DOES ANYONE WIN UNDER A BILL OF RIGHTS? A RESPONSE TO HILARY CHARLESWORTH'S 'WHO WINS UNDER A BILL OF RIGHTS?'

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INTRODUCTION

As I understand it, my task is to make a critical presentation of Hilary Charlesworth's guarded and conciliatory answer to the question set: 'Who Wins Under a Bill of Rights?' She points out that we may not be dealing with a zero-sum game here, rather it may be a win/win situation in which all benefit in one way or another. And she goes on to offer something of an olive branch from one 'camp', constituted by those who support at least a mild form of bills of rights, to another camp, the diminishing number of diehards in their coral who are holding out against the advancing army of bill supporters as they capture first the ACT (with the active assistance of Hilary herself), then Victoria, and now, perhaps, Queensland, as, one after the other, they bow to the globalisation of a rather thin form of American constitutionalism.

As a loyal member of the academically beleaguered hostile camp I am pleased to respond to the olive branch as an honourable effort to find common ground. I accept, with some important qualifications (see below) Hilary's point that both camps are keen to promote human rights. If this is the case, then we are at least in part engaged in a family dispute as to the best means to promote such rights, and it is unlikely that either camp has the whole truth about an empirical question concerning the most effective constitutional and cultural mechanisms to secure our shared goals. In this situation, it seems dogmatic to have nothing good to say in favour or against bills of rights.

Indeed I go so far as to welcome certain aspects of the *Human Rights Act (2004)* ACT (and in the same respects the *Victorian Charter of Rights and Responsibilities*) in so far as they set up an official version of human rights goals as the explicit objectives of governments and legislatures. Interestingly it is the impact on government that has emerged without any court involvement from the ACT HRA that has been presented as the prime benefit arising in its first year of operation. Who could have any objections to a Chief Minister being pleased that his administration, because of the HRA, has been more liberal in its anti-terror legislation than other Australian jurisdictions with respect to the age of detainees suspected of involvement in terrorist activities. That is something that his administration could and perhaps should have made possible without a bill of rights. But if the bill of rights process as it applies to government departments and the legislative process has worked out in this way, then that is certainly a win, although we should note that this advance does not require judicial review of legislation on human rights grounds, and that is really the disputed territory.

I also find some common ground in Hilary's objection to the assumptions underlying the question: who wins? However, while Hilary's hope is that everyone wins and all shall have prizes, my fear is that, in terms of human rights outcomes, no-one wins and no prizes will be awarded.

Contra Hilary, I think that we have to accept, that, as far as the allocation of power goes, there is a zero sum element in the issue of whether or not to move any way down the track towards a court-centred bill of rights. Bills of rights with judicial review inevitably diminish the right to self-government. I accept Hilary's view that mere Declarations of Incompatibility are not in isolation a significant worry in this regard, but the interpretive

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possibilities involved in most statutory bills of rights can have significant impact on what a piece of legislation is taken to mean, despite its evident public meaning, and this is something on which we might focus our attention today, especially as James Allan has plenty of examples of this interpretive overriding of legislation on his sleeve, and Hilary herself chides CJ Higgins on a matter of just such radical judicial 'interpretation' in relation to the ACT's *Domestic Violence and Protection Order Act 2001*. I return to this at the end of the paper.

Assuming an element of power redistribution between legislatures and courts in relation to current conceptions of bills of rights, we must ask whether the human rights losses in terms of political rights will be outweighed by other human rights gains? I suspect that the likely results will be marginally beneficial at best, and probably to the detriment of the social and economic rights that are generally excluded from bills of rights.[1] Further, such human rights gains as do emerge have to be evaluated in the context of the wider legal and political consequences of introducing bills of rights. In terms of judicial process and the formal rule of law, the jurisprudential methodology of human rights legal reasoning contributes to the disruption of the core function of judiciaries and what ought to be their distinctive role within the political process: the application not the making and rewriting of law. This tendency is also damaging to the quality of the legislation that emerges in a system that slackens its pursuit of formally good law that is clear, consistent and comprehensive, encouraging judges to rewrite the law in the light of the general policy objectives of government and their collective understanding of fundamental values. The blame for these developments is not, of course, to be laid solely or even primarily on bills of rights, but bills of rights are a significant contributory factor in the decline in respect for the positive law ideal that I believe is integral to the effective realisation of the rule of law, itself a key human right. We are therefore risking a good deal of human rights capital in the pursuit of marginal and uncertain human rights benefits.

So much for my attempt to bring the warring camps into some sort of amicable dialogue. Now I will identify a few of Hilary's interesting and important points and comment on them, particularly 'the inaccurate images of the major institutions affected by bills of rights' which she sees on all sides of the bill of rights debate.

STATES' RIGHTS

Two historical facts are presented by Hilary about the Federation debates concerning the incorporation of a bill of rights into the Australian Constitution: (1) it was said in the debates that a national bill of rights would interfere with States' rights, and (2) that this fact was particularly important for those who wished to maintain racially discriminatory State legislation. This inevitably floats the innuendo that the argument from states' rights is a front for hostility to human rights, particularly with respect to their rejection of racialism.

On this point we should note that federal bills of rights can indeed be an excellent mechanism for providing more unity and uniformity in federal systems, in that the particular judgments of constitutional courts can have quite a specific impact on all affected jurisdictions, thus harmonising otherwise divergent jurisdictional laws. If what we are dealing with are open-ended bills together with associated powers of legislative review, then

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[1] Brian Galligan and F L (Ted) Morton, 'Australian Exceptionalism: Rights Protection without a Bill of Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights* (2006) 17-39. Thus, p 37: 'Australia is exceptional in continuing to rely primarily upon parliamentary and political means for rights protection, with a complementary judicial contribution. However, it is probably just as successful in achieving a rights revolution as comparable bill of rights countries.'

there is plenty of history to support the connection between such bills and increasing political centralisation. This has clearly been very important in the US and is crucial to the understanding of the introduction and use of the Canadian Charter. There may indeed be a strong argument in favour of more centralism in the Australian political system, and a national bill of rights might be one means towards this end. But this is not a human rights argument, in that the issue here is not about promoting human rights, but about enhancing federal power to provide (arguably desirable) further national unity through greater legal uniformity. There is certainly an element of the zero sum involved here.

In passing, Hilary suggests that it was contradictory for the founding fathers to object to a bill of rights on the grounds of vagueness and yet hold that it would surely be used on racially discriminatory colonial legislation. How could they predict that consequence if the rights are so vague? Well the answer is, I think, that because the rights are vague they can easily be used for a wide variety of purposes, and those involved could predict from their knowledge of Australian politics at the time that Federal governments would be likely to adopt different policies on racial discrimination. It is precise, not vague, laws that can more effectively prevent your opponents doing what you don't want them to do. Hilary herself points out the irony of states rightists asking for a bill of rights to protect states' rights, but this is just another example of just how pliable bills of rights can be in the service of diverse ends and interest groups.

At any rate, the main point here is that the centrist tendencies of Federal bills of rights is an important constitutional issue that can be separated from the racist motivations common at the time and still to an extent with us today, although currently expressed more at the national than at the state level of politics. Indeed I do not believe that it is remotely plausible to say that racialism or slavery has been more effectively curbed through judicial review on the basis of bills of rights than through political change and good racial discrimination legislation. We should not therefore slur hostility to bills of rights generally with the taint of racism. Indeed, as Hilary's narrative makes clear, states rightists' opposition to bills of rights continued after the racial issue had subsided.

But there is fascinating material here assessing the merits of federal systems, and it is important to confront it. Especially as, again, Hilary points out: if there are problems with constitutionalising vaguely worded human rights, there are similar democratic worries about what judiciaries can get up to with vaguely worded federal constitutions. On this problem we might note the alternative, unfortunately, perhaps, not available to us, of having a non-entrenched constitution, or, more feasible, making constitutions easier to amend.

WARRING CAMPS IN THE BILL OF RIGHTS DEBATE

I have already introduced Hilary's thesis that the dispute between the warring camps are 'essentially founded on mechanics' as to how best to promote human rights. This is an important conciliatory gesture as it has no hint of the common disparagement of bills of rights critics as being persons who are 'against human rights'. This disparagement certainly does get under the skin of bills of rights critics, especially those whose primary objection to bills of rights is based on a human rights argument, perhaps the most profound of all human rights arguments, stemming for respect for persons as autonomous and moral beings on which is based the political right of self-determination, and opposition to oppression and paternalism.

It is this human rights basis of the chief criticism of bills of rights that makes it difficult to agree entirely with Hilary that the disagreement between the two camps is merely one of means not ends, for this is to ignore what she elsewhere states to be the critics' main argument, namely that such bills undermine the attempt to approach as near as possible to equality of political rights.

Hilary may be correct that it is the right rather than the left, if we can still use these ideological terms, that is most consistently hostile to bills of rights in Australia, largely on the complacent grounds that there is nothing that needs fixing. Yet that is not I think a universal phenomenon, for, historically, opposition to strong judicial review at any rate depends to a large extent on the nature of the decisions that are being made at the time and who are being disadvantaged by them. There is certainly a history of ambivalence on the left, in part because there is a perceived danger in constitutionalising civil and political rights (especially if these are attributed to corporations and used to restrict associational labour rights) in case this should turn out to endanger social and economic rights. For those who fear corporate power as much as state power, the sort of bills of rights currently on offer are wanting.

I would just add another variable to the division into camps of the 'for and against', and that is the statistically significant higher preponderance of bills of rights advocates within law schools, particularly amongst constitutional and international lawyers. There are, of course, conspicuous exceptions, but it is interesting to speculate on this factor. Without in any way casting doubt on the sincerity and integrity of those involved, I would suggest that it is perhaps too easy for legal academics to overemphasise the efficacy and importance of legal solutions to political problems. Human rights lawyers are nurtured on a history of court room triumphs that are frequently presented without sufficient reference to the political movements that preceded them and the impact that such movements were, in any case having within the political process.[2] It is, of course, attractive for law students and their professors to see themselves in the vanguard of moral progress, and one would certainly want them to be so, but I think that their focus on the job should be more on working out what good clear effective human rights respecting legislation would look like, rather than manufacturing devices whereby judges should be seen as higher authorities on what constitutes human rights.

DIALOGUE

In the olive branch spirit, let's put all that aside for the moment, and take up Hilary's proposal to examine the issue as being, not about the allocation of power, but about what mechanisms best contribute to public debate about human rights. Parliaments, she notes, have no monopoly of wisdom on human rights. Others, including courts, should have their say. It's not that courts should decide such matters but they should have some input into the dialogue, together with legislatures, government and citizens. 'In my view' Hilary writes 'we should analyse the effect of bills of rights not in terms of win/loss but rather in terms of the contribution they can make to public discussion and dialogue about the values we want to promote in our society' (p42, Charlesworth, in this issue).

This would be a wholesale acceptance of the democratic case *against* bills of rights if it were carried through consistently. In a democracy everyone may have their say. It is the decision-making process that aims to institutionalise equality of decision-making power. My worry here is that the subsequent analysis is not so much about discussion as it is about decision-making. Indeed there is a recurring slippage between the two distinct phenomena, as is apparent when Hilary writes 'I will suggest below that the judiciary has no particular claim to monopolise *decisions* about human rights, but rather that it is an appropriate participant in *conversations* about human rights' (p45, Charlesworth, in this issue, emphasis added).

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[2] Gerard Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*? (1991); Neal Devins and Louis Fisher, *The Democratic Constitution* (2004).

It seems to me that these comments about dialogue slip in and out of dealing with three rather different phenomena, which I will label (1) 'discussion': standing for an impartial and ongoing debate about values, policies and rights, (2) 'dialogue': standing for argument and counter argument about such matters aimed at or requiring compromise or concluding a bargain, and (3) 'debate': standing for the exchange of ideas in the process of arriving at a decision amongst those who are charged with making a decision binding on themselves and others, such as electing governments and enacting legislation. Everyone will agree with Hilary that Parliaments (and indeed voters) have no exclusive role in *discussion* on human rights, or anything else for that matter, but this does not mean that Parliaments should have to compromise or bargain with courts, or give others power actually within the *decision-making* process, or that electors should have to reach deals, except with other electors, or subject themselves to the veto or restraint of non-elected persons.

Such points have been well made by scholars such as Leighton McDonald[3] and Janet Hiebert[4] who note that the term 'dialogue' is inappropriate where one party can thwart or override the other. I think that Hilary might agree, for she is careful to point out that her defence is only of a weak form of judicial review, amounting to no more than courts drawing Parliament's attention to the possibility that they might have got it wrong. Indeed I take her tendency to approve of Declarations of Incompatibility over creative interpretations that rewrite legislation to make it compatible with existing human rights law, to be a very important step towards accepting the democratic case against bills of rights. Declarations of Incompatibility, understood either as expressions of opinion about human rights, in either their legal or moral forms, may make a valuable contribution to discussion, albeit with a few unhappy side-effects when the matter is presented as the courts having greater authority with respect to human rights as distinct from human rights law. But liberal rewriting of statutes is fraught with danger for the democratic rule of law and does not foster either discussion or dialogue, although it could trigger a tit for tat process of counter amendment, creative interpretation and further amendment.

Some will argue that courts should not be sidetracked into political debate, as it distracts them from their core function and may rob them of the appearance of impartiality. Others will say that courts should have a say and they will not be taken seriuosly unless governments have to pay attention to what they say, and that means strong human rights judicial review of legislation. Hilary is, I think and hope, suggesting a compromise here by emphasising the role of Declarations of Incompatibility as prods rather than impediments. I might be reconciled to living with that, although I think it does unhelpfully legalise the discourse of human rights, thus masking the fact that there are significant moral disagreements about what the content of human rights law ought to be, disagreements that are politically more fundamental than the question of whether an Act is or is not compatible with existing human rights law. Nevertheless, I think we should look closer at other, less court-centred, ways of increasing the attention and respect that governments give to human rights discourse. I suggest how, later on in the paper.

However, this rather pleasing interpretation of Hilary's paper ignores its, to me, less attractive point that, because vague terms and liberal rewriting of statute laws are commonplace, and, in any case, democratically endorsed through statutory interpretation legislation, we should not be too worried by the creative interpretation and indeterminate language characteristic of statutory bills of rights. To which I proffer the short and no doubt well-worn responses that (1) the existence of a defect or disadvantage does not in itself legitimate it, (2) the difficulty of eliminating a defect or disadvantage altogether does not render pointless attempts to reduce it and (3) democracies can indeed make mistakes,

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[3] Leighton McDonald, 'Rights, "Dialogue" and Democratic Objections to Judicial Review' (2004) 32 F*ederal Law Review* 1.

[4] In Campbell, Goldsworthy and Stone, above n 1.

including abolishing themselves and diminishing their power, as with some statutory interpretation Acts. The fact that a decision is democratically made does not make it democratic in content. That my fellow citizens may vote me down does not mean that they are right and I am wrong, although it does impact on my political and legal obligations meantime.

INSTITUTIONAL CAPACITY

The main focus of Hilary's paper is on her refusal to accept that governments and legislatures are 'adequate to protect individual rights' (p42, Charlesworth, in this issue). She has some telling quotes to justify her assertion that some have alleged just that. The over-confident affirmations of an Owen Dixon or a Robert Menzies, and maybe a Robert Carr, are clearly unjustifiably complacent. For, while the great rights-triumphs of democratic assemblies are taken too much for granted, it is surely impossible to deny that the existing democratic process has often failed, particularly on those human rights issues that relate to long term and minority interests. But I think she should be more careful when it comes to lumping Daryl Williams and James Allan in the too complacent category, for the former only claims that legislatures limit (not eliminate) abuses of power and the latter expresses a preference for democratic decision-making without claiming that it is infallible.

Further I do not believe that the crucial question is whether or not legislatures sometimes violate human rights. Obviously they do. The question is, rather, what ought we to do about it. Here we are up against two related paradoxes. The 'paradox of politics' according to which we need governments, indeed we can't do without them, but they are by their very nature highly dangerous institutions, so that we don't only need them, we also need protection against them. And the 'paradox of democracy', whereby democracies are not democracies unless they are permitted to make decisions that undermine the reasons why it is only democracies that have the right to make such decisions. Democracy is the best protection against government, but how can we protect democracy against itself? What we need to do here is to distinguish identifying failures of democratic process from establishing claims that there is something better on offer. Unfortunately the same paradoxes apply to so many of the solutions that we might suggest.

If I can try to encapsulate the argument Hilary uses here and elsewhere it is: OK, representative democracy is very important and often works quite well, but it could be improved at the margins, so that when 'majorities', 'in the heat of the moment' or for some other reason, get it wrong, we should have some impartial and relatively enlightened judges applying some higher law to put the matter right. I will call this the 'long stop' argument.

She illustrates her case with *Al-Kateb v Goodwin*[5] (the case in which the High Court did not overrule the indefinite detention of rejected and stateless asylum seekers) which, it is implied, as McHugh J suggested, would have been decided otherwise had Australia had a bill of rights. It is tempting to counter such a (let us agree unfortunate) result purely in terms of outcome (rather than the quality of the reasoning), by pointing to the mass of pioneering and progressive human rights legislation, such as the universal franchise, the abolition of capital punishment, anti-discrimination legislation etc. True, Parliaments do not often debate issues explicitly in terms of human rights, but human rights issues and decisions are before them all the time and the terms of their debates are replete with human rights values.

[5] [2004] HCA 37.

However, this apparent counter evidence does not adequately answer Hilary's case for making minor improvements designed to make things a little better in extremis.[6]

Yet we do need to be clear about the logic of her argument here. Evidently it is not hard to find bill of rights based decisions of courts that are progressive in human rights terms, just as it is not hard to find equally regressive decisions of the same courts.[7] Equally we can find human rights based legislation that we like and some that we do not like. And again, we can identify ordinary legal decisions and ordinary legislation that we may see as violating or not violating our morally defined conceptions of human rights. But, what follows? Are we trying to see if legislatures get it right more often than courts, or vice versa? Are we intending to give more power to one rather than the other depending on the outcome of our research? The model we are being offered would seem to be that legislatures sometimes get it wrong and courts sometimes get it right. Is it enough to respond that it is sometimes the other way round? Are we being led into believing, on the basis of these generally inconclusive enquiries, that when legislatures get it wrong, it is just then that courts get it right, at least if they have a bill of right to hand? And does this happen more often than legislatures getting it right, and judges getting it wrong in their subsequent interventions?

There do seem to be major obscurities in the nature and logic of this debate, quite apart from the fact that it is purely outcome-based and ignores the dimension of which institution has legitimate authority (see above). Principally, I think the problem is that the sort of historical evidence on which Hilary relies has to, but fails to, show that courts intervene only, and usually correctly, when legislatures are in fact violating human rights.

A related and crucial problem with the identification of legislative horror stories and judicial triumphs, or vice versa, is that its methodology depends on having agreement about what is progressive and regressive in terms of human rights, and this is frequently highly disputable.[8] It is sometimes said this is not the case with the obvious violations of human rights that are picked up by courts. However, in practice courts become involved in moral issues at the frontiers of moral progress. Bills of rights that are accepted for 'long stop' reasons readily become the basis for reforms at the moral frontiers.[9] And what seems obvious to some (eg that due process takes precedence over zealous anti-terrorist measures,) seems much less obvious to other equally decent people. Moreover we aren't told that court-centred bill of rights mechanisms are to be confined to situations where the human rights answer is evident to all concerned except the legislature.

Finally, this debate takes no account of the collateral damage of encouraging us to assess the outcome of cases by our opinions of the desirability of the result rather than the appropriateness of the reasoning, and actually or seemingly passing the buck on human rights from parliaments to courts. Even if it is not intended, this is in practice the effect of high profile human rights cases.[10] And, no wonder, if a principal argument for bills of rights is that parliaments are less suited than courts to making human rights decisions. And this seems to be at the heart of Hilary's case.

So, remaining within the parameters set by Hilary, of choosing between different mechanisms for protecting and furthering human rights, I think we should be looking for other ways of improving government performance than court-centred bills of rights. Human rights cannot be sustainably protected and advanced without broad support from the

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[6] For a powerful critique of the reasoning adopted by the dissenting minority judges see James Allan, '"Do the Right Thing" Judging? The High Court of Australia in *Al-Kateb*' (2005) 24 *University of Queensland Law Journal* 1.

[7] See James Allan, 'Portia, Bassanio or Dick the Burcher? Constraining Judges in the Twenty-First Century' (2006) 17 *Kings College Law Journal* 1.

[8] See Jeremy Waldron, *Law and Disagreement* (1999).

[9] Tom Campbell, 'Human Rights: A Culture of Controversy' (1999) 26 *Journal of Law and Society* 6.

[10] Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2001).

electorate and the full accountability of Parliament to the electorate on such matters. What appears a neat solution to the problems of democracy becomes a short-term measure that offers false hope, and the danger of arriving at something rather worse.

Hilary's conviction on this matter seems to rest on her perception that democracy is incurably utilitarian with respect to the selfish motivation of voters and the vulnerability of voting minorities to the exploitative power of voting majorities. There is truth in this to the extent that if the majority do not have the power to vote out governments then they will be exploited by powerful economic minorities. But the idea that people routinely do or always must vote on narrow short term self-interest is false, disrespectful, and, I believe, historically inaccurate.

So, yes, our current system, and perhaps any democratic system will be potentially defective with respect to the interests of minorities, but the cure must be to improve democracy not to diminish it. Moreover, democracy will not be improved by removing substantial and important areas, such as human rights, from its sphere of responsibility. Hilary will say that this is not the idea. It is more a sharing that is involved. Yet, if this sharing is in any degree a sharing of power, then to share is to dilute. Some outcomes may be win/win or lose/lose, but altering decision-making authority over a particular matter is a zero sum game with respect to the right to decide. We need very convincing evidence to override this factor, and I don't think we have been given it.

DEMOCRATIC BILLS OF RIGHTS

At this point, things are not looking so well for the olive branch approach, but all is not over yet. There is a sense in which Hilary's position and mine are comparable, or come down to a reasonable difference of factual opinion about which the evidence is not yet in. We are both looking for ways in which governments may be cajoled into taking human rights more seriously.

Hilary believes that the ACT Human Rights Act leaves the Legislative Assembly in charge, but enhances human rights generally without really damaging equality of political rights. She reaches this view, rather like the renegade Conor Gearty,[11] by saying that judges can be trusted to act with restraint and common sense, merely nudging governments in this way or that, and that the main work of such Human Rights Acts is their less visible impact on government bureaucracies and legislative process. True there are judges who haven't quite got into the spirit of the thing and go in for radical reinterpretation of legislation in a most undialogic manner. But let's not get hysterical about this. That will not be the norm. They will soon grow out of it. At least they will lift their act, once Conor Gearty, Hilary Charlesworth, and maybe even James Allan have got at them.

Meantime some damage is done to the legal fabric. Thus, Hilary regrets what happened when Higgins CJ of the ACT Supreme Court was confronted with an appeal from the ACT Magistrates Court under the *Domestic Violence and Protection Order Act 2001* (ACT).[12] That Act had been amended to give greater protection to threatened persons by turning an interim personal protection order (in other jurisdictions referred to as an 'AVO') into a final one, without a hearing, if the respondent who was not present when an interim order was made does not formally indicate an intention to contest the order 7 days before to the date set for the hearing. Higgins CJ decided that according to the principles of the Magna Carta and powers implied in the constitution relating to the judicial power of the ACT Supreme Court, the new law should be interpreted so as to empower but not, in such circumstances, to require the court to make a final order in the same terms as an interim order, thus opening

[11] Conor Gearty, *Principles of Human Rights Adjudication* (2004).
[12] *SI bhfn CC v KS bhnf IS* [2005] ACTSC 125.

the way for the exercise of the court's duty to give a respondent who turns up on the day a hearing, in accordance with the rules of natural justice, so that the interim order does not automatically become final after all. What was a clear legislative direction is essentially overridden through creative interpretation. Better, because more dialogic, Hilary argues, to make a Declaration of Incompatibility, thus inviting the ACT Legislative Assembly to have another go at protecting victims of violence without reducing the human rights of the alleged perpetrators.

I don't disagree with that in itself. As for Hilary, it is the interpretive power that really worries me about the UK style compromise on statutory bills of rights.[13] But we should look also at the legal disorder brought about by a HRA that seems to have prompted a judge in this case to hark back to what remains valid in the Magna Carta and indulge in finding very cleverly argued but clearly extreme implications to displace the evident meaning of the text. The effect is that the magistrate courts are left to sort out a legal mess, in which it is not even clear if the effect of the judgment is to require the magistrates court to set aside an order that automatically comes into effect, or whether no such order actually does come into effect. The result is not merely an undemocratic outcome but a situation that is thoroughly confusing to any citizen who wants guidance from the legislation in question. It may be a win for the right to be heard, although provisions such as the one overturned are quite common in civil matters, such as this is. On the other hand, if domestic and other violence is a human rights violation, then impeding efforts to reduce it has its own human rights implications.

So, having dispensed with creative judicial rewriting of statutes, and given only a cool welcome to Declarations of Incompatibility as less damaging than creative interpretation to the legal and democratic fabric, what alternative do I suggest, other than the status quo? Well, we might take up a version of the Father Brennan proposal,[14] and float the idea of a fully constitutional bill of rights whose function is to prod legislatures and governments towards a greater respect for human rights, to prompt better discourse about such rights and so achieve better human rights outcomes. This could be done without adopting new powers of judicial review and encouraging free rein interpretation, using instead various mechanisms to encourage adoption of the constitutionally confirmed rights through constitutionally required procedures, including independent Parliamentary committee scrutiny,[15] ministerial Declarations of Compatibility, and giving an enhanced interpretive status to human rights legislation as a form of law that cannot be impliedly overruled.[16]

However that is my plan, not Hilary's, and it is Hilary's day not mine. It does enable me, however, to enter into the spirit of the occasion and signal a measure of agreement about the undemocratic tendencies of democracies and the need to do something about them, and in general enhance the moral dimension of politics. That may not put us in the same camp, but I hope that it does encourage discussion and debate rather than another of those depressing dialogues of the deaf.

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[13] Tom Campbell, 'Incorporation through Interpretation' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (2001).

[14] Frank Brennan, *Legislating Liberty: A Bill of Rights for Australia* (1998).

[15] Building on the work of David Kinley, 'Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead' (1999) 10 *Public Law Review* 52; Brian Horrigan, 'Improving Legislative Scrutiny of Proposed Laws' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights* (2006) 61-100; Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Process' (Legal Studies Research Paper No 124, Melbourne Law School, 2005).

[16] Tom Campbell, 'Human Rights Strategies: An Australian Alternative' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights* (2006) 319-41.