Clayton Comments

Richard Clayton QC

DOES THE HUMAN RIGHTS ACT NEED A PRINCIPLE OF JUDICIAL DEFERENCE[1]

Introduction

This question of how and to what extent the courts should defer to governmental decisions is critical to the long term impact of the all human rights instruments. The approach to be taken will inevitably be coloured by different domestic legal cultures and traditions. The activist approach to the Canadian Charter of Rights in part reflects a the role of the court as an umpire in a federal system which will strike down legislation because, for example, a province has usurped the federal jurisdiction to enact criminal legislation. In England, on the other hand, there is a strong tradition of deference based on the Dicean view of Parliamentary sovereignty and a *Wednesbury* test to assess a merits challenge.

But it is not surprising that the approach of the courts to judicial deference under the Human Rights Act is somewhat undeveloped. The Act was not preceded by a broad-based campaign arguing for constitutional transformation- as in Canada or South Africa. And the Government justified the incorporation of the Convention on very mundane grounds. In the White Paper preceding the Act,[2] particular stress was laid on the cost[3] and time taken[4] in waiting for adjudication from the European Court of Human Rights. Consequently, there has been very little public discussion of the respective roles of courts and Parliament before human rights litigation commenced.

Lord Hoffman has suggested that no need for principle of judicial deference in Pro-life

I shall argue

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[1] This article is based on discussions at seminars I gave at York University and the University of Toronto in 2002 which resulted in a paper given to the Cambridge University Public Law Discussion Group. I am grateful for their suggestions and for the comments of Frederic Reynold QC and Vickram Sacheva; the responsibility for errors and omissions remains my own.

[2] *Rights brought Home: The Human Rights Bill* (1997) Cm 3782

[3] In *Rights brought Home: The Human Rights Bill* (1997) Cm 3782 it is estimated that the average case costs £30,000: see para 1.14.

[4] The Council of Europe has said that it takes five years before a case is finally decided before the European Court or Council of Ministers: see Council of Europe *Protocol 11 to the European Convention on Human Rights and Explanatory Report* May 1994 (H (94 5) 19 para 21).

The constitutional status of the Human Rights Act

The Human Rights Act is rightly regarded as a constitutional statute.[5] English law has traditionally had some difficulty in defining what is meant by constitutional.

As a Canadian writer observed:[6]

> "for the American anything unconstitutional is illegal, however it may seem: for the British anything constitutional is wrong however, legal it may be."

However, In *Thoburn v Sunderland City Council* [2002] 3 WLR 247 Laws LJ at para 62 defined a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.

The HRA can be properly described as a constitutional legislation in at least two senses. First, it permits the English court to review the compatibility of legislation with Convention rights when construing it under s 3 of the Act. Secondly, s 3(2) appears to displace the doctrine of implied repeal.[7]

The constitutional status of the HRA mandates an intensive standard of review because (as Lord Hope emphasised in *Kebeline*), the courts must give a broad and generous interpretation of the Act.

The scope of the principle of deference

It is important to distinguish between the different areas where deference might have a role to play.

It is worth differentiating applying the provisions of the HRA itself and arguments concerning the scope of Convention rights. The idea of deferring to Parliament affects at least two questions: first, whether the interpretative obligation is triggered at all and, if so, whether it is appropriate to order a declaration of incompability or whether a s 3 interpretation will suffice.

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[5] See eg *Brown v Stott* [2001] 2 WLR 817, per Lord Bingham at 835; and per Lord Steyn at 839; *R v Offen* [2001] 1 WLR 253, 275 per Lord Woolf CJ; *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277, 297 per Lord Steyn.

[6] JRB Mallory *The Structure of Canadian Government* (5th Ed, University of London Press, 1958) 36 quoted in A Bradley and K Ewing Constitutional and Administrative Law (12th Ed, Longmans, 1987)0 27.

[7] See generallly, Clayton and Tomlinson at paras 4.33, 4.34.

In *R v A(No 2)* Lord Steyn stressed that it will sometimes be necessary under section 3 to adopt an interpretation which is linguistically strained, not only by reading down the express language of the statute but by the implication of provisions. A declaration of incompatibility was a measure of last resort. It must be avoided unless it is plainly impossible to do so; if a *clear* limitation on Convention rights is stated *in terms*, such an impossibility will arise (see *R v Home Secretary, ex p Simms* [2000] 2 AC 115, 132 *per* Lord Hoffmann). In other words, regarded s 3 as a rule of priority.

Lord Hope emphasised in *R v A (No 2)*[8] s 3 is, in the final analysis, only a rule of interpretation.[9] It does not entitle the judges to act as legislators.[10] A s 3 construction will therefore be defeated by express language or by necessary implication if it is contradicted by a cardinal feature of the legislation in question.[11]

Nevertheless, the House of Lords in *R v A (No 2)* adopted a construction of s 3 which is very difficult to reconcile with these principles. The rape shield enacted by s 41 of the Youth Justice and Criminal Evidence Act severely restricts cross examination of a rape victim about her sexual conduct- although the cross examination might be relevant to a defence alleging consent. The House of Lords unanimously held that s 41 had to be read subject to s 3; and that the test of admitting such evidence is whether it was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial in breach of Article 6 of the Convention.[12]

The other area which requires consideration of deferring to Parl is whether or not to grant declaration of incompatibility. 99%

Secondly, it is very doubtful that deference has any role to play in relation to qualified rights such as the prohibition from inhuman treatment. In *R(T) v Secretary of State for the Home Department* the Court of Appeal returned to the question of what amounted to a breach of Article 3 following the decision in *R(Q) v Secretary of State for the Home Department* on the Nationality Asylum and Immigration Act 2003. The Court of Appeal said that the question of whether Article 3 had been violated was a mixed issue of fact and law which the Court of Appeal was a well placed to decide as the judge of first instance.[13]

Thirdly, and critically, the weight to be given the views of the legislature and executive are very important for proportionality. However, the ECtHR has always stressed that exceptions to the

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8 [2002] 1 AC 45 at para 108 (which he re-iterated in *R v Lambert* at 233, 234 para 79).

9 Contrast the views of Lord Steyn in *R v A (No 2)* [2002] 1 AC 45 at para 45 who seems to have taken the view that s 3 creates a rule of priority. However that analysis has been overtaken by *In Re S (Care Order: Implementation of Care Plan)* [2002] 2 AC 291.

10 See also in *Poplar Housing Association v Donoghue* [2001] QB 48.

11 *In Re S (Care Order: Implementation of Care Plan)* [2002] 2 AC 291.

12 [2002] 1 AC 45 at para 46 per Lord Steyn.

13 para 19.

right of respect for privacy or freedom of expression are to be construed narrowly and to be convincingly established.

The constitutional character of the HRA imposes a further duty. And Canadian jurisprudence is particularly pertinent because the English courts have adopted the Canadian test of proportionality.[14]

As McLachlin J in *RJR-McDonald v Canada (Attorney*-General)[15]:

> " care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded."

When Steyn analysed the proportionality principle in *Daly*, he also stressed that context was important. It is the context which requires consideration to be given to the broader issues when applying the structured proportionality test

A final area of significance is positive rights. Crucial issue is again proportionality but may need to consider wider issues Goodwin.

The discretionary area of judgment

The extent to which the courts must defer to Parliament or the executive has attracted controversy ever since the Human Rights Act was enacted. Initially some thought that the Strasbourg concept of the margin of appreciation might itself become domesticated under the HRA into a principle of judicial deference. However, the margin of appreciation reflects a principle of subsidiarity; as the EctHR emphasised in *Handyside v United Kingdom*:[16]

> "By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions."

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14 See *R(Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 per Lord Steyn at para 27 applying *De Freitas v Ministry of Agriculture* [1999] AC 69 at 80.

15 Fn 16 paras 133 to 137.

16 (1976) 1 EHRR 737 at para 49.

Instead it has been argued[17] that the legislature or courts have discretionary area of judgment and that the particular factors courts should take account of when considering whether to defer to the legislature or executive are:

- The nature of the right;
- The extent to which the issue involves consideration of social, economic or political factors;
- The extent to which the courts have a particular expertise eg in criminal matters;
- Whether the rights claimed have a high degree of constitutional protection eg political speech, access to the court or intimate aspects of private life.

That analysis was adopted by Lord Hope in *R v DPP ex p Kebeline* [18] where he said that:

> "difficult choices may need to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be in compatible with the Convention ... It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection. "

The idea of judicial deference

Although the courts have routinely applied a principle of judicial deference in HRA cases, there has been very little analysis of what is meant by it. It is often said that deference should be accorded to the decisions of the legislature where the context justifies it;[19] and the courts have taken this approach in many cases. Nevertheless, it is questionable whether a general theory of deference should be constructed which is so heavily based on one Canadian case[20] dealing with one element of the proportionality principle.[21] Nor is the idea of a free-standing general doctrine of deference compelling. A broad-brush

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17 D Pannick "Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment" [1998] PL 545

18 [2002] 2 AC 366, 381; and in relation to the right against self incrimination, see *Brown v Stott* [2001] 2 WLR 817, 834, 8355 per Lord Bingham; 842, 843 per Lord Steyn.

19 See, in particular, D Pannick "Principles of interpretation of Convention rights under the Human Rights Act and discretionary areas of judgment" [1998] PL 545; and see also, P Craig "The Courts, the Human Rights Act and Judicial Review" [2001] 117 LQR 589; R Edwards "Judicial Review under the Human Rights Act" [2002] 65 CLJ 859; M Chamberlain "Democracy and deference in resource allocation cases: a riposte to Lord Hoffmann" [2003] JR 12.

20 *Libman v A-G of Quebec* [1997] 3 SCR 569.

21 R Edwards "Judicial Review under the Human Rights Act" [2002] 65 CLJ 859.

principle of judicial deference reflects a formalist conception of the separation of powers and substitutes a generalised rule for a judgment which should be more closely attuned to the facts of a particular case and the nature and scope of the right in question.[22]

There is also an important discussion of the principle of judicial deference in the recent decision of the House of Lords in *Pro-life*. Lord Hoffmann[23] took the view that the word "deference" is inappropriate to describe a decision as to which branch of government in a particular instance has the decision-making power and what the limits of that legal power are. He stressed that the allocation by the courts of its decision-making powers to another branch of government is not a matter of courtesy or deference; but is based on recognised legal principles such as the principle that the independence of the courts is necessary for a proper decision of disputed legal rights or the principle that majority approval is necessary for a proper decision on policy or the allocations of resources.

In a recent lecture[24] Lord Hoffmann concluded that the separation of powers:

> "requires a degree of political awareness from judges, the ability to identify cases in which behind the formal structure of legal reasoning with which judges are so familiar, there lie questions of policy which are more appropriately decided by the democratically elected organs of the state. And it requires a degree of restraint on the part of judges, a willingness to stand back from the thickets of the law and accept that judges are not appointed to set the world to rights. However, slow, obtuse and maddening the democratic process may be, there is legitimacy about the decisions of elected institutions to which judges, however enlightened, can never lay claim."

Lord Hoffmann in fact appears to take the view that there are judicial no go areas where HRA issues are non justisiable- eg in resource allocation disputes or in national security *Rehman*. The idea that there are no go areas is difficult to justify[25] since the terms of the HRA are not defined or limited.

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22 See TRS Allan "Common law reason and the limits of judicial deference" in D Dyzenhaus (ed), *Baker: The Unity of Public Law?* (Hart Publishing, 2004)

23 *R(Pro-Life Alliance) v BBC* [2003] 2 WLR 1403 paras 75, 76; see further, E Barendt "Free Speech and abortion" [2003] PL 580; and J Jowell "Judicial deference: servility, civility or institutional capacity" [2003] PL 592.

24 'Separation of Powers' The COMBAR Lecture 2001, 23rd October 2001.

25 See M Hunt "Sovereignty's Blight: why contemporary public law needs a concept of 'due deference'" in N Bamforth and P Leyland *Public Law in a Multi-layered Constitution* (Hart Publishing, 2003).

Lord Walker in *Pro-Life* analysed the proportionality principle with the intensity appropriate to the circumstances of the case,[26] agreed with Lord Hoffmann that the word "deference" may not be the best word to use and concluded that any formulation of the deference principle as "one size fits all" would be impossible.[27]

In his dissenting judgment in *International Transport Roth GmbH v Secretary of State for the Home Department* [28] Laws LJ put forward a more principled analysis for assessing the degree to which judges should defer to the democratic powers of government; he suggested that:

- greater deference should be paid to an Act of Parliament than the decision of the executive or a subordinate measure;[29]
- there is more scope for deference where the Convention itself requires a balance to be struck and much less so where rights are expressed in unqualified terms;[30]
- greater deference will be due where the subject matter is peculiarly within the constitutional responsibility of democratic government (such as the defence of the realm[31] or immigration control) and less when it lies within the constitutional responsibility of the Court (such as the field of criminal justice);
- greater deference is due where the subject matter lies more readily within the actual or potential expertise of the democratic powers (such as governmental decisions in the area of macro-economic policy).[32]

The duty on a public authority to explain

Proportionality involves a procedural aspect. In order to justify interference with Convention rights, a public body must set out its stall.

Thus, in *RJR-McDonald v Canada (Attorney-Genera*l)[33] legislation had been enacted to prohibit (subject to specific exceptions) all advertising and the promotion of tobacco products unless its package included prescribed health warnings and a list of toxic constituents. The statute breached

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[26] Ibid, paras 136 to 139; and see *R(Bloggs 61) v Secretary of State for the Home Department* The Times, 4 July 2003 [2003] EWCA Civ 686 (CA).

[27] Ibid, para 144.

[28] [2002] 3 WLR 344 at paras 81 to 87.

[29] See Lord Woolf CJ in *R v Lambert* [2001] 2 WLR 211 para 16; and *Poplar Housing and Regeneration Community Association v Donoghue* [2002] QB 48 at para 69.

[30] See *R v DPP ex p Kebilene* [2002] 2 AC 326 at para 80 per Lord Hope

[31] See eg *Chandler v DPP* [1964] AC 763 at 790, 798 per Lord Reid and Viscount Radcliffe; *Marchiori v Enviromental Agency* [2002] EWCA Civ 3 at paras 31 to 38.

[32] See *R v Secretary of State for the Environment ex p Nottinghamshire CC* [1986] AC 240; *R v Secretary of State for the Environment ex p Hammersmith and Fulham LBC* [1991] 1 AC 521

[33] Fn 16 paras 133 to 137.

commercial freedom of speech and McLachlin J[34] had to consider the fact that did the government presented no evidence justifying its choice of a total ban[35]:

> "Instead, the Attorney General contented himself with the bland statement that a complete ban is justified because Parliament "had to balance competing interests" somehow. Its response to the minimal impairment argument is not evidence, but a simple assertion that Parliament has the right to set such limits as it chooses:
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> > ... Parliament was certainly entitled to conclude that nothing short of the means it designed would meet the public health objectives set out in s 3 of the [Act]. The Act is a justified preventative health measure. Parliament has the ability to set the exact limits of this measure. [original emphasis.]
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> .... Even on difficult social issues where the stakes are high, Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the Charter. The Constitution, as interpreted by the courts, determines those limits. Section 1 specifically stipulates that the infringement may not exceed what is reasonable and 'demonstrably justified in a free and democratic society', a test which embraces the requirement of minimal impairment, and places on the government the burden of demonstrating that Parliament has respected that limit. This the government has failed to do, notwithstanding that it had at least one study on the comparative effectiveness of a partial and complete ban. In the face of this omission, the fact that full bans have been imposed in certain other countries and the fact that opinions favouring total bans can be found, fall short of establishing minimal impairment."

Contrast the Court of Appeal in *Anufrijeva para 43*

> *"We find it hard to conceive, how*ever, of a situation in which the predicament of an individual will be such that Article 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage Article 3. Article 8 may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, Article 8 may require the provision of welfare support in a manner which enables family life to continue"

No evidence filed by Defendant (or indeed express application of proportionality principles: see below.

Applying a strict scrutiny test

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[34] Ibid, para 160.

[35] Ibid, para 167, 168.

The particular expertise of a public body may modify how the courts should tackle proportionality. In *A v Secretary of State for the Home Office*[36] the Court of Appeal looked at national security issues in the context of a human rights case. It confirmed that considerable deference should be shown to the Government's views on national security when examining its justification under Article 14 for detaining suspected international terrorists under the Anti-Terrorism Crime and Security Act 2001[37] despite the fact that it was discriminating against them on the ground of their nationality.

But the question of expertise must be critically tested. As Lord Hope observed in *R v Shayler* ([2002] 2 WLR 754 at para 61:

> "it is not enough to assert that the decision taken was a reasonable one. A close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone else who wishes to exercise them."

Bloggs 61. That approach has particular significance where the right to life is engaged. Mr Gold's conclusion that the Appellant would be provided with an appropriate cover story; that the Prison Service will make every effort to maintain the cover story; and that considerable responsibility for maintaining the cover will of necessity rest with the Appellant does not address or dispel Mr Ayer's concern that "to account for the last 18 months will be almost impossible …. If this man was an 'old lag', he might just be able to carry a move off, however, having discussed it with him, I fear he is a lamb to the slaughter."

Mr Gold does not meet the points made a Assistant Chief Probation Officer whose views command respect. The fact that Mr Gold's conclusion is not in point is not obviated by any principle which requires deference to Mr Gold's judgment.

It is therefore respectfully submitted that the issue is not one which depends on whether the decision is within the proper competence of Mr Gold: he simply sidesteps the points raised by Mr Ayers. Mr Gold's conclusion does not condescend to particulars and offers cold comfort to the Appellant. The absence of any refutation by Mr Gold means that there is no factual material which a Court can subject to close and penetrating examination so as to be satisfied that the material is anxiously scrutinised.

Respect for the Governmental view

[36] [2003] 2 WLR 564.

[37] The Act was passed following the terrorist attacks on the United States of America on 11 September 2001 and after the Government derogated from Article 5 of the Convention by making the Human Rights Act 1998 (Designated Derogation) Order 2001 SI 2001/3644.

By contrast with administrative decisions, a much more substantial justification is needed to explain why a court should find that the policy choices of Parliament amount to a breach of a Convention right.

In *Poplar Housing and Regeneration Community Association v Donoghue*[38] he expressed similar views concerning whether the grant of a possession order to a housing association on mandatory grounds[39] was a disproportionate interference with Article 8:

> "There is certainly room for conflicting views .... However, in considering whether Poplar can rely on Article 8(2), the Court has to pay considerable attention to the fact that Parliament intended when enacting s 21(4) of the 1988 Act to give preference to the needs of those dependent on social housing as a whole over those in the position of the defendant. The economic and other implications of any policy in this area are extremely complex and far-reaching. This is an area where, in our judgments, the courts must treat the decisions of Parliament as to what is the public interest with particular deference."

The need to defer to Parliament played an important role in *R v Lychniak*[40] where the House of Lords held that mandatory life sentences did not breach Articles 3 or 5. Lord Bingham took the view that:[41]

> " the House must note that section 1(1) of the Murder (Abolition of Death Penalty) Act 1965 represents the settled will of Parliament. Criticism of the subsection has been voiced in many expert and authoritative quarters over the years, and there have been numerous occasions on which Parliament could have amended it had it wished, but there has never been a majority of both Houses in favour of amendment.
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> The fact that section 1(1) represents the settled will of a democratic assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgment of a democratic assembly on how a particular social problem is best tackled.[42] It may be accepted that the mandatory life penalty for murder has a denunciatory value, expressing society's view of a crime which has long been regarded with peculiar abhorrence"

The principle of "democratic dialogue"

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38 [2002] QB 48, para 69.

39 Under the Housing Act 1988 as an assured shorthold tenancy let by a housing association.

40 [2002] 3 WLR 1842.

41 Ibid, para 14.

42 See *Brown v Stott* [2001] 2 WLR 817, 834-835, 842; *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, 854-855, 856, paras 33 and 38.

In 1997 Hogg and Bushell published an influential article[43] responding to the argument that the Canadian Charter was illegitimate because it was almost always undemocratic. They suggested that where a judicial decision is open to judicial reversal, modification or avoidance, then it is meaningful to regard the relationship between court and the legislative body as a dialogue.[44] In such a case the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there were not judicial decision. The legislative body is a position to devise a response which is properly respectful of the Charter values that have been identified by the Court, but which accomplish the social or economic objectives that the judicial decision has impeded. Hogg and Bushell surveyed 65 cases where the law was struck down under the Charter and found that 80% of the decisions generated a legislative response. They suggest that all legislative sequels constitute a dialogue although there may be room for debate about what exactly counts as dialogue.[45] Only rarely has been there been no legislative reaction to a court decision. One important example, however, was the failure to reach a political consensus when the Supreme Court[46] struck down the abortion laws: so that Canada is one of the very few countries where there is no regulation of even late term abortions

In fact, the concept itself requires close examination. The idea of dialogue as a description of institutional interaction between the courts and government must be differentiated from its role in setting prescriptive standards for courts when undertaking judicial review. Furthermore, the nature of the interface between the courts and government will obviously reflect the broader political culture and the larger institutional context.[47]

The Supreme Court of Canada and "democratic dialogue"

The Supreme Court has considered the implications of this principle in a number of cases.[48]

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43 P Hogg and A Bushell "The *Charter* dialogue between courts and legislatures (or perhaps the *Charter of Rights* isn't such a bad thing after all)" (1997) 35 Osgoode Hall LJ 75.

44 The idea of dialogue as an interplay between the courts and the legislature or people has been extensively canvassed by American scholars: see eg G Calabresa *A Common Law for the Age of Statutes* (Harvard University Press, 1982); M Perry The Constitution the Courts and *Human Rights: an inquiry into the legitimacy of constitutional policy making by the judiciary* (Yale University Press, 1982).

45 It has been argued that the figure for legislative reply is closer to 1/3 because legislative repeal of offending statutes and other forms of compliance not constitute democratic dialogue: see C Manfredi and J Kelly "Six Degrees of Dialogue: a response to Hogg and Bushell" (1999) 37 Osgoode Hall LJ 513; and see P Hogg and A Thornton "Reply to Six Dialogues" " (1999) 37 Osgoode Hall LJ 529.

46 *R v Morgantaler* [1988] SCR 30.

47 See L McDonald "New Directions in the Australian Bill of Rights debate" [2004] PL ??.

48 See eg *Vriend v Alberta* [1998] 1 SCR 493; *M v H* [1999] 2 SCR 3; *Corbiere v Canada* [1999] 2 SCR 203; *R v Mills* [1999] 3 SCR 668; *Little Sister Book v Canada* [2000] 2 SCR 1120; *R v Hall* [2002] SCC 64; *Sauve v Canada (No 2)* [2002] SCR 68.

In *Vriend v Alberta*[49] Cory J expressed the view that:

> Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.
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> This mutual respect is in some ways expressed in the provisions of our constitution ….
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> As I view the matter, the Charter has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some.[50] In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives.[51] By doing this, the legislature responds to the courts; hence the dialogue among the branches.
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> To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the Charter). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.
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> There is also another aspect of judicial review that promotes democratic values. Although a court's invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be.

The issue was thrown into stark relief in *Sauve v Canada (No 2)*[52] which concerned the rights to prisoners to vote. Originally, legislation prohibited all prisoners from voting in federal elections regardless of the length of their sentences; but the Supreme Court held in *Sauve v Canada (No*

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49 [1998] 1 SCR 493 paras 136 to 140.

50 P Hogg and A Bushell "The *Charter* dialogue between courts and legislatures (or perhaps the *Charter of Rights* isn't such a bad thing after all) (1997) 35 Osgoode Hall LJ 75.

51 F Hogg and A Bushell (above)

52 [2002] SCC 68

1)[53] that the restriction was an unjustified restriction on the right to vote. The statute was then amended to deny the vote to any prisoner who was serving a prison sentence of two or more years.

The Supreme Court again decided that the right to vote had been unjustifiably restricted by the new legislation. The majority judgment was given by McLachlin CJ rejected the suggestion that the case required deference because the court was dealing with philosophical, political or social consideration or democratic dialogue. He emphasised that the right to vote is fundamental and required not deference but careful examination; and "the healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of 'if at first you don't succeed, try again'".[54]

In his dissenting judgment Gonthier J remarked that:[55]

> "the heart of the dialogue metaphor is that neither the courts or Parliament hold a monopoly on the determination of values … when after a full and rigorous s 1 [proportionality] analysis, Parliament has satisfied the court that it has established a reasonable limit on a right … the dialogue ends; the court has had the last word and does not substitute Parliament's reasonable choice for its own."

It is respectfully submitted that the majority judgment is to be preferred. Where the right is afforded a very high degree of constitutional significance (like the right to vote or access to justice), then the legislative response to an earlier decision must be rigorously scrutinised.

Democratic dialogue vs judicial supremacism

The Bill of Rights gives the Supreme Court of the United States the final word on the issues that come before it. As the Supreme Court stressed in *Madison v Marbury*[56] "it is, emphatically, the province and duty of the judicial department, to say what the law is". Thus, the drafting of the First Amendment prohibits interference with freedom of expression in absolute terms[57] and a literal interpretation would permit no interference whatsoever.[58] A ruling of the Supreme Court

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53 [1993] 2 SCR 438; contrast the views under the Human Rights Act of the Divisional Court which decided in *R(Pearson) v Secretary of State for the Home Department* [2001] HRLR 31 that the restrictions on discretionary life prisoners on the right to vote were legitimate and proportionate.

54 [2002] SCC 68 at paras 8 to 18.

55 Above at para 106: see generally paras 104 to 108 where Gonthier J applies the dicta of Kennedy LJ in *R(Pearson) v Secretary of State for the Home Department* [2001] HRLR 31.

56 5 US (1 Cranch) 137 (1803).

57 The First Amendment states that "Congress shall make no law … abridging the freedom of speech, or of the press". There are, however, important implied limitations to free speech eg even political speech is curtailed if there is a clear and present danger of harm: see *Brandenberg v Ohio* 395 US 444 (1959).

58 The absolutist approach to the First Amendment is most closely associated with Black J eg in his dissenting judgment in *Ginsburg v United States* 383 US 463 (1966) he said:

cannot be superceded by legislation enacted by Congress (however controversial[59]): but requires a constitutional amendment.

The Canadian Charter was deliberately designed to avoid the American system of judicial supremacism. Charter rights were defined in relative rather than absolute terms and must satisfy the requirements of s 1[60] and, in particular, show that an interference with a right was proportionate.[61] Section 33 allows the federal Parliament or provincial legislature to make a declaration derogating from the Charter which ceases to have effect after 5 years.

Unlike the American Bill of Rights which is drafted to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities",[62] the Canadian Charter ensures that judicial decisions are not necessarily decisive if the elected government wishes to limit or override rights.

"Democratic dialogue" under the Human Rights Act

The Human Rights Act draws heavily on the Canadian Charter of Rights and Freedoms. The Labour Party was strongly influenced by the Charter when it decided to campaign for human rights legislation.[63] Like the Charter the Act permits derogation from Convention rights for a

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"I believe that the Federal Government is without power under the Constitution to put any burden on speech or expression (as distinguished from conduct)."

59 See eg *Dickerson v United States* 000 US 99-5525 (2000) where the Supreme Court ruled that Congress was not competent to overrule *Miranda v Arizona* 384 US 436. But see the trenchant dissent of Scalia J; and also his dissent in *Lawrence v Texas* 000 US 02-102 (2003) commenting on *Roe v Wade* 410 US 113 (1973).

60 S 1 states that "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The initial draft of s 1 was significantly looser and stated that the Charter guarantees rights "only to such reasonable limits are generally accepted in a free and democratic society with a parliamentary system of government"; for an interesting discussion of the drafting history of s 1, see L Weinrib "Canada's Charter of Rights: Paradigm Lost" *in Review of Constitutional Studies* (2002) Vol 6 No 2 (Alberta Law Review and Centre for Constitutional Studies).

61 The court applies four criteria (see *R v Oakes* 1986] 1 SCR 103 at 137, 138; see also *R v Chaulk* [1990] 3 SCR 1303): first, the objective which justifies limiting a Charter right must be of sufficient importance to warrant overriding a constitutionally protected right; secondly, the measures adopted must not be arbitrary, unfair or based on irrational considerations; thirdly, the means used should impair as little as possible the right in question; and finally, there must be proportionality both between the objective and the deleterious effects of the interference and between the deleterious and salutary effects of the interference (see *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835).

62 *West Virginia State Board v Barnette* 319 US 625 at 638 (1942) per Jackson J.

63 See eg Lord Irvine "The legal system and law reform under Labour" in D Bean (ed) *Law Reform for All* (Blackstone, 1996).

period of 5 years.[64] The doctrine of proportionality is fundamental to all qualified rights; and the English courts have adopted the Canadian test of proportionality.[65] The Act has been drafted so as to prevent courts having the final word in human rights litigation in much the same way as the Canadian Charter. In particular, the opportunity for dialogue between the courts and the legislature arises where the court is unable to construe legislation compatibly with Convention rights under s 3; and makes a declaration of incompatibility.

According respect to government as part of a process

Consequently, the principle of "democratic dialogue" is implicit in the structural features of the Act; and shows that any allegation of judicial supremacism (however accurate it may be in relation to the American Bill of Rights) is wide of the mark when leveled against the English model for human rights legislation.

Nevertheless, the idea of democratic dialogue provides a helpful starting point in formulating a theory of constitutional adjudication. It articulates the fact that a judicial pronouncement routinely prompts a response from those whose decision is being reviewed. The need to defer to Parliament or the executive is less compelling once it is acknowledged that the Human Rights Act envisages the other branches of government will have a second bite of the cherry.

Articulating justification

Proportionality a structured exercise Spelling out minimal impairment test

In *Libman v Quebec (Attorney*-General*)*[66] the applicants challenged the statutory regulation of financial contributions made to campaigns in relation to referenda in Quebec. The legislation restricted contributions to "regulated expenses" to national committees or to groups affiliated to national committees. It was, however, possible to make "unregulated expenses" up to a maximum amount of $600 for organising and holding the meeting.

The critical issue was the extent to which it was appropriate to defer to legislative choice[67]:

> "This Court has already pointed out on a number of occasions that in the social, economic and political spheres, where the legislature must reconcile competing interests in choosing

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64 S 16 of the Human Rights Act. The derogation from Article 5 of the Convention made under Human Rights Act 1998 (Designated Derogation) Order 2001 SI 2001/3644 was unsuccessfully challenged in *A v Secretary of State for the Home Department* [2003] 2 WLR 564

65 See *R(Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 per Lord Steyn at para 27 applying *De Freitas v Ministry of Agriculture* [1999] AC 69 at 80.

66 Fn 16.

67 Ibid at para 59 to 62.

> one policy among several that might be acceptable, the courts must accord great deference to the legislature's choice because it is in the best position to make such a choice. On the other hand, the courts will judge the legislature's choices more harshly in areas where the government plays the role of the 'singular antagonist of the individual' -- primarily in criminal matters -- owing to their expertise in these areas.[68] La Forest J's comment on the subject in *RJR-MacDonald* [69], is perfectly apposite:
>
> > 'Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups'
>
> ... The role of the Court is to determine whether the means chosen by the legislature to attain this highly laudable objective are reasonable, while according it a considerable degree of deference since the latter is in the best position to make such choices. As Wilson J stated in *Lavigne v Ontario Public Service Employees Union*[70], a failure to satisfy the minimal impairment test will be found only if there are measures 'clearly superior to the measures currently in use.'"

The Court then embarked on a careful analysis of the White Paper which set out the Government's objectives in enacting the legislation: to ensure that various factions in the referenda campaign had as equal choices as possible; to see that campaigns were based on personal financial contributions from voters rather than a handful of wealthy contributors and to guarantee that all the financial aspects of the campaign were made known to the public. It went on to conclude that the interference with freedom of expression did not meet the minimum impairment test: that the limitations on expenses were so restrictive that they amounted to a total ban and that there were alternative solutions which were consistent with the legislation's objectives which were far better than the statutory provision that had been enacted.

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[68] *Irwin Toy v Quebec (Attorney-General)* [1989] 1 SCR 927 at 993-94; *McKinney v. University of Guelph*, [1990] 3 SCR. 229 at 304-5; *Stoffman v. Vancouver General Hospital*, [1990] 3 SCR. 483, at 521; *RJR-MacDonald v Canada (Attorney-General)* Fn 16 at 279 and 331-32).

[69] Ibid at 277

[70] [1991] 2 SCR 211 at 296.

A prohibition on the publication or dissemination of opinion polls on the last three days of a federal election was challenged in *Thompson Newspapers v Canada (Attorney-General)*[71]. The Supreme Court decided that the legislation was a very crude way of guarding against the possible influence of inaccurate polls late in an election campaign by allowing a period of criticism and scrutiny immediately prior to election day. Bastarache J remarked that:

> "In the course of a contextual approach under s 1, the vulnerability of the group which the legislator seeks to protect, that group's own subjective fears or apprehension of harm, the inability to measure scientifically a particular harm, and the efficaciousness of a remedy, are all factors which the court must take into account in assessing whether a limit has been demonstrably justified according to the civil standard of proof .... Where the contextual factors indicate that the government has not established that the harm which it is seeking to prevent is widespread or significant, a deferential approach to the particular means chosen by the legislature to implement the legislative purpose is not warranted. In this case, [the statutory provision] is not narrowly tailored to its objective. The ban is overbroad because it prohibits in the final three days of an election campaign the publication and use by voters of all those polls which would meet the usual standards of accuracy. The ban is also underbroad because it may not adequately disabuse voters of an erroneous impression left by a poll which did not disclose its methodology to critics or the public. The obvious alternative was a mandatory disclosure of methodological information without a publication ban. Although such a provision would still leave the door open to inaccurate poll results published immediately prior to the election having some impact, that possibility would be significantly reduced both by virtue of the reader's initial access to those methodological data, and by the opportunity for rapid response by parties whose interests are prejudiced by the inaccurate poll. The failure to address or explain the reason for not adopting a significantly less intrusive measure which appears as effective as that actually adopted weighs heavily against the justifiability of [the statutory provision]. Finally, the experience of the international community is inconclusive."

Likewise need to spell out how factors affect application of proportionality principle.

In the important case of *R (Samaroo) v Home Secretary* (2001) UKHRR 1150 the Court of Appeal examined the ramifications of the *Daly* principles when assessing whether a decision to deport the claimant was a proportionate interference with the right of respect for family life. Dyson LJ took the view that what proportionality requires in any particular case will usually have to be considered in two stages:

• can the objective of the measure be achieved by means which are less interfering with an individual's rights? and

[71] [1998] 1 SCR 877.

• does the measure have an excessive or disproportionate effect on the interest of the affected individual?

Dyson LJ then stated that, when addressing this second issue, the task for the decision-maker is to strike a fair balance between the legitimate aim in question and the individual's Convention rights; and the function of the court is to decide whether this fair balance has been struck, recognising and allowing that the decision-maker has a discretionary area of judgment. The particular factors the court will consider when deciding whether to defer to the decision-maker's judgment will include:

• the nature of the right, that is, is it an unqualified or a qualified right;
• the extent to which the issue requires consideration of social, economic and political factors;
• the extent to which the court has a special expertise, for example, in criminal matters;
• where the rights have a high degree of constitutional protection such as freedom of expression and access to the courts.

Dyson LJ went on to hold that the court should give the Secretary of State a significant margin of discretion in assessing the proportionality of his decision to deport the claimant: the right to family life was not absolute or one which required high constitutional protection; the court did not have the expertise to judge how effective a deterrent is a policy of deporting foreign nationals convicted of serious drug offences once they had served their sentence; and the Court of Human Rights had on many occasions upheld deportations made against drug trafficking offences, even when they involved the most serious interferences with Article 8 rights. He concluded that it is not incumbent on the Secretary of State to *prove* that the withholding of a deportation order would seriously undermine his policy of deterring crime and disorder. Proof is not required. The justification must be 'convincingly established' and the court should consider the matter in a realistic manner, always keeping in mind that the decision-maker is entitled to a significant margin of discretion. The Secretary of State must show he has struck a fair balance; and the court will interfere if the weight accorded by the decision-maker to particular factors is unfair and unreasonable.

It is submitted that the *Samaroo* decision is unsatisfactory in a number of respects. First, Dyson LJ does not elaborate on his reasons for holding that the legitimate aim of deterring crime and disorder cannot be achieved by an alternative means which interferes less with Convention rights; or explain the justification for moving straight to the second stage of considering whether the interference with the claimant's right to family life was proportionate or excessive. In *R(Hirst) v Secretary of State for the Home Department* (2002) UKHRR 758 at paras 33 to 36 Elias J expresses the view that there is no room for a court to consider the principle that a right should be minimally impaired where the executive decide to remove it as a deliberate and considered response (such as denying the right to freedom of expression to a prisoner or deciding that deportation is the only appropriate response for a conviction for serious drug offences). However, this analysis is open to question. The fact that the executive has concluded that denying the essence of a right is appropriate is the *very* circumstance in which it may be appropriate for a court to consider

whether there is a *less* drastic means of accomplishing the objective in question. Furthermore, this approach is difficult to reconcile with the approach taken by the House of Lords in *R v Shayler* [2002] 2 WLR 754 (which is discussed below).

Constitutional vs institutional competence

Jowell

The fact that the court will acknowledge that the executive has special expertise which makes it better equipped to decide certain questions of fact (such as whether there is a genuine threat to national security) does not mean it should concede to the executive's views on the crunch constitutional question: whether, for example, the limitations on freedom of expression accords with the democratic requirements of constitutional review.[72]

Published: Judicial Review [2006] Judicial Review 109

[72] See J Jowell "Judicial deference: servility, civility or institutional capacity" [2003] PL 592.