THE COURTS VERSUS THE PEOPLE: HAVE THE JUDGES GONE TOO FAR?

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INTRODUCTION

I must thank the JCA for inviting me to speak at this, my third Colloquium, and for your continuing support. Now for the unenviable task of tying together all that has preceded me in this session, and putting forward my own view.

THEMES

The underlying issue of this session is to assess the role of the judiciary in a democratic society. More precisely, does, or should, this role include an oversight function of the actions of the executive and parliament. Is judicial review of administrative action valid? Would review of executive and legislative action against minimum human rights standards be legitimate?

John McMillan presented the case against allowing human rights dimensions into the assessment of judicial review of administrative action. His main criticism is of the style of judicial review required when human rights are introduced into the decision matrix. In particular, he has difficulty with the vagary and uncertainty of the legal standards applied, and with the scope of discretion transferred to the judiciary. John fears for the separation of powers when notions, such as "proportionality" and "fairness", become legal standards to be applied by judges.

Michael Lavarch maps the role of the judiciary in a democratic society, and recognises that there are no absolute answers in law, as in life. If law is to reflect community values, and community values change over time, than a justifiable role for the judiciary is to keep the law abreast of community values. According to Michael, judicial review of administrative action, and the increasing recognition of human rights as a factor in judging are legitimate. They reflect changes in community values over time which the judges (and parliament, mind you[1]) have responded to.

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[1] After all, it is the various legislatures of Australia that have introduced administrative law legislation (e.g. *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and the *Administrative Law Act* 1978 (Vic)) and

Justice Perry argued that Australian judges do not go far enough, particularly in developing human rights jurisprudence. He discusses the valid ways in which international human rights standards may be introduced into Australian jurisprudence, and outlines the British approach to human rights, now embodied in the *Human Rights Act* 1998 (UK).

I agree and disagree with each speakers on different issues. For instance, I agree with Justice Perry's assessment of the valid ways in which international human rights standards can be introduced into our domestic law. Yet, I also agree with John McMillan about the dangers of extensive "backdoor" entry of human rights considerations in judging. However, my concern is not based on the uncertainty or vagary of the judicial review standards. My concern is based on the public perception of the proper role of the judiciary. Judicial introduction of human rights standards, for instance via administrative law, will cause controversy and may be considered an improper judicial function. Moreover, I am concerned that judicial introduction of human rights standards will be piecemeal, with some rights being readily compatible with our existing legal regime and others not being so. I prefer the introduction by parliament of a comprehensive rights protective instrument, enforced by the judiciary, whether statutory or constitutional, just as Justice Perry appears to. My reasons will be revealed.

In this paper, I wish to expand on a few points Michael Lavarch proposes. I will also expand on Justice Perry's discussion, in the sense that his discussion of the *Human Rights Act* sets the scene for my theoretical justification for a rights protective instrument. I am going to present somewhat of a middle ground in the rights debate. This middle ground recognises a legitimate role for the judiciary in reviewing the actions of both the executive and the legislature. But it also recognises the legitimate role of the legislature and the executive in establishing the content of human rights. This is based on modern concepts of democracy, on the recognition that each arm of government has a role in defining the evolving commitments of society, and on the need for mixed government, not an absolutist view of the separation of powers.

DEMOCRACY

Michael stated that the role of the judiciary in a democratic society is to uphold the rule of law. I want to explore what "democracy" means, and how this impacts on the rule of law and, in turn, the role of the judiciary. In particular, I want to consider whether democracy can embrace human rights protection, and the concomitant question of how this alters the role of the judiciary.

Traditionally, democracy has been considered as majoritarian decision-making: popular power, through which people, by force of numbers, govern. Human rights, in contrast, are traditionally conceived as recognising and protecting the unpopular or a minority from the power of the majority. Human rights, by declaring minimum standards of

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human rights legislation (the *Racial Discrimination Act* 1975 (Cth), *Sex Discrimination Act* 1984 (Cth) and the *Disability Discrimination Act* 1975 (Cth), and the *Equal Opportunity Act* 1984 (Vic)).

behaviour, preclude majorities acting in certain ways and pursuing certain things. Prima facie, they appear incongruous.

I want to explore conceptions of democracy that are congruous with human rights protection. There is great diversity of opinion about the essence of democracy.[2] Democracy is an evolving concept. It is not an end in itself or a final destination.[3] Democracy is not simply a way of legitimising the institutions and procedures which have served existing democracies to date.[4] Democracy is a benchmark from which we aspire to improve. Society must take a provisional approach to democracy.

We must also remember that democracy, although it is an important value, is not *the only* important value.[5] Other important values include those embodied in human rights instruments that, aside from promoting and protecting democratic governance, perform other useful tasks. Indeed, the preamble to the *European Convention on Human Rights* 1950 explicitly recognises the co-dependence of democracy and human rights.[6]

I very much agree with Ronald Dworkin that democracy must involve notions of self-rule within a community of equals. He prefers a communal conception of democracy. Democracy is about participation by all as equals, and decisions that treat all with equal concern and respect. Statistical conceptions of democracy, which legitimate what an electoral majority favour, are lacking.

The *principle of democratic inclusion* best captures this communal conception of democracy.[7] The principle of democratic inclusion is concerned with 'relationships and processes'; it is an 'agenda of enhancing control by citizens of decision-making which

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[2] See Koskenniemi, in Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*, (Oxford University Press, Oxford, 2000), p49; Norberto Bobbio, *The Future of Democracy: A Defence of the Rules of the Game*, Polity Press, Cambridge, UK 1987 (Translated by Roger Griffin; Edited and Introduced by Richard Bellamy), p18; Campbell, "Judging in a Democracy", The Australian Judicial Conference, Sydney, November 1997, http://www.law.monash.edu.au/JCA/campbell.html

[3] If it were considered an end in itself, Marks argues that this would be a disappointingly low-demanding view of democracy. Current democratic theory accepts high levels of citizen passivity. It utilises the existing liberal institutions without addressing the limitations of those institutions. In particular, she queries whether our institutions can function without civil and political rights, and what role of separation of powers should play? Further, democratic theory is yet to address the enormous amounts of unaccountable power being exercised over the lives of citizens of the modern State. These shortfalls in current standards of democracy manifest in the contemporary melancholy about democracy and its ability to ensure self-rule and political participation. See Marks, op cit (fn 2), pp146-151 especially.

[4] See generally Marks, op cit (fn 2); Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review*, McGill-Queen's University Press, Montreal and Kingston, 1996.

[5] '[D]emocracy is not a unique fundamental value but rather one that must be understood in the light of a very limited list of other such values' as per Mac Darrow and Philip Alston, 'Bills of Rights in Comparative Perspective', in *Promoting Human Rights through Bills of Rights; Comparative Perspectives* (Philip Alston ed.) Oxford University Press, Oxford 1999, p 496.

[6] [T]hose Fundamental Freedoms which are the foundation of justice and peace in the world … are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend.

[7] Marks, op cit (fn 2).

affects them and overcoming disparities in the distribution of citizenship rights and opportunities.'[8] The essence of enhanced control by citizens over decisions that affect them is self-rule. The essence of overcoming disparities in rights and opportunities is concerned with political equality.

This principle of democratic inclusion is best effectuated by a *deliberative theory of democracy*. The deliberative theory of democracy is concerned with open, uncoerced deliberation, aimed at reaching rational consensus concerning the common good or the public interest.[9] Democracy is a process of developing preferences through dialogue which, in the absence of unanimity, will be interrupted by a majority decision. This majority decision is provisional; it is the practical compromise citizens live with until a final agreement can be reached. Democracy is evolutionary.

Given that the definition of democracy is indeterminate, noise and conflict about democracy, its institutions of governance, and the powers and limits of its institutions, is a sign of a healthy democracy. Noise and conflict advance the search for improved meanings of democracy. Exploring differing perspectives will ensure a critical analysis of the current provisional consensus about democracy. In turn, this should promote better self-rule and enhanced political equality.

The interpretative theory of *incompletely theorised agreements* is also useful in effecting the principle of democratic inclusion.[10] Constitutional arrangements should be viewed as incompletely theorised agreements that reflect the provisional agreement reached about democracy, but which are open to review and revision.[11] Accordingly, constitutional interpretation should focus on the incompleteness of the standards so adopted.

Let me explain. People will disagree about certain issues, but they will agree that a common settlement should be reached. If there is disagreement on a large-scale issue, people may agree on low-level principles and particular outcomes without having to agree on the general principle. Whether consensus is reached at the level of general principle, low-level principle or outcome, the point is that a consensus is reached. Common settlement of the issue promotes stability, mutual respect and reciprocity. By reaching an incompletely theorised agreement, the deepest and most defining beliefs and commitments of some people are not rejected by or subordinated to another's. Moreover, by not once and finally committing society to overarching general principles or particular outcomes, the morals and values of society can evolve and respond to changing circumstances. Finally, society can move ahead on the basis of the provisional settlement.

[8] Marks, op cit (fn 2), p116.
[9] Campbell, op cit (fn 2).
[10] Cass Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press, Oxford, 1996.
[11] Sunstein developed this notion of incompletely theorised agreements: see Sunstein, op cit (fn 10).

Constitutions tend to contain a particular type of incompletely theorised agreement: that is, agreement at a high-level of abstraction, because people can agree at the abstract level about how to live, but cannot agree about its specification.[12]

Overall, the principle of democratic inclusion emphasises the need for self-rule and political equality. The deliberative theory of democracy, coupled with incompletely theorised constitutional agreement, is best suited to attaining better self-rule and political equality. The principle of democratic inclusion does have human rights implications. In particular, both the deliberative theory of democracy and incompletely theorised constitutional agreements envisage judicially enforceable human rights instruments.

THE HUMAN RIGHTS IMPLICATIONS OF THE PRINCIPLE OF DEMOCRATIC INCLUSION.

The principle of democratic inclusion has human rights implications. If the aim is to be a more *inclusive political community*, 'securing respect for all categories of human rights must assume priority...'[13] Democracy could not function without the adoption of some rules regulating political participation and civil freedoms. Moreover, human rights limit democracy. Human rights provide the rules that limit the power of those elected to govern.

Democracy's Dependence on Human Rights

Focussing on the *International Covenant on Civil and Political Rights* (the "International Covenant") highlights the dependency of democracy on human rights.[14] The right of all peoples to self-determination is the quintessence of democracy. Self-determination is, *inter alia*, the right of a people to collectively determine its political status. This includes the right to free, fair and open participation in the democratic processes of government.[15] Additional rights secure the exercise of self-determination, including the right to vote and the right to run for public office.[16] Freedom of expression, and of assembly and association, create the conditions for debate which are essential to a democratic order.[17]

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[12] For instance, most people will agree that killing human beings is inappropriate, but will disagree on what constitutes a human being.

[13] Marks, op cit, (fn 2), p 116. See also Hiebert, op cit (fn 4), p 118: 'But public debate is not the only goal of a democratic polity. Policy choices should respect fundamental rights, those contained explicitly in the *Charter* and others related to its core values.'

[14] The regional conventions also demonstrate the dependency of democracy on human rights. See the European Convention on Human rights, the American Convention on Human Rights, and the African Charter of Human and Peoples' Rights.

[15] Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *AIJL* 46; Slaughter (Burley), 'Towards an Age of Liberal Nations' (1992) 36 *Harv. Int. LJ* 393.

[16] See Article 25 of the ICCPR, as well as Article 3 of Protocol 1 to the ECHR, Article 5 of the Charter of the Organisation of American States, and Article 13 of the African Charter.

[17] For freedom of expression, see Article 19 of the ICCPR, as well as Article 19 of the UDHR, Article 10 of the ECHR, Article 13 of the ACHR, and Article 9 of the African Charter. For freedom of assembly and association, see Article 22 of the ICCPR, as well as Article 20 of the UDHR, Article 11 of the ECHR, Articles 15 and 16 of the ACHR and Articles 10, 11 and 12 of the African Charter.

Individuals could not participate effectively in a democracy without the right to liberty, physical integrity, and due process.[18]

Human Rights' Limits on Democracy

Democratic power is not self-limiting, yet it requires limitation – absolute power corrupts absolutely. The *International Covenant* freedoms of expression, and of assembly and association, foster the deliberation and accountability that are essential to controlling and limiting power within a democracy.[19] Moreover, the freedom of conscience, religious belief and thought, rights of non-discrimination and rights of minorities ensure an open space where all views can be aired and debated.[20]

Self-rule

Another aim of the principle of democratic inclusion is to improve *self-rule* by enhancing control by citizens of decisions that affect them. Human rights, particularly in the form of constitutional rights, require the 'state authority … to justify itself to the citizenry on a continuing basis.'[21] Constitutional rights ensure that exercises of political power have been rational and reasonably.[22] The more transparent and open the processes and reasoning of the elected arms of government, the more fully informed is the citizenry about the direction the government is taking society. This augments genuine self-rule. All civil and political rights aid the transparency and openness of government.

Political Equality

Political equality diminishes the disparities in rights and opportunities. Human rights promote political equality. For instance, human rights inhere in all human beings in a non-discriminatory manner.[23] The protection of minority rights promote the co-existence of minority culture within the majority culture. Non-discrimination rights and minority rights also encourage tolerance and understanding within a diverse population. The various public participation and personal integrity rights ensure that minority voices are heard and accounted for in decisions concerning the direction of society. All views are protected and thus legitimated. Decisions based on all views should result in the elimination of disparities in the availability of opportunities and the protection of rights.

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[18] See Articles 6, 7, 8, 9, 10 and 14 of the ICCPR, as well as Articles 5, 6 and 7 of the ECHR, Articles 4, 5, 6, 7, 8 and 9 of the ACHR, and Article 6 and 7 of the African Charter.

[19] See Articles 19, 20, 21 and 22 of the ICCPR, as well as Articles 10 and 11 of the ECHR, Articles 13, 15 and 16 of the ACHR, Articles 9, 10, 11, and 12 of the African Charter

[20] See Articles 2, 3, 18, 26 and 27 of the ICCPR, as well as Articles 9 and 14 of the ECHR, Articles 12 and 24 of the ACHR, Articles 2, 3, 8, 19 and 28 of the African Charter.

[21] Marks, op cit (fn 2), p59.

[22] 'If governments are required to justify laws as per constitutional rights, '[a]ny law that burdened or withheld a benefit from an individual or group' would need to 'meet the standards of justice which the principles of rationality and proportionality imply' as per David Beatty, "Human Rights and the Rules of Law" in David Beatty (ed.), *Human Rights and Judicial Review: A Comparative Perspective*, Martinus Nijhoff, Dordrecht, 1994, p 23.

[23] Voting rights are explicitly guaranteed to be without distinction.

MODERN BILLS OF RIGHTS AND THE "EFFECTIVE POLITICAL DEMOCRACY"

Modern bills of rights (whether constitutional or not) incorporate the notion that current ideas pertaining to both democracy and human rights are provisional, and can accommodate the diverse views, disagreements and uncertainties that exist within pluralistic societies. The potential for dissent is evident in the breadth of the articulation of human rights guarantees, the non-absoluteness of rights, and the ability for legislatures and executives to react to judicial assessments of their actions.[24]

Constitutional ambiguity

Vagueness and ambiguity are deliberate tools in situations of diversity, disagreement and uncertainty. In the words of Tushnet, 'the language of rights is so open and indeterminate that opposing parties can use the same language to express their positions.'[25] Tushnet considers this to be a downfall, as 'rights talk can provide only momentary advantages in ongoing political struggles.'[26] However, the principle of democratic inclusion views this as a strength: both human rights and democracy are defined by ongoing political struggles.

Rights are not "trumps"

The fact that most rights are not absolute highlights the fact that diverse views and disagreement will exist.[27] Many rights are internally qualified.[28] Rights can also be internally limited, such that the enjoyment of the right is subject to the protection of public health, order and morals, the national interest, or the rights and freedoms of others.[29] Rights can be externally limited. Section 1 of the Canadian *Charter of Rights and Freedoms* 1982 (the "Charter") is a good example. The rights under the Charter are guaranteed subject to any reasonable limits prescribed by law and that can be demonstrably justified in a free and democratic society.

It is at this point that John McMillan's concern about the uncertainty of public law standards is relevant. In the human rights context, concepts such as reasonableness,

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[24] The potential for dissent is also recognised in the amending provisions of rights instruments.
[25] Mark Tushnet, "An Essay on Rights", (1984) 62:8 *Texas Law Review* 1363, p1371.
[26] Ibid.
[27] Under international customary law, absolute rights include the right to be free from genocide, slavery and servitude.
[28] Such as the right to liberty that can be violated for the purposes of lawful detention in Article 5 of the ECHR. See also Articles 9 and 14 of the ICCPR, and Sections 7 to 14 of the Charter.
[29] For example, Article 9(2) states that '[f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'.

rationality and proportionality are used. These concepts are far from being ill-defined. In fact, there is a wealth of jurisprudence that refines these terms.[30]

Let us consider the Charter. Once a right is violated, the courts must decide whether the section 1 justification/limitation saves the law. Firstly, the reasonableness of a limitation must be assessed by considering whether the objective underlying the limitation sufficiently outweighs the right or freedom protected.[31] Ninety-seven per cent of all legislation that violates Charter rights is held to be sufficiently important by the Supreme Court.[32] This indicates that the judiciary is unwilling to engage in final, high-level theorising about the principles and commitments which define society. Moreover, and related, the judiciary is unwilling to make decisions that are final, in the sense of permanently removing certain legislative objectives from the democratic arena.

Secondly, a proportionality test determines whether a limitation is demonstrably justifiable in a free and democratic society. The proportionality test is a three-step process. The first step addresses whether the measure used to achieve the objective is rational, fair and not arbitrary. Eighty-six per cent of Charter violations satisfy the rational objective test.[33] The second step is the minimum impairment test. This is the test that most section 1 Charter justifications/defences fail. Of the 50 (out of 86) infringements of Charter rights that have failed the *Oakes* test, 86 per cent failed the minimum impairment test.[34] The third step of test, which requires proportionality between the effects of the limitation and the sufficiently important objectives the legislation is to achieve, has been under-utilised.[35]

The upshot of section 1 analysis has been the courts telling 'the Governments involved … to pursue their political manifestos in ways and by means that impaired the constitutional entitlements of those affected as little as possible.'[36] By relying heavily on the minimum impairment test for invalidity, the court does not finally or permanently preclude legislative objectives. Rather, the court initiates a dialogue between itself and the legislature about the boundaries of legitimate regulation and the manner in which legislative objectives are pursued. The Supreme Court's use of section 1 reinforces the principle of democratic inclusion, by enhancing self rule and political equality, in a

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[30] These include the United Nations Human Rights Committee, the European Court on Human Rights, the European Court of Justice, the Inter-American Court on Human Rights, and the various domestic courts that have rights protective instruments.

[31] That is, is the objective pressing and substantial in a free and democratic society?

[32] LE Trakman, W Cole-Hamilton and S Gatien, '*R v Oakes* 1986-1997: Back to the Drawing Board' [1998] 36 *Osgoode Hall Law Journal* 83, at p95.

[33] LE. Trakman et al, op cit (fn 32), p98.

[34] LE. Trakman et al, op cit (fn 32), p100. Moreover, all legislation that passed the minimum impairment test passed the *Oakes* test.

[35] The third test has been satisfied each time the minimum impairment test was satisfied, and has not been met or not even considered when the minimum impairment test was not met. LE. Trakman et al, op cit (fn 32), p103.

[36] David Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review*, Carswell, Toronto, 1990.

number of ways.[37] First, it ensures that 'those who … have been ignored by their Governments can insist that valid explanations be provided for why they have been treated as they have.'[38] Secondly, the courts do not concretise issues that should remain open to democratic review. The underlying aim of the principle of democratic inclusion[39] – to form provisional truces amidst a changing and evolving society – is honored.

The salient point is that the non-absoluteness of rights accommodates diversity and difference of opinion: rights are flexible, indeterminate and provisional, just as democracy is. Rights do not necessarily trump other. Rights establish a formal dialogue within a deliberative democratic system.

Institutionalised dialogue: Legislative and Executive responses

Many modern bills of rights allow for legislative reaction after judicial review. The *Human Rights Act*, for example, only allows the judiciary to make declarations of incompatibility. A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision to which the declaration applies, nor is the declaration binding on the parties to the proceeding in which it is made.[40] In other words, the judge must apply the incompatible law in the case at hand.

The legislature has a number of responses to a declaration of incompatibility. The legislature may decide to do nothing, its view of the situation being unaltered by the institutional perspective of the judiciary. In this situation, the particular individual can still seek redress in the European Court of Human Rights, and the citizenry can express their dis/satisfaction with the legislature's response at the next general election. Alternatively, the legislature may decide to pass ordinary legislation in response to the judicial reaction to the impugned legislation. In addition, the relevant Minister in the executive is also empowered to take remedial action, which basically empowers the Minister to rectify an incompatibility by executive action.[41]

Both the declaration of incompatibility and the remedial measures are consistent with the principle of democratic inclusion. The declaration of incompatibility ensures self-rule subject to assessment against minimum human rights standards. Judicial review of legislative and executive action demonstrates a commitment to human rights that promote political equality. By rejecting judicial supremacy, the *Human Rights Act* keeps the channels of change open, such that society's deepest commitments are not set in stone. A

[37] Of course, there is criticism of the Supreme Court's use of section 1. See Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd Edition, Oxford University Press, Canada, 2001; Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*, Carswell, Toronto, 1987.
[38] Beatty, op cit (fn 36).
[39] As well as deliberative dialogue and incompletely theorised agreements.
[40] Section 4(6) of the Human Rights Act.
[41] See section 10 and schedule 2. If the Minister considers that there are "compelling reasons" for proceeding, the Minister *may* by order make such amendments to the legislation *as is considered necessary to remove the incompatibility*. All remedial orders must be by statutory instrument. Remedial orders must ultimately receive the approval by resolution of both Houses of Parliament.

declaration of incompatibility will prompt debate between the represented, the elected and the unelected arms of government. If the elected arms of government disregard the judicial view of human rights, the citizenry will express its view at election time.

Similarly, the Charter offers numerous legislative responses to a judicial invalidation of legislation. First, the legislature may not respond at all; the legislature may be happy to hand over certain issues to the judiciary because of an absence of political will or an absence of clear political preference. Secondly, the legislature may re-enact similar legislation which takes account of the reasons for the initial judicial invalidation. Thirdly, the legislature may re-enact the impugned legislation *notwithstanding* the Charter under section 33. The section 33 override clause ensures that there is no foreclosure on what the fundamental commitments of society should be. However, before acting under section 33, the legislature will have to assess the rational and reasoned judicial decision on its own merits, gauge the public mood, and decide whether it truly believes the judges misunderstood a core value.

CONCLUSION

In the words of Lord Justice Bingham:

> I cannot … accept that the [European Convention] Articles represent some transient sociological mood, some flavour of the month, the decade, of the half-century. They encapsulate legal, ethical, social and democratic principles, painfully developed over 2,000 years. The risk that they may come to be regarded as modish or *passe* is one that may safely be taken.[42]

Let us return to Michael Lavarch's first basic truth: 'The role of the judiciary in a democratic society is to uphold the rule of law.' Democracy and human rights are two sides of the one coin; they are compatible. The rule of law can be enhanced by the introduction of human rights standards of assessment. The role of the judiciary can be expanded to include human rights concerns. Judicial review of executive and legislative action based on human rights standards breaches only the strictest notion of separation of powers. Mixed government, which promotes dialogue between all the arms of government will produce a better democracy. Each arm of government has a worthwhile and legitimate institutional perspective to offer the debate about the direction of our society. y main concern in this whole process is that the human rights considerations be introduced into the judicial decision matrix via a statutory or constitutional instrument, rather than by a piecemeal, backdoor method. This will not only ensure a more cohesive system of human rights protection, but it will also undermine criticisms that the judiciary has gone too far.

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[42] Lord Bingham, "The European Convention on Human Rights: Time to Incorporate", in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, Oxford, 2000), p131; also in Richard Gordon QC and Richard Wilmot-Smith QC (eds.), *Human Rights in the United Kingdom*, Oxford University Press, Oxford, 1996, p1.