents that are couched in general terms and which must therefore be interpreted with a large measure of judicial discretion related in quite a loose way to reflections on the broad purpose of the constitution in question and how it can best be made to serve the needs of contemporary society (Barak 2005: 370-394).

In contrast to these tendencies, the advantage of a democratic Bill of Rights is that its role is compatible with the democratic rights contained therein, and encourages electorates and politicians to take responsibility for human rights articulation and implementation in an efficient and

fair manner. This is superior in form, and in terms of substance, has the potential to go far beyond what courts will dare to do as they operate their human rights jurisprudence under the shadow of its perceived illegitimacy. Moreover it allows for the prospect of polities developing their own distinctive codes and cultures of human rights without succumbing to a spurious harmonisation around social and political values.

III. CONCLUDING CONCERNS

The arguments against a democratic Bill of Rights centre larger on their questionable efficacy. Perhaps, it is only the possibility that courts may strike down or rewrite legislation on human rights grounds that lead elected assemblies to take human rights issues seriously. Moreover, it may also be argued that any jurisdiction that adopted such a system would be parasitic on the human rights discourse that has been generated by countless court cases in the past.

I don't address these historical and empirical arguments here, but concentrate instead on the fact that a democratic bills of rights, whether effective or not with respect to human rights in general, would be compatible with confining courts to a properly restricted process of legal interpretation that recognises that the only legitimate source of law is ultimately the outcome of a system that approximates to equality of political power. Hence a democratic Bill of Rights is compatible with a model of the rule of law, and of democratic control of law which enshrines a particularly important set of human rights that cluster around the idea of popular self-determination.

However, there are concerns that a democratic bill of rights, particularly if it is adopted as part of a constitution along with procedures designed to ensure that attention is given to the Bill or Rights in the processes and procedures of the political system. Many of these arise from the habits

that courts have already developed in relation to Bills of Rights. Even if it is explicitly stated to the contrary, courts may use democratic Bills of Rights as a basis for 'interpreting' ordinary law, citing the fact that such a Bill is evidence of the core enduring values of the polity in question. This would enable courts to read down or expand legislative acts to fit their ideas as to 'fundamental law'. Or, in enforcing the procedural requirements designed to place human rights on the political agenda in a way that gets them adequate attention, courts could readily slide from formal to substantive assessments so that procedure that do not produce what the courts considers to be appropriate outcomes could be invalidated on grounds that presuppose the courts superior knowledge of what constitutes human rights. Moreover there is a real question whether human rights legislation can be captured in sufficiently precise and clear terms as to exclude the scope for creative judicial 'interpretations'. This could be particularly troublesome if human rights legislation is given quasi-constitutional status by not being subject to implied repeal and taking precedence over subsequent incompatible legislation. Assessments of the compatibility of two pieces of legislation, even at the same level of specificity, has the potential to invite that degree of judicial discretion that the system is intended to exclude.

Nevertheless, moving from a court-centred to a legislative-centred system of articulating human rights could in itself, by reinforcing the counter-majoritarian thesis, encourage a legal culture that is more in tune with prescriptive legal positivism and its associated form of legal interpretation. Ultimately this is a matter of judicial ethics that, in the nature of the case, can be encouraged but not required.

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