

# Conceptual Precision and Parliamentary Systems of Rights: Disambiguating “Dialogue”

*Emmett Macfarlane\**

*The concept of “dialogue” has become an increasingly popular way to understand how judicial review operates in parliamentary systems of government with bills of rights. Dialogue is said to provide a middle ground between judicial supremacy and traditional parliamentary sovereignty by giving both courts and the elected branches of government a say in the resolution of policies that come into conflict with protected rights. This understanding of dialogue originates in Canada, and is often applied to the United Kingdom, New Zealand, and Australia. Scholars invoking the concept have explored how particular structural elements in the bills of rights adopted in these countries serve as mechanisms for dialogue, but they often employ the term in many different, sometimes contradictory, ways. This article develops four typologies of dialogue, and assesses the concept’s utility for empirical assessment of how parliamentary systems of rights protection operate. It finds that a lack of conceptual precision by scholars employing the term impairs its utility for both empirical and comparative analysis of parliamentary rights review.*

*Le concept de « dialogue » est devenu un moyen de plus en plus courant de comprendre le fonctionnement du contrôle judiciaire dans les gouvernements de régime parlementaire dotés d’une déclaration de droits. On dit que le dialogue offre un juste milieu entre la suprématie judiciaire et la souveraineté parlementaire traditionnelle en donnant une voix aux tribunaux et aux branches élues du gouvernement dans la résolution de politiques qui entrent en conflit avec les droits garantis. Cette compréhension du dialogue a vu le jour au Canada et est souvent appliqué au Royaume-Uni, à la Nouvelle-Zélande et à l’Australie. Les chercheurs qui invoquent le concept ont examiné comment des éléments structurels précis des déclarations de droits adoptées dans ces pays servent de mécanismes pour le dialogue, mais ils emploient souvent le terme de nombreuses façons différentes, parfois contradictoires. Dans cet article, l’auteur élabore quatre typologies du dialogue et examine l’utilité du concept aux fins d’évaluations empiriques du fonctionnement de la protection des droits dans les régimes parlementaires. Il constate qu’une faute de précision conceptuelle de la part des chercheurs qui emploient le terme diminue son utilité pour l’analyse empirique et comparative de l’examen des droits parlementaires.*

\* Department of Political Science, University of Waterloo. The author gratefully acknowledges the financial support of the Social Sciences and Humanities Research Council and wishes to thank Mark Tushnet, Anna Drake, and the journal’s anonymous reviewers for thoughtful comments on earlier drafts.

The notion of an interinstitutional dialogue between courts and legislatures has gained significant currency among observers of parliamentary systems of government that have recently enacted bills of rights. The principal idea invoked by the concept is that judicial pronouncements on rights are not necessarily the final word about the legitimacy of the policies at stake. In contrast to the classical understanding of American-style judicial review, where the United States Supreme Court's rulings on the constitutionality of legislation are considered final, the structure of the domestic rights instruments in systems of dialogic review affords legislatures the ability to avoid or respond to court assertions about the validity of policies subjected to rights-based challenges. Dialogic systems of rights protection are thus said to claim a middle ground between judicial supremacy and traditional parliamentary sovereignty.

This understanding of dialogue originates in Canada, where it was first employed against critics who argue that judicial review under the 1982 *Canadian Charter of Rights and Freedoms* is antidemocratic.<sup>1</sup> Over the past decade, scholars have considered the concept in light of other countries with traditions of parliamentary sovereignty that have recently adopted bills of rights, most notably with respect to the 1998 *Human Rights Act* in the United Kingdom and the 1990 *Bill of Rights Act* in New Zealand. Moreover, in Australia, a rights dialogue was an express goal during the development of both the 2004 Australian Capital Territory *Human Rights Act* and the 2006 Victorian *Charter of Human Rights and Responsibilities*. Scholars have explored how particular structural elements in each of these bills of rights serve as mechanisms for dialogue, but the term is often employed in various ways, each with different implications for how dialogue might be considered a useful concept to understand the institutional relationships surrounding the protection of rights. Indeed, some critics view the idea of dialogue as being so malleable that they conclude it is too abstract, nothing more than a useful buzzword or an empty rhetorical device.<sup>2</sup>

---

1 Peter Hogg & Allison Bushell, "The Charter Dialogue Between Courts and Legislatures: (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75.

2 Carissima Mathen, "Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on 'Charter Dialogue Revisited'" (2007) 45:1 Osgoode Hall LJ 131; Leighton McDonald, "Rights, 'Dialogue' and Democratic Objections to Judicial Review" (2004) 32 Federal Law Rev 26 [McDonald, "Judicial Review"]; Julie Debeljak, "Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line between Judicial Interpretation and Judicial Law-Making" (2007) 33:1 Monash UL Rev 16 [Debeljak, "Sovereignty and Dialogue"]; Sara Jackson, "Designing Human Rights Legislation: 'Dialogue', the Commonwealth Model and the Roles of Parliaments and Courts" (2007) 13 Auckland UL Rev 112-3.

This article explores the various conceptions of dialogue in comparative perspective and develops four primary typologies, each containing several different subcategories or uses of dialogue. It then investigates whether the term serves as a useful comparative tool for understanding judicial review in parliamentary systems.<sup>3</sup> Scholars of each of these countries disagree about the specific requirements or mechanisms by which dialogue is achieved. The question of dialogue's descriptive or empirical veracity is crucial, and my analysis includes an assessment of how the different formulations of the concept operate in these countries.

The first, most common, understanding of dialogue is as a descriptive statement about how the judicial-legislative relationship operates to reconcile democracy with judicial review of rights. Dialogue as description focuses on the structure of the relevant bill of rights and how particular provisions serve as mechanisms for dialogic interaction between government branches. Dialogue as description operates sequentially; the institutional interaction resembles a tennis match between branches about the compatibility of the policies at stake with the bill of rights. The interaction is procedural rather than conversational, as each branch acts under its own authority during its turn in the dialogue. Commentators differ over the conditions necessary for interactions to count as dialogue. In several of the countries, these differences stem from an underlying disagreement over whether dialogue means that the legislature has the final say or that none of the branches have the final say, and about whether legislatures share authority to interpret the rights themselves or whether they can only offer a perspective on the limits of those rights.

In the second section, the article explores an understanding of dialogic review that envisions it as having a communicative and educative function. Here, the concept is taken to reflect the notion of a conversation or deliberation between two or more participants. Dialogue as communication envisions the judiciary and government each "listening", learning, and taking cues from the other about the settlement of rights questions. Other scholars doubt the extent to which dialogue involves substantive interbranch "communication" as opposed to the more procedural "interaction" described above.

---

3 The idea of a constitutional dialogue has been invoked in the United States as well, but in even more diverse ways. Often dialogue is employed to refer to a broader discourse surrounding constitutional interpretation that includes not only the Supreme Court, Congress, and the president but also societal forces like interest groups, and is subject to the influence of political culture or public opinion. See e.g., Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton: Princeton University Press, 1988); Barry Friedman, "Dialogue and Judicial Review" (1993) 91:4 Mich L Rev 577. This article focuses on dialogue as it pertains to parliamentary systems with bills of rights that contain features that avoid judicial exclusivity in judicial interpretation of rights.

The article then examines the idea of dialogue as promoting a culture of rights in which attention to rights issues are integrated and promoted within government policy development and decision-making processes. Dialogic bills of rights can promote a rights culture by providing for parliamentary review of legislation on rights grounds, mandating that the relevant minister make statements on the compatibility of legislation with rights and bureaucratic screening of policies from their inception. These features are useful in demonstrating the idea that dialogue does not necessarily start with a judicial decision on rights. Further, the explicit aim of some of the rights instruments discussed here is to support broader consideration of rights within the legislative process, particularly in the UK and Australian cases. Nevertheless, the effectiveness of these intra-institutional practices is sometimes questionable.

The fourth section explores the idea that dialogue has (or should have) prescriptive significance. Dialogue is invoked in a prescriptive manner when scholars argue that the concept itself requires a particular approach by courts or legislatures with regard to how they go about their role as protectors of rights. The notion that dialogue should offer “normative guidance” to judicial or political actors is problematic. This quickly becomes apparent when we consider the divergent views about what, if any, connection exists between dialogue and judicial deference to legislative decisions. Some scholars argue that dialogue necessitates deference on the part of judges; others that it mandates the opposite; and others still that dialogue means nothing for deference.

The article concludes by exploring the implications these various uses of the term have for whether we ought to understand parliamentary systems as “dialogic”. It suggests that the highly nebulous and pliable manner in which scholars invoke dialogue risks negating it of any conceptual utility. Although the term has obviously caught the imagination of scholars looking at the relationship between judicial review of rights and democracy, the conceptual confusion exhibited by the extant comparative literature threatens to obscure the specific features that animate the new parliamentary or “Commonwealth model” of rights review,<sup>4</sup> and erodes precision in comparative study of bills of rights.

---

<sup>4</sup> Stephen Gardbaum, “The New Commonwealth Model of Constitutionalism” (2001) 49 *Am J Comp L* 707; Janet Hiebert, “New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?” (2004) 82:7 *Tex L Rev* 1963 [Hiebert, “New Constitutional Ideas”].

## Dialogue as description

Dialogue is most commonly used in a descriptive sense. It is invoked to illustrate how institutional interactions surrounding rights operate in practice or how particular features of a bill of rights can serve as mechanisms to facilitate responses from one branch of government to the actions of the other. The predominate understanding of a rights dialogue between courts and legislatures was first articulated in the Canadian context by Peter Hogg and Allison Bushell. The authors write that dialogue exists “where a judicial decision is open to legislative reversal, modification, or avoidance” by the competent legislative body.<sup>5</sup>

Hogg and Bushell point to a number of provisions in the Canadian Charter that provide for dialogue. The notwithstanding clause, section 33, allows legislatures to temporarily suspend the effects of a judicial decision striking down a law under certain sections of the *Charter*.<sup>6</sup> The general limitations clause under section 1 provides that rights are guaranteed “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Section 1 allows legislatures to put forward justifications for the impugned policies and to respond to court rulings by enacting legislation with the same objectives if tailored differently or if new evidence supporting the justifications becomes available. Further, several of the *Charter*’s enumerated rights have internal limitations.<sup>7</sup>

The *Charter*’s notwithstanding clause is a contentious device and is generally viewed as an instrument that “overrides” rights rather than one of an expression of legislative disagreement about rights. The controversial decision of the Quebec government to use section 33 in 1988 to protect the province’s controversial language laws, amid intense national debate over a constitutional reform package, is widely seen as marginalizing the provision. Considered a poison pill, the notwithstanding clause has never been used by the federal government. As Mark Tushnet argues, the “limited use of section 33 itself suggests that there is little difference between the Canadian system and one

---

5 Hogg & Bushell, *supra* note 1 at 79.

6 *Canadian Charter of Rights and Freedoms*, s 33, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The notwithstanding clause applies only to fundamental freedoms under section 2, legal rights under sections 7 to 14, and equality rights under section 15 (not including sexual equality rights protected under section 28). To maintain its force, use of the clause must be renewed every five years.

7 See e.g., *Charter, ibid*, s 7 (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”).

in which the Constitutional Court's decisions are final".<sup>8</sup> According to Kent Roach, the virtual obsolescence of the notwithstanding clause does little damage to the descriptive validity of dialogue because the principal mechanism for dialogic review is through section 1, which he describes as "the vehicle for the normal conversations and interchanges that regularly occur between courts and legislatures in Canada".<sup>9</sup>

Canadian political scientists and legal scholars have engaged in a protracted debate over the descriptive validity of dialogue, based largely on disagreement about the type of legislative response that counts as "legitimate" dialogue. Hogg and Bushell's original review of cases that generated dialogue consists of "those cases in which a judicial decision striking down a law on Charter grounds is followed by some action by the competent legislative body".<sup>10</sup> They find that two-thirds of cases involving judicial invalidation of legislation under the *Charter* are met with a dialogic response. Critics assert that counting any type of legislative response as dialogue is inappropriate and that for legitimate dialogue to occur there must be some evidence that the legislature diverges from, or expresses disagreement with, the judicial ruling. In other words, to count as dialogue, a legislative response must attempt to reverse, modify, or avoid the court decision, consistent with Hogg and Bushell's original definition of the term.<sup>11</sup> Mere obedience of court rulings is representative not of dialogue, but a judicial monologue. Christopher Manfredi and James Kelly find that dialogue only occurs in approximately one-third of cases of judicial invalidation (half as often as Hogg and Bushell contend) on the argument that legislative decisions to simply repeal a law or replace entire acts amount to "Charter ventriloquism".<sup>12</sup> My own study examines the substantive

---

8 Mark Tushnet, "New Forms of Judicial Review and the Persistence of Rights—and Democracy-Based Worries" (2003) 38 *Wake Forest L Rev* 832-3; see also Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter" (2001) 44:3 *Canadian Public Administration* 255. (As Tsvi Kahana notes, section 33 has only been used three times outside of Quebec, only rarely drawing much public attention due to the inaccessible nature of the cases).

9 Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 176.

10 Hogg & Bushell, *supra* note 1 at 82.

11 Christopher Manfredi & James Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37:3 *Osgoode Hall LJ* 513; FL Morton, "Dialogue or Monologue?" in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 111; Matthew Hennigar, "Expanding the 'Dialogue' Debate: Canadian Federal Government Responses to Lower Court Charter Decisions" (2004) 37:1 *Canadian Journal of Political Science* 3.

12 Manfredi & Kelly, *ibid* at 521.

content of legislative amendments in response to Supreme Court rulings and finds that even fewer responses (17 percent) are true instances of dialogue.<sup>13</sup>

A major point of contention within this debate involves whether Canadian legislatures can share interpretative authority with courts over the constitutionality of legislation. Hogg et al argue that criticisms like Manfredi and Kelly's imply that genuine dialogue is only possible if legislatures share coordinate authority to interpret the Constitution.<sup>14</sup> In their view, such an arrangement "by definition" cannot exist in Canada.<sup>15</sup> These diverging perspectives on what counts as dialogue in practice are essentially irreconcilable. For proponents, legislative replies based on interpretations of the *Charter* that do not coincide with those of the courts are impermissible. For critics, if legislatures are limited to responses that adhere to judicial pronouncements, then it becomes meaningless to refer to dialogue. It is worth noting that this issue may be unique to Canada (at least among the countries examined here); where the Canadian Charter is constitutionally entrenched and judges are empowered to invalidate legislation, the bills of rights in the other jurisdictions are statutory enactments under which the judges share no such power.

Many scholars have drawn from the Canadian example to apply the descriptive understanding of dialogue to the United Kingdom's *Human Rights Act (HRA or UK HRA)*.<sup>16</sup> Several scholars suggest that the *HRA* was designed with dialogue in mind, citing comments by then Home Secretary Jack Straw in parliamentary debate,<sup>17</sup> although others interpret his reference to dialogue

---

13 Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights", (2013) 34:1 *International Political Science Review* 39.

14 Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "Charter Dialogue Revisited—Or 'Much Ado About Metaphors'" (2007) 45:1 *Osgoode Hall LJ* at 31.

15 *Ibid*, but see Luc Tremblay, "The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures" (2005) 3:4 *International Journal of Constitutional Law* 617 (Tremblay expands on this argument, but in contrast to Hogg and Bushell, he argues this limits the utility of dialogue); *contra* Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen's University Press, 2010).

16 Julie Debeljak, "Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights" (2002) 26:2 *Melbourne UL Rev* 285 [Debeljak, "Review of Bills of Rights"]; Richard Clayton, "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention under the Human Rights Act 1998" (2004) *PL* 33 at 45; Ian Leigh & Roger Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Portland: Hart Publishing, 2008); Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Portland: Hart Publishing, 2009); *Human Rights Act 1998 (UK)* c 42 [UK HRA].

17 Francesca Klug, "Judicial Deference Under the Human Rights Act 1998" (2003) 2:2 *Eur HRL Rev* 125 at 131; Geoffrey Marshall, "The Lynchpin of Parliamentary Intention: Lost, Stolen, or Strained?" (2003) *PL* 236 at 243.

as largely rhetorical.<sup>18</sup> Viewed as a “modern reconciliation” between democracy and the protection of rights, the *HRA* is said to forge a new relationship—between the judiciary on one hand and Parliament and the executive on the other—through dialogue.<sup>19</sup> It is important to note, however, that the *HRA* is domestic legislation that incorporates the European Convention on Human Rights and that the final word on defining Convention rights rests with the European Court of Human Rights. This places any debate over how much influence either the court or Parliament should have in defining Convention rights in a somewhat conditional context.

Section 3 of the *HRA* requires courts to read and give effect to legislation in a manner that is compatible with Convention rights “so far as it is possible to do so”.<sup>20</sup> If a court cannot interpret legislation as compatible, it can make a nonbinding declaration of incompatibility under section 4.<sup>21</sup> Declarations of incompatibility are widely regarded as the principal mechanism for dialogue because they allow the judiciary input while explicitly leaving it to Parliament to decide how and whether to respond.<sup>22</sup> Although the structure of the *HRA* makes clear that the judiciary’s determination is not final, there are a range of views as to how the interactions between branches occurs following a declaration and whether there is a “final word” on the rights issues at stake. Murray Hunt writes that a declaration of incompatibility places an onus on the executive and Parliament to amend legislation that courts declare incompatible.<sup>23</sup> Francesca Klug argues that there has been a “presumption that through issuing a declaration of incompatibility the courts are effectively forcing the executive, through Parliament, to change that law”.<sup>24</sup> According to Klug, the rationale of dialogue “flies in the face” of the notion that a declaration should “automatically trigger legislative change”, adding “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”.<sup>25</sup>

---

18 Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009) 130, at n 65.

19 Murray Hunt, “The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession” (1999) 26:1 *JL & Soc’y* 86 at 89-90.

20 *UK HRA*, *supra* note 16 s 3(1).

21 *Ibid*, s 4.

22 Klug, *supra* note 17 at 131; Debeljak, “Review of Bills of Rights”, *supra* note 16 at 317; Danny Nicol, “Statutory Interpretation and Human Rights after *Anderson*” (2004) *PL* 274 at 282; Danny Nicol, “Law and Politics after the Human Rights Act” (2006) *Public Law* 722 [Nicol, “After HRA”].

23 Hunt, *supra* note 19 at 89-90.

24 Klug, *supra* note 17 at 131.

25 *Ibid* at 132.



While it would be incorrect to see section 4 declarations as imposing any mandatory obligations on Parliament, other scholars suggest it is also inappropriate to necessarily view Parliament as always having the final say. Instead, dialogue is ongoing, with no branch of government having exclusive power to interpret the limits of rights. Julie Debeljak, for example, views the *HRA* as “parliamentary sovereignty, tempered by judicial input”.<sup>26</sup> Going further, Aileen Kavanagh contends it is problematic to view declarations as sparking a dialogue “as if it were merely a conversation between two people ... By issuing a declaration of incompatibility, the courts are not simply ‘throwing the ball back into Parliament’s court’—they are pronouncing on what the law requires”.<sup>27</sup> Yet it is possible to take this perspective too far in practice and run the risk of negating the purpose behind the structure of the *HRA*, one that denies courts American-style powers of judicial review. The British Parliament has thus far responded to all section 4 declarations by adhering to the judicial readings of compatibility. As Ian Leigh and Roger Masterman write, “if this is a dialogue at all, it is one in which the judicial voice is beginning to be heard the loudest”.<sup>28</sup>

There is some disagreement over the extent to which the interpretative requirements under section 3 serve as an effective vehicle for dialogue. Danny Nicol argues that courts should avoid “strained interpretation” to read legislation as compatible because it undermines the potential for dialogue. Such instances “tend to go unnoticed outside the legal community and can be exploited, not just by the judiciary but by the executive, to by-pass Parliament in the rights-dialogue”.<sup>29</sup> By contrast, others view section 3 as being just as likely to foster dialogue as a section 4 declaration because if Parliament disagrees with an interpretation it is free to enact new legislation to modify it.<sup>30</sup> Although this is true, it is important to appreciate the added burden faced by Parliament in responding to judicial interpretations, widely viewed as the normal task of courts. Where a declaration of incompatibility explicitly leaves it to Parliament to decide how to respond, taking action in the face of judicial interpretations requires the clear overruling of courts.<sup>31</sup>

---

26 Debeljak, “Review of Bills of Rights”, *supra* note 16 at 310.

27 Kavanagh, *supra* note 18 at 410.

28 Leigh & Masterman, *supra* note 16 at 118.

29 Nicol, “After HRA”, *supra* note 22 at 747.

30 Clayton, *supra* note 16 at 46; Kavanagh, *supra* note 18 at 130; Leigh & Masterman, *supra* note 16 at 116; Young, *supra* note 16 at 10.

31 Jackson, *supra* note 2 at 107.

If there is concern that the judicial side of the dialogue may become too strong in practice in Canada and the UK, the opposite may be the case in New Zealand. The *New Zealand Bill of Rights Act (NZBORA)* gives judges even fewer powers of review than the *UK HRA*.<sup>32</sup> For this reason, there is comparatively less discussion of a dialogue between branches in that country. Nonetheless, there are structural mechanisms in the *NZBORA* similar to those in both the Canadian Charter and the *UK HRA*. Section 5 of the *NZBORA* contains a reasonable limits clause modelled on the Canadian Charter's section 1.<sup>33</sup> Section 6 of the *NZBORA* mandates that "wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning", which was no doubt influential when section 3 of the *UK HRA* was drafted.<sup>34</sup>

Importantly, the *NZBORA* does not give New Zealand courts the explicit power to declare laws inconsistent with rights, let alone invalidate or revoke them. A handful of observers have nevertheless argued that dialogue is still possible. One significant development is that some judges and other commentators have suggested that there might be an "implied power" of courts to make declarations of inconsistency.<sup>35</sup> Certainly, the language of section 6 logically entails that there will be instances where a legislative enactment cannot be given a meaning consistent with rights. Judicial restraint has thus far won out, however, because although courts have indicated they will be prepared to declare inconsistencies, none have to date.<sup>36</sup> Further, Claudia Geiringer's examination of recent case law in this area leads her to conclude that even if the power of courts to make declarations is eventually recognized, they will rarely be exercised.<sup>37</sup>

Despite the limited mechanisms presented by the *NZBORA* relative to the other countries surveyed here, dialogue as description is arguably still valid in New Zealand. According to a report by the London-based JUSTICE organization,

---

32 *New Zealand Bill of Rights Act 1990 (NZ)*, 1990/109 [*NZBORA*].

33 *Ibid*, s 5; c.f. *Charter*, *supra* note 6, s 1.

34 *NZBOHRA*, *ibid*, s 6; c.f. *UK HRA*, *supra* note 16, s 3.

35 JUSTICE Consultation Committee, *A British Bill of Rights: Informing the Debate, The Report of the JUSTICE Constitution Committee* (London: JUSTICE, 2007); Mark Tushnet, "Dialogic Judicial Review" (2008) 61 *Ark L Rev* 205 at 214-5; Claudia Geiringer, "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 *VUWLR* 613 at 646; Jackson, *supra* note 2 at 99.

36 Jackson, *ibid*.

37 Geiringer, *supra* note 35 at 616.

[The New Zealand] Parliament can disagree and has disagreed with [NZBORA] based court decisions and has reacted by a range of measures. On other occasions, the political arms have accepted judicial outcomes, even if only after a “robust debate”. Importantly, it is not that Parliament must accept the expression of a judicial view. Rather, it chooses to accept the judicial view.<sup>38</sup>

Like some observers of section 3 of the *UK HRA*, Geiringer also argues that the interpretative provision of section 6 in the *NZBORA* “facilitates a softer form of dialogue with the political branches”.<sup>39</sup> Nevertheless, given the design of the *NZBORA*, it is clear that dialogue is relatively weak in the New Zealand case.

The two subnational bills of rights enacted in Australia were designed with the explicit intention of facilitating dialogue. The Australian Capital Territory *Human Rights Act (ACT HRA)* and the Victorian *Charter of Human Rights and Responsibilities*<sup>40</sup> are similarly structured and both were influenced by the Canadian Charter and *UK HRA*. Indeed, the consultative committee report that led to the *ACT HRA* cites Hogg and Bushell’s idea of dialogue.<sup>41</sup> The Victoria government also stated from the outset of the process leading to the Charter that its preference was for mechanisms that promote dialogue (and although the influence of the *UK HRA* is widely noted, Debeljak speculates that the “glaring resistance to acknowledge any influence of the Canadian Charter” on the part of the Victorian government may be “because of its constitutional status”).<sup>42</sup>

Section 28 of the *ACT HRA* and section 7 of the Victorian Charter both contain a general limitations clause allowing for “reasonable limits” that must be “demonstrably justified in a free and democratic society”. Interestingly, both sections also outline factors that must be considered in gauging the reasonableness of the limitations that resemble the judicial test designed by the Supreme Court of Canada in relation to the Canadian Charter’s limitations clause.<sup>43</sup> Both bills also require courts to interpret legislation as compatible

---

38 JUSTICE Consultation Committee, *supra* note 35 at 80.

39 Geiringer, *supra* note 35 at 646.

40 *Human Rights Act 2004 (ACT) [ACT HRA]*; *Charter of Human Rights and Responsibilities 2006 (Vic) [Victorian Charter]*.

41 Leighton McDonald, “New Directions in the Australian Bill of Rights Debate” (2004) PL 22 at 28 [McDonald, “New Directions”].

42 Debeljak, “Sovereignty and Dialogue”, *supra* note 2 at 27 note 105.

43 *ACT HRA*, *supra* note 40 s 28(2); Victorian Charter, *supra* note 40 s 7(2). Both set out the factors as follows: “(a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the

“so far as it is possible to do so consistently with its purpose”.<sup>44</sup> The *ACT HRA* gives courts the power to make a declaration of incompatibility, while the Victorian Charter a declaration of “inconsistent interpretation”; both are unenforceable.<sup>45</sup> Masterman argues that the terminology used in the Victorian Charter regarding the declaration of “inconsistent interpretation” rather than “incompatibility” is “not accidental” and “less definitive”. He contends the language is explicit recognition that a declaration is “one valid and potentially contestable viewpoint” on the rights in question and thus strengthens the capacity for dialogue.<sup>46</sup> There are also provisions in the *ACT HRA* and Victorian Charter requiring the attorneys general to prepare a written response to a court declaration, submitted to their respective legislature within six months of the court decision.<sup>47</sup> This latter requirement is unique to the Australian rights instruments and it instigates dialogue in as direct a manner as possible. Significantly, while it compels a response by the political branches, it does not require changes to the legislation itself.

Section 31 of the Victorian Charter includes an override provision similar to the Canadian Charter’s notwithstanding clause. Debeljak argues that it is unclear why such a provision is necessary given that judicial declarations have no impact on the validity of legislation.<sup>48</sup> However, it is worth noting that any use of the override by the legislature would prevent the court from issuing a declaration of inconsistency or from interpreting it at all. It is possible that at some point a government may want to remove legislation from the spectre of judicial rights review altogether. Of course, used pre-emptively in this manner, the override completely inhibits dialogue rather than serving as a dialogic mechanism in the way its Canadian cousin is often envisioned.<sup>49</sup>

---

limitation seeks to achieve”.

44 *ACT HRA*, *ibid*, s 30; Victorian Charter, *ibid*, s 32(1).

45 *ACT HRA*, *ibid*, ss 32(2)-(3); Victorian Charter, *ibid*, ss 36(2), (5).

46 Roger Masterman, “Interpretations, Declarations and Dialogue: Rights Protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities” (2009) PL 112 at 124.

47 *ACT HRA*, *supra* note 40, s 33(3); Victorian Charter, *supra* note 40, s 37.

48 Debeljak, “Sovereignty and Dialogue”, *supra* note 2 at 34.

49 Debeljak elaborates on this point elsewhere: Julie Debeljak, “Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006” (2008) 32:2 Melbourne UL Rev 422. The debate may be moot. In its response to the Scrutiny of Acts and Regulations Committee’s four-year report on the Charter, the government agreed to repeal section 31. Austl, Commonwealth, Government of Victoria, *Victorian Government Response to the Scrutiny of Acts and Regulations Committee’s Review of the Charter of Human Rights and Responsibilities Act 2006* (Victoria: Victorian Government Printer, 2012).

Dialogue as description is procedural but, as this discussion illustrates, different conceptions of how it operates are based on diverging considerations of what institutional practices are viewed as possible or permissible. Disagreements over definition are ultimately proxies for disputes about institutional practice. If a Canadian legislature can only respond to court decisions in a manner that adheres to judicial interpretations of the *Charter* then, for some, dialogue is impossible. If UK courts rely too heavily on the interpretative mandates of section 3 of the *HRA*, then some scholars view dialogue as inhibited. This discussion also illuminates the distinction between whether dialogue occurs in practice and whether it is merely made possible. For example, the political obstacles legislatures face in invoking the Canadian notwithstanding clause limits dialogue in practice but not the capacity for that mechanism to serve as a vehicle for it. A similar line of reasoning might apply to the discussion of the implied power of New Zealand courts to make declarations of inconsistency under the *NZBORA*. These disagreements and different ways of understanding how dialogue operates make it more difficult to assess whether parliamentary bills of rights truly provide balance between judicial review and democracy.

## Dialogue as communication

Some commentators invoke the concept of dialogue in the more colloquial sense of the term as denoting a two-way (or more) conversation or deliberation between active participants. In this context, dialogue is instilled with a communicative and educative significance not reflected by the purely procedural definition. Some of the debate surrounding the empirical existence of dialogue in Canada stems from an understanding of a dialogue between two equal contributors about the meaning of rights. Viewing dialogue in this way, critics deplore that some proponents maintain judicial supremacy in terms of actual interpretation of the *Charter*. Hogg and Bushell argue that these critics are attacking an “idealized” conception of dialogue. In response, they write, “we never made the ridiculous suggestion that courts and legislatures were actually ‘talking’ to each other”.<sup>50</sup>

It is important to note that even the purely procedural form of dialogue involves obvious points of traditional communication between courts and the elected branches. The most obvious of these include judicial consideration of submissions and oral arguments made by government lawyers in court pro-

---

50 Hogg, Bushell Thornton, & Wright, *supra* note 14 at 26.

ceedings or the written judicial decisions that governments must pay heed to when deciding whether (and how) to craft legislative amendments.

Other more innovative features have been devised in Canada that arguably promote a more “communicative” form of dialogue. One way that governments have begun to communicate the purpose and justifications for any limitations on rights is by including written preambles in the legislation itself.<sup>51</sup> Janet Hiebert points out that a preamble can be used as an “education device” for courts and that it represents “a stage in a conversation between elected and judicial officials on how the *Charter* should be interpreted and applied to the particular case at hand”.<sup>52</sup> The Supreme Court has also been innovative in developing a mechanism of dialogue through which it uses its remedial powers under the *Charter* to temporarily suspend the effects of a decision invalidating a law (usually for six to eighteen months) to give the relevant legislature time to develop a response. This “remedial dialogue”, according to Roach, communicates to the government that the Court anticipates the invalidation of the particular legislation will be disruptive and that some type of legislative action is likely necessary.<sup>53</sup>

Several scholars of the *UK HRA* also refer to dialogue as an idea that promotes “debate” or “conversation” between branches.<sup>54</sup> Tom Hickman argues that standard accounts of dialogue diminish the proper role of courts by abandoning the idea “that the courts should hold government to fundamental principle and the law and repositions the courts within the forum of ordinary politics, providing not a check or balance, but counsel”.<sup>55</sup> He argues in favour of a “strong form” of dialogue in which courts collaborate with the other branches rather than merely proposing arguments of principle, leading to a productive and conversational form of interaction. By contrast, Alison Young distinguishes between “dialogue as conversation”, which involves the informal exchanges of learning and creating meaning, with “dialogue as deliberation”, which is more formal and has specific practical purposes. She argues the model of dialogue under the *HRA* is deliberative and is found in the specific legal mechanisms of interaction (i.e., dialogue as description).<sup>56</sup>

---

51 Roach, *supra* note 9 at 276.

52 Janet Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002) at 94-5 [Hiebert, “Charter Conflicts”].

53 Roach, *supra* note 9 at 200.

54 Debeljak, “Sovereignty and Dialogue”, *supra* note 16 at 320; Tom R Hickman, “Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998” (2005) PL 306 at 335.

55 Hickman, *ibid* at 309-10.

56 Young, *supra* note 16 at 117-8.

Any suggestion in the UK that a more informal, conversational dialogue take place between judges and legislators has been rebuffed by the senior judiciary, who are concerned about maintaining their independence. During an appearance before a joint committee of Parliament, several judges stated that they did not see it as their appropriate role to engage in dialogue with the other branches.<sup>57</sup> According to Leigh and Masterman, “any such ‘dialogue’ between the judiciary and the executive branch on the HRA would be confined to that which took place within the formal decision-making processes of the courtroom and Parliament”.<sup>58</sup>

Disagreement is also apparent in scholarship on dialogue in Australia. In the case of the Victorian Charter, Debeljak adopts the language of communication when she argues that the different branches of government “must respectfully listen to opposing perspectives, be open to persuasion and be willing to change their pre-conceived ideas”.<sup>59</sup> She views dialogue as offering a way for the representative arms of government and the judiciary to educate each other. By contrast, in an article exploring Hogg and Bushell’s conception of dialogue in relation to Australia, Leighton McDonald concludes it may be useful to use the term “institutional interaction” instead of dialogue to avoid the suggestion that courts and legislatures engage in “an amicable, standing seminar on rights discourse where achieving ‘reasonable’ outcomes seems inevitable given sufficient communication between the discussants”.<sup>60</sup>

Finally, it is worth noting that ministerial statements on the compatibility of legislation with rights—something that takes place in the UK, New Zealand, and Australia and is explored in the next section—might also be seen as a mechanism that promotes communicative dialogue about the rights issues at stake. These statements signal that the government has considered the legislation in relation to its duty to uphold the bill of rights. Though the statements are made in the legislature, the courts (and, of course, the wider public) may take note of those considerations in the same way Canadian courts may consider legislative preambles.

The distinction between the procedural understanding of dialogue and dialogue in the more colloquial, communicative sense has important implications. Some of the latter references are simply a product of rhetoric or imprecision. Nonetheless, the danger in conflating dialogue as communication with

---

57 Clayton, *supra* note 16 at 47.

58 Leigh & Masterman, *supra* note 16 at 117.

59 Debeljak, “Sovereignty and Dialogue”, *supra* note 2 at 35.

60 McDonald, “Judicial Review”, *supra* note 2 at 26.

dialogue as description is that it makes it more difficult for scholars to identify the practice of institutional interaction in the settlement of rights issues as a distinctive element of parliamentary rights review. Understanding aspects of dialogue as communication that help facilitate dialogue as description—such as legislative preambles or suspended declarations of invalidity—is certainly valuable in illuminating how dialogic interactions operate. Yet when dialogue is invoked in a communicative sense in other instances, it risks altering our understanding of how institutional interaction occurs in practice. This is reflected in Hogg and Bushell’s concerns that critics misappropriate the idea of dialogue to fit their conceptions of legislatures as co-ordinate authorities in interpreting the *Charter*, and in the unwillingness of the senior judiciary in the UK to consider their relationship with Parliament in dialogic terms.

## **Dialogue as developing a culture of rights**

Dialogue is said to promote a culture of rights by requiring or encouraging the executive and legislative branches to conduct assessments of the rights-compatibility of policy initiatives. They do this not only in response to judicial decisions but from the beginning of the policy development process. In many ways it can also be viewed as an executive-legislative dialogue.

As explored above, many Canadian critics of dialogue disagree with the empirical claims made by Hogg and Bushell regarding both dialogue’s ability to prevent judicial supremacy and the frequency at which it is said to occur. Other critics take issue with the “judicial centric” nature of dialogue. Hiebert disagrees with the predominate view that judicial interpretations are the starting point for understanding institutional relationships around rights.<sup>61</sup> She also argues that dialogue’s largely procedural focus is mistaken. Instead, the focus should be on the distinct vantage points with which courts and legislatures each approach assessments of policy in light of what the *Charter* requires. This “relational”, rather than dialogic, understanding offers a deeper appreciation for the role of the executive, bureaucratic, and parliamentary arms of government in protecting rights. Elsewhere, Hiebert explores practices of “legislative rights review”, where attempts have been made to infuse concern for rights within the decision-making processes. According to Hiebert, attention to these practices “differs from the perspective of most proponents of dialogue, who presume that the judicial part of the conversation will be dominant”.<sup>62</sup>

---

61 Hiebert, “Charter Conflicts”, *supra* note 52 at 50.

62 Janet L Hiebert, “Interpreting a Bill of Rights: The Importance of Legislative Rights Review” (2005) 35:2 *British Journal of Political Science* 235 at 245 [Hiebert, “Interpreting”].



This internal rights dialogue consists of several different features. All of the countries examined here have some type of ministerial reporting requirement. In Canada, the federal Minister of Justice is subject to a statutory obligation (which predates the *Charter* and was first developed in association with the statutory 1960 Bill of Rights) that requires a guarantee that bills presented to Parliament have been assessed in relation to the *Charter* and to report any inconsistencies. To date, there has yet to be a report of inconsistency.<sup>63</sup> The Canadian Parliament has no committee dedicated to scrutinizing legislation for rights consistency (although there are standing committees in both the House of Commons and the Senate that review legislation for legal and constitutional issues). As Hiebert explains, “the government treats the issue of Charter consistency as an executive rather than parliamentary responsibility.”<sup>64</sup>

James Kelly contends that Canada’s “Charter dialogue is initiated not by judicial actors but by cabinet and bureaucratic actors who attempt to reach principled policy decisions that accommodate the *Charter* during the legislative process.”<sup>65</sup> He explores the “Charter vetting” process by the Department of Justice and concludes:

Charter dialogue originates within the cabinet and has ensured the development of a rights culture within the legislative process. When the Supreme Court or lower courts engage in Charter dialogue through judicial decisions, it is a response to legislative activism and does not originate in judicial activism and court decision, as judicial dialogue theorists have contended.<sup>66</sup>

Although the term “legislative activism” is somewhat oxymoronic (the notion that the legislative branch can be described as “activist” with respect to policy development does not follow), Kelly’s general argument about the development of a rights-sensitive culture, institutionalized in the executive and bureaucracy, is important. Nevertheless, his analysis does not address the extent to which the rights vetting by government lawyers in the Department of Justice and line departments is dependent on previous *Charter* decisions by the courts. If *Charter* vetting represents the anticipation of what courts may decide—as opposed to independent governmental assessments or interpretations of what the *Charter* requires—then it remains a judicial-centric process.

---

63 *Ibid* at 248.

64 *Ibid* at 249.

65 James Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent* (Vancouver: UBC Press, 2005) at 30.

66 *Ibid* at 256.

Kelly dismisses this notion as “cynical”,<sup>67</sup> but much like the debate about whether legislative responses to court rulings merely follow court prescriptions or actually reflect independent interpretations of rights, it might not be correct to view *Charter* vetting as contributing to dialogue if it is, in fact, merely incorporating judicial views into the legislative process from the start.

In practice, however, the complete lack of report activity by the Minister of Justice in Parliament may be problematic because Parliament is too deferential to the scrutiny that takes place during the development of legislation. Recent accusations by a public servant involved in the process allege that the government has mandated approval for legislation so long as its lawyers believe it has a five percent chance of success if challenged in court.<sup>68</sup> If true, this very low threshold explains the lack of report activity and suggests a rather weak rights culture at play. Further, Parliament appears sidelined by the Cabinet and bureaucratic vetting process, which lacks transparency and therefore much communicative significance.

In the UK, section 19 of the *HRA* requires the minister sponsoring a bill to make a declaration on the compatibility of the legislation with Convention rights or to state if he or she is unable to do so.<sup>69</sup> Hiebert suggests this affirmative requirement, as opposed to the more discretionary practices in place in Canada and New Zealand, may offer a more robust form of parliamentary scrutiny. Also unlike Canada and New Zealand, the UK Parliament has in place a committee, the Joint Committee on Human Rights (JCHR), dedicated to advising both houses on whether legislation is compatible. The scrutiny of legislation in the UK by the JCHR is widely seen as promoting a healthy legislative rights culture. Indeed, the legislative-executive dialogue facilitated by its reports has seen proposed legislation modified after critical examination.<sup>70</sup> There is some evidence, however, that the JCHR has not always had the necessary time or information needed to fully perform its role.<sup>71</sup> According to a report by the House of Lords Select Committee on the Constitution, the record of section 19 statements suggests ministers have been “overly optimis-

---

<sup>67</sup> *Ibid* at 213.

<sup>68</sup> Bill Curry, “Judge raps Justice officials for treatment of whistle-blower” *Globe and Mail* (16 January 2013), online: <<http://www.theglobeandmail.com/news/politics/judge-raps-justice-officials-for-treatment-of-whistle-blower/article7394559/>>.

<sup>69</sup> *UK HRA*, *supra* note 16, s 19.

<sup>70</sup> Jackson, *supra* note 2 at 111.

<sup>71</sup> Janet L Hiebert, “Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?” (2006) 4:1 *International Journal of Constitutional Law* 1 [Hiebert, “Can the JCHR help?”].

tic” about the compatibility of legislation.<sup>72</sup> Hiebert notes that the section 19 process gives priority to legal advice,<sup>73</sup> which may mean that as jurisprudence relating to the *HRA* evolves, court decisions will carry significant weight and the process will be “judicial-centric”.

The *NZBORA*, under section 7, requires the attorney general to advise the New Zealand Parliament when bills are not consistent.<sup>74</sup> Contrary to the Canadian experience, more than two reports per year, on average, have been made since the *NZBORA* was enacted, suggesting that governments have been “conservative” with bills that represent “marginal calls”.<sup>75</sup> Despite the frequency of reports of inconsistency, they generally fail to result in parliamentary debate about the rights questions themselves. Grant Huscroft is critical of this pattern because the high number of such reports reflects an unwillingness on the government’s part to consider expressing justifications for the limits on rights under section 5. Justifying limits more readily would demonstrate that the government has considered the rights implications and would make such reports of inconsistency less common.<sup>76</sup> Moreover, Hiebert explains that the reports are based on legal advice of public servants, framing the issues as technical matters of law. She argues this dampens political debate over contested rights issues by making reports an administrative matter, leaving to the legal community what should be a matter for political scrutiny.<sup>77</sup>

The *ACT HRA* requires the attorney general to present a written statement on the compatibility of each bill and pre-enactment scrutiny by the relevant standing committee of the legislature, which includes a report to government and a response by the government.<sup>78</sup> The Victorian Charter requires a statement of compatibility in Parliament by the member introducing a bill and that the Scrutiny of Acts and Regulations Committee consider all legislation and report to Parliament on compatibility.<sup>79</sup> While the *ACT HRA* and Victorian Charter have less of a track record to assess, recent reports submitted

---

72 House of Lords, Select Committee on the Constitution, *Relations Between the Executive, the Judiciary and Parliament* Sixth Report (London: The Stationery Office Limited, 2007) at 32.

73 Hiebert, “Can the JCHR help?”, *supra* note 71 at 13.

74 *NZBORA*, *supra* note 32, s 7.

75 There were thirty-seven reports in the first fifteen years of the *NZBORA*’s existence. JUSTICE Consultation Committee, *supra* note 30 at 81.

76 Hiebert, “Interpreting”, *supra* note 62 at 246, citing Grant Huscroft, “The Attorney-General’s Reporting Duty” in Paul Rishworth et al, eds, *The New Zealand Bill of Rights* (Melbourne: Oxford University Press, 2003) at 214.

77 Hiebert, “Interpreting”, *supra* note 62 at 246-8.

78 *ACT HRA*, *supra* note 40 ss 37-38.

79 Victorian Charter, *supra* note 40 ss 28, 30.

to the respective governments show a promising record for those who hoped the legislative review provisions would create an effective dialogue.

Under the ACT *HRA*, the Standing Committee on Legal Affairs has performed the duties of a “Scrutiny of Bills Committee”, reporting on the human rights framework of all government and private bills. These reports have spurred a dialogue with government over the content of bills and even resulted in amendments to legislation. Perhaps most promising from a dialogic perspective, the government has been willing to engage by responding to committee reports, often to explain and defend its interpretation of compatibility (although responses by members presenting private bills have not been quite so forthcoming).<sup>80</sup> Similarly, there were continued exchanges about the Victorian Charter between the Scrutiny of Acts and Regulations Committee and ministers and Members of Parliament sponsoring bills, sparking “increased parliamentary debate and comment about the *Charter* and human rights issues”.<sup>81</sup> The first statement of incompatibility by a minister was issued in 2009. A report by the Victorian Equal Opportunities & Human Rights Commission stated,

While the Minister’s decision to be open about the legislation’s incompatibility with the *Charter* was welcome, the statement of incompatibility lacked the necessary detail and level of explanation required by the *Charter*. In matters such as these, where a proposed scheme is likely to impose serious restrictions on human rights, the Government should provide for extensive community consultation. Where such a scheme is enacted, the Government should undertake close and transparent monitoring of its operation and impact.<sup>82</sup>

Given the early status of the two Australian bills of rights, it remains to be seen how expansive the legislative rights culture will become. At this stage, however, it appears as though the explicit goal of creating a rights dialogue through these mechanisms, as further evidenced by the reports, enhances the prospects of inculcating the desired practices.

Dialogue as a culture of rights can help us understand the parliamentary and executive processes that create a role for the elected branches in interpret-

---

80 Austl, Commonwealth, ACT Department of Justice and Community Safety, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* by the ACT Human Rights Act Research Project and the Australian National University (Canberra: Australian Government Publishing Service, 2009) at 29-31.

81 Austl, Commonwealth, Victorian Equal Opportunity & Human Rights Commission, *Making Progress: The 2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (Victoria: Victorian Government Printer, 2010) at 16.

82 *Ibid* at 15.

ing rights. Some scholars frame this dialogue as distinct from understanding the concept as one of interinstitutional interaction involving courts. Yet in some instances the influence of court decisions in bureaucratic or political assessments of rights issues should not be understated. This is true of the *Charter* vetting process in Canada and the process surrounding section 19 statements in the UK, where legal advice takes precedence. As a result, this understanding of dialogue is still “judicial-centric” in important ways.<sup>83</sup>

## Dialogue as prescription

Since the concept of dialogue was first put forward by Hogg and Bushell, it was almost immediately infused with normative significance, and in conflicting ways, by scholars and even Supreme Court of Canada justices. The Court has referred to the dialogue metaphor on a number of occasions and most often uses it in the descriptive sense, marking the institutional interactions surrounding the *Charter*.<sup>84</sup> On several occasions, however, the justices have disagreed over whether dialogue should encourage deference on their part to legislative choices. In one case, Justice Iacobucci’s dissent accused the majority reasoning by Chief Justice McLachlin as having “transformed dialogue into abdication”.<sup>85</sup> Justice Gonthier’s dissenting reasons in a case that involved Parliament’s second attempt at defending its prohibition of prisoner voting argued that dialogue warranted deference.<sup>86</sup> Writing for the majority, this time McLachlin wrote that dialogue “should not be debased to a rule of ‘if at first you don’t succeed, try, try again’”.<sup>87</sup> In a more recent case, McLachlin writes that “the mere fact that the legislation represents Parliament’s response to a decision of this Court does not militate for or against deference”.<sup>88</sup> The Court has since curtailed its use of the term, likely because of the disagreements it generated among the justices.

---

83 It is worth noting that the creation of an executive-legislative culture of rights protection does not necessarily require judicial review at all. Indeed, the idea that the parliamentary system is effective at protecting individual rights has been one of the central arguments made by defenders of parliamentary supremacy in response to advocates of judicially enforceable bills of rights. My thanks to one of the journal’s anonymous reviewers for suggesting I note this.

84 Richard Haigh & Michael Sobkin, “Does the Observer have an Effect? An Analysis of the Use of the Dialogue Metaphor in Canada’s Courts” (2007) 45:1 Osgoode Hall LJ 67.

85 *R v Hall*, 2002 SCC 64 at para 127, [2002] 3 SCR 309, 217 DLR (4th) 536, 167 CCC (3d) 449.

86 *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 104, [2002] 3 SCR 519, 218 DLR (4th) 577, 5 CR (6th) 203.

87 *Ibid* at para 17.

88 *Canada (Attorney General) v JTI-Macdonald Corp* 2007 SCC 30 at para 11, [2007] 2 SCR 610, 281 DLR (4th) 589, 364 NR 89.

Canadian commentators argue that courts should approach *Charter* challenges to legislation enacted in response to an earlier judicial ruling with deference,<sup>89</sup> or that judicial deference should increase as the potential for dialogue decreases (such as when *Charter* rights to which the notwithstanding clause does not apply are at issue).<sup>90</sup> Others argue that not only is this normatively problematic, it is legally and morally impermissible.<sup>91</sup> Some scholars contend dialogue should mean that legislatures share co-ordinate authority to interpret rights.<sup>92</sup> Both proponents and critics of the concept of dialogue support the idea that legislatures should be more willing to invoke the notwithstanding clause.<sup>93</sup> Hogg and Bushell, meanwhile, contend, “it never occurred to us that the phenomenon we described (legislative action following a *Charter* decision) had any *normative* force at all, or any relevance to the *judicial* decision-making process”.<sup>94</sup>

The fact that Canadian judges have constitutional powers to invalidate legislation might create the impression that normative assertions about how they should behave under a dialogic model of judicial review would be more likely than in systems where the legislative body has more freedom to respond to relatively weaker courts. However, UK scholars have been no less willing to articulate their prescriptions for how judges ought to act to produce the healthiest dialogue under the *HRA*. As noted above, Nicol argues that dialogue operates best through declarations of incompatibility rather than the interpretative mandate under section 3. His broader argument is one in support of co-ordinate interpretation, as he contends that dialogue is made stronger by “breaking open the courts’ interpretative monopoly” and recognizing that Parliament can assert its own interpretation of Convention rights. He writes that viewing the preservation of parliamentary sovereignty under the *HRA* as meaning that Parliament is free to act contrary to rights is insufficient, noting that “if Parliament’s only choice is either to tug forelock at the judges or else throw a constitutional temper tantrum, this hardly constitutes dialogue”.<sup>95</sup>

---

89 Rosalind Dixon, “The Supreme Court of Canada, Charter Dialogue, and Deference” (2009) 47 *Osgoode Hall LJ* 235.

90 Christopher P Manfredi, “The Day the Dialogue Died: A Comment on *Sauvé v Canada*” (2007) 45:1 *Osgoode Hall LJ* 105 at 117.

91 Tremblay, *supra* note 15.

92 Grégoire CN Webber, “The Unfulfilled Potential of the Court and Legislature Dialogue” (2009) 42:2 *Canadian Journal of Political Science* 443; Manfredi, *supra* note 90 at 123.

93 Janet Hiebert, “Is it Too Late to Rehabilitate the Notwithstanding Clause?” (2004) 23 *Sup Ct L Rev* 169; Roach, *supra* note 9 at 193; Debeljak, “Review of Bills of Rights” *supra* note 16 at 323.

94 Hogg, Bushell Thornton & Wright, *supra* note 14 at 47 [emphasis in original].

95 Nicol, “After HRA”, *supra* note 22 at 742.

Hickman's "strong form" of dialogue, explored in the section on dialogue as communication, views the judiciary's role as more than simply making "provisional" declarations of incompatibility to the other branches. He contends courts should not merely "counteract protectively" but "interact productively, even conversationally". To achieve this, Hickman thinks judges need to balance their use of declaration of incompatibility under section 4 with interpretation under section 3.<sup>96</sup>

Young proposes a more relational approach to dialogue that creates the balance achieved by co-ordinate interpretation but avoids the risk of "creating a series of constitutional crises, as opposed to dialogue".<sup>97</sup> Her vision of dialogue is dependent on the circumstances of the case, where in some instances the legislature is viewed as the best place to make authoritative determinations of the scope or application of rights and in others the courts should be afforded final say. The determining factors are based on institutional features: courts are arguably better at protecting minorities, protecting long-standing principles, and protecting specific individual rights, whereas legislatures are better at balancing interests and broader (as opposed to individual) remedies for rights infringements. Young claims that the *HRA* creates "different forms of dialogue that enable either the judiciary or the legislature, in practice, to authoritatively resolve disputes as to the specific application of Convention rights, while at the same time facilitating a dynamic dialogue between the institutions".<sup>98</sup>

Despite these varied prescriptions, not all observers of the *UK HRA* are willing to view dialogue as automatically providing normative guidance in this manner. Richard Clayton writes, "the idea of dialogue as a description of institutional interaction between the courts and government must be differentiated from its role in setting prescriptive standards for courts when undertaking judicial review".<sup>99</sup>

Unlike Canada and the UK, there is little debate in New Zealand regarding how courts or legislatures should behave under the purported dialogue, especially given that courts do not enjoy the explicit power to make declarations of inconsistency. However, it is worth noting that the question of whether courts enjoy the implicit power to do so, explored above, is motivated as much

---

96 Hickman, *supra* note 54.

97 Young, *supra* note 16 at 120.

98 *Ibid* at 143.

99 Clayton, *supra* note 16 at 47.

by the normative question of whether they should as it is the empirical one of whether they are able.

In the case of Australia, writing before the ACT *HRA* and Victorian Charter were fully in place, McDonald argues that dialogue provides little guidance on how far courts should go in interpreting legislation as compatible or how much deference should be afforded by either judges to legislators or the legislative branch to court declarations. He is critical of dialogue's ability to offer answers, noting the risk that legislatures might get into the habit of leaving moral controversies to the courts or judges becoming "too adventurous".<sup>100</sup>

By contrast, with respect to the Victorian Charter, Debeljak argues for a relational approach that views each branch of government presenting its unique understanding of the requirements of rights. She explicitly warns against judicial deference, noting that "for dialogue to work, the judiciary must robustly contribute *its* view on the scope of the rights and justifiability of limits". She points out that "the strongest motivation for robust judicial contributions is the fact that the judiciary does *not* have the final say".<sup>101</sup> Debeljak criticizes views of dialogue or deference premised on co-ordinate construction, describing it as an "unworkable compromise" that ignores the distinct and unique roles of each of the branches. She argues that co-ordinate authority to interpret rights risks losing the "educative" benefits of dialogue and lacks a respectful exchange.<sup>102</sup> Finally, Debeljak encourages the judiciary to adopt a robust use of declarations of inconsistency because applying interpretations to make legislation compatible is less transparent.

These examples of dialogue as prescription demonstrate two important consequences of the conceptual elasticity of the term. First, they reflect disagreement over how dialogue operates in practice, as the debate over which features best facilitate dialogue in the UK and Australian cases attest. Second, and more fundamentally, dialogue as prescription allows scholars to use the concept of dialogue as a proxy for their normative considerations about judicial review and ideas like judicial activism or deference. In this latter respect, dialogue as prescription only further clouds the conceptual utility of the term.

---

100 McDonald, "New Directions", *supra* note 41 at 30-2.

101 Debeljak, "Sovereignty and Dialogue", *supra* note 2 at 30-1.

102 *Ibid* at 60-1.



## **Dialogue as conceptual chaos**

Dialogue is most often used as a description of the institutional interactions surrounding rights, but it has been applied in ways that give it communicative and educative meaning, depict it as promoting a culture of rights, or present it as offering normative guidance to institutional actors. When scholars use dialogue to refer to Hogg and Bushell's idea of a procedural interaction in which the courts and legislatures respond to each other, they disagree over what type of response counts as dialogue. They also disagree over whether the legislative branch can properly interpret rights, whether dialogue means Parliament has the last word, whether judicial decisions place an onus on Parliament to respond, or whether dialogue is ongoing and there is no last word. There are arguments about which mechanisms in particular countries produce the "best" dialogue and whether certain ones even count as dialogue. Debates about whether dialogue occurs in practice depend on these shifting and sometimes contradictory definitions. Underlying these debates is the fact that there is also a difference between whether dialogue actually occurs and whether it is possible given the structural features in place. This latter distinction is perhaps most evident in Canadian debate over the notwithstanding mechanism, where critics point out that section 33 is politically unviable and proponents respond that just because legislatures refuse to use it does not mean it is no longer an important instrument of dialogue.

There are diverging opinions over whether dialogue should be viewed as communicative and about the various mechanisms across these different countries that arguably facilitate an exchange of learning between branches of government. Although considering dialogue as communication is useful for explaining how dialogue as description is sometimes facilitated (in Canada, through the use of suspended judicial declarations of invalidity, for example), a communicative understanding of the concept often has no connection to the procedural understanding. Indeed, framing dialogue as a direct discussion between branches is sometimes viewed as undesirable or inappropriate, as members of the senior judiciary in the UK have expressed.

In examining mechanisms intended to promote a culture of rights, some scholars point out that it is not necessarily the case that dialogue starts with a judicial decision or even that dialogue should be considered in a "judicial-centric" manner at all. Nevertheless, even bureaucratic vetting processes may rely heavily on judicial decisions. Further, there exist various ways to measure dialogue's relative success in developing a rights culture.

Finally, the various ways commentators impose normative ends on the concept are often irreconcilable. The preceding survey of opinion on the matter suggests that dialogue should mean less judicial deference, that it should mean more, or that deference should not be part of the equation at all. Scholars also hold a variety of contradictory attitudes on what mechanisms legislatures should use and under what conditions they should use them.

It is tempting to conclude that the veritable cacophony of different and often competing conceptions of dialogue renders the idea meaningless. Given that the concept has stimulated considerable attention to these various features of the institutional relationships surrounding rights, it would go too far to say that dialogue is an empty idea, devoid of consequence. Nevertheless, it is insufficient to say that dialogue is simply a contested concept; after all, it is so malleable that each of its multiple meanings is contested in multiple ways. If dialogue can serve as a metaphor for any institutionalized course of action involving rights issues, then it is neither novel nor illuminating. Further, if the meaning derived from the institutional actions that engage rights is based on innumerable interpretations of what “counts” in practice, then there is no way to develop empirical measures necessary to evaluate parliamentary systems of judicial review. Nor is there any way to compare between these countries the relative power of the courts to enforce rights and affect government policy. Similarly, if dialogue is so flexible a concept that it invites normative prescriptions that cover the entire range of alternatives from supporting judicial supremacy to sustaining parliamentary sovereignty, then it ultimately offers scant support for the idea that the recent enactment of bills of rights in these countries is truly distinctive.

Drawing empirical or normative conclusions becomes impossible without at least some conceptual precision. It is worth nothing that other terminology used to describe parliamentary systems of rights review is somewhat nebulous as well. As noted above, the four countries examined here have been described as constituting a new model of constitutionalism, the “Commonwealth” or “Parliamentary Rights Model” of review.<sup>103</sup> Tushnet writes that the parliamentary model represents “weak form” judicial review, in contrast to the “strong form” epitomized by the American system. He has speculated that weak form systems may in practice become strong form systems if judicial decisions routinely become the final word (as is arguably the case of Canada), or they may degenerate into parliamentary sovereignty (which may reflect New

---

103 Gardbaum, *supra* note 4; Hiebert, “New Constitutional Ideas”, *supra* note 4.

Zealand).<sup>104</sup> This “instability thesis” is at the core of empirical disagreement over dialogue, particularly as reflected in the Canadian debate, though it is likely to become just as relevant for the other systems.

Despite the broad labels, it is perhaps more suitable to ask whether a particular country’s bill of rights produces a weak form or strong form system of judicial review, rather than asking how often a contested notion like dialogue occurs between branches. Comparative research into the state of judicial review in parliamentary systems should investigate how often legislatures or courts get the final say, rather than simply attempting to survey the state of an amorphous concept like dialogue across countries. Disagreement about what constitutes a weak or strong form of judicial review will no doubt remain a central feature of debate, but any disagreement about their application centres on the relative strength of judicial review in a particular country rather than definitional disputes over the concept itself. The question of which branch of government has the determinative say on the policies at stake in rights cases brings focus to a concrete phenomenon that can be observed and measured for the basis of making comparisons, allowing scholars to examine the relative strength of systems of judicial review.

This line of reasoning applies just as forcefully to understanding dialogue as a culture of rights. Examination of the processes surrounding bureaucratic vetting of legislation for rights consistency or the executive-legislative exchanges that lead up to ministerial statements on compatibility is obfuscated by the invocation of the term “dialogue”, given its application to both the very different process of judicial-legislative interaction and the sometimes discordant idea of communication between courts and legislatures. Focusing on the procedures or mechanisms that animate the internal rights scrutiny in the legislative or executive branches directly, without summoning the concept of dialogue with all its baggage, reduces uncertainty. Similarly, avoiding the term “dialogue” when making normative arguments about judicial deference to legislative initiatives, or about whether a legislature should use a particular tool available to it under the bill of rights, avoids confusion and results in more genuine and accurate ideas to advance for consideration.

The concept of dialogue is used interchangeably to reflect many distinct processes that comprise parliamentary systems of rights protection. This makes it difficult, if not impossible, to examine empirically the mechanisms that

---

104 Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, Princeton University Press, 2008).

animate them.<sup>105</sup> Rather than engaging in debates about how the overarching notion of dialogue applies to specific aspects of the institutional relationships in parliamentary rights review, scholars should focus on those particular features in a more direct manner. This is not an argument to remove the term “dialogue” from the broader rights vernacular completely. It is perfectly suitable for governments in Australia to promote the concept of a dialogue around rights in the colloquial sense of educating the citizenry about the new bills of rights or as a rhetorical device to encourage rights-oriented practices within government. Yet comparative scholarship requires a level of rigour and specificity that the conceptual chaos surrounding dialogue impairs. The institutional relationships surrounding rights are complex and are comprised of procedural, communicative, and even cultural elements. The dialogue about dialogue adds an unnecessary layer of contestability and confusion over how these various aspects of the parliamentary rights model operate.

---

105 For a discussion on the importance of conceptual work for empirical study in political science, see James Johnson, “Conceptual Problems as Obstacles to Progress in Political Science: Four Decades of Political Culture Research” (2003) 15:1 *Journal of Theoretical Politics* 87.

Copyright of Review of Constitutional Studies is the property of Centre for Constitutional Studies and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.