Clayton Comments

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JUDICIAL DEFERENCE AND "DEMOCRATIC DIALOGUE": THE LEGITIMACY OF JUDICIAL INTERVENTION UNDER THE HUMAN RIGHTS ACT[1]

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The extent to which the courts should defer to Parliament when deciding cases under the Human Rights Act is inherently controversial. Some very public criticisms of the judiciary have been made by Government spokesmen and the press, particularly in relation to asylum claims.[3] Part of the problem is that so many Human Rights Act issues are open textured; and the scope for judicial intervention under the Act is therefore considerable. But the most serious difficulty is that the English courts have yet to articulate a developed approach towards judicial deference when considering human rights claims, although Lord Walker recently began that process in *R(Pro-Life Alliance) v BBC*.[4]

I shall argue that the constitutional nature of the Human Rights Act mandates an intensive standard of review by the courts. The implications of this sort of analysis for administrative decision making are relatively straightforward. More challenging are conflicts that arise where the courts examine the policy choices of the legislature.

The justification for an intensive standard of review calls for a constitutional theory of adjudication in Human Rights Act cases. And a rationale for a doctrine of strict scrutiny can be gleaned from developments concerning the Canadian Charter of Rights and Freedoms (which the Human Rights Act strongly resembles). Canadian scholars and courts have focused on the structural features of the Charter. They have contrasted the Charter's framework with that of

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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 Co-author *The Law of Human Rights* (Oxford University Press, 2000).

3 Eg the decision of Collins J in *R(Saadi) v Secretary of State for the Home Department* that the temporary detention of asylum seekers at Oakington reception centre to process their claims breached Article 5 [2001] EWHC Admin 670 reversed by the Court of Appeal at [2002] 1 WLR 356 and the House of Lords at [2002] 1 WLR 3131); the decision of the Special Immigration Commission in *A v Secretary of State for the Home Department* at [2002] HRLR 45 that the derogation from the Human Rights Act in the Anti-Terrorism Crime and Security Act breached Article 14 (reversed by the Court of Appeal at [2003] 2 WLR 564); the decision of Collins J in *R(Q) v Secretary of State for the Home Department* that the rejection of asylum claims on the ground that they were not made as soon as practicable under the Nationality Immigration and Asylum Act 2002 breached Article 3 (The Times, 20 February 2003; affirmed Court of Appeal The Times, 19 March 2003).

4 [2003] 2 WLR 1403.

the more absolutist character of the American Bill of Rights, drawing attention to the way in which Charter rights may be trumped by the proportionality principle and by the fact that Parliament can legislate to derogate from Charter Rights. These structural features mean that judicial decisions are not the final word on human rights; but provide the opportunity for the legislature (and the executive) to respond to court decisions. As a result, the Charter legitimises strict scrutiny by the judiciary: so that the courts contribute to a "democratic dialogue" to define and develop the proper limits of human rights.

The constitutional status of the Human Rights Act

The Human Rights Act is rightly regarded as a constitutional statute.[5] The Privy Council has often stressed that a generous and purposive interpretation must be given to constitutional instruments; and Lord Hope confirmed in *R v DPP ex p Kebeline*[6] that this construction should be applied to the Human Rights Act.

The English courts have not so far laid any particular emphasis on the importance of interpreting the Act generously. In fact, there is an obvious tension between the courts giving effect to the Human Rights Act as a constitutional instrument and avoiding the charge of excessive judicial activism.

The wide language of the Human Rights Act

The language of the Human Rights Act is broad and malleable so that the opposite conclusions on the same issue may be equally arguable. More specifically, the Act provides numerous opportunities for the courts to second guess Parliament

For example, the rule of statutory construction under s 3 of the Act provides considerable latitude for the courts to gainsay Parliament. S 3 of the Act states that so far as possible to do so, legislation should be read and given effect in a way which is compatible with Convention rights. [7] As 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

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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 [2000] AC 326 at 381.

7 The radical character of s 3 is sometimes not appreciated: see R Clayton 'The limits of what's possible: statutory construction under the Human Rights Act' [2002] EHRLR 559.

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.

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]

Another difficult area is where a court must consider an issue of mixed fact and law: whether a public authority has breached a Convention right. This question will be particularly important where the court is considering breaches of an unqualified right such as the prohibition from inhuman treatment; and may account for the reluctance of the domestic courts to find breaches of Article 3[13] even though the standards applied by the European Court of Human Rights are becoming stricter.[14]

Where qualified rights are in issue, a public authority must show that its interference with the right is proportionate. Although Lord Steyn set out the key principles in *R v Secretary of State for the Home Department, ex p Daly,*[15] he also stressed that context was crucial. The flexible nature of the proportionality test was also highlighted by Dyson LJ in *R (Samaroo) v Home Secretary*[16] where he identified particular factors the court will consider when deciding whether to defer to the decision-maker's judgment:

- whether the right unqualified or qualified;
- 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;
- whether the right has a high degree of constitutional protection such as freedom of expression and access to the courts.

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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 See eg *R(Bernard) v Enfield LBC* (2003) HRLR 4; *R(S) v Secretary of State for the Home Department* The Times, 9 October 2003 (CA).
14 See *Selmouni v France* (2000) 29 EHRR 403 at para. 101.
15 [2001] 2 AC 532 at paras 27, 28 where he stated that a public authority must prove: (i) that the legislative objective is sufficiently important to justify limiting the fundamental right; (ii) that the measures designed to meet the legislative objective are rationally connected to it; and (iii) that the means used to impair the freedom are no more than is necessary to accomplish that objective.
16 [2001] UKHRR 1150

The application of these principles is not self evident. The Court of Appeal adopted a rigorous approach in *Prolife Alliance v British Broadcasting Corporation*,[17] when reviewing a decision by the BBC to refuse permission to the Prolife Alliance to air a party election broadcast which showed images of abortion operations. Laws LJ, rejected the factual justifications put forward for the decision, remarking that:

> "there is nothing gratuitous sensational or untrue in the appellant's intended [party election broadcast]. It is certainly graphic and, as I have said, disturbing. But if we are to take political free speech seriously, those characteristics cannot begin to justify the censorship that was done in this case."

By contrast, in *R(Farrakan) v Secretary of State for the Home Department* [18] the Court of Appeal accorded a very wide margin of discretion to the decision maker in holding that a refusal of the claimant entry to the UK on the ground that the disorder it might provoke was a proportionate restriction on freedom of expression.

The approach towards "judicial deference" under the Human Rights Act

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 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]

When considering the impact of the Human Rights Act on a reverse onus provision *in R v DPP ex p Kebeline* [23] Lord Hope stated 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

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17 [2002] 2 All ER 756 at para 43; the House of Lords reversed the decision on other grounds.

18 [2002] 3 WLR 481 para 21

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.

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 [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.

> 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 necessity for judicial deference was discussed in *R v Lambert*[24] where Lord Woolf CJ observed that:

> "… the legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle, pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention."

In *Poplar Housing and Regeneration Community Association v Donoghue*[25] he expressed similar views concerning whether the grant of a possession order to a housing association on mandatory grounds[26] 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."

Lord Bingham underlined the limited nature of the judicial function of the House of Lords in *R (Pretty) v DPP*:[27]

> "The committee is not a legislative body. Nor is it entitled or fitted to act as a moral or ethical arbiter. It is important to emphasise the nature and limits of the committee's role, since the wider issues raised by this appeal are the subject of profound and fully justified concern to very many people. The questions whether the terminally ill, or others, should be free to seek assistance in taking their own lives, and if so in what circumstances and subject to what safeguards, are of great social, ethical and religious significance and are questions on which widely differing beliefs and views are held, often strongly …. The task of the committee in this appeal is not to weigh or evaluate or reflect those beliefs and views or give effect to its own but to ascertain and apply the law of the land as it is now understood to be."

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24 [2001] 2 WLR 211, 219

25 [2002] QB 48, para 69.

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

27 [2002] 1 AC 800 para 2.

In *A v Secretary of State for the Home Office*[28] 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[29] despite the fact that it was discriminating against them on the ground of their nationality.

The need to defer to Parliament played an important role in *R v Lychniak*[30] where the House of Lords held that mandatory life sentences did not breach Articles 3 or 5. Lord Bingham took the view that:[31]

> " 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.[32] 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"

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[33] 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. Lord Walker analysed the proportionality principle with the

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28 [2003] 2 WLR 564.

29 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.

30 [2002] 3 WLR 1842.

31 Ibid, para 14.

32 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.

33 *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.

intensity appropriate to the circumstances of the case,[34] 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.[35]

The dicta in the cases do little more than to re-state the proposition that judges should defer to policy choices of Parliament. 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,[36] particular stress was laid on the cost[37] and time taken[38] 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.

In his dissenting judgment in *International Transport Roth GmbH v Secretary of State for the Home Department* [39] 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;[40]
- 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;[41]
- 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[42] or immigration control) and less when it lies within the constitutional responsibility of the Court (such as the field of criminal justice);

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34 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).

35 Ibid, para 144.

36 *Rights brought Home: The Human Rights Bill* (1997) Cm 3782

37 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.

38 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).

39 [2002] 3 WLR 344 at paras 81 to 87.

40 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.

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

42 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.

- 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).[43]

I shall comment on judicial deference in relation to administrative decision making before looking at the more problematic question of legislative policy.

Judicial deference and administrative decision making

The rationale for judicial deference towards decisions of the executive is based on the principle of separation of powers,[44] that it is not the task of the judiciary to usurp the function of the executive by substituting its decisions for the authority charged by law to decide the matters in question.[45] However, the constitutional status of executive decision making can be overstated.

First, it is not self evident that administrative decisions should be accorded primary weight by the judiciary simply by virtue of the fact that they fall within the executive's province where they clash with other principles we value and where the court can exercise a supervisory role. 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.[46] Secondly, routine decision making by civil servants or local government officers has no direct connection with voters making choices through the ballot box. Thirdly, where the lawfulness of an administrative decision is being assessed, the court is not being called upon to evaluate the underlying policy and its objectives; and it is difficult to understand why the judicial assessment of a breach of a Convention right or proportionality is inherently less valid or legitimate than that initially made by a civil servant. Finally, the separation of powers is not the cornerstone of

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43 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

44 The essence of the doctrine was described by Montesquieu *The Spirit of Law* Chap XI pp 3 to 6 as:

> "Political liberty is to be found only where there is no abuse of power. But constant experience shows us that every man is invested with power is liable to abuse it, and to carry his authority as far as it will go .... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another .... Where the legislative and executive powers are united in the same person or body ... there can be no liberty, ... Again, there is no liberty if the judicial power is not separated from the legislature and the executive. There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers."

45 See *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155, 1160 per Lord Halsham; and generally Lord Irvine 'Judges and Decision-Makers: the Theory and Practice of *Wednesbury* Review' [1996] PL 59.

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

the English constitution, at least by comparison with the subtly structured institutional framework in the United States.

On the other hand, 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. The process would become easier if it were possible to devise a constitutional theory of adjudication under the Human Rights Act.

Developing a constitutional theory of adjudication

The nature of constitutional adjudication has been most comprehensively studied in the United States in relation to the Bill of Rights. At one extreme it is argued that judicial review of legislation should be confined to the language of the constitution and its original intent.[47] At the other, non-interpretivism[48] asserts that the vague and indeterminate nature of the constitutional text permits a variety of standards and values: the moral values of the judge, the moral values of society or, perhaps, some form of natural law such as a theory of justice, democracy or morality.[49] Others claim that the purpose of a Bill of Rights is to protect the process of decision making, limiting judicial decisions to issues of fair process instead of broader substantive issues.[50]

The search for a single overarching theory for constitutional adjudication is a sterile one; and the unsatisfactory nature of these approaches has led to a more modest eclectic analysis of the Bill of Rights.[51]

By contrast, the recent Canadian debate about a "democratic dialogue" offers a more attractive starting point. The principle is based on the legislative framework of the Canadian Charter; and, in particular, the way it differs from the American model.

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47 See eg R Bork, *The Tempting of America: the Political Seduction of the Law* (MacMillan, 1990); R Berger, *Government by Judiciary* (Harvard University Press, 1971); and contrast the views of R Dworkin in *Freedom's Law* (Oxford University Press, 1996), Chaps 12 and 14.

48 Ely contrasts non interpretivism with interpretivism. Interpretativism indicates that judges deciding constitutional issues should confine themselves to enforcing norms which are stated or clearly implicit in the written constitution whereas non interpretivism is the view that the courts should go beyond the constitution's set of references and enforce norms which cannot be discovered within its four corners: see J Ely, *Democracy and Distrust* (Harvard University Press, 1980) at 1.

49 See eg W Fisher 'The development of modern American legal theory and the judicial interpretation of the Bill of Rights' in M Lacey & Haakonssen, *A Culture of Rights* (Cambridge University Press, 1991).

50 See eg J Ely, *Democracy and Distrust* (Harvard University Press, 1980).

51 See eg L Tribe and M Dorf *On Reading the Constitution* (Harvard University Press, 1991); L Alexander (ed) *Constitutionalism Philosophical Foundations* (Cambridge University Press, 1998).

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*[52] "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[53] and a literal interpretation would permit no interference whatsoever.[54] A ruling of the Supreme Court cannot be superceded by legislation enacted by Congress (however controversial[55]): 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[56] and, in particular, show that an interference with a right was proportionate.[57] 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",[58] the

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52 5 US (1 Cranch) 137 (1803).

53 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).

54 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:

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

55 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).

56 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).

57 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).

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

Canadian Charter ensures that judicial decisions are not necessarily decisive if the elected government wishes to limit or override rights.

The principle of "democratic dialogue"

In 1997 Hogg and Bushell published an influential article[59] 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.[60] 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.[61] 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[62] 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

There are many occasions where the courts have held that the minimal impairment element of the proportionality test was not satisfied where the legislature has subsequently enacted legislation which addresses its views. For example, in *RJR-McDonald v A-G of Canada*[63] the Supreme Court struck down federal legislation which banned advertising of tobacco products. In discussing the minimal impairment, the Supreme Court indicated that it would have upheld restrictions on advertising which were limited to "lifestyle" advertising or advertising directed at children; and within two years new legislation was passed which prohibited lifestyle advertising but allowed informational advertising for adult smokers.

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59 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.

60 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).

61 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.

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

63 [1995] SCR 199.

On the other hand, the power to derogate from Charter rights under s 33 has been relatively unimportant.[64] Quebec's initial political response to the Charter was to enact blanket legislation which added a provision to every provincial statute which overrode the effect of the Charter. When the legislation expired after 5 years it was not renewed. Similarly, when the Supreme Court[65] struck down a law banning the use of languages other than French for outdoor signs, Quebec enacted legislation which overrode the Charter under s 33; but again allowed the override to expire after 5 years. It is arguable, however, that more extensive use should be made of s 33, especially where the legislature gives an "in your face" reply to an earlier judicial finding that the Charter had been infringed.[66]

The Supreme Court of Canada and "democratic dialogue"

The Supreme Court has considered the implications of this principle in a number of cases.[67]

In *Vriend v Alberta*[68] 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.[69] 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

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64 Outside of Quebec the override has only been used once in Saskatchawan, upholding back to work legislation which the Saskatchawan Court of Appeal decided violated the Charter: see *RWSDU v Saskatchawan* (1985) 39 Sask R 193. However, the Supreme Court reversed the Court of Appeal at [1987] 1 SCR 460.

65 *Ford v A-G of Quebec* [1988] SCR 712.

66 See K Roach *The Supreme Court on Trial* (Irwin, 2000) at 273 ff.

67 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.

68 [1998] 1 SCR 493 paras 136 to 140.

69 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.

> has been followed by new legislation designed to accomplish similar objectives.[70] By doing this, the legislature responds to the courts; hence the dialogue among the branches.
>
> 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.
>
> 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.

There has been a lively debate about what democratic dialogue requires where the legislature has given its considered reply to an earlier finding that the Charter has been infringed. In *R v O'Connor*[71] the Supreme Court decided that the provisions limiting the disclosure of private records in criminal proceedings for sexual assault breached the Charter. The amendments subsequently made to the Criminal Code differed significantly from the views expressed by the Supreme Court. Nevertheless, in *R v Mill*[72]the Supreme Court stressed that the courts did not hold a monopoly on the promotion and protection of rights; and that the new provisions should be regarded as a notable example of dialogue between the judicial and legislative branches.

On the other hand, as Iacobucci J observed in his dissenting judgment in *R v Hall*,[73] it is possible to transform dialogue into abdication if Parliament's response to an adverse Charter decision fails to meet the constitutional standards set in the earlier case.[74]

The issue was thrown into stark relief in *Sauve v Canada (No 2)*[75] 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 1)*[76] that the restriction was an unjustified restriction on the right to vote. The statute was then

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70 F Hogg and A Bushell (above)

71 [1995] 4 SCR 411.

72 [1999] 3 SCR 668.

73 2002 SCC 64 at paras 123 to 129

74 The Supreme Court were considering bail under the Criminal Code which had been amended in 1997 following decisions in *R v Pearson* [1992] 3 SCR 665 and *R v Morales* [1992] 3 SCR 711.

75 [2002] SCC 68

76 [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.

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'".[77]

In his dissenting judgment Gonthier J remarked that:[78]

> "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" 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.[79] Like the Charter the Act permits derogation from Convention rights for a period of 5 years.[80] The doctrine of proportionality is fundamental to all qualified rights; and the English courts have adopted the Canadian test of proportionality.[81] 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.

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77 [2002] SCC 68 at paras 8 to 18.

78 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.

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

80 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

81 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.

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. A number of declarations have been made since the Act has been in force.[82] So far Parliament has responded by making one remedial order[83] (to amend the Mental Health Act following the declaration of incompatibility in *R (H) v N & E London Mental Health Review Tribunal*)[84] and will enact the Criminal Justice Act 2003(which will change the Home Secretary's role in setting the tariff for mandatory prisoners in the wake of *R(Anderson) v Secretary of State for the Home Department*).[85]

By contrast, the ability of the courts to reach a strained interpretation of legislation under s 3 of the Human Rights Act (which bears no resemblance to the true intention of Parliament) would at first blush point against the idea of "democratic dialogue". But it will of course remain open to Parliament to enact new legislation which modifies a s 3 interpretation.

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.

Conclusion

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82 See eg *R(H) v N & E London Mental Health Review Tribunal* [2002] QB 1 where the Court of Appeal held that ss72 and 73 of the Mental Health Act were incompatible with Articles 5(1)(4) because they imposed the burden of proof on a mental patient to establish that one of the criteria for lawfully continuing his detention is no longer satisfied; In *R(International Transport Roth) v Secretary of State for the Home Department* [2002] 3 WLR 344 the Court of Appeal held that the statutory scheme which penalised carriers of illegal immigrants into the UK under the Immigration and Asylum Act breached Article 6; *R(Anderson) v Secretary of State for the Home Department* where the House of Lords held that setting of the tariff for a mandatory life prisoner was a sentencing exercise and subject to Article 6; *Wilkinson v Inland Revenue Commissioners* (2002) STC 347 where Moses J held that section 262 of the Income and Corporations Taxes Act discriminated against widowers; *R(D) v Secretary of State for Health* [2002] EWHC 2085 Admin where Stanley Burnton J held that the continued detention of discretionary life sentences breached Article 5(4); *Bellinger v Bellinger* [2003] 2 WLR 1174 where the House of Lords decided that the provision preventing a woman who was male at birth from marrying a man breached Articles 8 and 12; *R(M) v Secretary for Health* The Times, 25 April 2003 where Maurice Kay J decided that the procedure for appointing the "nearest relative" under the Mental Health Act breached Article 8. Note that the House of Lords in *Rusbridger v A-G* [2003] UKHL 38 decided in the exercise of its discretion not to grant a declaration.

83 Mental Health Act 1983 (Remedial) Order 2001, SI 2001/3712.

84 [2002] QB 1.

85 (2002) UKHRR 785

The principle of "democratic dialogue" was formulated in Canada primarily as an antidote to the majoritarian view that judicial decision making is intrinsically anti-democratic.[86]

However, the concept also serves another important purpose. The Human Rights Act in terms ensures that the judicial view is not definitive on human rights issues. The idea of "dialogue" therefore provides a principled justification for the courts strictly scrutinising governmental decision making. The actual analysis to be adopted when undertaking strict scrutiny will require considerable refinement if the "one shoe fits" model is abandoned (as suggested by Lord Walker in *Pro-life*).

However, the idea of democratic dialogue has not so far attracted any analysis in Human Rights Act cases. When the senior judiciary gave evidence before the Joint Committee on Human Rights, they did not agree with Lord Irvine's view that the dialogue between Parliament, the courts and the executive was the main mechanism in moving towards a culture of human rights. Lord Bingham said that it was not the role of judges to engage in dialogue; and Lord Phillips also felt that dialogue was not the right word although he thought that there was a spirit of co-operation (rather than adversarial feeling) between the judiciary and the executive.[87]

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.[88]

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.

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86 The thesis is not uncontroversial; and some have argued that the "democratic dialogue" thesis significantly overstates the importance of the courts' role in the constitutional arrangements which the Charter has set in train: see eg L Weinbrib "Canada's constitutional revolution: from legislative to constitutional state" (1999) 33 Israel Law Review 13.

87 Joint Committee on Human Rights Minutes of Evidence Q78, 26 March 2001.

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