3. Institutional Dialogue between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and elsewhere)

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1. INTRODUCTION

In recent years, a number of commentators have used the concept of dialogue to capture the relationship between Canadian courts and legislatures in the judicial review of constitutionality.¹ As long as dialogue is treated sceptically

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and is not assumed to describe an ideal conversation, the idea of dialogue can provide a useful perspective on human rights protections generally, for it emphasises the extent to which both courts and legislatures have valuable things to say about rights, directs our attention to the ways in which the two institutions interact, and provides tools for evaluating the remarkably broad range of mechanisms that can be used to protect rights.

This paper reviews a spectrum of means by which such ‘dialogue’ over rights can be structured in a constitutional system. It then focuses in more detail on three specific forms of rights protection and evaluates the institutional balance achieved in each:

- the finding, by the courts, that constitutional provisions dealing with other matters contain implicit rights guarantees, so that rights come to be addressed through the adjudication of provisions having little ostensibly to do with rights (an ‘implied rights’ approach);
- the entrenchment of a bill of rights in the constitution, backed by judicial review, but subject to express derogation by legislative action (the approach contained in section 33 – the ‘notwithstanding clause’ – of the Canadian Charter of Rights and Freedoms2); and
- the declaration of rights in an ordinary statute, lacking constitutional status but protected by a requirement that derogation occur in a specified manner and form (the ‘statutory bill of rights’ approach).

Each of these mechanisms has been used in Canada. In this paper I will draw primarily on Canadian experience, although I will also discuss the Australian jurisprudence on implied rights and refer to approaches to rights taken in a number of other chiefly Anglo-American jurisdictions.

The notion that rights guarantees are characterised by ‘dialogue’ between courts and legislatures may strike the reader as both counter-intuitive and normatively inappropriate. We generally think of judicial review in much simpler and monological terms. Parliament passes laws, and courts either uphold them or strike them down on the basis of their interpretation of the constitution. Any sense that political actors influence the courts’ interpretation of the constitution seems incompatible with judicial independence and the rule of law; we assume that courts should come to their own conclusions as to constitutionality, without reference to what political actors like or dislike. Some legal realists have emphasised that political actors do have an impact on judicial review. But this

their legislation to withstand constitutional scrutiny, once a law has been declared invalid.

This paper concentrates not on legislatures’ responses to judicial decisions, but on legislatures’ impact on the interpretation and application of the rights themselves.

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impact is generally treated by the realists themselves as incompatible with claims of judicial independence.\(^3\)

In this paper, I will deal with principled justifications for legislative participation in the definition of rights only *en passant*, as part of the evaluation of the balance struck by various rights instruments.\(^4\) I should note, however, that institutional dialogue over rights is much more common than is often acknowledged – indeed is, to some extent, universal.

In Canada, the claim that judicial review involves dialogue has special credence because of two distinctive aspects of the *Canadian Charter of Rights and Freedoms*.

First, the Canadian *Charter* contains an express limitation clause, section 1, which states that its rights and freedoms are ‘subject only to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society.’\(^1\) This clause recognises not only that rights are subject to limits, but also, implicitly, that government should have the burden of justifying those limits.\(^3\) Second, the Canadian *Charter* permits legislatures to derogate from some of the rights it enunciates. Section 33 provides that legislatures can insulate a statute from certain forms of *Charter* review by expressly declaring that the statute shall operate notwithstanding certain sections of the *Canadian Charter of Rights and Freedoms*. When this occurs, judicial review is excluded. Both these provisions suggest that the legislature may actively participate in the definition of constitutional protections.

Although these clauses are distinctively Canadian, there are functional parallels in virtually all constitutions. Other bills of rights contain express limitation clauses.\(^6\) But even if they do not, it is generally conceded that all rights are subject to limits. Those limits may not be conceived as restrictions of an otherwise unlimited right; they may be conceived as aspects of the definition of the right. And there may be no clear understanding that government has the burden of justifying limits; it may simply be assumed that the courts will determine the limits. But these distinctions make little difference for our purposes. The rights

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3 Although he is not generally considered a legal realist, this was essentially the argument put so effectively by Robert Dahl in his classic article, *Decision-making in a Democracy: the Supreme Court as a National Policy-maker* Journal of Public Law, 6 (1957), pp. 279–295.


5 R v. Oakes [1986] 1 SCR 103 at 136–137. As Hogg and Bushell emphasise in above n. 1, pp. 87–90, other Charter rights contain their own internal qualifications which have, within a more restricted compass, a similar effect.

6 For limitation clauses that apply, like Canada’s, to the rights instrument generally, see: New Zealand Bill of Rights Act 1990, No. 109 (NZ), section 5; Constitution of the Republic of South Africa 1996, section 36. Other instruments have limitations clauses applicable to specific rights. See, for example: International Covenant on Civil and Political Rights, article 19(3); European Convention on Human Rights, article 10(2).
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