

Francesca Klug

Judicial deference under the Human Rights Act 1998

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Francesca Klug

Professorial Research Fellow, Centre for the Study of Human Rights, LSE

This opinion examines the approach to date of the courts to ss.3 and 4 of the Human Rights Act 1998 and the extent and nature of judicial deference to statute law, and by implication, Parliamentary sovereignty. The author argues that if the scheme of the Act under ss.3 and 4 is correctly applied there is no need for a further doctrine of judicial deference to the legislature. As a result the author concludes that provided a Convention right is at stake, there should be no legislation which the courts exclude themselves from declaring incompatible simply because they consider the subject matter to fall more within Parliament's "responsibility" than their own. At the same time she points out that courts should follow the scheme of the Act and where it is not possible, to interpret legislation compatibly, the courts should declare the legislation incompatible and leave it to Parliament to amend or not as the case may be.

Introduction

Lord Justice Sedley recently suggested that it is the methodology of adjudication under the European Convention on Human Rights ("ECHR"), such as the concept of proportionality, which is going to have the deepest effect on the law as a result of the Human Rights Act 1998 ("HRA").² Of equal significance, I would suggest, is the judicial approach to the scheme of the Human Rights Act itself, most particularly the interpretation and application of the interpretive obligation in s.3 and the power to declare legislation incompatible under s.4 and the construction by the judiciary of a principle of deference.

In this opinion, I argue that there is no need for judges, legal practitioners or academics to develop complex theories of judicial deference if the scheme of the Act is properly appreciated and appropriately applied. But, first, it is important to disentangle different forms of deference. The issue of concern here is not judicial deference to the *executive* as a decision-maker. This should be a relatively uncontroversial issue provided that the ECHR doctrines on legality, necessity and proportionality are accepted. After a slow start,³ the signs are that the courts are beginning to absorb the Strasbourg approach to judicial review. Lord Justice Steyn provided the death throes to the *Wednesbury* reasonableness grounds for review in *Daly*, at least where Convention rights are at stake.⁴ This approach has broadly speaking been followed in most subsequent public law cases.⁵

Deference to the legislature

The focus of this paper, then, is on judicial deference to the *legislature* – or, more accurately, deference to *legislation*, given the confusing nature of the (unwritten) British constitution where the executive and legislature are mostly impossible to disentangle.

The quest to re-establish appropriate boundaries between the judiciary and executive/legislature drove the debate which preceded incorporation of the ECHR into UK law. There was concern across the political spectrum, and in judicial as well as academic circles, that incorporating broad human rights standards into UK law would lead to the demise of the British system of Parliamentary supremacy (or sovereignty) over the courts without the transparency that preceded such constitutional earthquakes in other jurisdictions.⁶ Crudely put, the debate concerned whether an elected Parliament or unelected courts should have the *final say* in determining what the law should be in a democracy (as distinct from the interpretation of that law).⁷

There are many ways of characterising this debate.⁸ A recent example can be found in an article by Danny Nicol entitled "*Are Convention Rights a No-go Zone for Parliament?*"⁹ In the one corner he places what he terms "incorporationists" who view Convention rights as "elevated beyond the reach of statute and state" which "only an independent judiciary, immune from executive domination and above 'faction' can construe".¹⁰

¹ This opinion was first delivered as a paper to the Society of Public Teachers of Law (SPTL) Conference, De Montfort University, September 2002.

² Sedley, "Colonels in Horsehair", London Review of Books September 2002.

³ In *R. (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 W.L.R. 840, the Court of Appeal had held: "When anxiously scrutinising an executive decision that interferes with human rights, the court will ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was necessary to achieve ... the legitimate aims recognised by the Convention" (p.857, emphasis added). This test was further applied by the Court of Appeal in *R. (on the application of Isiko) v Secretary of State for the Home Department* [2001] 1 F.L.R. 930 and *R. (on the application of Samaroo) v Secretary of State for the Home Office* [2001] U.K.H.R.R. 1150.

⁴ *R. (on the application of Daly) v Secretary of State for the Home Department*. The point here being that, under the Convention doctrine of proportionality, it is required that the measure adopted by the decision-maker must be that which is the least intrusive of the protected right, while still achieving the legitimate aim in question.

⁵ e.g. *R. (on the application of Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2002] 1 W.L.R. 419; *R. (on the application of Prolife Alliance) v BBC* [2002] 2 All E.R. 756.

⁶ For example, Canada prior to introducing the Charter of Rights 1992 and South Africa prior to its new constitutional settlement.

⁷ See M. Loughlin, "Rights, Democracy and Law", in *Sceptical Essays on Human Rights*, K. D. Ewing and A. Tomkin (Oxford University Press), 2001.

⁸ See, e.g. F. Klug, *Values for a Godless Age: the story of the UK's new bill of rights* (Penguin, 2000).

⁹ D. Nicol, "Are Convention Rights a no-go Zone for Parliament?" *Public Law*, Autumn 2002, pp.438-448.

¹⁰ *ibid.*, p.438.

In Nicol's other corner are "third-wavers"¹¹ for whom the HRA is a "unique constitutional instrument designed to enable Parliament and government, as well as courts, to participate in giving 'further effect' to fundamental rights". From this perspective, "the *conception* to be accorded to each Convention right is rarely self-evident".¹² In other words rights frequently collide, if not with each other then at the very least with the "pressing social needs" which can in certain circumstances legitimately constrain them under the ECHR. When this happens "the demos would appear a better forum to decide these issues than the courts".¹³

The background to the Act

The debate which Nicol articulates concerns the question of when judicial scrutiny of legislation strays into judicial creation of legislation. The underlying issue in this debate – the appropriate constitutional boundaries of the judicial function – has, of course, a long pedigree in relation to the development of the common law and judicial review of executive discretion. But this question did not materially arise in this country in relation to primary legislation before the HRA because courts were effectively constitutionally barred from reviewing statutes prior to the enactment of the Act.

The issue has now become pressing for two main reasons. First, because Convention rights are framed in extremely broad and general terms, the usual distinction between legislation and interpretation easily blurs. The ECHR is utterly unlike the "black letter" or detailed legislation we are used to in English law. Lord Woolf made this point in *Poplar* when he said that the dividing line between interpretation and legislating would not be easy under the HRA.¹⁴

Secondly, the fact that the European Court of Human Rights has developed its doctrine of "a margin of appreciation" means that, notwithstanding the limits of its writ in domestic law, there are certain no-go areas for the Strasbourg court. This leaves our courts with virtually a blank page on which to determine the meaning of (at least the non-derogable) rights in some contexts, or how they should be exercised when they collide.

In the few years immediately preceding the passing of the HRA the debate about what approach to follow – incorporationist or "third wave" in Nicol's terms – focussed on the contrasting approaches of the 1982 Canadian Charter of Rights and the 1991 New Zealand Bill of Rights.¹⁵ The Canadian model could be characterised as judicial entrenchment with a "notwithstanding clause" added on to allow the legislature *explicitly* to pass statutes which bypass the Canadian charter. The New Zealand approach – by contrast – could be described as a "legislature first" approach in which the courts are explicitly barred from scrutinising clearly expressed Acts of Parliament – as was the case here prior to the HRA.

The Human Rights Act – and in particular the intersection of ss.3 and 4 – was deliberately and carefully crafted to differ from both of these models. The issue of judicial deference to the legislature was settled through the intersection of these two sections. If they are applied as intended no further doctrine of judicial deference to the legislature (or legislation) is required.

The new rules of statutory interpretation

As is by now well known, the new rule of statutory interpretation in HRA, s.3 is that primary and subordinate legislation (where primary legislation requires subordinate legislation to be framed in a certain way) must "be read and given effect in a way which is compatible with Convention rights" but only "so far as it is possible to do so". Where it is not possible, the higher courts *may* issue a "declaration of incompatibility" under s.4(2) of the HRA.

Two competing views on what is meant by "possible" have emerged. Lord Steyn maintained in *R. v A* that unless a "clear limitation on Convention rights is stated in terms" it should be possible to interpret an Act compatibly with the ECHR.¹⁶

Lord Hope disagreed. He argued that you have to look at the meaning and purpose of an Act as a whole, not just any *express* intention on behalf of Parliament as to whether it is possible to interpret a statute compatibly with Convention rights or not.¹⁷ On this basis, he thought the reinterpretation his fellow judges made to the post-HRA rape shield provisions in the case of *A* turned the will of Parliament on its head. It reinstated most of the judicial discretion which the new Act sought to remove on when to admit evidence of a woman's sexual history with the defendant.

Accepting Lord Hope's logic, it might have been more appropriate for the courts to have issued a "declaration of incompatibility" rather than effectively re-write the new rape shield legislation.¹⁸ Likewise the same point applies – however desirable the outcome in this case – to the re-interpretation (or effectively re-writing) of the "two strikes and you're out" legislation in *Offen*. What happened in *Offen*¹⁹ and *A*²⁰ is that the courts effectively "read-into" the HRA itself a new section to replace the current s.3. This section reads something like the following:

¹¹ To be distinguished from "3rd way"; that term would have to be reserved for those who see nothing irreconcilable in both positions.

¹² Nicol, *op. cit.* p.439. His emphasis.

¹³ R. Bellamy, "The Constitution of Europe: Rights or Democracy", quoted in D. Nicol, *op. cit.*, p.440.

¹⁴ *Poplar Housing and Regeneration Community Association Limited v Donoghue* [2001] EWCA Civ 595.

¹⁵ See F. Klug, "The Role of a Bill of Rights in a Democratic Constitution", in *Debating the Constitution*, A. Barnett et al. eds, (Polity, 1993).

¹⁶ *R. v A* [2001] 3 All E.R. 1.

¹⁷ Subsequent cases which have born out Hope's approach include *Matthews v Ministry of Defence* [2002] 3 All E.R. 513; *R. v Shayler* [2002] 2 W.L.R. 754 and *Re W and B (Children) (Care Plan)*, *Re W (Children) (Care Plan)* [2002] 2 W.L.R. 720.

¹⁸ Applying this reasoning, it is difficult to understand why s.3 could not have been appropriately applied in *H* rather than s.4. *Re (H) v MHRT London N & E Regional Mental Health Tribunal* [2001] EWCA Civ 415.

¹⁹ *R. v Offen* [2001] 1 W.L.R. 253.

²⁰ *ibid.* at para. 16.

"With regard to Art. 5 and Art. 6 rights, even if it is not possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights to liberty and a fair trial *unless a clear limit on a Convention rights is stated in terms.*"

The last (italicised) phrase of the clause is a direct quote from Lord Steyn in *R. v A*²¹; the rest was implicit in the approach of the courts in these cases.

Judicial deference

Where did this scheme come from? It is clearly not inherent in the provisions of the Act itself. The answer is found in the judge-made concept of judicial deference which has emerged as a recurring theme in many of the leading post-HRA decisions, although not always consistently.²² One of the most extensive and analytical treatments of the subject is found in the judgment in *Roth*.²³ For Laws L.J., deference is one of the ways of resolving the tension between parliamentary sovereignty and fundamental rights which has arisen in what he sees as the half-way house created by the Human Rights Act between legislative supremacy and constitutional supremacy.

According to this approach the scope of s.3 is determined by the courts' construction of the boundaries of deference. As the courts have looked to the concept of deference to shape their interpretative function under the HRA, the factors which they cite to determine when and how the courts should defer have, predictably, grown more complex. They include rather nebulous notions such as the "culture and conditions of the British State"²⁴ as well as more definable elements such as whether the rights are absolute or qualified and the subject matter of the issue before the court. It is this last factor which, according to Laws L.J. and others, ultimately determines the extent of judicial deference. Moreover, the potential spectrum of deference/activism is extremely wide: "in some contexts the deference is nearly absolute. In others it barely exists at all".²⁵

Broadly speaking, this spectrum of deference spans from Arts 5 and 6 issues concerning due process and fair trial which give rise to the least deference, to national security and "social or economic" matters which the courts are very unlikely to scrutinise to any significant degree. This variation is regarded by the judiciary as a natural consequence of the differing "special responsibilities" of the two branches of the state:

"A paradigm of the executive's special responsibility is the security of the State's borders. A paradigm of the judiciary's special responsibility is the doing of criminal justice ... And between the special territory of each there lies, not a no-mans land, but a spectrum. The degree of deference owed to the democratic decision-maker must depend upon where the impugned measure lies within the scheme of things."²⁶

The argument that both institutional and constitutional competence give the courts a greater input in justice issues is a persuasive one. As far back as 1993 in an article entitled *The Democratic Entrenchment of a Bill of Rights*, John Wadham and I argued that Arts 5 and 6 of the ECHR²⁷ should probably be included in a list of Articles in an incorporated Convention which should be *judicially determined*; the rest being subject to the ultimate say of Parliament aided by the scrutiny of a Joint Human Rights Select Committee.²⁸ This was largely received as science fiction at the time.

But whatever arguments there may be in favour of this proposal – or the Canadian approach which is what Lord Steyn was effectively re-stating in *A* – this was not the model that Parliament passed in 1998. If we are going to move closer to the Canadian approach this needs to be openly and democratically debated. The danger of proceeding through "the backdoor" is a backlash which can which could halt further progress. Misuse of s.3 to effectively re-write legislation in justice areas will undermine the careful balance set in motion by the Act.

Equally, a self-imposed abstinence by the courts from engaging in social policy and national security issues could undermine their ability to protect some fundamental rights altogether. As Simon Brown L.J. commented in *Roth* (notably endorsed by Laws L.J. in his judgment in the case): "The court's role under the Human Rights Act is as the guardian of human rights. It cannot abdicate this responsibility".²⁹ The logic of this argument is that Laws L.J.'s suggestion that in some areas deference is "nearly absolute" cannot be supported by the provisions of the Act itself.

The role of s.4 and the dialogue model

Concluding that there cannot be "no-go" areas for judges under the HRA does not, however, necessarily require them to intrude on the rightful role of elected and accountable politicians. The Act was specifically structured to allow the courts to uphold rights while also retaining parliamentary authority. Behind the construction of ss.3 and 4 was a carefully thought-out constitutional arrangement that sought to inject principles of parliamentary accountability and transparency into judicial proceedings without removing whole policy areas to judicial determination. In other words it sought to create a new dynamic between the two branches of the State.

It is this new relationship which the courts have failed to articulate properly, most obviously in the case of *R. v A*. Paradoxically, in the light of that decision, one of the persuasive factors behind the adoption of the UK model was Canada's own rape shield case. After years of campaigning for stronger rape shield provisions, the Canadian women's

²¹ *ibid.* at para.16.

²² Lord Woolf, *Brown v Stott* [2001] 2 W.L.R. 817 at 842; Lord Bingham, *R. (on the application of Pretty) v DPP* [2001] UKHL 61, at paras 2 and 120; Lord Hoffman, *R. v Secretary of State for the Home Department Ex p. Simms* [2000] 2 A.C. 115 at 131F-G.

²³ *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 1 C.M.L.R. 52.

²⁴ Laws L.J., *Roth* para.81.

²⁵ *Roth*, para.75.

²⁶ *Roth*, para.77.

²⁷ The right to liberty and a fair trial.

²⁸ "The 'Democratic' Entrenchment of a Bill of Rights, Liberty's Proposals", Public Law, Winter 1993.

²⁹ Quoted in *Roth*, para.81.

movement was stunned when the judicially entrenched Charter of Rights they had also campaigned for overturned those provisions as a breach of the right to a fair trial. Only now, the women's movement discovered, it was not possible to lobby the judges in the way they had Parliament.³⁰

It was with this experience in mind that the British model was developed. In the academic literature it could be called a "dialogue approach" or in the words of Janet Hiebert, a Canadian academic, a "relational approach" in which the institutions of the state influence each other, rather than the role of the judiciary being to police or correct the "wrong" decisions of the legislature.³¹

Jack Straw, the then Home Secretary, was explicit about this when piloting the Human Rights Bill through the Commons:

"Parliament and the judiciary must engage in a serious *dialogue* about the operation and development of the rights in the Bill ... this *dialogue* is the only way in which we can ensure the legislation is a living development that assists our citizens."³²

This vision of the HRA is clearly far more consistent with the approach of Lord Hope than Lord Steyn. To give proper effect to the dialogue model requires a rehabilitation of s.4. It requires judges to have the confidence to issue a declaration of incompatibility whenever it is "not possible" to apply s.3 and where they deem legislation – *any* legislation – to be incompatible with Convention rights.

Instead, s.4 has come to be seen by the courts as a measure of last resort because of the presumption that through issuing a declaration of incompatibility the courts are effectively forcing the executive, through Parliament, to change the law. There were signs of this in *Pearson and Martinez*³³ (the prisoners' voting rights case) where deference to the legislature was relied upon as part (admittedly a minor part) of the reason for not issuing a declaration of incompatibility and by implication in *Poplar*.³⁴

This logic of this approach does not sit comfortably with Lord Hope's argument in *Shayler*, that where "compatibility cannot be achieved without overruling decisions which have already been taken on the very point at issue by the legislator, or if to do so would make the statute unintelligible or unworkable" then "the only option left to the court will be to make a declaration of incompatibility under section 4(2) of the Act with the consequences that decisions as to whether ... and how, to amend the offending legislation, are left to Parliament".³⁵

Note the reference to *whether* and not *when* "to amend the offending legislation" following a s.4 declaration. Yet, paradoxically, declarations of incompatibility have come to be regarded as if they constituted an expansion of the judicial role rather than a means of maintaining the existing separation in the functions of the legislature and the courts. This has arisen because there is a widespread, and erroneous, assumption that legislative amendment *must* follow a declaration.³⁶

Conclusion

The rationale of the "dialogue" or "relational" approach flies in the face of the assumption in much of the legal literature that the so-called "booby prize"³⁷ declaration of incompatibility should *automatically* trigger legislative change. It will not be a sign that the Act has failed when the day comes – as it surely will – that the government, with strong parliamentary backing, refuses to amend a statute that the courts declare breach fundamental rights.

The purpose of the HRA is to allow the courts to apply human rights principles where they were once barred from doing so. It was not enacted so that the courts could have the final say in areas where there is no settled human rights answer any more than it allows them to abdicate from their responsibility to scrutinise on the grounds that it is outside their sphere of competence.

The outcome of a refusal to amend legislation after a declaration of incompatibility may be a trip to Strasbourg, but given the possible application by the European Court of the margin of appreciation the outcome of such a challenge may not automatically be a decision against the government.

It was the prospect of the courts overturning such measures as gun controls laws, tobacco advertising restrictions or requirements that freemasons declare their membership – all Labour commitments before they got into power – that made the then Labour opposition hesitate about Incorporation for so long. In the unlikely event that the courts were to declare that any future legislation outlawing fox hunting, for example, was incompatible with Convention rights (disregarding the issue of compensation) then Parliament would be entitled to choose to protect its democratic mandate on an issue where the human rights case law is far from settled. Encouraging this kind of "dialogue" was one of the purposes of the HRA.

In reality, regardless of any other consideration, it would be surprising if the courts *were* to issue such a declaration on an issue like fox-hunting. It would probably be regarded by the courts as falling within the realm of "social issues" which lie within Parliament's sphere on the deference spectrum. Yet following the rationale of the dialogue model –

³⁰ Eventually a new formula was agreed. See J. Fudge, "The Effect of Entrenching a Bill of Rights upon Political Discourse", *International Journal of Sociology of Law*, Vol.17, 1989.

³¹ "A Relational Approach to Constitutional Interpretation: Shared Legislative and Judicial Responsibilities", J. Hibbert, Paper for Research Committee on Comparative Judicial Studies, Cape Town. 2001.

³² 314 H.C. 1141, June 24, 1988. Emphasis added.

³³ R. (Pearson & Martinez) v Home Secretary (2001) H.L.R.L. 39 at paras 20 & 40.

³⁴ cf. n.14 at para.69.

³⁵ [2002] 2 W.L.R. 754 at para.52.

³⁶ Nicol, op. cit., p.442.

³⁷ G. Marshall, "Two kinds of incompatibility: more about s.3 of the HRA 1998" [1999] P.L. 377.

provided a fundamental right is at stake³⁸ – there should be *no* legislation which the courts automatically bar themselves from declaring incompatible with Convention rights solely because the subject matter is deemed by the judges to be more in Parliament's field of vision than their own.

Likewise, Parliament's intention is crucially relevant in determining whether it is possible to *interpret* legislation compatibly with Convention rights. It is not necessarily relevant when judges weigh up whether to declare that *in their view* legislation is incompatible. This is because, as Lord Hope reminds us, there can be no *automatic* presumption that Parliament will agree, and respond accordingly, when a declaration of incompatibility is issued.

The substitution of differing degrees of deference for the provisions of the Act themselves, therefore, is likely to lead the courts to effectively rule out testing the compatibility of some legislation altogether – regardless of the merits of the case – on the grounds that it is not within their "special responsibility". That will take them nearer to the New Zealand Bill of Rights where the courts are strictly speaking barred from reviewing statutes that are not ambiguously expressed – an approach which was rejected here as explicitly as the Canadian one.

The irony is that if we are not careful we could be faced with the following bizarre scenario: s.3 being interpreted along the Canadian model when Arts 5 and 6 are engaged and the New Zealand approach of no judicial review at all being effectively inserted into s.4 when social, political or economic factors are said to be dominant. It was because these two models were viewed to have swung too far in the direction of judicial entrenchment and democratic deference respectively, that the British model was intentionally drafted to be different from both in the first place.

Rather than construct a complicated new doctrine of judicial deference to the legislature, the courts need only look to the provisions themselves. There is no need for judges, legal practitioners or indeed academics to develop complex theories of judicial deference if the *scheme* of the Act is properly appreciated.

[2003] E.H.R.L.R. Issue 2, 125-133

³⁸ Which in the case of fox hunting is a highly questionable proposition anyway.