

PROBLEMA

Anuario de Filosofía y Teoría del Derecho 3

A LIVING TREE CONSTITUTIONALIST REPLIES<sup>1</sup>

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Never literary attempt was more unfortunate than my Treatise of Human Nature. It fell dead-born from the press, without reaching such distinction, as even to excite a murmur among the zealots.<sup>2</sup>

In 1777, David Hume published these now famous words. Hume's great disappointment was, of course, soon replaced by his equally great sense of satisfaction following the much better reception afforded his later work, *An Enquiry Concerning Human Understanding*.<sup>3</sup> While in no way wishing to compare myself to Hume, I do wish to express relief that my own humble efforts have landed me closer to the latter of Hume's two experiences than the former. It is an honour to have ones work receive the attention of such a fine group of fellow philosophers and colleagues. It is an absolute delight to encounter the level of care, attention and sympathy

<sup>1</sup> I would like to thank Brian Burge-Hendrix for organizing the panel session (IVR, Krakow, Poland, August, 2007) at which most of the papers discussed in this reply were first presented. I would also like to thank Imer Flores and Juan Vega for facilitating their publication in *Problema*.

<sup>2</sup> David Hume, *The Life of David Hume, Esq.: My Own Life* (1777), p. 2.

<sup>3</sup> David Hume, *A Treatise of Human Nature*, David Fate Norton, ed. (Oxford: Oxford University Press, 2006); *An Enquiry Concerning Human Understanding*, T. Beauchamp, ed. (Oxford: Oxford University Press, 2007).

thetic – but at the same time critical – understanding displayed in this fine collection of essays. Without exception, each author displays a combination of intellectual and professional virtues one too seldom encounters in academic exchanges: honesty and respect, combined with a thirst for understanding and a willingness to engage critically with an argument on its own terms. The result, in each case, is an attempt to understand and appreciate the perspective from which I tackle the various issues at play, while at the same time drawing attention to points of weakness, incompleteness and lack clarity in my book. Not only that. Each author goes on to offer constructive alternatives, not merely to the overall project and the picture I have attempted to paint, but to the particular lines of argument I pursue. The result is not only a better understanding of the relevant issues and my attempts to deal with them, but a clearer picture of the further questions my analysis commits me to addressing in subsequent work. To the authors I owe a great debt of gratitude. I will attempt, in what follows, to take some initial steps towards repaying that debt, and to do so in a manner that honours their fine example. As is usual with these kinds of things, I will be forced to focus on only a small number of the important issues raised, leaving aside many of the other fine points each author brings to our attention.

*Imer Flores*

Though no doubt indispensable, the use of metaphors and labels in philosophy is fraught with danger. Among the greatest of these dangers is misunderstanding of an author's intentions. Professor Flores' critique serves to illustrate this point well. Section IV of his insightful piece begins with the following observation: "From my point of view Waluchow's alternative [to what I call 'the standard view of Charters of Rights'] is very appealing, counting most of the

premises and conclusions.”<sup>4</sup> Flores goes on to add that he has “a small problem with one of the premises (one might even think that it is a conclusion in itself.” (54) And what is that problem? Let me quote him in full.

More precisely, the problem is with circumscribing the alternative to the common law methodology, which is characterized as a bottom-up one to meet the challenge that disagreement comes all the way down: suggesting that it is possible to revise Charter Rights by Judicial Review at the point of their application and to re-elaborate them all the way up as judge-made law. The approach echoes Hart’s to-the-centre moves – which resemble Aristotle’s middle term. Let me rephrase it: common law is revisable at the point of application whereas statutory law is not. Charter Rights, which resemble fixed statutory law in the sense that they are entrenched and written, require a flexible application similar to the one of common law. Hence, the common law bottom-up methodology appears to be the way out. As I said, it seems to be all the way up to face disagreement all the way down.

But this is not the case...[T]he idea of a purely common law constitutionalism is highly contestable [even in common law jurisdictions without written constitutions]. Anyway, in my opinion, it is absolutely not the case for an entrenched written one, in which legislators, including framers amenders or reformers, have a say: they have already said something and are entitled to say something else. (54-55)

So according to Professor Flores, my analysis, though instructive, is questionable on a number of fronts. (a) It ignores or, at the very least seriously underplays, the fact that written charters are *written*, and hence that their interpretation can not be completely “bottom-up.” As a consequence, (b) it ignores or seriously underplays the fact that the application and interpretation of written charters is a multi-party phenomenon. “[J]udges are not alone in this and space must remain open for legislators, including fram-

<sup>4</sup> P. 54 in this issue. Page numbers mentioned throughout are to this issue of *Problema*.

ers, amenders or reformers, as well as other legal officials and operators, such as lawyers and citizens, to play a key role in others stages of the political process.” (63) And finally, (c) it ignores the fact that most if not all civil law – that is, *non-common-law* – jurisdictions follow something rather like the methodology I encourage for the application and interpretation of written charters. So conceiving of and describing this methodology as common-law in nature is highly misleading at best.

These responses nicely illustrate the dangers of labeling to which I draw attention above. In labeling my approach to judicial review under a charter of rights “a common law theory,” I in no way meant to restrict its range to common law jurisdictions.<sup>5</sup> Nor did I mean to suggest a thoroughly “bottom-up” methodology – if that is meant to suggest that judges create constitutional law from scratch as they confront the individual cases they are called upon to decide and must pay no mind to the words chosen to express their charter’s moral commitments. As I repeatedly emphasize in the book – and as Professor Flores, to his credit, acknowledges on more than one occasion – what is on offer is “something like” the methodology historically employed by common law judges to deal with areas of law in which statutes are not the primary focus, e.g. Anglo-American tort law. But it is also one that attempts fully to account for the special role an entrenched, written charter plays in the jurisdictions I consider. I fully acknowledged then, as I fully acknowledge now, that there are important differences between Anglo-American tort law and modern charter-based constitutional law, between an area of law which has been developed largely by judges left to their own devices (but importantly subject to override by legislation, a superior source of law in all jurisdictions of which I am aware), and one in which a written instrument, of superior status, plays the starring role. So if bottom-up is meant to imply lack of

<sup>5</sup> Henceforth I will refer to the practice of judicial review under a charter or bill of rights as charter review.

restraint by binding, written instruments, then it would be correct to point out that charter adjudication neither is, nor can be, bottom-up in nature.<sup>6</sup>

But then I never meant any such thing. What I meant was the denial of a point of view which sees judges' active participation in the creation, application and development of constitutional charters as a threat to democracy, and which therefore recommends that charters be completely abandoned, or that we take an approach to their interpretation and application which completely ties judicial decisions under them to previously established (though largely illusory, I argue) "fixed points" – that is, points fixed by the prior decisions of some of the other actors Professor Flores mentions – framers and legislators. I used the phrase "bottom-up" to convey one of the ways in which the broad, abstract clauses of charters can, should be, and, I believe, often are developed or particularized on a case-by-case basis by judges deciding specific issues arising in specific cases. This is not to say, of course, that this development is completely at the whim of individual judges and their moral predilections. Charter rights can (and, I hazard to suggest, do) make reference to what I call a "community's constitutional morality" – a morality which serves as a touchstone for all their decisions. This constitutional morality is, I suggest, a complex of normative standards establishing rights against government which arises from a multitude of sources: e.g., moral judgments of community members, decisions taken by their legislative representatives, and the decisions of judges in constitutional cases. If this is at all correct, then a number of important consequences follow. First, a judge who decides a charter case is not necessarily creating new law from scratch, following her own moral lights – a consequence that might well threaten the democratic legitimacy of her decision. On the contrary, her decision, if responsibly taken, is based on views attributed to

<sup>6</sup> But then neither can most any other area of law either, including tort law. This is a point which cannot, unfortunately, be developed here.

the relevant community, as representing some of that community's fundamental moral commitments. Having said this, there is no denying that the content of constitutional morality is to a significant degree shaped by judges, that often their decisions do not merely respond to pre-existing constitutional morality but rather add to it, or change its content (a point to which I'll return very shortly). But if this is so – and I in no way wish to deny it – then it is equally crucial to stress that judges are not alone in this venture. As noted above, the content of a community's constitutional morality is determined by a host of factors. It is given shape by such things as social conventions and judgments, as well as by statutes and the particular political choices the latter represent.

As Raz and Honore point out, abstract morality seldom provides fully determinate guidance. On the contrary, it provides, a somewhat indeterminate “blueprint” which sometimes needs to be fleshed out, in particular contexts, by choices from within ranges of morally acceptable options set by abstract morality. In order to do this fleshing out we must, as Aquinas would have it, engage in “the determination of common notions,” notions like fairness, equality, justice, and democratic. This insight, I argue, applies as much in relation to the political morality to which charters make reference as it does with respect to an individual's own personal morality. To be sure, when it comes to political morality, particularly the *constitutional* morality of a community – assuming, again, that it makes sense to speak in such terms – these determinations are sometimes made by judges in controversial charter cases. But they are not alone here. When a legislature decides to enact a law, its decision often reflects and results in the determination of a common notion of, say, fairness or justice. Different schemes of taxation can represent different choices concerning these values – choices each of which is consistent with the relevant common notion but none of which is uniquely determined. In making choices among these open

alternatives, legislators help to give shape to the constitutional morality particular to their community – a morality which, on the conception I defend in the book, is one to which a community commits itself when it adopts a charter of rights and which judges are called on to enforce and develop in their decisions. But even after the legislature has made its choice (and assuming that its choice lies within the boundaries set by the blueprint) we often run into yet further indeterminacy and a need for further determination, this time by the judges who adjudicate the cases in which such indeterminacies arise. Here creative choice – or what is normally called “judicial discretion” – may well be necessary. But it would be a mistake to see even these choices as completely unbridled. Judges who exercise the power to develop further the constitutional morality of their community are bound to do so in a way that respects, not only the blueprint, but also the broad range of prior commitments reflected in their community’s previous determinations. There is nothing in this picture which rules out the kind of multi-party partnership for which my book argues, and in calling the method I advocate ‘bottom up’ I certainly never meant to rule any of this out.

*Noel Struchiner & Fabio Schecaira*

Does the notion of “a community’s constitutional morality” to which I make reference above make sense? As we have just seen, my defence of charter review assumes that it does. Suppose, for a moment, that charters incorporate or tie the community and the courts to standards set by “Platonic morality,” that is the supposedly objective or true universal morality which philosophers, theologians and students in neighbourhood pubs have long attempted to discover or articulate in developing their philosophical theories. Suppose, in short, that charters render conformity with Platonic morality the touchstone of constitutional validity. Were this true, then charter critics would almost cer-

tainly be right: Charter review could not be defended in a modern constitutional democracy. Platonic morality is fraught with so much uncertainty, and disagreement, and, if Raz and Honore are correct, indeterminacy, that allowing judges to strike down the judgments of democratically accountable representatives on its basis would not only be politically dangerous, it would be insulting as well. It would give too much discretion on moral matters to judges. So a charter defender might be tempted to turn to something else instead, perhaps what the early legal positivists called *positive morality*, that is, the moral values, beliefs and principles widely endorsed and practiced by the citizens of a particular community. Suppose a constitutional charter is read as incorporating positive morality, so understood. Would we then be able to find the desired determinacy? If we could, then one major obstacle would be overcome. We would have a determinate body of norms capable of being discovered and applied in a manner which did not call upon the personal moral views of judges. We might also remove the sting of insult. If judges were simply enforcing the community's moral views, then there would be little reason to condemn the practice of judicial review as undemocratic, or as an implicit admission that we must rely on the moral judgments of our judicial superiors to determine what is right. Charter review would be based on norms established by the community not the courts. But alas, positive morality, particularly in multi-cultural, liberal democracies such as the ones which concern me in my book, seems just as fraught with uncertainty and disagreement as Platonic morality, thus bringing with it an inevitable contamination by the judge's own personal moral views. Not only that, positive morality often seems to be seriously misguided, especially when it comes to moral views involving the interests and rights of minorities and other disadvantaged groups. For example, it is arguable that, in many democratic jurisdictions, social practices which discriminate against women, homosexuals and aboriginals enjoy considerable popu-



lar support. Thus individuals in these communities seem to endorse moral norms and views which promote unfairness. Why, it might be asked, should judges, in deciding charter cases, be required to respect these erroneous norms and views? Why should moral error, as opposed to reason, fairness and justice, be the proper basis for legal decisions concerning fundamental rights and freedoms? Especially in light of the fact that offering legally enforced moral protections to vulnerable individuals and minorities is usually touted as one of the principal reasons to adopt a written charter of rights?

If the above two alternatives – Platonic and positive morality, so conceived – exhaust the possibilities, then one inclined to support charter review has a tough row to hoe. But what if there is a third option? What if instead we view charters as referencing the relevant community’s *constitutional morality* – that is, the morality presupposed in a community’s basic laws and political institutions, including, most importantly, its charter of rights? Do we not here have the best of both worlds? We have the conception of a morality that is crucially tied to the fundamental moral beliefs and commitments of the community. But it also one that allows us to make sense of a judicial argument the conclusion of which is that the community and/or its democratically chosen representatives have *made a mistake* on some relevant moral question. It permits a judge to argue that one of the latter’s political decisions, even one overtly based on an admittedly popular moral view or choice, is mistaken, as a matter of constitutional law, because it is deeply at odds with the community’s very own constitutional moral commitments.

So a good deal turns on the possibility of ascribing such a thing as a “constitutional morality” to a particular democratic community. Struchiner and Shecaira “worry” that I am “too confident about the guiding capacity” of what I describe as “the true morality of the community.” (136) They “are equally sceptical about the possibility of precedents

and word choice being capable of fixing roots.” (p. 136, note 2) On the basis of this very deep scepticism, and some reflections on the degree of dissensus that seems to be part and parcel of modern constitutional democracies, they are drawn to conclude that “the “Living Tree” has its roots fixed in quicksand.” (145) And if its rooted in quicksand, then my proposed alternative is sunk.

It is always difficult to respond to sceptics in ways which they will ultimately find satisfying. For any proposition or theory put forward, there will always be some ground, remote and implausible as it might seem, for doubt. And so one who offers up contentious propositions and arguments for consideration must always proceed with a good deal of caution and humility. This is especially true when it comes to philosophy – particularly its claims about the nature and demands of morality. So, how is all this relevant to our discussion here? It applies as follows. Among my principal aims in *A Common Law Theory of Judicial Review: The Living Tree* was to open up a new avenue of thought, to introduce what I somewhat immodestly called a “Copernican revolution” in our way of thinking about charters and possible practices of charter review under them. One can think of my argument as taking the following form. If the so-called “Standard View” of charters and the so-called “Standard Case” for charter review is all we have to go on, then we might just as well surrender to the critics. The critics’ case is probably insurmountable. But what if there is another option? What if we could make sense of something called a community’s constitutional morality, a set of norms which can be dealt with by judges in a manner similar to the ways in which common law judges have developed and applied a more or less coherent body of norms governing things like negligence and reasonable force? Would we then have a plausible alternative that might enable us to side step some of the critics’ most powerful objections? And would we not then have a conception of charter review that highlighted its potential for good? It was with these modest

ambitions in mind that I took some preliminary steps in the direction of introducing a theory about constitutional morality and its possible role in charter review. As noted in my response to Imer Flores, Platonic morality contains considerable indeterminacy. So too does positive morality, if by that we mean the result of simply trying to cobble together an amalgam of popular moral opinions widely held within a modern democratic community at any given time. Positive morality so conceived is, as Struchiner and Shecaira remind us, a hodgepodge of conflicting, incommensurate, and in many instances, ill-considered, moral opinions. So if the morality to which charters made reference were of either of these two varieties, then we *should* be sceptical about whether we could find enough to constrain the judges, and we *should* be calling for their complete abandonment. And my living tree would indeed be destined to sink. But constitutional morality as presented in my book is neither of these two things. As mentioned, it is the complex product of innumerable choices made by countless individuals over the course of a community's history. And importantly, it may not be consistent with all of the widely shared views held within the community on a particular issue like abortion or same-sex marriage. True, if we conducted a survey of people within a country like Canada, Mexico, Brazil or the United States, we would almost certainly find a lack of consensus about the morality of same-sex marriage. One might express this by saying either that people's moral views, even those which are very well considered, are radically different, or that the community's morality (if there is such a thing here) is split on the issue. But it wouldn't follow from this that the community's *constitutional morality* is likewise split, in the sense of being consistent with, or indeterminate with respect to the correctness of, any of those competing views. When the Canadian Supreme Court ruled in favour of same-sex marriage, they did not base their decision merely on a consensus of opinion among Canadians on the issue. It's a good thing too, because there obviously

was no such consensus, even after one had purged, from ones sample, views based on obviously false factual beliefs and logical inconsistencies. And perhaps most importantly for our purposes here, the Court did not base its decision on the community's morality conceived as something independent of its law, particularly its constitutional law. On the contrary, the Court drew upon a long line of prior decisions by Canadian courts *and legislatures*, each "determining," in some particular way, the norms of "equality" as these apply to Canadian gays and lesbians on issues such as pension benefits, adoption, and so on. When all these elements were added to the mix, what emerged was the conclusion that a denial of marriage to gays and lesbians violates Canada's constitutional morality. At least that's how the Court saw things, even if they and I were perhaps a bit injudicious in pressing what we took to be the obvious rectitude of this conclusion. And all of this is true despite the obvious fact that there was – and continues to be – widespread disagreement among reasonable, well-informed Canadians on the moral desirability of same-sex marriage.

So my ambitions were modest: to suggest how a community's constitutional morality, *if such a thing could be constructed*, could adequately constrain judges, despite an undeniable deep level of disagreement over the contentious issues raised by and within charter review. Of course I don't say nearly enough about *how* such a morality might be constructed and whether, on the assumption that it could be constructed, it would prove sufficiently determinate to root my living tree in something more stable than quicksand. These are definitely important questions yet to be fully answered.

*Natalie Stoljar*

It is to the credit of Struchiner and Shecaira that they bring home so forcefully the further directions in which my argument must be developed and the obstacles I face if I

am to overcome their deep scepticism. The same might be said of Professor Stoljar's superb piece. She too questions whether my constitutional morality will do the work I intend it to do. Following her beautifully clear and insightful summary of my main lines of argument, Stoljar goes on to outline what she takes to be a "tension" in my argument. On the one hand, I need a conception of constitutional morality which enables judge to apply it without engaging in first-order moral theorizing. I need such a conception if I am to answer the Critic's charge that charter review leaves a democratic citizenry hostage to the personal moral views of unaccountable judges. I particularly need a method by which a judges can, without engaging in first-order moral theorizing, dismiss, as "inauthentic," a popular moral view widely shared by the community or some significant portion of it, or a view officially endorsed in previous judicial and legislative decisions. In other words, what I need, if I am to answer the Critic, is a "descriptive model" of constitutional morality according to which it can (at least to a very significant extent) be discovered not created by judges when they apply it in charter review. On the other hand, as she also rightly points out, I am committed to a "constructive model" of constitutional morality which sees it as subject to the same kind of first-order, creative moral reasoning as one encounters in common-law reasoning. The old myth to the contrary, the common law neither is nor ever was merely waiting there to be "discovered" by judges. Rather the common law is the ever-changing product of judges' creative efforts in dealing with the many new cases that come before them. So if I want to claim that charter review follows a path "something like" (to echo Flores) common-law reasoning, then I am committed to a similarly constructive model of constitutional morality. And this leaves me vulnerable to charter critics and the claim that charter review is fundamentally at odds with democracy.

I think Stoljar is absolutely right to have detected this tension in my overall argument, and in subsequent work I

am going to have to work hard to overcome it. As noted in my reply to Struchiner and Shecaira, my aim in *A Common Law Theory of Judicial Review* was not to provide and defend a fully articulated conception of constitutional morality. Rather, it was the much humbler one of providing a preliminary thumbnail sketch of a different way of thinking about the moral norms involved in charters and charter review.<sup>7</sup> I wanted to show how, if constitutional morality were something like the morality I describe and briefly defend, we could fashion convincing responses to most of the Critic's many arguments against them, as well as chart a new course towards a deeper understanding of the possibilities for charter review within a constitutional democracy. What Stoljar's essay demonstrates is that the constitutional morality I want might be characterized as residing somewhere between Platonic morality, on the one hand, and positive morality on the other. It is rooted in the fundamental moral and legal commitments of a community, but not in such a way as to render it immune from the critical bite of Platonic morality, nor from the need for development and fleshing out *via* common law reasoning in the service of Thomistic determination. I will also, as she rightly points out, need to say something more about how constitutional morality as I conceive it differs (or not) from the constitutional morality constructed by Dworkin's super-judge, Hercules' constructive interpretations.<sup>8</sup>

### *Ken Himma*

Ken Himma raises a number of very interesting questions about the overall strategy I adopt in my book. Though sym-

<sup>7</sup> In defence, allow me shamelessly to quote myself: "I have herein provided little more than an admittedly sketchy account of a community's constitutional morality." (*A Common Law Theory of Judicial Review: The Living Tree*, 228).

<sup>8</sup> Hercules is Dworkin's super-human judge who makes an appearance in several of Dworkin's writings, most notably *Taking Rights Seriously* (London: Duckworth, 1977) and *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).

pathetic to my conclusion that charter review can play a legitimate role within a constitutional democracy, he wonders whether I have missed the target set by Waldron. First, my argument is flawed because Waldron's attack is mounted against a very strong US-style judicial review in which courts have the final say on whether the community's constitutional commitments have been violated by some government action or other, whereas I argue for alternative forms of judicial review, e.g., the Canadian one in which the Section 33 override permits a legislature to affirm the validity of a statute "notwithstanding" a court's ruling that said legislation stands in violation of Canada's Charter of Rights. But if I am to answer Waldron I must defend the stronger version of the practice, the one which involves a recognition of "judicial supremacy." (86-87) Second, my argument "does not fully engage the issue of whether the *right* to self-governance is violated by judicial review... Waluchow fully addresses only the... issue of whether allowing judicial review would result in some important moral good." (86, emphasis added) And finally, my argument fails because I have inaccurately characterized Waldron's argument as falling prey to what I called "Waldron's Cartesian Dilemma." Let me take each issue in turn.

When one first delves into issues surrounding the practice commonly referred to as "judicial review," or as I prefer to call it, "charter review," one is immediately struck by the extent to which discussion is driven by the American model. By this I mean that the vast majority of discussions of charter review assume that the practice embodies two cardinal features: fixed points of prior commitment coupled with judicial supremacy in determining the extent and application of said fixed points. As noted in the introduction to *A Common Law Theory of Judicial Review*, I wanted to make a clean break with this trend and introduce a conception of charters and charter review which did not embody those two features. My aim, in other words, was to demonstrate that there are sensible, defensible forms of the prac-

tice that are fully consistent with pretty much whatever conception of democracy one happens to choose, procedural, constitutional, or whatever. And this includes, I argued, conceptions of democracy which focus on the right to self-governance, because self-governance as *enhanced*, not threatened, by charter review.<sup>9</sup> To be self-governed, I argued, includes being true to what I called one's *authentic* moral commitments – something that charter review can be seen to encourage. So my aim was not to show that the so-called American model is consistent with democracy. My aim was to show that charter review can be of a form which departs from this model in crucial ways, and that in this particular form it is perfectly consistent with “the right to self-governance” *as that notion is properly construed*. Understood in this way, my argument in no way misses the mark.

Finally, we come to Waldron's Cartesian dilemma. Have I, as Professor Himma suggests, misconstrued the logic of Waldron's argument from disagreement? According to Himma “there is no claim being made [by Waldron] that everyone agrees on the right to participate. The claim is rather that *accepting* a right to participate [in political decisions], together with some uncontroversial claims, entails that judicial review violates the right to participate... [T]he meta-structure of the argument is that if you accept these premises (and supporting reasoning), you are committed to denying the legitimacy of judicial review.” (91) If this is the proper reading of Waldron's argument, then I have few qualms about accepting it, though once again I would insist that it is a mistake to assume that judicial review must be based on the so-called American model. But I do want to question the suggestion that my critique seeks to undermine the validity of Waldron's argument by challenging the

<sup>9</sup> Helping to establish this point was one of my main purposes in discussing cases involving consent to medical interventions, decisions to drive home drunk, and so on. Here, I argued, self-governance is a very complicated matter and does not necessarily demand respect for, or compliance with, expressed wishes.



claim that everyone agrees on the right to participate. In actual fact, I argued for the contrary, that very few people agree on this right. Most importantly, I suggested that most people dispute what this right entails for the various forms of governance which democratic ideals sanction as possibilities. As I and many others have noted, people disagree widely on what the right to participate entails for issues like party financing, referendums versus determination by legislative decision, majority versus voting unanimity rules, direct versus representative decision-making, and so on. But this is the same kind of disagreement one sees on virtually all of the issues arising in charter review. And so one cannot validly cite, as a strong, knock-down argument against charter review, the fact that people disagree on the questions dealt with in that process – which is exactly what Waldron at times seems to do. And the reason is fairly simple: the argument can be turned right around and aimed at Waldron’s premise concerning the fundamental right to participate and the argument(s) upon which it is based. And so if, despite widespread disagreement on its nature and justification, we were to base a decision to reject charter review on the right to participate, there appears to be no basis for denying others the right to base *their* decision to adopt charter review on equally contentious rights to things like equality, free expression and so on. At best, then, we have a saw-off. Either that, or a kind of “Cartesian dilemma” whereby the reasons cited by Waldron for rejection of views put forward by others can be turned round and applied to his own position. So the only way the right to participate could do its work – motivate a rejection of charter review based on it and the ideal of self-governance which serves as its justification – would be to suggest that these represent fundamental commitments upon which everyone agrees. And since there obviously is no such agreement, charter review would appear to stand unscathed. It stands or falls on the same footing as Waldron’s rejection of it.

*Tom Campbell*

Tom Campbell's excellent paper raises many of the issues discussed above. For example:

There remains the strong suspicion...that the task Waluchow sets for common law reasoning with respect to working out the true implications of shared common values (i) wrongly claims, at the level of theory, to be a matter of discovery not creation (ii) is in practice liable to result in the projection of the values and experience of a small unrepresentative social and professional elite." (27)

For reasons of economy, permit me simply to say that my responses to Struchiner, Shecaira and Stoljar pretty much apply here as well. I agree that more needs to be said about the notion of a community's constitutional morality, particularly about whether we can reasonably expect it to provide an adequate degree of determinate guidance to judges. But I have yet to see sufficient reason to abandon my "rather optimistic perspective" (20) on these questions. Instead of belabouring these points further, however, I would like to consider the intriguing alternative proposed by Campbell in his concluding section.

Campbell rightly notes that the plausibility of my "model of constitutional reasoning changes with the context and issues to which it is applied." (32) For instance, in political systems incorporating the features of strong judicial review traditionally associated with the American model - *i.e.* (i) the relevant moral provisions are very broadly or abstractly stated; (ii) constitutional amendment is extremely difficult to bring about - *i.e.* the constitution is deeply entrenched; and (iii) judges pretty much have "the final say" in determining the content of the abstract moral provisions of their entrenched constitution - the case for common law constitutionalism becomes difficult to sustain. On the other hand, "In constitutional contexts where constitutional change, either by statute, referendum or more elaborate

mechanisms, is a common and accepted phenomenon, some of the democratic deficits of [my alternative] model do not apply.” (33) This is particularly so “where there is a democratic system which assumes the propriety of legislative review of common law decisions and, therefore, of [my] version of common law constitutionalism.” (*ibid.*) As an example, Campbell cites the notwithstanding clause of the Canadian Charter. If a system were to adopt some such override and, importantly, were there enough political will actually to use it, then “a judicial brief to be on the look-out for selfish majoritarianism, the vested interests of politicians, and dilutions of democratic rights, [would have] its attractions *provided the courts [did] not have the final say in such controversial matters.*” (33, emphasis added).

For reasons cited in my response to Himma, I pretty much agree with the thoughts outlined in the preceding paragraph. We are not necessarily wedded to the so-called American model of strong review and there are ways of forging meaningful, democratically respectable partnerships among the various parties that have a role or stake in charter review. So far so good. Campbell’s next step is to sketch one particularly intriguing form of partnership which, he believes, might well garner for us all the advantages we want without jeopardizing our democratic ideals. What if, he writes, “we view Charters and Bills of Rights as part of a political constitution which calls for human rights legislation that is clear and specific enough to be applied by courts without engaging in controversial moral debate...” (34) In such a set-up, “ordinary legislation could be interpreted as...subordinate to human rights legislation... unless the contrary is clearly and explicitly affirmed in the legislation in question.” (*Ibid.*)

On the standard models of charter review, we essentially have two types of object in play: (a) a charter and all the decisions taken to flesh out its abstractly stated moral requirements; and (c) a piece of legislation whose consistency

with the former is in question.<sup>10</sup> But with Campbell's model, we now appear to have a third, intermediate object in play: (b) human rights legislation which stands somewhere between (a) and (b), is both inspired by and intended to be a more concrete expression of (a), and is to be used by judges to test the acceptability (constitutionality?) of (c). The claimed virtues of (b) include its democratic pedigree – it is the product of legislative, not judicial, decision – and its specificity. The particular moral judgments about particular cases that help shape the community's constitutional morality, and which I argue judges are often in a better position than legislators to make, are now to be made by those self-same legislators when they enact their human rights legislation. We get the concrete, particular judgments we need, but in a way which provides them with the required democratic legitimacy. Space permits me from examining this intriguing option in the detail it clearly deserves. I will therefore have to rest content with a few, very brief observations.

It is not clear to me what role (a) – *i.e.* a charter and the decisions made under it – is to play in Campbell's proposed arrangement. Can it actually be used by courts directly to challenge level-(c) legislation? If it can, then one wonders whether the proposal introduces an unnecessary level of legislation (level-(b)) which merely duplicates or reiterates the various Thomistic determinations introduced by level-(c) legislation. Perhaps, the added value can be found in a second potential role for (a), namely, to stand in judgment of level-(b), human rights legislation. But one cannot help but wonder if this is enough to overcome some of the inherent disadvantages brought along with this option. For reasons articulated by Denise Reaume, and upon which I draw in defending living-tree charters, human rights legislation more often than not results in "pigeon-holing." To quote her

<sup>10</sup> As noted earlier, I have deliberately focused on charter review of legislation. But of course that process can take as its object virtually any political or legal decision.

once again, “With more than fifty years of experience in dealing with discrimination, we have... outgrown the method of law-making that consists of using the legislative machinery to enact successive new pigeonholes each time a new kind of fact situation arises that deserves protection... The phenomenon of discrimination...is not capable of being codified in precise terms of the sort that have characterized past legislative efforts.”<sup>11</sup> If Reaume is correct, as I think she is, what will be the result if the role of a level-(a) charter is to justify and stand in judgment of level-(b) human rights legislation? The result will presumably be continual amendment of the latter to account for all the new fact situations in which the relevant moral rights are at stake. That and further pigeonholing, the inevitable result of attempts to create and apply meaningful and effective level-(b) legislation. Unless, of course, the level-(b) legislation is expressed in such broad terms as to permit subsuming, without amendment, the new fact-situations which are bound to arise. But if that degree of non-specificity is in play, then level-(b) legislation adds no value to the process at all, in addition to what is already evident in the kind of charter review for which I argue in my book.

So introducing level-(b) legislation while permitting judges to employ their charter to assess level-(c) legislation directly seems to introduce no added value, while restricting such assessments to level-(b) legislation introduces the threat of pigeon-holing unless the moral categories it utilizes are so broad as to add nothing, once again, over and above what one already gets with a level-(a) charter. The only other option seems to be to deny judicial appeals to charters altogether. On this option, the charter would only serve as a symbolic vehicle upon which legislators draw to justify their choice of human rights legislation, and upon which other parties might draw to lobby for changes in the

<sup>11</sup> Denise Reaume, “Of Pigeonholes and Principles: A Reconsideration of Discrimination Law” 40 *Osgoode Hall L.J.* (2002), 113-14, quoted in *A Common Law Theory of Judicial Review: The Living Tree*, 205.

latter, as well as other forms of legislation. While in no way wishing to downplay the valuable, symbolic role of a community's charter,<sup>12</sup> I cannot help but wonder whether this is really enough. Because on this option, those whose charter rights have been compromised by legislative action, and who might have benefitted from a system in which charter review of the kind I defend is in effect, will likely be left with no comparable relief. They may, of course, have recourse to the level-(b) legislation in which Campbell sees so much promise. But like Reaume, I have to wonder whether, when it comes to the protection of fundamental rights of political morality, "we have outgrown [this] method of law-making" and whether we are far better off relying on living tree charters.

<sup>12</sup> Indeed, in my book I stress the importance of that role within a constitutional democracy. See *A Common Law Theory of Judicial Review: The Living Tree*, pp. 244-5.