

*The Dignity of Rights**

CÉCILE FABRE†

1. *Introduction*

Jeremy Waldron's latest book, *Law and Disagreement*, shows, once again, that he is one of those theorists of rights who can wear several hats at the same time, those of a moral, political, and legal philosopher. Yet, Waldron's contribution to legal and political philosophy, as evidenced by this book, sets him apart from distinguished figures such as Joseph Raz and Ronald Dworkin. For although he agrees that rights are a fundamental ideal in political and legal discourse and has, indeed, spent most of his academic career analysing them with relentless intensity, he is very wary of any fetishistic attempt to constitutionalize them and thereby to remove them from the political fray. *Law and Disagreement's* central, and original, claim is that the existence, and persistence, of moral disagreements should constitute the starting point of any jurisprudential inquiry into the nature of law and of its authority. In the face of such disagreements, fundamental moral issues, and in particular issues concerning rights, should not be dealt with by judges; they should be addressed by legislators according to democratic procedures, for only laws thus enacted have authority. Thus, Waldron is concerned not with what he calls the first task of political philosophy, to wit, the task of delineating a conception of rights and justice, but with the second task, to wit, the task of defending the best principles for choosing between competing such conceptions.

All of the book's 13 chapters, bar the introductory one, first appeared as articles in various publications; they have been substantially rewritten for the purpose of this volume which, as a result, looks like a book rather than a collection of essays. They are organized into three parts. The first deals with the 'jurisprudence of legislation', and sheds light on the importance of institutional facts about legislatures for legislative practice and the authority of laws. The second part analyses the idea of disagreement in politics, via a study of John Rawls' *Political Liberalism* and Ronald Dworkin's *Law's Empire*, and a chapter on moral objectivity. The last part, for which the first two

* A review of Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999). I am grateful to Jeremy Horder, Aileen Kavanagh, Jacob Levy and Daniel McDermott for very helpful comments on earlier drafts of this article.

† Nuffield College, Oxford.

prepare the grounds, is a long argument against bills of rights and American-style judicial review.

This is very rich material indeed, to which it is difficult fully to do justice in a single article. I shall focus on what I take to be Waldron's main two arguments against bills of rights and in favour of democratic procedures.¹ The first one, deployed in Chapters 2 to 6, claims that democratic decision-making is the only procedure whose outcomes are authoritative in the face of disagreements about rights. The second one takes up Chapters 10 to 13, and claims that paying due respect to individuals as autonomous agents and right-bearers commits one to conferring on them the 'right of rights', to wit, the right to participate in debates and decisions about rights themselves.²

I shall argue in Sections 2 and 3 that neither argument is convincing. In particular, I shall cast doubt on the possibility of deciding which political procedures we should follow without appealing to what one thinks justice requires. Moreover, I shall argue in Section 4 that to conceive of individuals as autonomous and to confer on them rights which protect and promote their autonomy commits oneself to arguing that those rights should be constitutionalized and protected by the judiciary, although not necessarily along the lines of the American model. In doing so, I shall be led to refine my criticisms of Waldron's rejection of bills of rights.

2

Law and Disagreement rests on a central claim, which describes what Waldron calls the 'circumstances of politics'.³

There is a recognizable need for us to act in concert on various issues or to coordinate our behaviour in various areas with reference to a common framework, and . . . this need is not obviated by the fact that we disagree among ourselves as to what our common course of action or our common framework ought to be (7).⁴

And later: 'the point of the law is to enable us to act *in the face of disagreement*' (7). The first part of the book is given over to answering the following question. Let us assume, following Raz, that an outcome is binding if citizens fare better if they accept it than if they follow their own judgment. In the face of disagreements about rights, which political procedures deliver outcomes which can be considered as binding on citizens, some of whom will think that those outcomes are wrong?

¹ I thus prescind from discussing in detail his arguments on the interpretation of legislative texts and on legislators' intentions (Chapters 4 and 6) as well as his reading of the views of John Rawls and Ronald Dworkin on disagreement (Chapters 7 and 9, respectively). I choose to focus on his arguments regarding Bills of Rights and democracy because they constitute the backbone of his current intellectual enterprise.

² Waldron borrows the phrase 'the right of rights' from William Cobbett's *Advice to Young Men and (incidentally) to Young Women* (1829).

³ The phrase 'the circumstances of politics' echoes Rawls' 'the circumstances of justice', which refers to the background conditions, such as scarcity of resources, under which it is necessary to devise principles of justice.

⁴ Throughout this review, the numbers bracketed in the text are page references to *Law and Disagreement*.

Waldron's answer, in a nutshell, is that disagreements about rights cannot be satisfactorily resolved by entrenching rights in the constitution and by asking the judiciary to adjudicate them. For the point is precisely that we disagree about rights, and so the only political mechanism which has authority to settle those issues is one where all views are represented and confronted with one another, and where decisions are made by majority rule, that is, through a procedure which treats each view, each vote, equally. Issues of rights, in short, can only be settled by a large assembly through democratic procedures (51, 72, 85, 111–16, 136–8).

I am not convinced that to appeal to those procedures is actually the only way to handle disagreements. For a start, in federal systems, where the allocation of rights and duties as between various levels of decision-making is a constant source of conflict, it is doubtful that one can dispense with the judiciary as the final arbiter in such conflicts.⁵

Moreover, it is unclear why one cannot handle such disagreements by invoking one's understanding of what justice requires. Waldron is not a relativist, and as such does not think that one has any right one thinks one has. As he claims, 'rape is wrong even in societies where it is a common practice' (105). But if one allows for the possibility that someone may be wrong about his and other people's rights, why not argue that in so far as he is wrong, his understanding of rights should not prevail? Since it is the case that individuals do not have the right to have sexual intercourse with others without their consent, and conversely that they have the right to refuse sexual intercourse, there is no reason why one must resort to democratic procedures to settle disagreements between those who deny that rape is wrong and those who think it is. Or consider discrimination on grounds of race. Since it is wrong to turn down individuals for a job on the grounds that they belong to a particular race and as such must be presumed to be incompetent (as Waldron undoubtedly would claim), there is no reason why one cannot say to the advocate of racial discrimination that his views, although sincerely held, are so mistaken that we cannot allow them to have legal and political authority. In both cases, it does make sense to claim that the legislature should not be allowed to pass laws condoning rape and the kind of racial discrimination I have just described.

Waldron, I think, would reply that there are many cases where we cannot be so confident that our understanding of rights is the correct one. Positive discrimination (to wit, racial or gender discrimination on the grounds that it rectifies historical injustices) is a paradigmatic example of a conflict between positions neither of which can, *prima facie*, be dismissed as unreasonable. In such cases where we do not have easy access to the underlying truth about

⁵ I owe this point to David Miller.

rights, democratic procedures constitute a heuristic device whereby individuals settle what their rights and duties are.⁶

Waldron's line of argument calls for an account of the criteria whereby one can judge that an individual will do better by following Parliament's directives than by deciding for himself how he should act. Each citizen, or representative, brings his own view to the legislative table, has it confronted with everybody else's views, and in the process of doing so develops a view which is a synthesis of the views on offer. Sometimes, even though none of the participants develops such synthesis, the group as a group does (137–8). I find the legislative process as described by Waldron rather mysterious: it is not clear at all that such synthesis will always operate. For a start, to talk about that which emerges from the process of discussion and deliberation as a synthesis presupposes that the various competing views on offer can be merged into a coherent one. This clearly is not often the case. There is no way an irreducible proponent of abortion can reconcile his view with the Pro Life militants' claim that abortion in all its forms is an instance of murder. What is likely to emerge from the confrontation of those two views is not a synthesis of both, but rather a winner and a loser.

Assuming that the competing positions are not so diametrically opposed that they cannot yield a compromise, it is unclear that the compromise in question will always be one under which all citizens do better than under other outcomes (recall that the outcome in question can be considered as binding only if citizens do better under it than if they followed their own judgment), *and* one which can be said to constitute a *just* position. In a trivial sense, citizens do better by accepting a decision reached by the democratic majority—a decision which they have good reasons to think everybody else will accept as well—than they do by engaging in civil disobedience every time they think that *their* conception of rights and justice, and not that of the majority, is the right one. Any settlement is better than none.⁷ But it does not follow that any settlement reached through democratic procedures is always better, more likely to be just, than settlements reached through other procedures. Waldron does acknowledge that citizens may and will violate other people's rights, but does not attach to that point the importance it has. In fact, he simply says that 'although rights-bearers may on occasion be rights-violators, they are not themselves indifferent to that possibility' (258). Maybe not, but what about cases where they are, or where they conclude, *in bad faith*, that in voting for a given policy they are not, in fact, violating anyone's rights? Bills of rights, or so I shall argue in Section 4, are precisely meant to deal with such cases.

⁶ As textual evidence for my reading of Waldron's views on democratic procedures, consider the following statements: 'To say that . . . justice is being subordinated to procedural values in political decision-making would be to beg the question of which of the positions competing for political support is to be counted as just' (161). And in addressing the claim that democratic procedures are instrumentally justified, justified, that is, only if they bring about just outcomes, Waldron writes that 'rights-instrumentalism seems to face the difficulty that it presupposes our possession of the truth about rights in designing an authoritative procedure whose point it is to settle that very issue' (253).

⁷ In some extreme situations, though, some people could do better by engaging in civil disobedience than by obeying the law: fugitive slaves might very well have held that view.

This is not to deny that proponents of bills of rights and judicial review very often present us with a naïve view of the judicial process. As Waldron rightly points out, Dworkin does not have much to say about the series of disastrously unjust (on Dworkin's own view) decisions handed down by the US Supreme Court in the first 30 years of the last century. Having said that, the point of a bill of rights protected by the judiciary is precisely to offer safeguards against mistakes committed by the majority, in cases where those mistakes can adversely and very seriously affect people's chances for a decent life. They offer a second chance to people who think that their rights have been violated to put their case forward to an independent institution such as the judiciary—independent in the sense that it is not a party in the conflict between the claimant and the democratic majority. To be sure, that institution may and will reach wrong decisions; in cases where it does, in so far as it is the final decision-maker about rights, no institution will in turn protect us from its mistakes. However, one appeal procedure is better than none at all.

3

In this section, I want to come back to the right to political participation, the 'right of rights', the importance of which Waldron defends as follows: 'it is impossible . . . to think of a person as a right-bearer and not think of him as someone who has the sort of capacity that is required to figure out what rights he has' (251). In short, if one thinks that people are autonomous and responsible and if one confers rights on them for those reasons, one must confer on them the right to participate in political decision-making, including in decisions concerning rights themselves. If we take people seriously we have to take seriously what they have to say about their rights.

Now, if, as Waldron says, citizens disagree about important issues, there is no reason to doubt that they will also disagree about those very procedures which are meant to settle disputes about substantive issues. They are likely to disagree, that is, about three issues: (a) whether the best way to arrive at justice is through a set of political procedures or independently of any such procedure, by argument alone; (b) whether the right to political participation has pre-eminence over other rights, so that procedures in which it is pivotal should be used to solve issues about those other rights; (c) the modalities of the right to political participation itself. For example, should women and ethnic groups be given special representation rights? Should citizens be given the opportunity to settle important issues by referendums?

The latter question is actually quite crucial. Waldron does not draw a distinction between citizens and their representatives, between direct and indirect democracy: 'a representative's claim to respect is in large measure a function of his constituents' claims to respect; ignoring him, or slighting or discounting his views, is a way of ignoring, slighting, or discounting *them*. So let us deal direct' (109). But it is not difficult to think of many cases where citizens on the one hand and

their representatives on the other hand will disagree about rights. For example, French MPs abolished capital punishment in 1981. There are good reasons to think that had citizens been given the opportunity to settle the issue by referendum, they would have decided against the abolition. Who, then, should have made the decision? And given that large democratic societies live under a representative regime, how should we decide when it is appropriate to make decisions about rights by referendum?

By which procedures, then, are citizens in turn going to settle *those* disagreements? Note that disagreements about (a) are deeper than disagreements about (b) since they pertain to the very nature of justice; as far as I can see, Waldron, who in any case, and as we have seen, is not very clear on that point, nowhere gives any guidance as to how they should be solved.

Disagreements about (b) in turn are deeper than disagreements about (c), since they pertain to the very nature of the regime. To claim that citizens should solve them by resorting to democratic means presupposes that they agree that democracy is the best regime. And yet, imagine that some citizens in the polity think that disagreements about rights can only be settled by a good understanding of God's law. It is quite plausible that they would invest priests, who by training and vocation are thought to be in the best position to understand God, with the authority to settle those disagreements. How is that conflict between the religious and the secular to be solved? In the light of recent events in the tumultuous political and legal history of North Africa and the Middle East, this is not merely an academic question.⁸ Disagreements of type (c) pose the same problem. To say that in a country where only men vote, men should decide whether women should vote, implies that the procedure whereby men only vote is the right procedure; but that is exactly the problem we seek to solve.

In sum, to appeal to democracy and the right to participation in cases where those very values are at issue is question-begging. This is a familiar charge indeed, which Waldron unsatisfactorily seeks to rebut, in two steps (298–301): (1) it does not follow from the fact that the majority does not have the right to settle an issue pertaining to democracy itself that another institution, for example, the judiciary, has the right to do so; (2) there are compelling reasons for solving those issues by majority rule in the legislature instead of resorting to results-driven mechanisms: (a) for people disagree about results anyway; and (b) democratic procedures are appealing from a pragmatic point of view.

Consider claim (1). Waldron concedes that 'a majority of men has no moral right to decide in the name of the whole community whether women shall have the right to vote' (299–300). Indeed not, for the very simple reason that as men are party to the conflict, for them to vote on that issue amounts to conferring on them the power to be judge in their own cause. Hence the claim, made by many, that, when there are such conflicts, another institution should settle them.

⁸ For example, secular Israelis are now demanding that marriages and divorces be handled by the state under democratically approved laws, rather than by Rabbinical courts under the *halacha*. Needless to say, orthodox Jews violently (sometimes literally) disagree.

Waldron rejects the principle *nemo iudex in sua causa* for two reasons. First, 'such decisions will inevitably be made by persons whose own rights are affected by the decision' (297). Note that it is not always true, and that in any case, even if it is, those persons are asked to reason in their official capacity, as members of that institution, not as persons whose rights are at stake. A judge who has to decide whether, on the basis of the constitution, women should have the right to vote, is constrained by the constitution, rules of interpretation, past jurisprudence etc. None of these considerations apply to citizens and their representatives.

Secondly, one cannot really invoke that principle 'in a situation where the community as a whole is attempting to resolve some issue concerning the rights of *all* the members of the community and attempting to resolve it on the basis of equal participation' (297). The last clause is problematic in those cases where what is at issue is precisely whether equal participation obtains. Setting that aside, it is misleading to aver that any debate about rights is a debate about rights *all* members have. When the legislature decides whether homosexuals should be granted all the rights heterosexuals have, they are discussing rights for *one* group of the population, to wit homosexuals. To deny that is to overlook the fact that serious conflicts are at stake between the majority and the minority and to paint a picture of a far more unified society than is warranted.

Suppose that I am wrong, and that claim (1) is valid. What about claim (2)? It says that, although one can question the legitimacy of using any procedure to make decisions pertaining to democracy, one should make such decisions through democratic procedures and not through result-driven procedures, on the grounds that people disagree about the results that are to be delivered by procedures. But, as we have seen, people do disagree about procedures themselves, so what reason is there to think that those disagreements are less problematic than disagreements about results?

Waldron, at this stage, appeals to pragmatism: we need a decision-making procedure, we happen to use majoritarian rules, so we might as well keep using them, 'without investing it with democratic legitimacy in any particularly question-begging way' (300). This does not amount to *privileging* that procedure, it simply amounts to *using* it, 'as we are stuck with [it] for the time being' (301). I do not see how we can avoid investing that procedure with democratic legitimacy; if we cannot do so, does that mean that anyone can contest its outcomes, on the grounds that the procedure whereby they were arrived at is not authoritative? Nor do I see how we can be said not to privilege the procedure in question. To employ an example Waldron uses in a different context, suppose that proportional representation (PR) is the most democratic electoral system, that the UK Parliament is torn between proponents of PR and advocates of the current system: bills and drafts go back and forth, without coming to a vote. The Queen takes the matter into her own hands and decides that henceforth PR will be used. On Waldron's view as expounded at 300–1, the Queen should have left Parliament to decide, a Parliament elected under the first-past-the-post

system, on the grounds that this is after all the procedure we have. However, on grounds of pragmatism, there is no reason, in that instance, to claim that Parliament should have made the decision; in fact, there are reasons to endorse decision-making by the Queen, which solved a deadlock. Waldron cannot avoid appealing to moral considerations pertaining to the value of democracy in order to argue convincingly against the Queen's decision to pre-empt Parliament's decision. But by appealing to such moral considerations, Waldron would be vulnerable to the charge that he is in fact pre-empting the expression by citizens of their conflicting views on those moral considerations themselves. In other words, Waldron's answer to the second question of political philosophy presupposes, indeed cannot but presuppose, an answer to the first.

4

Waldron, as we have seen, denies that rights should be protected under the constitution by the judiciary, yet acknowledges that rights violations do occur, even if the citizenry acts in good faith and with civic spirit. He does not seem to have anything constructive to say about such violations. As I shall argue in this section, a commitment to the view that individuals have rights by virtue of being autonomous entails a commitment to the constitutionalization of some of those rights, *even though some members of one's polity may disagree with one's conception of rights*.⁹

On the interest-based view of rights, which I adopt and which Waldron, as I understand, endorses, to say that *P* has a moral right to *X* against *Y* means that an interest of *P* is important enough to hold *Y* under some moral duty to provide *P* with *X*, if *X* furthers that interest.¹⁰ It is not up to *Y* to decide whether he should do so. Note that interest-based moral rights are also powers, liberties, and immunities. The latter kind of right is particularly important in the present context. To say that *P* has a moral immunity with respect to *X* against *Y* means that *Y* is disabled from doing *X* or, as the case may be, from not doing *X*, to *P*.

If we are to take autonomy-protecting rights seriously, we must be committed to legalizing some of them, and to conceiving of them as rights we have not simply against private individuals but also against fellow citizens and representatives. Consider the first point. Simply to say that *P* has a moral right to freedom of speech, and thus that *Y* is under a moral duty not to silence him, without making any provision to ensure that *Y* performs that duty, is to fail to pay proper respect to the right in question.¹¹ To be sure, not all moral rights should be turned into legal rights. For example, if I promise to meet you at five o'clock, you have a right against me that I do so, but it would be absurd to seek to turn that right

⁹ The next four paragraphs are a very concise summary of Chapter 3 of my *Social Rights Under the Constitution* (2000).

¹⁰ The *locus classicus* for the definition of an interest-based right is J. Raz, *The Morality of Freedom* (1986) at 166.

¹¹ H. L. A. Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175 at 178. See also R. Martin, *A System of Rights* (1993) at 83.

into a legal right. However, some rights clearly should be legal rights, and in particular those rights which secure goods and freedoms without which we cannot hope to lead an autonomous life; rights, for example, to freedom of speech, freedom of association, minimum income etc.

Secondly, we have those moral rights not only against private individuals but also against citizens. To claim that *P* has a moral right to *X* against *Y* only if *Y* is a private individual, even though *Y* is in a position, as a citizen, to secure *X*, is to drive an arbitrary wedge between what people can and ought to do as private individuals and what they can and ought to do as citizens and representatives.¹² Note that as a citizen and representative one respects others' rights by refraining from enacting laws which violate them, or by enacting laws which secure goods demanded by them. To claim that *P* has a moral right against citizen *Y* that he grant him freedom of speech amounts to saying that *Y* should refrain to pass laws censoring *P*'s views.

If one is committed to the claims deployed in the last three paragraphs, one must be committed to the view that rights held against both private individuals and citizens and their representatives, and which are important enough to be turned into legal rights against private individuals, must also be turned into legal rights against citizens and their representatives. Simply saying that moral rights should be turned into legal rights is not enough, because it does not provide any legal guarantee that citizens and members of the legislature will respect those rights by refraining from enacting laws which violate them, or by enacting the laws necessary to implement them. But legal rights against citizens and representatives *are*, by definition, constitutional rights. The constitution, and more specifically the bill of rights, thus serve as such legal constraints on citizens and members of the legislature.

The foregoing argument works if it is true that a commitment to autonomy-protecting moral rights entails a commitment to legalizing those rights. Waldron actually disputes that it does, on the following grounds. To claim that *P* has a moral right to *X* does not entail that *P* (morally) ought to have a legal right to *X*; it only entails that the law ought to be such that *P* gets *X*. Waldron distinguishes (a) legal situations where there is 'an articulated legal rule or principle entitling *P* to *X*' (218), and (b) legal situations 'in which some official has been vested with discretion to determine on a case-by-case basis how best to distribute a limited stock of resources like *X* to applicants like *P*' (218). For example, if one thinks that homeless people have a right to shelter, one may think that they all have a legal right to get a place in a shelter. Or one may think that officials should decide who gets shelter on the basis of neediness, and so should be able,

¹² Here, I am touching upon the complex question of the relationship between private morality and public morality. My point is not that private morality constrains public morality and that it is possible to determine everything that the State cannot do simply by determining everything that private individuals cannot do. Rather, my claim is that private and public morality stem from the same source, that in some cases we forbid private individuals and the State from harming people on the same grounds. For points along those lines, see W. Nelson, *On Democracy* (1980) at 100 ff and T. Nagel, 'Ruthlessness in Public Life' in S. Hampshire (ed.), *Public and Private Morality* (1978).

for example, to set aside some places for special cases (219). In the latter case, the principle that people have a right to shelter is respected, without the right being turned into a legal right.

The first thing to note is that Waldron circumscribes legal situations of type (b) to moral rights to distributable resources: it is unclear how the right to freedom of speech and association, the right not to be tortured, and generally rights which ground duties of non-interference would fit in. If the only reason for denying that a moral right to *X* should be turned into a legal right is that it is better to allow for flexibility in distributing material resources of type *X*, then rights which secure non-material goods such as freedoms can be turned into legal rights.

Moreover, to claim that individuals have a moral right to shelter does not mean that shelter places should be allocated indiscriminately. On the contrary, given that resources are scarce, and assuming for the sake of argument that helping people according to their needs is a requirement of justice, one should confer on the homeless a right to a place in a shelter subject to places being available and provided that, if there are not enough places available for everybody, places should go to the neediest. I do not see why a moral right to shelter formulated along those lines cannot be turned into a legal right. Clearly, in any given shelter, the official in charge will have to make discretionary decisions. But the right to shelter does not simply ground duties on such officials to allocate places in the most just way. It also grounds duties on the government to provide for shelters in the first instance, and to define the conditions under which people can use them, as well as a duty on government officials that they respect those conditions when making decisions as to whom to take in. It is quite appropriate to seek to turn those moral duties into legal rights, and thus to grant individuals the right to seek redress in court should they think that their right to shelter has been violated. To be sure, not all arrangements such that people get *P* are legal arrangements. In certain societies, people may very well get *P* through the enforcement of well-entrenched customs backed by taboos.¹³ However, in societies ruled by laws, such arrangements ought to be legal, and enforced, as governments and courts will (mostly) do what the law asks them to do.¹⁴

I argued above that legal rights which we have against private individuals should be turned into legal rights against citizens and representatives, which amounts to turning them into constitutional rights. Waldron not only denies that moral rights should be turned into legal rights, he also denies, unsurprisingly, that legal rights should be turned into constitutional rights. Rights, once constitutionalized, are cast in certain words, certain phrases, which, as shown by the American experience, 'tend to take a life of their own, becoming the obsessive catchphrase for expressing everything one might want to say about the right in

¹³ See H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) at 16. Waldron actually refers to it on p. 218.

¹⁴ If legalizing the right will make the situation of the homeless worse then we have a good reason not to legalize it. But whether this is so or not cannot be decided *a priori*.

question' (220). By contrast, although the phraseology used in statutes is more specific and therefore more rigid than the phraseology of the constitution, it can be amended very easily by Parliament itself. In so far as our understanding of rights is likely to change over time, legislative statutes, Waldron claims, are a better textual locus for its expression than a constitution.

Waldron is correct that the clauses of a bill of rights cannot be changed easily, but the picture he draws of constitutional interpretation in America—that of a rarefied debate about the exact meaning of the words used in the text—is rather hasty. Even if he were right on that latter account, however, one could still point out that constitutional adjudication need not have such effect. Waldron, like so many legal scholars steeped in the American tradition, seems to overlook the fact that other ways of enforcing the constitution are possible. Judicial review on the American model is not the be all and end all of constitutional protection of rights. I have argued at length for that conclusion elsewhere, but let me elaborate a little.¹⁵

When drafting a constitution, constitution-makers face the following dilemma. On the one hand, if the constitution is too vague, it is of very little help to policy-makers and to the judiciary. On the other hand, if it is too specific, it runs the risk of becoming irrelevant and of denying some people the resources and freedoms to which they should have constitutional rights. I suggest that a good way to protect constitutional rights is to draft the bill of rights in such a way as to leave scope for innovation, and to entrust a monitoring body, for example, a Human Rights Commission, with the task of further delineating the scope of the government's obligations so as to take into account changing economic and social circumstances. For example, let us assume that everybody has a right to a minimum income. Such a right is understood as a right to the resources necessary to meet our basic needs, that is, the needs we have *qua* human beings, as well as those needs we have and which stem from the kind of society in which we live. Basic needs do not vary over time (we all need roughly the same quantity of food and liquids to survive) and the constitution can therefore specify them without running the risk of being obsolete. Socially determined needs, by contrast, should not be specified in the constitution. The latter should simply say that people should get the resources necessary for them to live a decent life given the kind of society that obtains. The role of the Human Rights Commission would be to assess what are these socially determined needs, and how much money people should have in order to meet both kinds of needs.

In adjudicating constitutional rights, the judiciary would be able to refer to the standards of compliance developed by the Human Rights Commission. Note, also, that in drafting policies, the government would be encouraged to cooperate with the Commission, so as to make sure that people's constitutional rights are not violated. Clearly, however, the Commission must be as independent as possible from the government. It should also include people from different walks

¹⁵ See my *Social Rights under the Constitution* (2000) ch 5.

of life: economists, jurists, representatives of the medical profession and of social workers' associations, of trade unions etc. Finally, it should have enough authority to request from the government that it submit regular reports on the steps taken to respect the bill of rights.¹⁶

The argument I have just deployed in favour of bills of rights is unlikely to convince a dedicated opponent of constitutional entrenchment. Waldron, after all, could argue against me that nothing I have said solves the problems stemming from the fact that whilst some citizens may agree with me, others are as likely to disagree. But my point is precisely that although not everybody will be convinced by the conception of rights enshrined in the constitution, one has to bite the bullet, and stand, in the face of others' disagreeing with us, for what is just. That is, one has to state what rights people have, as a matter of justice, and how those rights should be protected. Clearly, if a democratic majority is bent on violating rights, no legal or constitutional provision will hinder it: a bill of rights, if it is not to be useless, will have to be accepted by a democratic majority, if not on grounds of justice at least on grounds of expediency. However, if one thinks that autonomy is of crucial importance and that certain requirements, such as treating people in certain ways, can be *shown* to flow from it, that people, however genuinely, disagree about these requirements cannot invalidate the claim that it is just that they be enforced by way of a bill of rights.

5

Let me recapitulate. In this review article, I have expressed scepticism about Jeremy Waldron's rejection of bills of rights and, more generally, about his views on the authority of democratically enacted statutes, on the ways in which disagreements about rights amongst citizens should be solved, and, fundamentally, on how one should think of justice. Most importantly, I have denied that one can settle the question of which institution is best suited to handle questions of justice without appealing to one's view of what justice itself requires. But however strongly one might, quite fittingly, disagree with this book, its emphasis on that most neglected area of jurisprudence, to wit, legislation, and its exploration of issues which are relevant to moral, political, and legal philosophers alike, make it an invaluable contribution to the field.

¹⁶ What I call the Human Rights Commission is modelled on the Committee of Experts and the Conference Committee of the International Labour Organization, which monitor the extent to which member states comply with the various conventions of the ILO; it is also drawn on the Committee of Independent Experts, which monitors the implementation of the European Social Charter. Both bodies gather evidence on State performances, levels of social and economic development etc.