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Legal Theory Semester 2, 2007

Question 2b

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Habermas's description of an 'internal relation' between human rights and popular sovereignty, along with other theorists understands of the ideals of democracy do indeed justify giving judges the power to review decisions of the legislature. History has shown us that the legislature do not always follow popular sovereignty. In such cases the existence of human rights can in fact support such abrogation by the legislature. How does this justify the power then going to the judiciary? I will argue that the judiciary can uphold or rights and review legislative action, as their power is granted through democracy itself, as is argued by Eisgruber. [good intro]

#### HABERMAS AND HIS EXPERIENCE

Habermas as a child of Nazi Germany experienced first hand the injustices that can be carried out by the legislature using the law as their own weapon against some of its people. This experience led Habermas to base his legal theory around the question of 'legitimate law'. [tick] His conclusions led to a strong argument for democracy with ideals of communicative rationality. These ideals being so important that such values of democracy should be entrenched. [tick] Habermas himself did not go so far as to say that entrenchment is necessary as there is ambiguity in this area [say more?] of his argument. [why?] The democrat in him stops him from exclusively claiming this.

However, human rights are certainly a way of protecting ourselves democratically. Opting for such protections help in the legitimation of our laws, as is the main concern of Habermas. [tick good]

## EISGRUBER AND THE STRONG ARGUMENT FOR JUDICIAL REVIEW

Even if Habermas's theory does not fully legitimate powers of JR against legislations encroachment of rights, Eisgruber manages to present a strong argument for why even unelected judges are justified in overruling decisions of the legislature which relates to rights.

Eisgruber bases his arguments around four aspects of judicial review (of which I'll discuss three)

### (1) Judges as disinterested and independent

[don't need to argue for why it's ok that judges review just whether contravention of rights by legislation is enough to warrant – unless your argument is that what warrants judicial review is the fact that judges are so able...?]

It is a traditional feature of the judiciary that they are to be disinterested and independent from the cases they decide. In fact there are strict mechanisms that prohibit judges from sitting on cases where they may have a personal interest.

This is a qualifying feature if one is to scrutinise the legislature. It is empirical fact that the legislatures don't always enact legislation that is at the will of those that they govern. [tick] In the past there have been cases where the legislature have pursued their own political interests. More importantly, the political climate itself often prevents the legislature from being independent and impartial on issues of individual rights.

Judges through their tenure and the tradition of the court as the independent arbiter justifies their power of JR in cases of potential violations of rights. [good] They do not have to worry about suffering political backlash, which puts them in a good position to review rights based legislation.

### (2) Judges need to give reasons for decisions

This procedure allows for disclosure. We see through judgments exactly the argument and thought process of the judges. These in turn can be re-interpreted and argued in different ways when another dispute arises.

In enacting legislation, ulterior motives of politics can be hidden by the legislature. The political motives of the party room may never come to light in Parliament.

This gives judiciary heavy burden in justifying their decisions. [tick]

### (3) Democratic Pedigree

Eisgruber argues that the judiciary is part of the democratic pedigree. They are only one of many institutions that are within the arms of government to allow for a broader spectrum of representation. Examples include Reserve Bank, Senate, institutions that are not majoritarian but aid in the representation of the people 'as a whole'.

Judges are appointed by the legislature in this way the democracy attached from people to the legislatures flows on to the judiciary.

This fits with Eisgruber's idea of democracy and his rejection of democracy as equalling majoritarianism. Government ought to represent a wider range of society.

This is also supported by Hogg, who claims that the dialogue between the judiciary and the legislature only work to enhance democracy.

I agree with Eisgruber, Habermas and Hogg that JR is justified and doesn't take away from popular sovereignty or the ideal of democracy, but is just, as argued above, another feature of representation. [tick]

### WALDRON'S CRITIQUE

Radical democrats such as Waldron do put strong arguments against the above proposition. Namely that JR takes away the inherent democratic power of participation. [treatment of Waldron a bit brief! Don't raise it if no time to discuss] Goldsworthy, however, in articulating the Canadian experience of its Charter of Rights and the operation (or in-operation) of s33 suggests that the people in fact trust the judiciary as they subscribe to its traditions of impartiality. Even with the power of participation and the legislatures which that power creates the people are still distrusting of its elected government, and are happy to defer to the other mechanisms of representative democracy such as the legislature.

This inherent mistrust, though strongly critiques by Waldron, seems to be a feature of liberal society. Empirical evidence from the past has shown that such mistrust is not unjustified. In this way, following from argument raised by Eisgruber, the independence as well as other features of the judiciary justify its power to review government action especially with relation to legislature's encroachment of individual rights. [good]

[Structurally fairly strong, good understanding of question and treatment of Habermas]