



ANU LAW
STUDENTS'
SOCIETY

LAWS2249
Legal Theory
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Question 3b

81/100

Entrenchment of Fundamental rights and Democracy

The constitutional entrenchment of democratic rights does not necessarily undermine the quality of democracy

Waldron argues that entrenchment inevitably leads to judicial revision of these rights in our changing society. He believes that entrenchment would effectively remove popular control. He argues that is undemocratic.

Eisgruber – argues that democracy is not undermined by entrenchment of fundamental rights, but rather it is enriched by giving rise to judicial review.

Limitations of participation

Waldron believes in diverse values/experiences in coming up with the best set of fundamental rights.

He believes that everyone should be able to participate in any policy decision making that takes place.

However this theory is flawed.

Susan Moller-okin suggests that sometimes these are discriminations within cultures instead of merely across cultures. She suggests that women are ‘hidden’ from the public sphere in some cultures, and this not given equal recognition.

She is therefore in favour of entrenching fundamental rights in order to uphold the rule of law.

Pragmatic Desires

Waldron fails to see the self-interested effects of parliament and the people. He believes that each view is made in ‘good faith’ and should be respected equally. However, this ‘sharing’ of fundamental values is not always possible (e.g.: abortion).

It is not possible to gather everyone together in a paddock to deliberate and vote on an issue in the case of a large nations.

Therefore, people's input is reduced to a mere vote. Waldron fails to see this when he suggests the input of wide experiences (people don't get to explain their vote).

In addition, politicians may not in a self-interested manner in order to uphold their careers when making decisions. This may lead to majoritarian control over minorities. Politicians have do desire to uphold the values of minorities.

Judicial Review (Dialogic model)

Eisgruber suggests a multi-institutional democracy were parliament makes legislation and the judiciary fundamental interests of the people.

This dialogic model is favourable.

If parliament were to be given both the jobs of making the fundamental values (by popular participation) and also the protection of these rights; they may feel the need to compromises the fundamental principles such as economic/environmental issues.

Judges on the other hand, have no interests in deciding in order to save their jobs. This means that minorities are not disadvantaged. They are able to make decisions on genuine moral principle (thus upholding the rule of law) due to the nature of their role:

Judges have life tenure:

This enables them to protect fundamental rights by eliminating desire to further their careers by deciding a majority favoured outcome.

Judges have public accountability:

The only professional interest of a judge is to uphold his/her reputation of being a fair decision-maker. Parliament is not required to give reasons for their decisions. However, judges are required to give lengthy accounts of their judgements.

This means that their reputation is at state if they put too much personal characteristics into their decisions.

Iris Marion Young is not in favour of entrenchment because she believes impartiality is impossible. She believes that it is not possible to separate a judge from their personal characteristics and upbringing.

However, it is to be noted that no authoritative institution is perfect. We just need to find the one that can best uphold the rule of law.

Parliament cannot make AND uphold fundamental rights; their job should be restricted to making them to their best. Judicial review is necessary in order to help uphold the interests of minorities (such as women who may be ‘hidden’ within cultures) where equal participation is not always possible in reality.

The judiciary is not subject to pragmatic demands and this is able to best uphold fundamental values.

Waldron’s obsession with participatory democracy is flawed.

Dialogic model preferred.

Marker’s Comments

A very good essay – clear and consistent . You introduce some interesting points. You give a good A/C of difference/opposing points in the debate. Perhaps mention the dialogic model in your intro – an important feature in of the question. Well done.