

Clayton Comments

Richard Clayton QC

PRINCIPLES FOR JUDICIAL DEFERENCE

Introduction

1. Deference involves the principle that the courts (out of respect for the legislature or executive) will decline to make their own independent judgment on a particular issue. The concept is critical to a proper understanding of how the courts are to approach the HRA- whether and in what circumstances it is legitimate for the courts to gainsay Parliament or the executive, a process which has excited real political controversy with recent Home Secretaries.¹
2. In this paper I propose to cover the following topics:
 - the obligation to defer to democratic institutions;
 - the structural features of the HRA which mandate strict scrutiny;
 - the lessons that can be learned from the Canadian case law concerning its Charter of Rights and Freedoms, particularly the relevance and value of the principle of democratic dialogue;
 - the appropriateness of deference in the context of unqualified rights;
 - the nature of the obligation to defer to the decision maker whose decision is under challenge; and
 - the substantive and procedural aspects of the deference principle.
3. To date there has been very little critical examination of what we mean by deference. The most extended analysis was undertaken by the House of Lords in *R(ProLife) v BBC*.² Lord Hoffmann observed that:

the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that

¹ 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 313); 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 which was reversed by the Court of Appeal at [2004] QB 335 but upheld by the House of Lords [2005] 2 WLR 87; 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 [2004] QB 36.

² [2004] 1 AC 185.

Clayton Comments

Richard Clayton QC

its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening

Lord Hoffman went on to discuss the principle in terms which I shall discuss later. Lord Walker, on the other hand, analysed the proportionality principle with the intensity appropriate to the circumstances of the case,³ 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.⁴

Origins

4. In fact, 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*:⁵

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.
5. Instead David Pannick argued⁶ 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.

³ Ibid, paras 136 to 139.

⁴ Ibid, para 144.

⁵ (1976) 1 EHRR 737 at para 49.

⁶ D Pannick “Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment” [1998] PL 545; his views were essentially reiterated in Lester and Pannick *Human Rights Law and Practice* (2nd ed, 2004, Butterworths), paras 3.18 to 3.21.

Clayton Comments

Richard Clayton QC

6. That analysis was adopted by Lord Hope in *R v DPP ex p Kebeline*⁷ 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. “

7. The approach the English courts have taken towards judicial deference under the HRA inevitably reflects the domestic legal culture, and, in particular:

- (a) our deferential principles of administrative law: ie
- that it is not the role of the court to substitute its judgment for that of the decision maker; and
 - the principle of *Wednesbury* irrationality;
- (b) our undeveloped principles of constitutional law.

Indeed, the absence of a written constitutional document means that it is difficult to identify what is meant by the British Constitution: other than to say it describes the rules for determining the creation and operation of governmental institutions;⁸ and the term ‘unconstitutional’ has no defined legal content in English law. As a Canadian writer put it:

for the American, anything unconstitutional is illegal, however it may seem: for the British, anything unconstitutional is wrong, however legal it may be.⁹

8. It is often helpful to draw on approaches taken in other jurisdictions for comparative purposes; and I shall look at some Canadian jurisprudence in due course. However, the particular nature of our legal culture has wider

⁷ [2002] 2 AC 366, 381.

⁸ Sir Ivor Jennings, *The Law of the Constitution* (5th ed, University of London Press, 1958)

36.

⁹ JRB Mallory, *The Structure of Canadian Government*, quoted in A Bradley and K Ewing, *Constitutional and Administrative Law* (12th ed, Longmans, 1997) 27.

Clayton Comments

Richard Clayton QC

significance because the HRA was not preceded by a broad-based campaign arguing for constitutional transformation- as in Canada or South Africa. The Government justified the incorporation of the Convention on very mundane grounds. In the White Paper preceding the Act,¹⁰ particular stress was laid on the cost¹¹ and time taken¹² 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.

9. The absence of any real social momentum behind the HRA has required us to formulate human right principles in a something of a vacuum- informed only by an injunction under s 2(1) to take account of Strasbourg decisions. Thus, Lord Bingham in *R(Ullah) v Secretary of State for the Home Department*¹³ emphasised that the duty of national courts is to keep pace with the Strasbourg jurisprudence over time as it evolves: no more, but certainly no less.¹⁴ Lord Steyn has rejected the idea that domestic cultural traditions should determine the scope of Convention rights, parting company with Lord Woolf's views on identity cards;¹⁵ and Lord Bingham has expressed reservations about the value of examining Commonwealth case law in HRA cases since the UK must take its lead from Strasbourg.¹⁶ This attitude cannot be squared with the view that the HRA was intended to encourage the development of indigenous human rights jurisprudence- but that is a topic for another day.

The obligation to defer to democratic institutions

10. The necessity for judicial deference was discussed in *R v Lambert*¹⁷ where Lord Woolf CJ observed that:

¹⁰ *Rights brought Home: The Human Rights Bill* (1997) Cm 3782

¹¹ 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.

¹² 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).

¹³ [2004] 2 AC 323 para 20

¹⁴ See *Price v Leeds CC* [2005] 1 WLR 1825 where the Court of Appeal considered the effect of s 2(1) in circumstances where a House of Lords decision had become incompatible with a later decision of the ECtHR. The House of Lords will hear argument in December 2005.

¹⁵ *R(Marper) v Chief Constable of Yorkshire* [2004] 1 WLR 2196 at para 27 rejecting the view of Lord Woolf CJ in the Court of Appeal at [2002] 1 WLR 3223 para 34.

¹⁶ *Sheldrake v DPP* [2004] 3 WLR 876 para 33.

¹⁷ [2002] QB 1112 para 16.

Clayton Comments

Richard Clayton QC

“... 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.”

11. In *Poplar Housing and Regeneration Community Association v Donoghue*¹⁸ he expressed similar views concerning whether the grant of a possession order to a housing association on mandatory grounds¹⁹ 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.”

12. In *Brown v Stott*²⁰ Lord Bingham said:

Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies.

In *Brown* Lord Steyn made similar observations:²¹

Just as there are circumstances in which an international court will recognise that national institutions are better placed to assess the needs of society, and to make difficult choices between competing considerations, so national courts will accept that there are some circumstances in which the legislature and the executive are better placed to perform those functions.

¹⁸ [2002] QB 48, para 69.

¹⁹ Under the Housing Act 1988 as an assured shorthold tenancy let by a housing association.

²⁰ [2003] 1 AC 681, 703.

²¹ *Ibid*, 711 quoting Lester and Pannick.

Clayton Comments

Richard Clayton QC

13. Lord Bingham underlined the limited nature of the judicial function of the House of Lords in *R (Pretty) v DPP*:²²
- 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."
14. Similar views were expressed by Lord Nicholls in *Bellinger v Bellinger*²³ where the House of Lords had to consider the appropriateness of reinterpreting legislation under s 3 of the HRA or making a declaration of incompatibility under s 4:
- I am firmly of the view that your Lordships' House, sitting in its judicial capacity, ought not to accede to the submissions made on behalf of Mrs Bellinger. Recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would necessitate giving the expressions "male" and "female" in that Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex.
- This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.

²² [2002] 1 AC 800 para 2.

²³ [2003] AC 467 paras 36, 37.

Clayton Comments

Richard Clayton QC

15. The need to defer to Parliament played an important role in *R v Lichniak*²⁴ where the House of Lords held that mandatory life sentences did not breach Articles 3 or 5. Lord Bingham took the view that:²⁵

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.

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.²⁶ 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

16. In recent cases the courts have developed a more sophisticated analysis of the precise relationship between democratic deference and proportionality principle. *Evans v Amicus Heath Care*²⁷ concerned a complaint that the ability of a sperm donor to withdraw his consent to the claimant's IVF treatment was a disproportionate interference with her right of respect for private life. Sedley LJ asked:²⁸

What is therefore critical in deciding whether the point of intervention has been reached is the legitimacy, in Convention terms, of the choice that Parliament has made. As Lord Nicholls said in *Wilson v First County Trust Ltd (No 2)*:²⁹

"Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified ... The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's Convention right ... The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene."

²⁴ [2003] 1 AC 903.

²⁵ Ibid, para 14.

²⁶ 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.

²⁷ [2005] Fam 1.

²⁸ Ibid, paras 64 to 69.

²⁹ [2004] 1 AC 816, 844, para 70

Clayton Comments

Richard Clayton QC

The last of these propositions is not gratuitous or free-standing. It follows logically from the preceding propositions, for this reason: while legislation modifying individuals' private law liabilities can be expected not to infringe their Convention rights without clear justification, legislation directed to the implementation and management of social policy may well have to infringe some individuals' Convention rights in the interests of consistency. But the test is the same in both cases: could a less drastic means have been used to achieve the chosen end without infringing the primary right of the claimant?

The contentious point is whether the principle of proportionality has been infringed here. As [Counsel] submits, there may be good reasons for a uniform regime: exceptions are not always necessary to comply with the requirement of proportionality. He goes on to argue that the fact that legislation may produce a harsh or unreasonable outcome in a particular case does not render it disproportionate. That may be right, but--at least if the outcome is a denial of a primary Convention right--the case for a bright line rule requires careful examination. Adopting the synoptic test propounded by Hale LJ in *In re W and B (Children: Care Plan)*³⁰ for the generality of care cases, we ask ourselves "whether the proposed interference with the right to respect for private life is proportionate to the need which makes it legitimate". The answer, in our judgment, is that it does. The need, as perceived by Parliament, is for bilateral consent to implantation, not simply to the taking and storage of genetic material, and that need cannot be met if one half of the consent is no longer effective. To dilute this requirement in the interests of proportionality, in order to meet Ms Evans's otherwise intractable biological handicap, by making the withdrawal of the man's consent relevant but inconclusive, would create new and even more intractable difficulties of arbitrariness and inconsistency. The sympathy and concern which anyone must feel for Ms Evans is not enough to render the legislative scheme of Schedule 3 disproportionate.

17. However, the context in which proportionality will be assessed is often decisive. Thus, in *Guidan v Godin-Mendoza*³¹ Lord Nicholls said:

arguments based on the extent of the discretionary area of judgment accorded to the legislature lead nowhere in this case. As noted in *Wilson v First County Trust Ltd (No 2)*,³² Parliament is charged with the primary responsibility for deciding the best way of dealing with social problems. The court's role is one of review. The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's

³⁰ [2001] 2 FLR para 54(iii)

³¹ [2004] 2 AC 557 at para 19.

³² [2004] 1 AC 816, 844, para 70

Clayton Comments

Richard Clayton QC

Convention rights. The readiness of the court to depart from the view of the legislature depends upon the subject matter of the legislation and of the complaint. National housing policy is a field where the court will be less ready to intervene. Parliament has to hold a fair balance between the competing interests of tenants and landlords, taking into account broad issues of social and economic policy. But, even in such a field, where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification. The reasons must be cogent if such differential treatment is to be justified.

18. A more comprehensive set of principles was identified by Laws LJ in his dissenting judgment in *International Transport Roth GmbH v Secretary of State for the Home Department*;³³ he suggested that:
- greater deference should be paid to an Act of Parliament than the decision of the executive or a subordinate measure;³⁴
 - 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;³⁵
 - greater deference will be due where the subject matter is peculiarly within the constitutional responsibility of democratic government (such as the defence of the realm³⁶ 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).³⁷
19. I shall comment on judicial deference in relation to administrative decision making before looking at the more problematic question of deference to Parliament in enacting legislation.

³³ [2003] QB 728 at paras 81 to 87.

³⁴ See Lord Woolf CJ in *R v Lambert* [2002] QB 1112 para 16; and *Poplar Housing and Regeneration Community Association v Donoghue* [2002] QB 48 at para 69.

³⁵ See *R v DPP ex p Kebilene* [2002] 2 AC 326 at para 80 per Lord Hope

³⁶ See eg *Chandler v DPP* [1964] AC 763 at 790, 798 per Lord Reid and Viscount Radcliffe; *Marchiori v Environmental Agency* [2002] EWCA Civ 3 at paras 31 to 38.

³⁷ 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

Clayton Comments

Richard Clayton QC

Judicial deference and administrative decision making

20. The rationale for judicial deference towards decisions of the executive is based on the principle of separation of powers,³⁸ 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.³⁹ However, the constitutional status of executive decision making can be overstated

21. 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.⁴⁰ In other words, it is valuable to draw on Jeffrey Jowell's important distinction in this context between constitutional competence and institutional competence. 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 the English constitution, at least by comparison with the subtly structured institutional framework in the United States.

³⁸ 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."

³⁹ 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.

⁴⁰ See J Jowell "Judicial deference: servility, civility or institutional capacity" [2003] PL 592.

Clayton Comments

Richard Clayton QC

What deference to the democratic institutions entails

22. The early HRA cases emphasised the need to defer to democratic institutions. In principle, deference could involve two different concepts:⁴¹
- the idea of respecting the reasons offered in support of a decision by the executive agency or a statutory decision of the legislature;
 - the idea of submitting to executive or legislative view, what Murray Hunt has described as a spatial metaphor-⁴² a no go area or zone of immunity.
23. In *Secretary of State for the Home Office v Rehman*⁴³ the House of Lord were reviewing a decision by the Home Secretary to deport a Pakistani national on the ground that it was conducive to the public good. In that case the Lords held that the executive is the best judge of the need for international co-operation to combat terrorism and to develop counter terrorist strategies. Lord Hoffman added a post script to his opinion.
- I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.
24. In *Pro-Life* Lord Hoffmann⁴⁴ went further, stating 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

⁴¹ D Dyzenhaus “The Politics of Deference: judicial review and democracy” in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, 1997)

⁴² M Hunt “Sovereignty’s Blight: why contemporary public law needs the concept of ‘due deference’ in N Bamforth & P Leyland (ed) *Public Law in a Multi Layered Constitution*; (Hart Publishing, 2003) Lester and Pannick reject his characterisation in *Human Rights Law and Practice* at para 3.18.

⁴³ [2003] 1 AC 153 para 62.

⁴⁴ *R(Pro-Life Alliance) v BBC* [2004] 1 AC 185 paras 75, 76; see also Lord Hoffman ‘Separation of Powers’ The COMBAR Lecture 2001, 23rd October 2001 [2002] JR; and see further, E Barendt “Free Speech and abortion” [2003] PL 580; and J Jowell “Judicial deference: servility, civility or institutional capacity” [2003] PL 592.

Clayton Comments

Richard Clayton QC

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.

25. Lord Steyn⁴⁵ has taken issue with the suggestion that there is a democratic prohibition preventing the courts from examining certain issues that they are not competent to adjudicate on national security or other issues or that democracy entails that there are zones of immunity which are not subject to judicial review.
26. In relation to the HRA that view is plainly right as a matter of statutory construction. Although some questions of ‘high policy’ within the prerogative have remained outside the scope of judicial review⁴⁶ such as the making of treaties⁴⁷ or the defence of the realm;⁴⁸ arguments to the effect that there are non-justiciable decisions of public authorities under the HRA must fail. The Act binds the Crown⁴⁹ and the obligation on public authorities to comply with Convention rights under section 6(1) is expressed in unqualified terms. The Human Rights Act does not give the court a discretion to refuse in principle to review the acts of a public authority.
27. Furthermore, the approach taken towards the Canadian Charter of Rights supports this view that there are no decisions of public authorities which will be outside the scope of the Human Rights Act on the ground that they are not justiciable. In *Operation Dismantle Inc v The Queen*⁵⁰ proceedings were brought by a peace organisation alleging that the government’s decision to allow the United States to test cruise missiles violated the Charter. Although the claim

⁴⁵ “Deference: a tangled story” [2005] PL 346

⁴⁶ See C Neenan, ‘Reviewing Prerogative Powers: Roskill’s List Revisited’ [1998] JR 36.

⁴⁷ *CND v Prime Minister* [2002] EWHC 2759 QB; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552

⁴⁸ But see the decision of the Divisional Court in *R v Ministry of Defence, ex p Smith* [1996] QB 517 where it rejected the argument; at 539 Simon Brown LJ said that only the rarest cases would now be beyond the purview of the court (such as cases involving national security and where the court lacks expertise or material to form a judgment); and see Curtis J at 545.

⁴⁹ See s22(5).

⁵⁰ [1985] 1 SCR 441.

Clayton Comments

Richard Clayton QC

itself failed, the Supreme Court rejected the suggestion that an issue might become non-justiciable because it was too political to be decided by the courts.⁵¹

28. However, deeper reason for rejecting the idea that the need to defer to democratic institutions prevents the courts from gainsaying their views on human right which is inherent to the DNA or structure of the HRA.
29. I shall argue that the constitutional nature of the Human Rights Act mandates an intensive standard of review by the courts; and that a doctrine of strict scrutiny is appropriate to the HRA when it is contrasted the more absolutist character of the American Bill of 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.

The constitutional status of the HRA

30. The Human Rights Act is rightly regarded as a constitutional statute.⁵²
31. The effect of s 3 is to permit judicial review of Acts of Parliament. As Lord Nicholls emphasised in *Ghaidan v Godin- Mendoza*⁵³, s 3 has an unusual and far-reaching character; it may require the court to depart from the unambiguous meaning that legislation would otherwise bear.⁵⁴ He said that the intention of Parliament in enacting s 3 was, to the extent bounded only by what is 'possible', a court can modify the meaning and hence the effect of primary and secondary legislation.⁵⁵
32. Section 3 therefore represents a radical change to the conventional view of Parliamentary sovereignty. This perspective represents a significant change from the views expressed by Lord Reid in *Pickin v British Railway*,⁵⁶
In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was

⁵¹ Ibid per Wilson J at 472; Dickson J concurred at 459.

⁵² 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.

⁵³ [2004] UK HL 30.

⁵⁴ Ibid, para 30.

⁵⁵ Ibid, para 33.

⁵⁶ [1974] AC 765 at 782.

Clayton Comments

Richard Clayton QC

finally demonstrated by the Revolution of 1688 any such idea has become obsolete

33. Furthermore, the HRA takes precedence over subsequent legislation so the doctrine of implied repeal does not operate. As Laws LJ stressed in *Thoburn v Sunderland CC*,⁵⁷ future legislation will have to be very explicit if it is to fall outside the scope of the HRA.

Judicial supremism and constitutional rights

34. It is instructive to compare the way in which different human rights instruments take effect.
35. The Bill of Rights entrenches constitutional rights and 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*⁵⁸ “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 terms⁵⁹ and a literal interpretation would permit no interference whatsoever.⁶⁰ A ruling of the Supreme Court cannot be superceded by legislation enacted by Congress (however controversial): but requires a constitutional amendment. As Renquist CJ stressed in *Dickerson v United States*⁶¹ where the Supreme Court ruled that Congress was not competent to overrule *Miranda v Arizona*.⁶²

Miranda, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress. Given §3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and its instruction for trial courts to consider the totality of the circumstances surrounding the giving of the confession, this Court agrees with

⁵⁷ [2003] QB 151.

⁵⁸ 5 US (1 Cranch) 137 (1803).

⁵⁹ 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 *Brandenburg v Ohio* 395 US 444 (1959).

⁶⁰ 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).”

⁶¹ 000 US 99-5525 (2000)

⁶² 384 US 436 (1966).

Clayton Comments

Richard Clayton QC

the Fourth Circuit that Congress intended §3501 to overrule *Miranda*. The law is clear as to whether Congress has constitutional authority to do so. This Court has supervisory authority over the federal courts to prescribe binding rules of evidence and procedure.⁶³ While Congress has ultimate authority to modify or set aside any such rules that are not constitutionally required,⁶⁴ it may not supersede this Court's decisions interpreting and applying the Constitution.⁶⁵

36. The judicial supremism inherent to the American system has inspired a focus on constitutional adjudication and considerable argument about its nature. At one extreme it is argued that judicial review of legislation should be confined to the language of the constitution and its original intent.⁶⁶ At the other, non-interpretivism⁶⁷ 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.⁶⁸ 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.⁶⁹ However, 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.⁷⁰

Constitutional rights under the Canadian Charter of Rights and Freedoms

37. The Canadian Charter was deliberately designed to avoid the American system of judicial supremacy. Charter rights were defined in relative rather than

⁶³ 517 US 416, 426

⁶⁴ See eg *Palermo v. United States* 360 US 343, 345, 348

⁶⁵ see, e.g., *City of Boerne v. Flores*, 521 US 507, 517-521.

⁶⁶ 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.

⁶⁷ 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.

⁶⁸ 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).

⁶⁹ See eg J Ely, *Democracy and Distrust* (Harvard University Press, 1980).

⁷⁰ 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).

Clayton Comments

Richard Clayton QC

absolute terms and must satisfy the requirements of s 1⁷¹ and, in particular, show that an interference with a right was proportionate.⁷² 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.

38. 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”,⁷³ the Canadian Charter ensures that judicial decisions are not necessarily decisive if the elected government wishes to limit or override rights.

The HRA and the Charter of Rights

39. 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.⁷⁴ Like the Charter the Act permits derogation from Convention rights for a period of 5 years. The doctrine of proportionality is fundamental to all qualified rights; and the English courts have adopted the Canadian test of proportionality.⁷⁵ 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. As a result, an examination of case law under the Charter can be illuminating.

⁷¹ 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).

⁷² 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).

⁷³ *West Virginia State Board v Barnette* 319 US 625 at 638 (1942) per Jackson J.

⁷⁴ See eg Lord Irvine “The legal system and law reform under Labour” in D Bean (ed) *Law Reform for All* (Blackstone, 1996).

⁷⁵ 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.

Clayton Comments

Richard Clayton QC

Some general principles of Canadian administrative and constitutional law

40. The Canadian case law demonstrates that there is no jurisprudential contradiction between the courts adopting a deferential approach to administrative law and a more rigorous hard edged one to constitutional rights. Thus, in *CUBE v Haldimand-Norfolk Regional Board of Commissioners of Police*⁷⁶ the Supreme Court held that a hands off approach should be taken when an administrative body interprets ambiguous statutory language where the ambiguity relates to matters within that body's expertise and asks whether the administrative body's interpretation is so patently unreasonable that its construction cannot rationally be supported by the relevant legislation and demands intervention by the court on review. Inevitably, this approach has been difficult to maintain.⁷⁷
41. By contrast, Canadian constitutional law has developed the need to police the boundaries established by its written constitution concerning whether legislation is properly enacted in federal or provincial sphere. As Lamer J observed,⁷⁸
- The novel approach of the Constitution Act 1982 ... is not that it has suddenly empowered the courts to consider the content of legislation The truly novel features of the Constitution Act 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values.
42. The Supreme Court emphasised that its constitutional interpretation was to be purposive.⁷⁹ It rejected the idea of an originalist approach⁸⁰ and adopted the traditional "living tree" interpretation of the constitution⁸¹ originally promulgated by Lord Sankey in *Edwards v Canada (A-G)*.⁸²
43. The robust Canadian views on constitutional adjudication contrasts strongly with our doctrine of parliamentary sovereignty. The difference between the

⁷⁶ [1979] 2 SCR 227

⁷⁷ See eg D Dyzenhaus "The Politics of Deference: judicial review and democracy" in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, 1997)

⁷⁸ *Reference re s 94(2) of the Motor Vehicle Act (British Columbia)* [1985] 2 SCR 486 para 12.

⁷⁹ *Hunter v Southam Inc* [1984] 2 SCR 145.

⁸⁰ *R v Therens* [1985] 1 SCR 613 at 638 per Le Dain J.

⁸¹ *Hunter v Southam Inc* [1984] 2 SCR 145.

⁸² [1930] AC 124.

Clayton Comments

Richard Clayton QC

legal cultures was demonstrated when a number of Canadian Indian chiefs sought to challenge the power of the UK Parliament to repatriate the Canadian constitution in *Manuel v A-G*,⁸³ Sir Robert Megarry VC at first instance expressed surprise at style of the arguments being put forward.

On the face of it, a contention that an Act of Parliament is *ultra vires* is bold in the extreme. It is contrary to one of the fundamentals of the British Constitution: see, for example, *Halsbury's Laws of England*

The Canadian views on deference and the Charter

44. It is striking feature of examining the Canadian case law to see how little the issue of deference features in the analysis.
45. However, in the tobacco advertising case, *RJR-McDonald v A-G of Canada*,⁸⁴ McLachlin J made some important observations in the context of considering how proportionality should be addressed. She stated that the proportionality principles should be applied flexibly, having regard to the factual and social context of the case;⁸⁵ and went on to say:⁸⁶

Related to context is the degree of deference which the courts should accord to Parliament. It is established that the deference accorded to Parliament or the legislatures may vary with the social context in which the limitation on rights is imposed. For example, it has been suggested that greater deference to Parliament or the Legislature may be appropriate if the law is concerned with the competing rights between different sectors of society than if it is a contest between the individual and the state.⁸⁷ However, such distinctions may not always be easy to apply. For example, the criminal law is generally seen as involving a contest between the state and the accused, but it also involves an allocation of priorities between the accused and the victim, actual or potential. The cases at bar provide a cogent example. We are concerned with a criminal law, which pits the state against the offender. But the social values reflected in this criminal law lead La Forest J. to conclude that "the Act is the very type of legislation to which this Court has generally accorded a high degree of

⁸³ [1983] Ch 73

⁸⁴ Above.

⁸⁵ Ibid, para 132

⁸⁶ Ibid, paras 135, 136.

⁸⁷ *Irwin Toy v Quebec* [1989] 1 SCR 927 at pp. 993-94; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at p. 521

Clayton Comments

Richard Clayton QC

deference".⁸⁸ This said, I accept that the situation which the law is attempting to redress may affect the degree of deference which the court should accord to Parliament's choice. The difficulty of devising legislative solutions to social problems which may be only incompletely understood may also affect the degree of deference that the courts accord to Parliament or the Legislature. As I wrote in *Committee for the Commonwealth of Canada v. Canada*⁸⁹ some deference must be paid to the legislators and the difficulties inherent in the process of drafting rules of general application. A limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive".

As with context, however, 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.

46. McLachlin CJ returned to question of deference in prisoner vote case, *Sauve v Canada (No 2)*:⁹⁰

My colleague Justice Gonthier proposes a deferential approach to infringement and justification. He argues that there is no reason to accord special importance to the right to vote, and that we should thus defer to Parliament's choice among a range of reasonable alternatives. He further argues that in justifying limits on the right to vote under s. 1, we owe deference to Parliament because we are dealing with "philosophical, political and social considerations", because of the abstract and symbolic nature of the government's stated goals, and because the law at issue represents a step in a dialogue between Parliament and the courts

I must, with respect, demur. The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of

⁸⁸ Above at para. 70.

⁸⁹ [1991] 1 S.C.R. 139, at p. 248

⁹⁰ [2002] 3 SCR 519 paras 8 to 17

Clayton Comments

Richard Clayton QC

substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense.

At the s. 1 [proportionality] stage, the government argues that denying the right to vote to penitentiary inmates is a matter of social and political philosophy, requiring deference. Again, I cannot agree. This Court has repeatedly held that the "general claim that the infringement of a right is justified under s. 1" does not warrant deference to Parliament.⁹¹ Section 1 does not create a presumption of constitutionality for limits on rights; rather, it requires the state to justify such limitations.

The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights. This case is not merely a competition between competing social philosophies. It represents a conflict between the right of citizens to vote -- one of the most fundamental rights guaranteed by the Charter -- and Parliament's denial of that right. Public debate on an issue does not transform it into a matter of "social philosophy", shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the Charter.

Charter rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside. This is manifestly true of the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override. Thus, courts considering denials of voting rights have applied a stringent justification standard.⁹²

The Charter charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good. While a posture of judicial deference to legislative decisions about social policy may be appropriate in some cases, the legislation at issue does not fall into this category. To the contrary, it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the Charter that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.

⁹¹ [1999] 2 S.C.R. 3, at para. 78, per Iacobucci J

⁹² *Sauvé v. Canada (Attorney General)* (1992), 7 O.R. (3d) 481 (C.A.) and *Belczowski v. Canada*, [1992] 2 F.C. 440 (C.A.).

Clayton Comments

Richard Clayton QC

47. In fact, the idea that it is legitimate for the courts to engage in strict scrutiny in Charter cases has provoked the view that the courts perform an important democratic function, that that the courts and legislature are mutual partners in developing a culture of human rights.

The principle of “democratic dialogue”

48. In 1997 Hogg and Bushell published an influential article⁹³ 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.⁹⁴ 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.⁹⁵ 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 Court⁹⁶ 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
49. There are many occasions where the courts have held that the minimal impairment element of the proportionality test was not satisfied where the

⁹³ 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.

⁹⁴ 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).

⁹⁵ 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.

⁹⁶ *R v Morgentaler* [1988] SCR 30.

Clayton Comments

Richard Clayton QC

legislature has subsequently enacted legislation which addresses its views. For example, in the *RJR-McDonald* case⁹⁷ 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.

50. On the other hand, the power to derogate from Charter rights under s 33 has been relatively unimportant.⁹⁸ 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 Court⁹⁹ 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.¹⁰⁰

The Supreme Court of Canada and “democratic dialogue”

51. The Supreme Court has considered the implications of this principle in a number of cases.¹⁰¹
52. In *Vriend v Alberta*¹⁰² 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

⁹⁷ [1995] SCR 199.

⁹⁸ Outside of Quebec the override has only been used once in Saskatchewan, upholding back to work legislation which the Saskatchewan Court of Appeal decided violated the Charter: see *RWSDU v Saskatchewan* (1985) 39 Sask R 193. However, the Supreme Court reversed the Court of Appeal at [1987] 1 SCR 460.

⁹⁹ *Ford v A-G of Quebec* [1988] SCR 712.

¹⁰⁰ See K Roach *The Supreme Court on Trial* (Irwin, 2000) at 273 ff.

¹⁰¹ 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; *Doucet-Boudreau v A-G (Nova Scotia)* [2003] 3 SCR 3.

¹⁰² [1998] 1 SCR 493 paras 136 to 140.

Clayton Comments

Richard Clayton QC

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.

This mutual respect is in some ways expressed in the provisions of our constitution

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.¹⁰³ 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.¹⁰⁴ 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.

53. 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*¹⁰⁵ the Supreme Court decided that the provisions limiting the disclosure of private records in criminal proceedings for sexual assault breached the Charter. The amendments

¹⁰³ 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.

¹⁰⁴ F Hogg and A Bushell (above)

¹⁰⁵ [1995] 4 SCR 411.

Clayton Comments

Richard Clayton QC

subsequently made to the Criminal Code differed significantly from the views expressed by the Supreme Court. Nevertheless, in *R v Mill*¹⁰⁶ 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.

54. On the other hand, as Iacobucci J observed in his dissenting judgment in *R v Hall*,¹⁰⁷ 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.¹⁰⁸
55. The issue was thrown into stark relief in *Sauve (No 2)*¹⁰⁹ 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)*¹¹⁰ 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.
56. 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. She 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'".¹¹¹
57. In his dissenting judgment Gonthier J remarked that:¹¹²

¹⁰⁶ [1999] 3 SCR 668.

¹⁰⁷ 2002 SCC 64 at paras 123 to 129

¹⁰⁸ 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.

¹⁰⁹ [2002] SCC 68

¹¹⁰ [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.

¹¹¹ [2002] SCC 68 at paras 8 to 18.

¹¹² Above at para 106.

Clayton Comments

Richard Clayton QC

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."

58. 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 HRA

59. Some argue that this concept may provide a useful analytical tool under the HRA.¹¹³ There are, however, a number of difficulties with this approach. 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.¹¹⁴ There is a danger that the democratic dialogue should be viewed as no more than a rhetorical device which justifies judicial activism.
60. My own perspective is more modest. The value of the concept is that it draws attention to a critical structural feature of the HRA. 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.

The legitimacy of strict scrutiny

61. The question of whether the courts are ever justified in rejecting the government's views in a very sensitive area had to be faced head on in the

¹¹³ Eg F Klug "The Human Rights Act- a 'third way' or 'third wave'" [2001] EHRLR 361; T Hickman "Constitutional Dialogue, constitutional theory and the Human Rights Act 1998: [2005] PL 306.

¹¹⁴ See L McDonald "New Directions in the Australian Bill of Rights debate" [2004] PL 22.

Clayton Comments

Richard Clayton QC

Belmarsh internment case. Lord Bingham in *A v Secretary of State for the Home Department*¹¹⁵ expressed himself in unequivocal terms:

The A-G ... submitted that as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not judicial judgment. Just as the European court allowed a generous margin of appreciation to member states, recognising that they were better placed to understand and address local problems, so should national courts recognise, for the same reason, that matters of the kind in issue here fall within the discretionary area of judgment properly belonging to the democratic organs of the state. It was not for the courts to usurp authority properly belonging elsewhere.

Those conducting the business of democratic government have to make legislative choices which, notably in some fields, are very much a matter for them, particularly when (as is often the case) the interests of one individual or group have to be balanced against those of another individual or group or the interests of the community as a whole. The European court has recognised this on many occasions¹¹⁶ Where the conduct of government is threatened by serious terrorism, difficult choices have to be made and the terrorist dimension cannot be overlooked¹¹⁷ I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true ... that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues.

¹¹⁵ [2005] 2 AC 68 paras 37 to 42.

¹¹⁶ Citing *Chassagnou v France* (1999) 29 EHRR 615, para 113, and *Hatton v United Kingdom* (2003) 37 EHRR 611, paras 97-98

¹¹⁷ Citing *Brogan v United Kingdom* (1988) 11 EHRR 117, para 80; *Fox, Campbell & Hartley v United Kingdom* (1990) 13 EHRR 157, paras 32, 34; and *Murray v United Kingdom* (1994) 19 EHRR 193, para 47.; *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, paras 28, 62.

Clayton Comments

Richard Clayton QC

The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate.

62. The Belmarsh case is without question one of the most important cases decided in the last few years and comparable to such seminal public law cases as *Anisminic*,¹¹⁸ *Ridge v Balwin*¹¹⁹ or *Conway v Rimmer*.¹²⁰

Deference and unqualified rights

63. The cases concerning assistance to destitute asylum seekers have thrown up a number of difficult issues; and have inspired a suggestion that deference has a role in relation to unqualified rights. In *Secretary of State for the Home Department v Limbuela*¹²¹ the Court of Appeal returned to the question of when the refusal of the Secretary of State to provide assistance to a destitute asylum seeker would amount to a breach of Article 3 of the Convention; and to the approach it had earlier taken in *Q*.¹²²
64. In his dissenting judgment in *Limbuela* Laws LJ gave extensively analysed Article 3 *obiter* which Carnworth LJ accepted.¹²³ Laws LJ began by distinguishing between (i) breaches of Article 3 which consist in violence from State servants; and (ii) breaches which consist in acts or omissions by the State which expose the claimant to suffering inflicted by third parties or circumstance.¹²⁴ He went on to say that state violence is the paradigm case of violating Article 3 and contains three kinds of cases: (a) where the violence in question is actually authorised by the state; (b) where a State official acting in the course of his duty assaults another without the permission of his superior to do so; and (c) where the official has authority to use force (eg to arrest a criminal) but exceeds what is reasonable.¹²⁵ Laws LJ then stated that acts or omissions by the State which expose individuals to suffering other than violence (even in instances as grave

¹¹⁸ [1969] 2 AC 147.

¹¹⁹ [1964] AC 40.

¹²⁰ [1968] AC 910.

¹²¹ [2004] QB 1440

¹²² [2004] QB 36.

¹²³ *Ibid*, para 118.

¹²⁴ *Ibid*, para 59.

¹²⁵ *Ibid*, para 65.

Clayton Comments

Richard Clayton QC

from the victim's point of view as acts of violence which breach Article 3) are not categorically unjustified eg if they arise in the administration or execution of lawful government policy where Article 3 offers protection against suffering albeit not occasioned by violence where the suffering is sufficiently extreme.¹²⁶ He concluded by stating that where Article 3 is deployed to challenge the consequences of lawful government policy, the Article operates as a safety net in exceptional or extreme cases. Laws LJ explained that the spectrum of Article 3 breaches is required by the need of some respect for the obligations the States undertook in becoming parties to the Convention and the need for a measured balance between the judicial domain of the protection of individual rights and the political domain of the State's policy evolved in the general interest.¹²⁷ Laws LJ developed his analysis further in *R(Gezer) v Secretary of State for the Home Department*;¹²⁸ and in *R(N) v Secretary of State for the Home Department*¹²⁹ Lord Brown appeared to approve it.

65. Nevertheless, the approach taken by Laws LJ marks a radical departure. First, it is difficult to identify any basis for it in the decisions of the ECtHR (which would seem to be contrary to *Ullah* and *Marper*). The concept of margin of appreciation has no role in Strasbourg in relation to the scope of Convention rights (except where there is an issue about the existence of a positive obligation). Secondly, his approach is difficult to square with the proper construction of the terms of s 55 of the 2002 Act (which specifically is made subject to the HRA and is not therefore the consequences of lawful policy). Finally, it is difficult to follow why (as a matter of principle) deference to government policy should result in lowering the threshold for liability for breaching an unqualified right.

Deferring to the decision maker whose decision is under challenge

66. In *Daly* Lord Steyn emphasised that proportionality does not mean a shift to merits review, and that the intensity of review will depend on the subject matter in hand, even in cases involving Convention rights. The extent to which the court should defer to the decision maker under challenge has been extensively considered in the immigration context.

¹²⁶ Ibid para 68.

¹²⁷ Ibid, para 77

¹²⁸ (2005) HRLR 16.

¹²⁹ [2005] 2 WLR 1124 paras 87, 88

Clayton Comments

Richard Clayton QC

67. In *R (Samaroo) v Secretary of State for the Home Department*¹³⁰ 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
- 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. He held 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.

68. In *Edor v Secretary of State for the Home Department*¹³¹ the Court of Appeal approved the judgment of Moses J in *R(Ala) v Secretary of State for the Home Department*.¹³² *Ala* was a judicial review of a certificate issued by the Secretary

¹³⁰ [2001] UKHRR 1150

¹³¹ [2003] INLR 361

¹³² [2003] EWHC Admin 521 para 44.

Clayton Comments

Richard Clayton QC

of State that a claim, inter alia, under Article 8 of the Human Rights Convention was manifestly unfounded. Moses J said:

It is the Convention itself and, in particular, the concept of proportionality which confers upon the decision maker a margin of discretion in deciding where the balance should be struck between the interests of an individual and the interests of the community. A decision maker may fairly reach one of two opposite conclusions, one in favour of a claimant the other in favour of his removal. Of neither could it be said that the balance had been struck unfairly. In such circumstances, the mere fact that an alternative but favourable decision could reasonably have been reached will not lead to the conclusion that the decision maker has acted in breach of the claimant's human rights. Such a breach will only occur where the decision is outwith the range of reasonable responses to the question as to where a fair balance lies between the conflicting interests. Once it is accepted that the balance could be struck fairly either way, the Secretary of State cannot be regarded as having infringed the claimant's Article 8 rights in concluding that he should be removed.

69. However, the House of Lords in *R(Razgar) v Secretary of State for the Home Department*¹³³ set out a different approach to be taken when a court reviews a decision of the Secretary of State to remove an individual. Lord Bingham described the various questions to be addressed;¹³⁴ and stated that when reviewing decisions taken in relation to lawful immigration control, those decisions will be proportionate in all but a small minority of cases, identifiable only on a case by case basis.¹³⁵ However, this approach appears to add a gloss to the

70. In *Huang v Secretary of State for the Home Department*¹³⁶ the Court of Appeal had to consider three test cases from the Immigration Appeal Tribunal in *M* Croatia*¹³⁷ where Ouseley J had said:

The starting point should be that if in the circumstances the removal could reasonably be regarded as proportionate, whether or not the Secretary of State has actually said so or applied his mind to the issue, it is lawful. The Tribunal and adjudicators... should normally hold that a decision to remove is unlawful only when the disproportion is so great that no reasonable Secretary of State could remove in those circumstances. However, where the Secretary of State, eg through a consistent decision-making pattern or through decisions in relation to

¹³³ [2004] 2 AC 368.

¹³⁴ Ibid, para 17.

¹³⁵ Ibid, para 20.

¹³⁶ [2005] EWCA Civ 105

¹³⁷ [2004] INLR 327

Clayton Comments

Richard Clayton QC

members of the same family, has clearly shown where within the range of reasonable responses his own assessment would lie, it would be inappropriate to assess proportionality by reference to a wider range of possible responses than he in fact uses. It would otherwise have to be a truly exceptional case, identified and reasoned, which would justify the conclusion that the removal decision was unlawful by reference to an assessment that removal was within the range of reasonable assessments of proportionality...

71. The Court of Appeal went on to examine the earlier authorities in the light of *Razgar*. It rejected the *Edore* approach because, it considered, that it involved a reversion to traditional *Wednesbury* grounds of review and was therefore inconsistent with the speech of Lord Steyn in *Daly*; and decided that an immigration adjudicator could allow an appeal against removal or deportation brought on Article 8 grounds only if he concluded that the case was so exceptional on its particular facts that the imperative of proportionality demanded an outcome in the appellant's favour notwithstanding that he could not succeed under the Immigration Rules. The adjudicator's decision on whether the case was truly exceptional was entirely his own. Where in a human rights challenge the court was called upon in any respect to judge the weight or the merits of government policy, it should in deciding the outcome allow a margin of discretion to the policy maker. Where the court was not called upon to judge policy, no question of the democratic powers of the state arose save that prior decisions of the executive or legislature might have fixed the territory across which the adjudicator's autonomous judgment might operate.
72. The reasoning of Laws LJ in *Huang* is open to question on several grounds. In particular, the distinction drawn by the Court of Appeal between policy decisions" where a democratically accountable decision maker (such as the Secretary of State) is entitled to a significant degree of deference and "decisions in relation to individual cases" where no deference is required is difficult to sustain: factual findings and judgments made by the decision maker are also entitled to a measure of deference.
73. However, it is respectfully submitted that the *Edore* approach is also flawed. To say that *Edore* merely accepts that in any particular case there may be two ways of properly striking the fair balance between individual rights and the public interest; and if that is the case, then the decision of the Secretary of State is to be respected looks perilously close to a reversion to the *Wednesbury* test.

Clayton Comments

Richard Clayton QC

74. In any event, *Edore* applies an unduly attenuated legal test: the fact that there are two ways of properly striking a fair balance does not relieve a court from engaging in the factual exercise of deciding if a particular interference with Convention rights is proportionate. Thus, the ECtHR when deciding a proportionality question will consider a state's margin of appreciation; but nevertheless go on to address the question of whether there are relevant sufficient reasons to interfere with a Convention right. In other words, ascertaining whether a particular decision is within a band of reasonableness is not the end of the judicial process, but calls for further analysis- as I shall argue below.

What amounts to “due deference”

75. It will often be obvious in an HRA case that some amount of deference is due in a particular case. The crucial question will always be how much deference is due; and how the court should tackle this issue.
76. Deference has both a substantive and procedural aspect. I do not suggest that the insights I offer are profound. Nevertheless, I believe that if we are to achieve effective protection for human rights through litigation, there are some basic points that are worth drawing attention to.

The substantive aspect of due deference

77. There is probably not much disagreement about the sort of factors the courts should consider when addressing whether it should defer to the views of others
78. When the court is considering whether and to what extent it is appropriate to defer to the views of the public authority, the court should undertake a close factual analysis of the justification for the views expressed. Context (as Lord Steyn stressed in *Daly*) is everything. It would be rash to attempt to give an exhaustive list of relevant factor; but I think that consideration should take account of the following factors (which may conflict in particular cases):
- the nature of the right eg whether the right in question is unqualified or qualified; and whether proportionality requires weighing competing rights or is primarily a dispute between the individual and the state;.
 - the importance of the rights at stake: some rights are of particular importance and will require a high degree of constitutional protection: for example, access to the courts, freedom of expression (particularly,

Clayton Comments

Richard Clayton QC

- political expression) and intimate aspects of private life such as an individual's sexuality;
- the extent of the interference with the right and, in particular, whether the interference impairs the very essence of the right;
- whether the reason for interfering with the right is sufficiently important to justify the interference;
- the context within which the public authority is operating: the court is likely to defer to discretionary judgments which require consideration of social, economic or political policy at one end of the spectrum, but will be disinclined to do so when considering routine administrative decisions;
- the degree of specialist expertise involved: there are some areas where the court has a particular expertise (for example, in relation to the criminal law) and others where it is appropriate to defer to the specialist expertise of the decision maker.

Although the court will normally be involved in reviewing of another decision maker, it nevertheless remains subject to its obligation under s 6 of the HRA not to act incompatibly with Convention rights.

The procedural aspect of due deference

79. The s 6 obligation on the court, at the very least, requires it to undertake a transparent reasoning process when resolving proportionality questions suggested by Lord Steyn in *Daly* and by Dyson LJ in *Samaro*:
- whether the objective of the interference is sufficiently important to justify limiting the right;
 - whether the measures designed to meet the objective are rationally connected with it;
 - whether the means used to impair the right is no more than is necessary to accomplish that objective; and
 - whether the interference does not have an excessive or disproportionate effect on the affected individual.

80. Again, it is illuminating to compare the way the Canadian courts with the way cases have been decided under the HRA. I do not have the time or opportunity to do so in any systematic way. But I would like to emphasise one broad point which is apparent from reading the cases. The Canadian cases routinely analyse the proportionality issues in close detail, certainly by comparison with the sometime exiguous style adopted in some

Clayton Comments

Richard Clayton QC

HRA cases. The absence of detailed reasoning in the HRA cases is particularly disappointing since Lord Hope stressed in *R v Shayler*:¹³⁸

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.”

81. In *R v Secretary of State for the Home Department ex p Pearson and Martinez*¹³⁹ applications were brought by prisoners complaining that their disenfranchisement was incompatible with the right to free elections under Article 3 of the First Protocol. Under s 3(1) of the Representation of the People Act 1983 a convicted person detained in a penal institute was legally incapable of voting. As a result of the proceedings the Home Secretary gave reasons for his policy stating that prisoners with custodial records have forfeited the right to have a say in the way the country is governed. Kennedy LJ in dismissing the claim dealt with the point by stating that:

If an individual is to be disenfranchised that must be in pursuit of a legitimate aim. In the case of a convicted prisoner serving his sentence the aim may not be easy to articulate. Clearly there is an element of punishment, and also an element of electoral law. As the Home Secretary said, Parliament has taken the view that for the period during which they are in custody convicted prisoners have forfeited their right to have a say in the way the country is governed. The Working Group [on electoral procedures] said that such prisoners had lost the moral authority to vote. Perhaps the best course is that suggested by Linden JA, namely to leave to philosophers the true nature of this disenfranchisement whilst recognising that the legislation does different things.

82. The same argument was put forward by the Government in *Sauve (No 2)*¹⁴⁰ where it was rejected by MacLachlin CJ in somewhat different terms.

This brings us to the government's final argument for rational connection -- that disenfranchisement is a legitimate weapon in the state's punitive arsenal against the individual lawbreaker. Again, the argument cannot succeed. The first reason is that using the denial of rights as punishment is suspect. The second reason is that denying the right to vote does not comply with the requirements for legitimate punishment established by our jurisprudence.

¹³⁸ [2003] 1 AC 247 para 61.

¹³⁹ (2001) HRLR 39; leave to appeal was refused by the Court of Appeal.

¹⁴⁰ Above, paras 45 to 52.

Clayton Comments

Richard Clayton QC

The argument, stripped of rhetoric, proposes that it is open to Parliament to add a new tool to its arsenal of punitive implements -- denial of constitutional rights. I find this notion problematic. I do not doubt that Parliament may limit constitutional rights in the name of punishment, provided that it can justify the limitation. But it is another thing to say that a particular class of people for a particular period of time will completely lose a particular constitutional right. This is tantamount to saying that the affected class is outside the full protection of the Charter. It is doubtful that such an unmodulated deprivation, particularly of a right as basic as the right to vote, is capable of justification under s. 1. Could Parliament justifiably pass a law removing the right of all penitentiary prisoners to be protected from cruel and unusual punishment? I think not. What of freedom of expression or religion? Why, one asks, is the right to vote different? The government offers no credible theory about why it should be allowed to deny this fundamental democratic right as a form of state punishment.

The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen's continued membership in the self-governing polity. Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order. Certain rights are justifiably limited for penal reasons, including aspects of the rights to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact. Indeed, the right of the state to punish and the obligation of the criminal to accept punishment are tied to society's acceptance of the criminal as a person with rights and responsibilities. Other Charter provisions make this clear. Thus s. 11 protects convicted offenders from unfair trials, and s. 12 from "cruel and unusual treatment or punishment".

The second flaw in the argument that s. 51(e) furthers legitimate punishment is that it does not meet the dual requirements that punishment must not be arbitrary and must serve a valid criminal law purpose. Absence of arbitrariness requires that punishment be tailored to the acts and circumstances of the individual offender.¹⁴¹ In the immortal words of Gilbert and Sullivan, the punishment should fit the crime. Section 51(e) qua punishment bears little relation to the offender's particular crime. It makes no attempt to differentiate among inmates serving sentences of two years and those serving sentences of twenty. It is true that those serving shorter sentences will be deprived of the right to vote for a shorter time. Yet the correlation of the denial with the crime remains weak. It is not only the violent felon who is told he is an unworthy outcast; a person imprisoned for a non-violent or negligent act, or an Aboriginal

¹⁴¹ *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073.

Clayton Comments

Richard Clayton QC

person suffering from social displacement receives the same message. They are not targeted, but they are caught all the same. For them the message is doubly invidious -- not that they are cast out for their apparently voluntary rejection of society's norms, but that they are cast out arbitrarily, in ways that bear no necessary relation to their actual situation or attitude towards state authority.

Punishment must also fulfill a legitimate penal purpose.¹⁴² These include deterrence, rehabilitation, retribution, and denunciation.¹⁴³ Neither the record nor common sense supports the claim that disenfranchisement deters crime or rehabilitates criminals. On the contrary, as Mill recognized long ago, participation in the political process offers a valuable means of teaching democratic values and civic responsibility.

This leaves retribution and denunciation. Parliament may denounce unlawful conduct. But it must do so in a way that closely reflects the moral culpability of the offender and his or her circumstances. As Lamer C.J. indicated in *M. (C.A.)*, supra, at para. 80:

Retribution in a criminal context, by contrast [to vengeance], represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. [Emphasis in original.]

Denunciation as a symbolic expression of community values must be individually tailored in order to fulfill the legitimate penal purpose of condemning a particular offender's conduct (see *M.*)¹⁴⁴ and to send an appropriate "educative message" about the importance of law-abiding behaviour.

Section 51(e) imposes blanket punishment on all penitentiary inmates regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct. It is not individually tailored to the particular offender's act. It does not, in short, meet the requirements of denunciatory, retributive punishment. It follows that it is not rationally connected to the goal of imposing legitimate punishment.

When the facade of rhetoric is stripped away, little is left of the government's claim about punishment other than that criminals are people who have broken society's norms and may therefore be denounced and punished as the government sees fit, even to the point of removing fundamental constitutional rights. Yet, the right to punish and to denounce, however important, is constitutionally constrained. It cannot be used to write entire rights out of the Constitution, it cannot be arbitrary, and it must serve the

¹⁴² see *Smith*, supra, at p. 1068.

¹⁴³ *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 82.

¹⁴⁴ *(C.A.)*, supra, at para. 81

Clayton Comments

Richard Clayton QC

constitutionally recognized goals of sentencing. On all counts, the case that s. 51(e) furthers lawful punishment objectives fails.

83. The prisoner vote cases show the cross pollination that now occurs in human rights cases. In *Pearson* the Divisional Court considered case law from Canada, the United States and South Africa in addition to the Strasbourg cases. In *Sauve (No 2)*¹⁴⁵ Gauthier J in his dissenting judgment applied the dicta of Kennedy LJ in *Pearson*. In *Hirst v United Kingdom*¹⁴⁶ the ECtHR attached considerable weight to the views of the Canadian Supreme Court in *Sauve (No 2)* when finding for the applicant. *Hirst* is now be argued before the Grand Chamber whose judgment we must now await.
84. The Canadian approach to factual issues, particularly in relation to the minimal impairment test, is again rigorous. The analysis in the following cases is of particular interest because the courts ruled that legislative interferences with rights were not proportionate.
85. In the *RJR-McDonald* case legislation prohibiting tobacco advertising breached commercial freedom of speech and McLachlin J¹⁴⁷ observed that:
... the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.¹⁴⁸ On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.
- She went on to consider the fact that did the government presented no evidence justifying its choice of a total ban¹⁴⁹:
Instead, the Attorney General contented himself with the bland statement that a complete ban is justified because Parliament "had to balance competing interests"

¹⁴⁵ [2002] SCC 68; see generally paras 104 to 108..

¹⁴⁶ Judgment, 30 March 2004.

¹⁴⁷ *Ibid*, para 160.

¹⁴⁸ See *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* [1990] 1 S.C.R. 1123, at pp. 1196-97; *R v Chaulk*, Fn 32 at pp. 1340-41; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, at pp. 1105-06.

¹⁴⁹ *Ibid*, para 167, 168.

Clayton Comments

Richard Clayton QC

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:

... 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.]

... 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."

86. In *Libman v Quebec (Attorney-General)*¹⁵⁰ 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 choice¹⁵¹:

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 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.¹⁵² La Forest J's comment on the subject in *RJR-MacDonald*¹⁵³, is perfectly apposite:

¹⁵⁰ Fn 16.

¹⁵¹ Ibid at para 59 to 62.

¹⁵² *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).

¹⁵³ Ibid at 277

Clayton Comments

Richard Clayton QC

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*¹⁵⁴, a failure to satisfy the minimal impairment test will be found only if there are measures 'clearly superior to the measures currently in use.

87. 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.

88. 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 (A-G)*¹⁵⁵. 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

¹⁵⁴ [1991] 2 SCR 211 at 296.

¹⁵⁵ [1998] 1 SCR 877.

Clayton Comments

Richard Clayton QC

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.

Conclusion

89. In the derogation case¹⁵⁶ Lord Bingham approved Professor Jowell's view that under the HRA the courts are charged by Parliament with delineating the boundaries of a rights-based democracy. The implications of this suggestion for the legal profession are considerable. It means that the courts have a more central role in our governance than we have traditionally assumed- although (as Lord Hoffmann cautioned in *Alconbury*),¹⁵⁷ the HRA was intended to strengthen the rule of law, not to inaugurate the rule of lawyers.
90. I believe that the responsibility thrust on the courts by the HRA can be more readily achieved by:
- an acceptance that the constitutional status of the HRA mandates a principle of strict scrutiny where it is alleged that Convention rights have been breached;
 - a recognition that the courts themselves have a legitimate democratic role in subjecting governmental decision making to close analysis;
 - a recognition that it will often be necessary for a court to defer to the judgment of others: but that the critical issue is to evaluate how much deference is due to that judgment in a particular case;

¹⁵⁶ *A v Secretary of State for the Home Department* [2005] 2 AC 68 para 42 citing "Judicial Deference: servility, civility or institutional capacity?" [2003] PL 592.

¹⁵⁷ [2003] 2 AC 295 para 129.

Clayton Comments

Richard Clayton QC

- an acceptance that proportionality issues require rigorous examination (i) to establish a rational connection (as in the derogation case) and (ii) to demonstrate that an interference is in fact proportionate;
- a commitment to provide detailed and transparent reasoning when undertaking this exercise.

91. As the Chief Justice of the Supreme Court of Canada has stressed in the *RJD-McDonald* case,¹⁵⁸ 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 diminishes the role of the courts in a constitutional process. I hope some of my suggestions contribute to developing a different and more fruitful approach.

Published 26th July 2005

¹⁵⁸ Above, para 136.