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### Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference

Liora Lazarus

*Allard School of Law at the University of British Columbia*, [lazarus@allard.ubc.ca](mailto:lazarus@allard.ubc.ca)

Natasha Simonsen

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## 20

*Judicial Review and Parliamentary Debate: Enriching the  
Doctrine of Due Deference*

LIORA LAZARUS AND NATASHA SIMONSEN

PARLIAMENTARY SOVEREIGNTY IS often conceptualised as the opposite of judicial supremacy, and the struggle for democratic legitimacy with respect to human rights as a perennial tug-of-war.<sup>1</sup> The contributions in this volume argue that the relationship between courts and the legislature need not be a zero sum game, as these institutions can work together to protect human rights. This chapter makes some bold propositions on how to develop that partnership and enrich the doctrine of due deference. Our argument is that rigorous and respectful judicial examination of democratic processes enhances constitutional dialogue, increases the opportunities for judicial deference and heightens the transparency with which deference is exercised. This proposal challenges established constitutional orthodoxy in the UK. But constitutional orthodoxy is also an evolving phenomenon that has adapted to changing constitutional landscapes over time.

This chapter is divided into two sections. Part A outlines the doctrine of due deference and its relationship to judicial review, making a case for courts to consider the quality of legislative debate when deciding whether and how to defer. Part B proposes a set of criteria that we think judges ought to take into account when exercising deference.

The discussion that follows is premised on a particular set of assumptions. We assume a high level of institutional functioning and competence of parliament, the executive and the courts. We assume further that each of these institutions is committed both to protecting human rights, and to fostering a constructive

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<sup>1</sup> See, eg, R Ekins, 'Judicial Supremacy and the Rule of Law' (2003) 119 *Law Quarterly Review* 127; PA Joseph, 'Parliament, the Courts, and the Collaborative Enterprise' (2004) 15 *King's College Law Journal* 321; R Ekins, 'The Authority of Parliament: A Reply to Professor Joseph' (2005) 16 *King's College Law Journal* 51. For a criticism of this dichotomous understanding of parliamentary and judicial supremacy, see M Hunt, 'Reshaping Constitutionalism' in J Morison, K McEvoy, and G Anthony, *Judges, Transition and Human Rights* (Oxford, OUP, 2007), 467-77.

constitutional dialogue. With these parameters in place, there is a case that domestic and supranational courts should consider the quality of democratic deliberation in their decisions about when and how to defer to the elected branches.

### I. DUE DEFERENCE AND JUDICIAL REVIEW

Opponents of judicial review argue that it diverts and undermines democracy.<sup>2</sup> The judiciary's common response to this criticism is to exercise self-restraint and defer to the legislature when evaluating the human rights pedigree of legislation.<sup>3</sup> But the relationship between the three branches of government with respect to human rights is now evolving towards a 'modern constitutionalism which rejects the old dichotomy between political and legal constitutionalism', and embraces the shared responsibility of 'all branches of the State, the Government, the Parliament and the Courts ... to uphold the rule of law.'<sup>4</sup> This dialogic model of constitutionalism views the judiciary and the legislature as partners in a common enterprise,<sup>5</sup> rather than adversaries in a perpetual contest for supremacy. It calls on the one hand to strengthen democratic oversight of human rights, and on the other hand to find creative ways for courts to complement these participatory processes.

The constitutional dialogue model has developed in the UK and elsewhere<sup>6</sup> against the backdrop of a changing human rights landscape. These changes include

<sup>2</sup> See generally J Waldron, 'Judicial Review and the Conditions of Democracy' (1998) 6 *Journal of Political Philosophy* 335–355; J Waldron, 'Moral Truth and Judicial Review'.

(1998) 43 *American Journal of Jurisprudence* 75; J Waldron, *The Dignity of Legislation* (Cambridge, Cambridge University Press, 1999); M Tushnet, *Taking the Constitution Away from the Courts* (New Jersey, Princeton University Press, 1999); R Ekins, above n1; LD Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford, OUP, 2004); J Waldron, 'The Core of the Case against Judicial Review' (2005) 115 *Yale Law Journal* 1346.

<sup>3</sup> See, eg, RA Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 *Modern Law Review* 859; A Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451.

<sup>4</sup> M Hunt, 'The Joint Committee on Human Rights' in A Horne, D Oliver and G Drewry (eds) *Parliament and the Law* (Oxford, Hart, 2013).

<sup>5</sup> A Barak, *The Judge in a Democracy* (New Jersey, Princeton University Press, 2006) 15-19; A Barak, *Purposive Interpretation in Law* (New Jersey, Princeton University Press, 2007), 250. See also B McLachlin, 'Charter Myths' (1999) 33 *University of British Columbia Law Review* 23, 34-6, describing the 'symbiotic' relationship between courts and the legislature in realising the rights in the Canadian Charter. See further Joseph, above n1, 322-3, describing the 'constitutional relationship of interdependence and reciprocity' between parliament and the courts, in which each branch 'is engaged in a collaborative enterprise...committed to the same ends and ideals, albeit in different, task-specific ways'. This relationship of 'institutional *interdependence*' should be distinguished from their 'operational *independence*', 335 (emphasis original).

<sup>6</sup> These features are common to other developed countries with constitutional democratic models of government such as Canada, Germany, South Africa, Israel, Australia and New Zealand.

the creation of parliamentary select committees to strengthen the role of parliaments in protecting human rights and improve the quality of legislative deliberation on rights.<sup>7</sup> At the same time, there has been growth and strengthening of independent human rights institutions, equality bodies, non-governmental organisations and other civil society groups,<sup>8</sup> leading to a broader human rights ‘bricolage’.<sup>9</sup> These developments support stronger institutional oversight, and have resulted in an improved array of mechanisms for resolving conflicts with respect to human rights. These changes are important steps towards creating and maintaining a culture of justification, whereby citizens can reasonably expect that every exercise of power will be justified, and ‘the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by force at its command’.<sup>10</sup>

But the human rights landscape is also characterised by significant challenges. These include the increasing pressure on courts through expanding demand for judicial review of human rights,<sup>11</sup> leading to parallel efforts to restrict access to relief.<sup>12</sup> The mounting pressure on judicial processes is augmented by calls for special

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<sup>7</sup> See, eg. C Evans, and S Evans, ‘Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights’ [2006] *Public Law* 785; M Hunt, ‘The Impact of the Human Rights Act on the Legislature: A Diminution of Democracy or a New Voice for Parliament?’ [2010] *European Human Rights Law Review* 601.

<sup>8</sup> There is a growing body of literature on this trend and its implications; see, eg. R Murray, ‘The Relationship Between Parliaments and National Human Rights Institutions’, in J Morrison, K McEvoy and G Anthony, *Judges, Transition and Human Rights* (New York, OUP, 2007) 357-76; T Pegram, ‘Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions’ (2010) 32 *Human Rights Quarterly* 729; R Carver, ‘A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law’ (2010) 10 *Human Rights Law Review* 1; R Carver, ‘One NHRI or Many? How Many Institutions Does It Take to Protect Human Rights? – Lessons from the European Experience’ (2011) 3 *Journal of Human Rights Practice* 1; B de Witte, ‘New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance’ (2012) 60 *American Journal of Comparative Law* 49.

<sup>9</sup> B de Witte, *ibid.*

<sup>10</sup> E Mureinik, ‘Bridge to Where - Introducing the Interim Bill of Rights, A’ (1994) 10 *South African Journal on Human Rights* 31, 32. See also D Dyzenhaus, ‘Law as Justification: Etienne Mureinik’s Conception of Legal Culture’ (1998) 14 *South African Journal on Human Rights* 11; and L Lazarus, ‘Conceptions of Liberty Deprivation’ (2006) 69 *Modern Law Review* 738.

<sup>11</sup> For a brief analysis of the increasing number of judicial review applications in the UK, see R Rogers, ‘Judicial Review Statistics: How Many Cases Are There and What Are They About?’ *The Guardian Datablog*, November 19, 2012, available at: [www.guardian.co.uk/news/datablog/2012/nov/19/judicial-review-statistics](http://www.guardian.co.uk/news/datablog/2012/nov/19/judicial-review-statistics). The raw data is available at: [www.gov.uk/government/publications/judicial-and-court-statistics-annual](http://www.gov.uk/government/publications/judicial-and-court-statistics-annual). See also, as regards Strasbourg, [www.echr.coe.int/echr/en/header/reports+and+statistics/reports/annual+reports/](http://www.echr.coe.int/echr/en/header/reports+and+statistics/reports/annual+reports/). For discussion of the implications of that increase, see the report of the Joint Committee on Human Rights, ‘Enhancing Parliament’s Role with Respect to Human Rights Judgments’, *15th Report of Session 2009-10*, March 26, 2010, HL 85/HC 455. See also N Simonsen, ‘The Strasbourg Court, The ‘Exhaustion of Domestic Remedies’ Rule, and the Principle of Subsidiarity: Between a Rock and a Hard Place?’ *Oxford Human Rights Hub*, March 18, 2013, available at: [www.ohrh.law.ox.ac.uk/?p=1235](http://www.ohrh.law.ox.ac.uk/?p=1235).

<sup>12</sup> See, in the UK, G Parker, ‘Cameron Set to Reform Judicial Review’, *Financial Times*, (18 November 2012). Reduced funding and access restrictions to legal aid will also have the effect of

measures and exceptions on national security grounds, leading to the development of new regimes for secret evidence, special advocates, and the development of preventative models for the criminal law.<sup>13</sup>

The recent changes in the human rights landscape and the challenges they bring necessitate a shift in the institutional pattern of human rights protection. In particular, we think these developments present new possibilities for courts to exercise restraint. But these developments also raise some important, and difficult, questions. To what extent should courts consider the quality of democratic debate? What considerations should guide courts in considering legislative materials? Our view is that courts should consider the quality of democratic debate in deciding whether and how to defer to the legislature when reviewing human rights. If parliament has done its job well, its decisions should invite a high degree of deference from the courts. Thus, our model positions parliaments squarely in the centre of the frame.

Supranational courts too should pay close attention to democratic debates in member states to bolster the principle of subsidiarity. The Strasbourg Court has followed this approach when applying the margin of appreciation in the recent cases of *Hirst (No 2)*,<sup>14</sup> *Animal Defenders International*<sup>15</sup> and *Shindler*.<sup>16</sup> In each of these cases, the Strasbourg Court assessed the quality of the democratic debate that had preceded the passage of rights-restricting measures to determine to what extent the margin of appreciation applied. This is a welcome development in the Court's case law, offering a useful departure point for extension by domestic courts.

Given their proximity to domestic legislative processes, domestic courts should defer as often as they can to preserve the legitimacy of judicial review. Presently, this objective is hampered by the absence of a clear and principled answer

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limiting access to judicial review in the UK. See the Ministry of Justice Consultation *Transforming Legal Aid*, 9 April 2013, available at: [www.consult.justice.gov.uk/digital-communications/transforming-legal-aid](http://www.consult.justice.gov.uk/digital-communications/transforming-legal-aid). In the ECtHR context, see the Interlaken Declaration and Action Plan (19 February 2010), aiming to improve implementation of ECtHR judgments at the national level.

<sup>13</sup> For a discussion of these aspects, see L Lazarus, B Goold and C Goss, 'Control Without Punishment: Understanding Coercion', in J Simon, and R Sparks (eds), *The SAGE Handbook of Punishment and Society* (London SAGE Publications Ltd, 2012), 463-492.

<sup>14</sup> *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41. See in particular paras 21-24, 78 and 79.

<sup>15</sup> *Animal Defenders International v United Kingdom* (App No 48876/08) (April 22, 2013) (GC). See in particular paras 42—55; 108, 110 and 114.

<sup>16</sup> *Shindler v United Kingdom* (App No 19840/09) (May 7, 2013). See in particular paras 22—28, 102, and para 117.

to the question of how and when English courts should defer.<sup>17</sup> Aside from the question-begging proposition that some matters fall within the competence of the legislature or executive while others lie within the competence of the courts,<sup>18</sup> attempts to structure analysis of deference have met with limited success. Notwithstanding Laws LJ's more rigorous exposition in *Roth*,<sup>19</sup> many cases continue to follow the opaque approach to deference in *R v Lichniak*.<sup>20</sup> There, Lord Bingham (with whom Lord Steyn agreed) asserted without substantiation that 'a degree of deference [was] due to the judgment of a democratic assembly on how a particular social problem is best tackled'.<sup>21</sup> The critical questions that the case left unanswered, and which subsequent cases also skirt, is what degree of deference is due, and when is it justified?

Our view is that, in a culture of justification, deference should be *earned* by the legislature.<sup>22</sup> Rather than simply noting, as Lord Bingham did in *Lichniak*, that 'there have been numerous occasions on which Parliament could have amended [the section] had it wished',<sup>23</sup> courts should consider whether Parliament '*meaningfully engaged*' with the rights considerations in play.<sup>24</sup> Concretely, this means they should

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<sup>17</sup> See, inter alia, C Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 *Law Quarterly Review* 248, 249 describing the engagement of the senior judiciary with the Human Rights Act 1998 as 'rather ad hoc and unprincipled'. See also J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' (2003) *Public Law* 592, arguing that 'It is becoming clearer by the day that the most difficult question for the courts in the interpretation of the Human Rights Act 1998 is the extent to which they should defer to Parliament and other institutions of government on matters relating to the public interest'; and R Clayton, 'Judicial Deference and "Democratic Dialogue": The Legitimacy of Judicial Intervention Under the Human Rights Act 1998' [2004] *Public Law* 33, observing that 'English courts have yet to articulate a developed approach towards judicial deference when considering human rights claims'.

<sup>18</sup> See the opinion of Hoffmann LJ in *R (ProLife Alliance) v BBC* [2003] UKHL 23; [2004] 1 AC 185. Jowell summarises this proposition as the 'dichotomy ... between principle (involving moral rights against the state—a matter for judges to determine) and policy (involving utilitarian calculations of the public good—a matter for the legislature or its agents to determine)', *ibid*, 593, citing R Dworkin, *Taking Rights Seriously* (Cambridge, Harvard University Press, 1978). Hunt's description of this 'spatial language of areas or margins of discretion' is apt: see M Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"', in N Bamforth, and P Leyland, (eds), *Public Law in a Multi-Layered Constitution* (Oxford, Hart, 2003), 339.

<sup>19</sup> *International Transport Roth GmbH & Ors v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] QB 728 (per Laws LJ, dissenting) [hereafter '*Roth*'].

<sup>20</sup> [2002] UKHL 47; [2003] 1 AC 903.

<sup>21</sup> *R v Lichniak*, *ibid*, 912 (per Bingham LJ) (citations omitted) (emphasis added).

<sup>22</sup> M Hunt, above n18, 340 (footnote omitted) (emphasis in original).

<sup>23</sup> *R v Lichniak*, above n20, 911 (per Bingham LJ).

<sup>24</sup> The concept of 'meaningful engagement' is transplanted here from South African jurisprudence, including, inter alia, *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd and 97 Others* [2012] ZASCA 116 (CC). In the South

consider whether the Parliament rigorously debated the measure; what kind of scrutiny it was subjected to at the committee stage and in parliament; the nature of the right that the measure impugns; and the extent of the restriction on the right.<sup>25</sup> If these conditions are satisfied, then the measure in question should attract a high degree of deference from the courts. Structuring the assessment of deference according to such criteria will not only increase the transparency with which deference is exercised, but will also lead to new opportunities for deference where the Parliament is doing its job well.

In contrast, if courts are free to ignore the deliberations of the democratically elected branches, and if they fail to defer as a consequence, they will likely face a crisis of legitimacy at some point, regardless of their constitutional mandate. In the tension between majoritarian democratic processes and protecting fundamental rights, judicial review is justified as a corrective or complement to democracy. If, like Ely, we see judicial review as self-correction where majoritarianism fails to protect the interests of the unrepresented or the minority, then it follows that judicial review must always examine whether the legislature has applied its mind to the rights considerations in question and act where those processes have fallen short.<sup>26</sup> It is hard to see how judicial review can be justified if it ignores legislative deliberation altogether. Where there is scope for disagreement, and room to defer, the courts should do so.

The same arguments apply with equal, if not greater force to international courts, where the principle of subsidiarity ‘underpins the obligation on State Parties to ensure Convention rights are secured at the national level.’<sup>27</sup> The further international courts are from the democratic deliberations of signatory states, the more strained the international order will become.<sup>28</sup> The Strasbourg Court has acknowledged that ‘the

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African context ‘meaningful engagement’ has been used as an interim remedy to prompt the parties to come to a deliberative solution without the court’s intervention. While the context is different, the standards applied in the assessment of meaningful engagement may well offer guidance in how Courts can assess parliamentary procedures. See further discussion below, 14.

<sup>25</sup> These criteria are developed in Part B below.

<sup>26</sup> JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Harvard University Press, 1980); see also A Nolan, *Children’s Socio-Economic Rights, Democracy and the Courts* (Oxford, Hart, 2011).

<sup>27</sup> L Lazarus, C Costello, N Ghanea, and K Ziegler, *The Evolution of Fundamental Rights Charters and Case Law* (1 February, 2011) European Parliament Directorate-General for Internal Policies, 75, available at: [www.ssrn.com/abstract=2210448](http://www.ssrn.com/abstract=2210448).

<sup>28</sup> This presumably explains why the European Court has softened its position in the face of public outcry over the prisoner voting debate in the UK and the deportation of terror suspects such as Abu Qatada.

national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions.<sup>29</sup> The recently concluded Protocol 15 to the European Convention will add a reference to the preamble ‘affirming’ that States parties ‘in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention... and that in doing so they enjoy a margin of appreciation’.<sup>30</sup>

In the Strasbourg context, assessing the quality of legislative debate in deciding whether a particular measure falls within the margin of appreciation allows the principle of subsidiarity to operate to its fullest effect. Until recently, the European Court was criticised for its failure to develop clear criteria or principles as to when a measure falls within the margin of appreciation.<sup>31</sup> However, in *Animal Defenders International* the Strasbourg Court built on its earlier decision in *Hirst (No 2)*, developing an approach that bears directly on the performance of Parliament in its deliberative process. The Grand Chamber said that a determination of the proportionality of a general measure demands an assessment of ‘the legislative choices underlying it’, including the ‘quality of the parliamentary and judicial review of the necessity of the measure’.<sup>32</sup> It went on to analyse the legislative history of the prohibition on political advertising on broadcast television in detail.<sup>33</sup> This included a review of the provision by a parliamentary committee in 1998, publication of a White Paper in 2001 which included discussion of relevant Strasbourg case law; consultation with specialist bodies such as the Joint Committee on Human Rights and the Electoral Commission; and the bipartisan support which the passage of the 2003 Act had attracted.<sup>34</sup> The Grand Chamber thus described the impugned measure as ‘the culmination of an exceptional examination by parliamentary bodies of the cultural,

<sup>29</sup> *Hatton v UK* [2002] 34 EHRR 1, para 97.

<sup>30</sup> Article 1, Protocol 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (open for signature May 24, 2013) (not yet in force).

<sup>31</sup> See, eg. E Brems, ‘Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights’ (1996) 56 *Zeitschrift Fur Ausländisches Öffentliches Recht Und Völkerrecht* 240; HC Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Leiden, Martinus Nijhoff, 1996); Arai-Takahashi, Y, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Cambridge, Intersentia, 2002).

<sup>32</sup> *Animal Defenders International v UK*, above n15, para 108. The quality of the legislative and judicial review of the measure was later described as ‘of central importance’ to the outcome: para 113.

<sup>33</sup> *ibid*, paras 42-55.

<sup>34</sup> *ibid*, para 114.



political and legal aspects of the prohibition’,<sup>35</sup> and confirmed that this justified the degree of deference that domestic courts had afforded to parliament in judicial review.<sup>36</sup> It also justified the UK Parliament being afforded a wide margin of appreciation in deciding how best to implement the Article 10 right to freedom of expression.

We broadly support the Strasbourg Court’s approach to the margin of appreciation in *Animal Defenders International*. In what follows, we propose a set of criteria to further structure its analysis of parliamentary debate and apply it across other cases, as well as to help domestic courts in the UK and elsewhere to develop a more principled doctrine of due deference. The level of scrutiny that courts apply in assessing legislative debate will no doubt differ depending on the court’s mandate and the legal culture.<sup>37</sup> In some countries, judicial scrutiny of democratic processes follows from an obligation to enforce constitutional norms of democratic procedure. For example, the South African Constitution obliges parliament to facilitate public participation in its decision-making processes.<sup>38</sup> In the *Doctors for Life* case the South African Constitutional Court held that all branches of government have an interest in courts making sure that Parliament fulfils its constitutional obligations, and in correcting democratic procedures if required.<sup>39</sup> That is a strong mandate to confer upon a constitutional court, but even in countries such as Israel where the courts lack that explicit mandate, they are often asked to scrutinise parliamentary debates.<sup>40</sup> Thus,

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<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.* para 115. For a summary of the domestic proceedings, see the judgment of the House of Lords in *R (On the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312.

<sup>37</sup> See, eg, M Hunt, ‘The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession’ (1999) 26 *Journal of Law and Society* 86.

<sup>38</sup> See ss59 and 72, *Constitution of the Republic of South Africa*, 1996. See further ss 73–82, which oblige ‘public debate’ on proposed constitutional amendments (s 74(5)(c)) and allow members of the National Assembly to apply to the Constitutional Court for a determination of the constitutionality of a proposed bill.

<sup>39</sup> *Doctors for Life International v Speaker of the National Assembly and Ors* (2006) 6 SA 416 (CC) (17 August 2006), hereafter ‘*Doctors for Life*’.

<sup>40</sup> The Israeli Supreme Court—with no express constitutional mandate to do so—has considered matters such as, inter alia: whether the Prime Minister of Israel had correctly exercised his discretion with respect to removal of a Minister from office (HCJ 3094/93 *Movement for Quality Government v State of Israel* 47(5) PD 404); and whether an outgoing executive acted lawfully in entering peace negotiations with the Palestinians, in circumstances where it lacked the confidence of the parliament (HCJ 5167/00, *Weiss v Prime Minister of Israel* 55(2) PD 455); and decisions of the Speaker of the Knesset with respect to tabling matters in Parliament and the length of time for debate (HC 9070/00 *Livnat v Chairman of Constitution, Law & Justice Committee* 55(4) PD 800, 813). For discussion of these and other cases, see, Barak, A, *The Judge in A Democracy*, above n5, and Barak-Erez, D, ‘Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint’ (2009) 3 *Indian Journal of Constitutional Law* 118.

even English courts are not unfamiliar with questions of the relevance and weight to be attached to parliamentary materials. Our proposal builds upon this experience, as well as the example set by the Strasbourg court in recent decisions.

These propositions may encounter resistance based on practical grounds such as the potential lengthening of court proceedings and/or the complexity of judgments;<sup>41</sup> the limited capacity and expertise of parliamentarians with respect to human rights;<sup>42</sup> or fears that judicial scrutiny might have a ‘chilling’ effect on parliamentary speech.<sup>43</sup> But the gains of enhancing democratic dialogue, and improving the transparency with which deference is exercised, weigh strongly against such pragmatic considerations. In any event, a clear discussion of due deference at the outset of judicial rights analysis offers the potential to shorten rather than lengthen court proceedings. In our view, objections grounded in constitutional orthodoxy are no more insurmountable than these pragmatic objections. The prospect of courts taking a view on the quality of democratic debate arguably raises the same spectre of constitutional crisis as would the prospect of courts ignoring those debates altogether. As Simon Brown LJ said in *Roth*, ‘constitutional dangers exist no less in too little judicial activism as in too much.’<sup>44</sup> The politics of assessing a democratic debate are no less fraught than the politics of rights interpretation and judicial override of legislation.

We believe that the debate on the legitimacy of judicial review has reached an impasse and objections grounded in constitutional orthodoxy ought to be re-evaluated. This contribution is given in the spirit of moving this debate on from the question of whether courts can exercise legislative review, to the question of how best legislative review can be conducted in light of an overriding commitment to parliamentary democracy. If we shift the debate to these terms, the critical issue becomes how that analysis should be structured.

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<sup>41</sup> See, eg, the criticisms in J Steyn, ‘Pepper v Hart: A Re-Examination’ (2001) 21 *Oxford Journal of Legal Studies* 59.

<sup>42</sup> See, eg, the circumstances raised in Evans and Evans, above n7, which ‘make it difficult for parliamentarians adequately to analyse human rights issues in parliamentary debate’, such as the ‘crowded parliamentary agenda, combined with bills of ever greater complexity’ and the fact that ‘many, perhaps most, members of parliaments lack the expertise that would allow them to make an assessment of the human rights implications of legislation, even if they had the time or interest to do so’: 785-6 (citation omitted).

<sup>43</sup> see, eg, the discussion in HJ Hooper, Chapter 19 of this volume.

<sup>44</sup> [2002] EWCA Civ 158; [2003] QB 728, 754 (per Simon Brown J) [hereafter ‘*Roth*’].

## II. CRITERIA FOR EVALUATING LEGISLATIVE DEBATE

We propose a set of specific criteria to give structure to the overarching question, given the quality of the deliberative process, how weighty are the rights considerations in question? Our approach suggests that certain institutional questions ought to be resolved before the proportionality analysis takes place.<sup>45</sup> If the quality of legislative debate has been strong, then the court should approach the rights limiting measure with a presumption of deference that may be rebutted only by very weighty rights considerations.

Legislative debate that engaged meaningfully with rights considerations was evident in the passage of rights-restricting measures in *Animal Defenders International*<sup>46</sup> and in *Shindler*,<sup>47</sup> and in both cases the quality of the debate was invoked to support the Court's conclusion that the measures fell within the State's margin of appreciation. In *Animal Defenders International*, a majority of the Grand Chamber endorsed the parliamentary debate in the context of its analysis of the proportionality of the measure, attaching 'considerable weight' to the view of the legislature that the measure was 'necessary in a democratic society'.<sup>48</sup> In *Shindler*, the Court considered the parliamentary debate and select committee proceedings as evidence that 'Parliament has sought to weigh the competing interests and to assess the proportionality of the [rule].'<sup>49</sup>

Conversely, where the legislative debate invites little deference, the courts should be exacting in their scrutiny. This more exacting approach was evident in *Hirst (No 2)*, where the Grand Chamber observed that there was 'no evidence that Parliament [had] ever sought to weigh the competing interests or assess the proportionality of a blanket ban on the right of a convicted prisoner to vote,' and further, that there had been no 'substantive debate by members of the legislature' in

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<sup>45</sup> Cf the discussion of deference in the interstices of proportionality analysis in HJ Hooper, Chapter 19 of this volume, and K Roach, Chapter 22 of this volume. Cf also J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174.

<sup>46</sup> The legislative background to the Communications Bill 2002 (UK), which prohibited political advertising on broadcast television, is outlined in *Animal Defenders International*, above n15, paras 35-64.

<sup>47</sup> The legislative background to the measure, which prohibited British citizens who had been living abroad for more than 15 years from voting, is described in *Shindler*, above n16, paras 15-28.

<sup>48</sup> *Animal Defenders International*, above n15, para 116.

<sup>49</sup> *Shindler*, above n16, para 117.

light of human rights standards.<sup>50</sup> We support the general approach adopted by the Strasbourg Court in these cases. But our analysis goes further. We would require the court to make a prior assessment of the quality of deliberative debate according to certain key criteria. Once this analysis is concluded, it will form one consideration in the proportionality analysis. This contrasts with the ad hoc invocation of the quality of legislative debate in the interstices of the proportionality analysis.

In all of this, transparency is key. Just as courts should develop clear criteria in their application of the proportionality analysis, so they should be transparent in their evaluation of the democratic deliberative process. The clearer the criteria, and the better the reasoning courts use when taking a view on the democratic deliberative process, the greater the potential for focused democratic dialogue between the arms of the State.

While the Strasbourg Court has taken the lead in this area, it is also worth noting that domestic courts have developed analytical tools to govern their analysis of legislative materials in other judicial proceedings. Domestic and international courts commonly refer to deliberative processes to clarify the ordinary meaning of the words in a statute or to resolve ambiguities in the text.<sup>51</sup> The construct of ‘legislative intention’ pervades statutory interpretation and judicial review.<sup>52</sup> There is, no doubt, room for improvement in the way that English courts have approached these questions,<sup>53</sup> but our point is that reference to legislative debate does not always invite charges of constitutional heresy. In Australia, not renowned for its unorthodox constitutionalism, the Acts Interpretation Act allows courts to consider ‘any relevant

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<sup>50</sup> *Hirst (No 2)*, above n14, para 79. The Court echoed this phrase in respect of Hungary’s restriction of the franchise for persons under guardianship in *Alajos Kiss v Hungary*, App no 38832/06, (20 May 2010), para 41.

<sup>51</sup> See, in the UK, *Pepper (Inspector of Taxes) v Hart* [1993] AC 593. In Australia, see *Saeed v Minister for Immigration* [2010] HCA 23. Internationally, see the 1969 *Vienna Convention on the Law of Treaties*, articles 31-2. But cf Waldron, J, ‘Legislators’ Intentions and Unintentional Legislation’ in Waldron, J, *Law and Disagreement* (Oxford, OUP, 1999), 119-46, arguing that there is no such thing as collective legislative intention: ‘Legislators will come to the chamber from different communities, with different ideologies, and different perspectives on what counts as a good reason or a valid consideration in political argument. The only thing they have in common, in their diversity and in the welter of rhetoric and mutual misunderstanding that counts for modern political debate, is the given text of the measure currently under consideration’ (at 145).

<sup>52</sup> See above n41.

<sup>53</sup> See, eg, the criticisms of R Munday, ‘In the Wake of “Good Governance”: Impact Assessments and the Politicisation of Statutory Interpretation’ (2008) 78 *Modern Law Review* 385, arguing that English courts have, on occasion, incorrectly invoked Regulatory Impact Assessments (reports produced by the executive branch) to try to discern the intentions of the legislature in the course of statutory interpretation: 392.

material... in any official record of debates in the Parliament'.<sup>54</sup> In Sweden, the intention of the parliament, discerned through the drafting debates and the *travaux préparatoires* to the legislation is the most important interpretive tool available to courts.<sup>55</sup> Further, much of the criticism in England of courts' engagement with legislative material could be mitigated if courts were more transparent in their analysis of legislative debate, and deployed consistent criteria across cases.<sup>56</sup>

In the discussion that follows, we propose a set of criteria to guide courts in the slightly different context of judicial review of the rights compatibility of legislation. These criteria give substance and structure to the courts assessment of the degree of deference due to democratic deliberation of rights restrictions. They aim to resolve whether the quality of democratic deliberation can outweigh the seriousness of the rights restrictions in question.

### **1. The representative conditions in which legislative debate takes place**

Supporters of judicial review frequently argue that unfettered majoritarian process leads to an unfair override of the interests of the silent minority. In such conditions, Ely would argue that human rights review plays a crucial democratic role.<sup>57</sup> The first question a court should ask itself therefore is whether parliament can demonstrate engagement with the otherwise unrepresented voices of the minority. Was the democratic debate on human rights, or limitations on rights, inclusive of representatives of those whose rights would be affected? For example: did anyone in the deliberative process represent the interests of asylum seekers, the Roma or Muslim minority? Did this debate engage with their democratically represented views, or was the consultative process instead characterised by 'legislative or executive indifference and inertia'<sup>58</sup>? Was there a balance of views or empathy with rights bearers, given the democratic conditions surrounding the particular question at

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<sup>54</sup> s15AB(2)(h), Statutes in each state broadly echo the federal provision. See, eg, s34 *Interpration Act 1987* (NSW); s35 *Interpretation of Legislation Act 1984* (VIC).

<sup>55</sup> T Bull, and ICameron, (2013) 'Legislative Review for Human Rights Compatibility: A View From Sweden' (draft on file with the authors). See also I Cameron, 'The Swedish Experience of the European Convention on Human Rights Since Incorporation' (1999) 48 *International and Comparative Law Quarterly* 20.

<sup>56</sup> See, eg, J Steyn, above n41, emphasizing the importance of delineating between statements that are indicative of *executive* as distinct from *legislative* intention.

<sup>57</sup> See Ely, above n26; see also HJ Hooper, Chapter 19.

<sup>58</sup> Nolan, above n26, xxvii.

hand? This question is not concerned with ‘the substantive merits of the political choice’ made by parliament,<sup>59</sup> but rather with degree of participation and the quality of the representation involved in the process.

No doubt it can be argued that participation of representatives of the affected minority is important for instrumental reasons, since it may lead to better legislative outcomes. The *Doctors for Life* case shows that when courts scrutinise democratic processes, it can improve the quality of the legislation that is ultimately adopted.<sup>60</sup> But we think that participation in public debate is itself a substantive good. Shue argues that participation is a fundamental constituent of the basic right to liberty.<sup>61</sup> Waldron describes participation as the ‘right of rights’,<sup>62</sup> and argues persuasively that ‘there is a certain dignity in participation, and an element of insult and dishonour in exclusion, that transcends issues of outcome.’<sup>63</sup> These insights are often marshalled in support of parliament rather than judges being cast as the final arbiters on rights, since it is the institution with the widest participation.<sup>64</sup> Some theorists deploy these arguments to discredit judicial review, on the grounds of its lack of democratic legitimacy.<sup>65</sup> But this relies on an underlying premise that all the relevant interests were represented in the deliberative process, and thus the choice favoured by the majority should therefore prevail. That premise does not always hold. Many rights bearers are totally ‘excluded from majority decision procedures’, such as children, prisoners and asylum seekers.<sup>66</sup> Other rights bearers, while formally enfranchised, may be excluded or marginalised in majoritarian processes in more subtle and complex ways.<sup>67</sup> If the relevant interests have not been represented ‘at the point of substantive decision’, then the majoritarian premise does not hold.<sup>68</sup>

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<sup>59</sup> Ely, above n26. 181.

<sup>60</sup> *Doctors for Life*, above n39.

<sup>61</sup> H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2<sup>nd</sup> Edn) (New Jersey, Princeton University Press, 1996), 71-8.

<sup>62</sup> J. Waldron, ‘Participation: The Right of Rights’, in J Waldron, *Law and Disagreement* (Oxford University Press 1999), 232-54.

<sup>63</sup> J Waldron, ‘A Right-Based Critique of Constitutional Rights’ (1993) 13 *Oxford Journal of Legal Studies* 18, 40.

<sup>64</sup> See Waldron, *ibid*.

<sup>65</sup> See, inter alia, Waldron, *ibid*, Ekins above n1.

<sup>66</sup> Nolan, above n26, 118.

<sup>67</sup> Ely, above n26.

<sup>68</sup> *ibid*, 121.

Constitutional democracy is about more than simple majoritarianism: it is about ‘democratic conditions’, namely ‘equal status for all citizens.’<sup>69</sup> Dworkin argues that majoritarian institutions must themselves ‘provide and respect the democratic conditions’.<sup>70</sup> Our proposition goes slightly further, namely that it is only when those democratic conditions are provided and respected that parliaments can be taken to have *earned* the deference of the courts. Consequently, courts should ‘keep the machinery of democratic government running as it should; [making] sure the channels of political participation and communication are kept open.’<sup>71</sup> In this way courts can enforce the democratic conditions that they themselves are accused of undermining.

The court’s consideration of the ‘representative conditions of democratic debate’ might also engage questions of the shape and make-up of the particular democratic legislature. Is it constituted by a first past the post majority? Do minorities get a higher level of representation through proportional representation? Are elected representatives ‘beholden to an effective majority [who] are systematically disadvantaging some minority out of a simple hostility?’<sup>72</sup> Is there an upper house with ‘teeth’? Are there other mechanisms in the human rights bricolage<sup>73</sup> for representing minority views, such as in select committee proceedings, or in public consultations and reviews? Does the parliament really work—or is there a continuous one party majority? Is there a pervasive culture of political corruption? The representative conditions of democratic debate form one important consideration in deciding whether deference is due.

## **2. The quality of the consideration given to the views of rights bearers**

Criterion two follows as a logical consequence of criterion one, and relies on the same justifications. While the first criterion considers the structural question of representation, criterion two asks courts to assess the quality of the legislative attention given to the concerns of the affected rights bearers. To put this another way, where criterion one asks, were the minority voices represented? Criterion two asks,

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<sup>69</sup> R Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford, Oxford University Press, 1996), 17.

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.*, 123, paraphrasing Ely, above n26, 76.

<sup>72</sup> Ely, above n26. 103.

<sup>73</sup> B de Witte, above n8.

whether Parliament *meaningfully engaged* with these minority voices. Were their views taken into account and considered in good faith? Were the relevant interests given weight, or were they simply heard and ignored? To what extent were the recommendations of parliamentary select committees, national human rights institutions or equality bodies weighed up in the legislative debate? As with criterion one, criterion two recognises that ‘the duty of representation which lies at the core of our system requires more than a voice and a vote.’<sup>74</sup>

The approach we advocate here draws in some ways on the concept of ‘meaningful engagement’ that has been developed by the South African Constitutional Court. This interim remedy requires government and public bodies to consider the implications of policy measures for affected groups and individuals, and to enter into good faith discussions with those people in an attempt to secure a mutually advantageous outcome. The concept derives from the 2008 case of *Occupiers of 51 Olivia Road* in which more than 400 people who had been squatting in unsafe buildings in inner city Johannesburg challenged a council eviction order.<sup>75</sup> Rather than directly resolving the question of whether the eviction order breached the applicants’ constitutional rights,<sup>76</sup> the Constitutional Court ordered the parties to ‘meaningfully engage’ with each other to find an appropriate solution.<sup>77</sup> While developed from earlier cases,<sup>78</sup> meaningful engagement was also grounded in the constitutional rights to life and dignity.<sup>79</sup> The obligation to meaningfully engage is one of process rather than outcome: a municipality seeking to evict people need not necessarily succeed in its negotiations with the occupiers, but ‘it is the duty of a court to take into account whether... at least, that the municipality has made reasonable efforts towards meaningful engagement,’ and the absence of any engagement at all

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<sup>74</sup> Ely, above n26, 135.

<sup>75</sup> *Occupiers of 51 Olivia Road Berea Township*, above n24.

<sup>76</sup> s 26(3) of the South African Constitution provides that ‘No one may be evicted from their home, or have their home demolished, without an order of a court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.’

<sup>77</sup> *Occupiers of 51 Olivia Road*, above n24, paras 6—23 (Yacoob J).

<sup>78</sup> The court order was grounded in two earlier cases: in *Grootboom*, the Constitutional Court ordered the city to take reasonable measures to realise the respondents’ right to housing (*Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC)). In *Port Elizabeth Municipality*, the Court resolved to ‘encourage and require the parties to engage with each other in a proactive and honest endeavor to find mutually acceptable solutions (*Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), para 39).

<sup>79</sup> ss 10, 11 of the South African Constitution; quoted in *Occupiers of 51 Olivia Road*, above n24, para 16 (Yacoob J).



would be a persuasive factor weighing against the municipality.<sup>80</sup> This approach adopted by South Africa's Constitutional Court has much to offer beyond housing rights, and indeed beyond South African borders. One commentator has observed that 'at its best, engagement [may] avoid the need for court involvement altogether.'<sup>81</sup> 'Meaningful engagement' exists as an interim remedy in the South African context. However, it might also offer substantive guidance in framing the Court's assessment of parliamentary engagement with the views of affected minority rights-bearers. In this way, it offers a benchmark against which to evaluate when deference might be exercised by the Court.

### **3. Was there evidence presented to the legislature of the necessity of the measure that restricts or violates rights?**

Criterion three demands an assessment of the reasons for introducing the rights-restricting measure. It relates to the manner in which the legislation was introduced into parliament and the justifications that were offered in its defence. How necessary is the restriction or violation? What is the public interest that it aims to serve? Did the legislature consider other alternatives, or was the solution adopted the only one proposed? Was there a meaningful attempt to engage with a broader policy problem? Were the reasons for the adoption of the measure discussed by parliamentarians? Was there a discussion of the relationship between the means chosen, and the ends pursued? Was there plausible evidence presented to the parliament for why the rights restriction was necessary or desirable to pursue?

The Strasbourg Court considered this criterion in *Animal Defenders International*, observing that the Parliament had considered the measure to be necessary by reference to the need to 'prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process.'<sup>82</sup> The applicants argued that less restrictive measures were available to achieve the same objective, such as banning political broadcasts only during election periods. However, the Grand Chamber noted that those alternatives had been thoroughly discussed during the deliberative process in Parliament, and there were 'reasonable' and 'rational' grounds

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<sup>80</sup> *ibid*, para 21.

<sup>81</sup> B Ray, 'Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through "Engagement"' (2008) 8 *Human Rights Law Review* 703, 709.

<sup>82</sup> *Animal Defenders International*, above n15, para 116.

for preferring the broader measure that was ultimately adopted.<sup>83</sup> *Animal Defender's International* lends weight to criterion three. It establishes that where there is plausible evidence presented to the legislature for the necessity of the measure, and alternatives to it are meaningfully discussed in Parliament, a greater degree of deference or a broader margin of appreciation is due.

In conducting this assessment, courts should also recognise that moral arguments about rights or their limitations may be present even where the language of rights is not explicit. Bearing in mind that ‘one of the strengths of parliaments as protectors of human rights is said to be precisely that capacity to move beyond legalistic definitions of rights’,<sup>84</sup> courts should recognise rights-talk even when it appears in unfamiliar guises. The prisoners’ voting rights debate in the UK, for example, was dominated by concerns about the legitimacy of the European Court of Human Rights rather than any extensive engagement with the nature of the right to vote. Nevertheless, submerged within that rhetoric was an underlying ‘forfeiture of rights’ argument: ‘if you break the law you can’t make the law.’ Courts should thus be alive to the possibility that moral arguments about rights can take varied forms, but they should also be sceptical of empty rhetoric.

#### **4. The courts’ own democratic mandate, institutional role and its place in the constitutional culture and system**

This criterion acknowledges that constitutional cultures and mandates vary significantly and that courts’ perceptions of their own role in a constitutional democracy will affect the level of scrutiny applied. For example, the constitutional mandate could be very broad, but the court could be self-limiting where democratic deliberation and executive review or regulation in the light of human rights is exceptionally strong. Alternatively, courts may feel that it is legitimate to extend their mandate or to push at the boundaries of popular understandings of their mandate where the quality of democratic deliberation or executive deliberation is particularly weak.

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<sup>83</sup> *ibid*, para 122.

<sup>84</sup> Evans and Evans, above n7, 806.

By constitutional culture, we mean the ‘legal norms and principles that form fundamental underlying precepts for our polity’,<sup>85</sup> the ‘institutional values of the legal system’<sup>86</sup>, or as Laws LJ said in *Roth*, ‘our judgment as to the deference owed to the democratic powers will reflect the culture and conditions of the British state.’<sup>87</sup> For example, Germany has a ‘highly articulated rights culture’ and as such public confidence in the judiciary may support a more interventionist position by the courts,<sup>88</sup> whereas in countries such as the UK where the place of justiciable rights within the constitutional culture is matter of continuous dispute,<sup>89</sup> a greater degree of deference to more representative institutions may be warranted.<sup>90</sup>

Judicial intervention can enhance democratic deliberation by introducing considerations that can be taken into account in legislative debate. In a dialogic model, the courts may be called upon to define the parameters of the rights that are implicated by a proposed legislative measure, and the permissibility of restrictions, if any. A good practical example was the institutional dialogue following the decisions of the Victorian Supreme Court and the High Court of Australia in a case concerning the compatibility of reverse burdens of proof with the presumption of innocence.<sup>91</sup> Ideally, parliament or the executive should take judicial remedial action in good faith and embark on a discussion of the substantive issues articulated by the court.<sup>92</sup> In Clayton’s words, ‘the judicial decision causes a public debate in which the ... values

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<sup>85</sup>WN Eskridge, ‘Public Values in Statutory Interpretation’ (1989) 137 *University of Pennsylvania Law Review* 1007, 1008. Eskridge cites the principle of non-discrimination as one example of a ‘public value’ in the United States. Cf Sunstein’s conception of ‘background norms’ in C Sunstein, ‘Interpreting Statutes in the Regulatory State’ (1989) 103 *Harvard Law Review* 405.

<sup>86</sup> Joseph, above n1, 338.

<sup>87</sup> *Roth*, above n19, 765 (Laws LJ, dissenting).

<sup>88</sup> L Lazarus, *Contrasting Prisoner’s Rights* (Oxford, OUP, 2004), 3.

<sup>89</sup> See, eg. B. Goold, L Lazarus, R Desai, and Q Rasheed, ‘The Relationship between Rights and Responsibilities’, *Ministry of Justice Research Paper No. 18/09*, December 1, 2009, available at: [www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2022270](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2022270).

<sup>90</sup> For a discussion of the emerging human rights culture in the UK, see, eg. M Hunt, ‘The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession’ (1999) 26 *Journal of Law and Society* 86; AL Bendor, and Z Segal, ‘Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model’ (2001) 17 *American University International Law Review* 683; M Hunt, above n7, 601.

<sup>91</sup> See *R v Momcilovic* [2010] VSCA 50 and *Momcilovic v The Queen* [2011] HCA 34. Following that decision, the Victorian Parliament’s Scrutiny of Acts and Regulations Committee recommended that the government consider repealing the provisions of the Victorian Charter of Human Rights related to courts and tribunals. However, the Government rejected that submission and issued a detailed response declaring it was ‘strongly committed to the principles of human rights and considers that legislative protection for those rights provides a tangible benefit to the Victorian community’, *Victorian Government Response to the Review of the Charter of Human Rights and Responsibilities Act 2006* (March 14, 2012), available at: [www.parliament.vic.gov.au/](http://www.parliament.vic.gov.au/).

<sup>92</sup> Cf the poor quality of the parliamentary debate in *Hirst (No 2)*, above n14, para 79 and in *Alajos Kiss*, above n50.

play a more prominent role than they would if there was no judicial decision.<sup>93</sup> Ideally, the response from the legislature will be respectful of the values identified by the court, but achieve the same or similar objectives.<sup>94</sup>

When thinking about the court's mandate, it is important to distinguish between its constitutional deliberative position and its remedial power. For example, in 'weak' models of judicial review, the court has the power to issue declarations of incompatibility as distinct from 'strong' judicial review offering legislative strike down of legislation.<sup>95</sup> The more anti-democratic the remedy, the greater the caution with which it should be used. Courts may have a greater impact on the democratic process by adopting a weak remedy but a strong criticism. In a dialogic model, judicial analysis of the strengths and weaknesses in a particular parliamentary debate may enrich subsequent debate in legislative chambers. This may occur, for example, when a matter is returned to parliament following a declaration of incompatibility by the courts.<sup>96</sup> In that circumstance, judicial intervention can contribute to a more constructive dialogue in parliament when the assembly considers the matter the second time around. Kent Roach's contribution in this volume discusses how judicial invalidation of old laws can enhance democracy by demanding that parliamentarians revisit the issue, often leading to better tailored legislative outcomes.<sup>97</sup> But even short of judicial strike-down, judicial interventions through declarations of incompatibility can lead to productive parliamentary debate.<sup>98</sup> A good example of that process working well was in the debate in the UK over preventative detention of terrorist suspects post-9/11. When Parliament passed a law permitting detention of terrorist suspects without charge for up to 90 days, the House of Lords remitted the matter to Parliament for reconsideration, and the period of detention was ultimately reduced to 28 days.<sup>99</sup> Judicial intervention enhanced the quality of the subsequent deliberative

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<sup>93</sup> Clayton, above n17, 42; cf Roach, Chapter 22 of this volume.

<sup>94</sup> Clayton, *ibid.*

<sup>95</sup> Waldron, 'The Core of the Case Against Judicial Review', above n2, 1354.

<sup>96</sup> See, eg, PW Hogg, and AA 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 Law Journal* 75; for a discussion of the dialogue model in New Zealand and the UK, see Joseph, above n1. See generally, Clayton, above n17.

<sup>97</sup> See Roach, Chapter 22 of this volume. See also K Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto, Irwin Law, 2001).

<sup>98</sup> For a comparative assessment of the success of different models of judicial review in different jurisdictions, see S Gardbaum, 'Reassessing the New Commonwealth Model of Constitutionalism' (2010) 8 *International Journal of Constitutional Law* 167.

<sup>99</sup> See *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.

debate, and the UK Parliament responded with a better and less rights-restricting measure.

Hence, we might view a Court's criticism of parliamentary debate as an interim measure, in much the same way as the 'meaningful engagement' measure works in the South African context. By prompting democratic reconsideration of right limiting legislation, the Court enriches the deliberative process. It also avoids the question of which institution has the final say—a perennial question in constitutional debate which in many ways distracts from the rights issues in play.

### 5. The nature of the right

Courts, as the 'guardians of rights',<sup>100</sup> must be prepared to disagree with the legislature notwithstanding the quality of democratic debate. Recall that the overarching question that these criteria seek to answer is how weighty are the rights considerations, given the countervailing quality of democratic deliberations? By this stage of the analysis, the court will have answered a series of institutional questions encompassed by criteria one to four. This puts them in a stronger position to evaluate the deference questions that now arise in the interstices of the rights analysis. This includes, first, the interpretive determination of whether the right is engaged, and second, as regards qualified rights, the conduct of the proportionality analysis.

The permissibility of rights-restrictions is inextricably bound up with the nature of the rights in question. Rights 'may be limited to pursue a wide range of public and private interests', but 'that range is not unlimited, and the limits vary according to the rights in question.'<sup>101</sup> The importance of the right and the gravity of the limitations will ideally be reflected in the democratic deliberations.

But even so, in exceptional circumstances, courts must be prepared to declare certain measures incompatible with human rights, notwithstanding the most robust and rigorous debate. As the Strasbourg Court observed in *Shindler*,

This is not to say that because a legislature debates, possibly even repeatedly, an issue and reaches a particular conclusion thereon, that conclusion is necessarily Convention compliant. It simply means that

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<sup>100</sup> J Rivers, above n45, 205.

<sup>101</sup> *ibid*, 195.

the review is taken into consideration by the Court for the purpose of deciding whether a fair balance has been struck between competing interests.<sup>102</sup>

In *Shindler*, the Court agreed with the legislature that the restrictions were Convention compliant. However the Court observed correctly that strong deliberative process cannot ‘neutralise’ a clear rights violation. For example, if a legislature votes to torture terrorist suspects, no matter how strong the deliberative process, there is no role for deference to play. *Jus cogens* norms are one category into which legislative intrusions—even with the best possible parliamentary debate—may be clearly excluded.

#### CONCLUSION

Asking courts to evaluate the quality of democratic deliberation is, on its face, a bold proposal. But we make this proposal in the context of the shift towards a form of constitutionalism in which responsibility for upholding human rights is shared across all branches of government, together with a changing landscape of human rights institutions. In this context, it is imperative to ensure the integrity of the framework as a whole. In our view, this proposal will strengthen the partnership between courts and parliaments in furthering human rights. This proposal invites courts to set the parameters of the debate, while parliament determines where and how to strike the balance in all but the most exceptional cases. Rather than undermining democratic politics, this approach has the potential to strongly enhance that democratic engagement. In a constitutional democracy premised on human rights and fundamental freedoms, it is no longer appropriate to ‘equate “democratic principle” with “majority approval”.’<sup>103</sup>

The concepts of due deference in the domestic context, and the margin of appreciation in the Strasbourg context, are in urgent need of further substantiation. Lord Irvine, writing extra-judicially, rightly observed ‘we cannot simply recite the need for “deference” or “self-restraint”’. Rather, we must, where appropriate, argue the

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<sup>102</sup> *Shindler*, above n16, para 117.

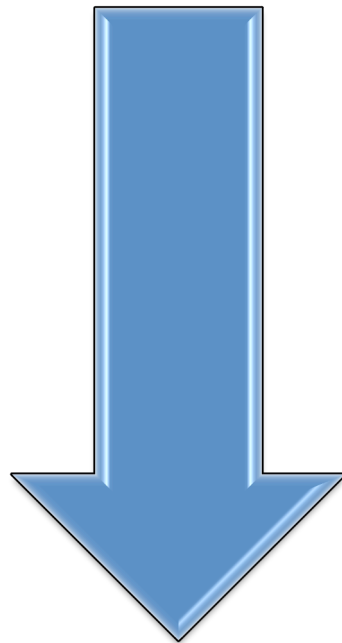
<sup>103</sup> Jowell, above n17, 597.

case for it carefully and persuasively.’<sup>104</sup> In this chapter, we have made a case for a set of criteria that should inform the courts in this endeavour. This is not an invitation to judicial activism; nor is strengthening deference tantamount to promoting the ‘abdication of judicial responsibility’.<sup>105</sup> This is a proposal to deepen the rigour with which deference is exercised, and an invitation to parliament to stand at the centre of rights deliberation.

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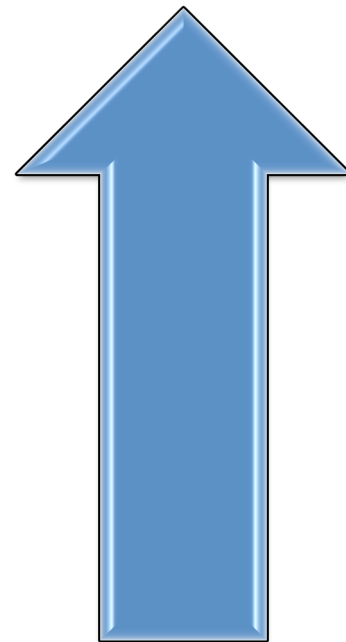
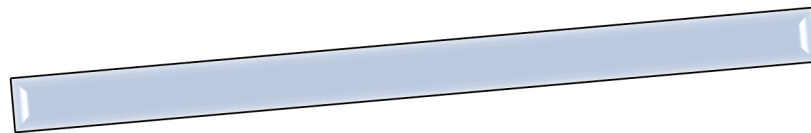
<sup>104</sup> D Irvine, ‘The Impact of the Human Rights Act: Parliament, the Courts and the Executive’ (2003) *Public Law* 308, 316.

<sup>105</sup> TRS Allan, ‘Human Rights and Judicial Review: A Critique of Due Deference’ (2006) *Cambridge Law Journal* 671, 675.



### Criteria for evaluating democratic deliberation about rights

- The representative conditions of democratic debate
- The extent to which Parliament meaningfully engaged with the views and interests of minority rights bearers
- The representative make up of Parliament
- The power and make up of a second chamber
- The existence of a long standing one party democracy
- The existence of political corruption
- The quality of pre-legislative scrutiny
- The extent to which parliamentary bodies charged with rights based scrutiny is taken into account
- The quality of the evidence for the rights limitations presented to the legislative assembly
- The Courts own constitutional mandate
- Quality of moral and political reasoning about rights



### The nature of the right

- How weighty are the rights considerations, given the countervailing quality of democratic deliberations
- Is the right absolute and subject to deference at all?
- Does the right - by definition or by factual application - protect minority interests
- Does the right engage questions of political representation or exchange
- Does the right engage majority and redistributive interests