LEEDS CONFERENCE

INTRODUCTION

- Aim to investigate the current criticisms of democratic dialogue under the HRA, particularly regarding whether the courts and Parliament do or even could perform the roles required of them in a democratic dialogue defence of the HRA.
- Outline of the argument I'm going to make:
    - Criticism of democratic dialogue:
        - Misunderstanding of the role that the institution is meant to play in dialogue
        - Misunderstanding of the place of the UK vis a vis the ECHR
        - Both arguments from Tushnet, who was critical of the ability to maintain the HRA as dialogue model of rights protections, fearing it would collapse into either a strong court or weak parliamentary protection of rights.
        - Role Parliament – argument that Parliament is not performing its task properly as MPs, both as members of the Government and in the opposition, regard the definition of a right as a legal issue. As such, this is something for the court to resolve if the court gets it right, then the job of Parliament is to go along with this and just modify the legislation to bring this in line with the courts.
            - See this criticism in the work of Danny Nicol and Janet Hiebert.
        - Role of Court – failing to define rights properly and not entering into the fray to give a strong enough protection of rights. Instead, failing to exercise their powers properly to protect rights.
            - See this criticism in the work of Danny Nicol and Keith Ewing
            - I've made criticism, in a more complex way, with regard to double counting
            - Similar criticism from rights protagonists, particularly through the way in which the court uses deference – eg Trevor Allan.
        - ECHR relationship
            - Both Parliament and the court aware of the position of the ECHR and are beginning to see this as a hierarchical relationship, both seeing any declaration of incompatibility as leading automatically to a reference to the ECtHR.
                - Also, court seeing ECHR as a ceiling not a floor, therefore being less willing to give progressive interpretations of rights.
                - Parliament response to court decisions may have ECHR problems in the background.
    - Are these valid?
        - Hope to argue that some of the criticisms levelled at the way in which Parliament and the courts perform their role are over-stated and stem from two separate misunderstandings of dialogue
        - The criticisms of the role of the ECtHR are not over-stated and call into question the way in which democratic dialogue models of rights can operate. Not the death blow! But do need to re-think through the relationship and correct a potential misunderstanding here.

- How am I going to do this?
  - FIRST – look at what is meant by democratic dialogue, set out my theory and point out possible misunderstandings of dialogue that may explain why there are misunderstandings concerning the role of Parliament and the courts.
  - SECOND – having set out dialogue, examine whether it is true that dialogue is not working. Explain why it may be that Parliament was right to correct the legislation according to the interpretation of the court in the vast majority of cases where courts have made a declaration of incompatibility. Also, set out a success story where dialogue did work! Aim to demonstrate that some of the criticisms of dialogue are overstated.
  - THIRD – set out criticisms that are still valid and explain how they stem from two further misunderstandings surrounding the meaning of democratic dialogue. Argue that these are capable of correction through explaining what is required of Parliament and the courts more clearly.
  - FOURTH – explain why the current use of ECHR is a misunderstanding and discuss how this could possibly be corrected.
  - WHOLE – democratic dialogue is not perfect, not currently working, but this does not mean that it is impossible.
  - Paraphrase GK Chesterton and Christianity – 'Not that it has been tried and found wanting, but has been found difficult and left untried.'

❖ MEANING OF DEMOCRATIC DIALOGUE

- Broadly, theories focusing on democratic dialogue focus on recognising that it may not always be appropriate for the court to have the final authoritative decision as to the definition of a human right, or its application to a particular circumstance
- In particular – does not argue that rights are political, or subjective, but recognises that rights, even if objective, can be contestable. There may be some instances in which it is reasonable to disagree about how a particular right is defined, how it is balanced when it conflicts with another right, or whether a right applies to a particular situation or not. This may arise from issues of indeterminacy and incommensurability. Equally, may be instances in which there is a clear answer.
- Application to parliament and court – recognising that there are different institutional features and strengths of parliament and court, determining that each institution may be more or less suited to resolving particular issues concerning rights
  - Partly through subject matter – e.g. see courts as more expert at determining the content of procedural rights
  - Partly through contestability – contestability may dictate that Parl is better suited, but may also recognise that courts are able to correct mistakes that Parl can make in certain circumstances and court should be more vigilant to protect rights in these circumstances.
  - Also, recognise courts or parl may be better placed to remedy breaches of rights, depending on the nature of the breach of the right and the nature of the proposed resolution of that breach.
- Refinement of my theory: through use of two distinctions that will become relevant later on
- Hickman – distinction between 'weak' and 'strong' theories of dialogue

        - Weak: argument that the court is to provide principles to the legislature, but it is the job of the legislature to authoritatively determine issues of rights. Leads to criticism of the court as using too many section 3(1) declarations and the need for more use of section 4 as the default. Would appear to be based upon a more radical criticism of rights, seeing them as political as opposed to legal. Evident in theory of Nicol for example.
        - Strong: argues that courts are to use their constitutional powers with restraint in certain circumstances, prompting dialogue as opposed to giving an authoritative resolution.
        - I'm strong as opposed to weak. See the role of the court as not necessarily to authoritatively resolve all rights issues and that some rights issues are best resolved through dialogue between the legislature and the courts.
    - Further distinction I want to draw within strong theories of dialogue
        - Dialogic interpretation of rights protections: where courts may well be given the power to authoritatively resolve rights issues, but that they refrain from doing so, using various tactics, in order to facilitate democratic dialogue between the legislature and the courts.
            - Example of Canada – courts have the power to strike down legislation, but it was argued that this should not always be used.
            - Tactics here – through defining the right such that it removes a potential conflict and there is no need to overturn the legislation, or through deciding rights issues on procedural as opposed to substantive manner
        - Dialogic model of rights protections: where the courts are not given the power to authoritatively determine rights and, instead, mechanisms are found in the legal powers granted to the courts that facilitate dialogue.
            - What happens in the UK – through section 3(1) and section 4 which give different relative powers to the legislature and the courts to resolve rights issues.
            - Section 3(1): more authority to the courts, as it can give a remedy, dictate the content of the right and interpret legislation to do so. Parl can reverse this, through enacting new legislation, but open to re-interpretation by the courts!
            - Section 4: more authority to Parliament. No remedy. Parl has to do something to protect right. Or executive if the fast-track procedure is used.

❖ WHAT PRECISE MODEL DO I PROPOSE?

- Dialogue on relative institutional powers of legislature and courts, stemming from whether court is faced with a contestable rights issue or not, taking into account factors both relevant to the institutional features of the legislature and the courts concerning who may be more likely to reach the right answer, or have more authority to determine the rights issue as well as who may be best placed to reach right answer or make authoritative determinations concerning how we remedy a particular rights issue
- Contestable rights issue: section 4
- Non-contestable rights issue: Section 3(1)

        - UNLESS: linguistically impossible to interpret the legislation in line with the non-contestable right
        - UNLESS: Parliament may be better placed to provide the solution to this rights issue, either:
            - Because it requires the creation of procedures, or broad sweeping changes that the legislature is better suited to making
            - Because it requires a precise definition of an indeterminate right, which Parliament may be better able to provide as opposed to the courts. Eve in instances where the issue before the court is clear and the right is clearly contravened, may be difficult to determine precisely how to interpret the legislation, or define the right for the purposes of legislation and Parl may be better suited, particularly where there are broad social ramifications from the choice of the wording.
    - NOT going to fully defend this now – but can refine in questions (hopefully!)
- ONE way in which the criticism of dialogue goes too far
    - Criticism in question – that Parliament is not performing its role correctly, given that it sees the definition of the right as a legal issue, and as such merely goes along with the definition of the right per se.
    - This would appear not to fit in with the framework of dialogue, which appears to require Parliament to enter into a reasoned debate to help determine the right outcome in particular situations
    - Too broad a picture of dialogue. Depends on when section 4 is used and for what purposes and require different roles of Parliament:
        - Wanting Parliament to engage in a serious debate regarding the confines of the right in question – when section 4 is used because the rights issue before the court is contestable, or because although the rights issue before the court is not contestable, the remedy to that right requires a refinement of the definition of the right,
        - Where it would be acceptable for Parliament to accept the definition of the right provided by the court – where the rights-issue before the court is non-contestable and section 4 is used either because it is not linguistically possible to interpret the legislation to make it compatible with a Convention right, or because the right is not contestable but Parliament is better able to bring in the broad sweeping measures that would be required to make the legislation Convention-compatible. Here, Parliament being asked to intervene for different reasons.
    - So – what happens to our assessment of dialogue when we factor these elements into account?
        - Source: Responding to Human Rights Judgments – government response to the JCHR 31 report of 2007-8. Cm 7542. Presented in January 2009
        - 26 doi – 17 of which had become final – i.e. were final decisions of HL, or lower court that was not appealed
        - 10/17 remedied by primary legislation
        - 1/17 remedied by a remedial order under section 10 HRA
        - 3/17 had been remedied by primary legislation before the final judgment

- 1/17 subject to public consultation also in conjunction with implementing a decision of the ECtHR
- 2/17 – still under consideration as to how to apply the remedy
- Easy to see why you make the claim that Parliament responds to DOI by bringing the law in line with the court
- BUT what type of case are we dealing with?
    - 14 cases of remedy from the 17
    - 8: Clear rights issue, but not possible linguistically to bring the legislation into line with the ECHR: *Anderson, R (Baiai) v Secretary of State for the Home Department*; *R v SS of Home Department ex parte D*; *R (H) v Mental Health Review Tribunal; R (M) v Secretary of State for Health; McR's application for judicial review; R (Wilkinson) v Inland Revenue Commissioners; Blood and Tarbuck v Secretary of State for Health, Wright*
    - 1: Predominantly clear rights issue and linguistic, controversial issue through reading the right so as to avoid incompatibility *R (Clift) v Secretary of State for the Home Department*
    - 2: Clear legal rights issue, but equality angle meaning parliament better suited to determining whether to level up or down: *R (Hooper) v secretary of state for pensions [already amended by then]; R (Wilkinson) v irc [already amended]; Morris; Gabaj*
    - Contestability
        - *International Transport Roth GmbH v Secretary of State for the Home Department* –rights issue partly contestable, concerning extent to which article 6 applied and
        - *Bellinger v Bellinger* – rights issue not contestable, but remedy was contestable
        - *A v Secretary of State (Belmarsh)* – same element of rights issue not contestable on the facts, but Parl needed to determine remedy, as well as linguistic angle

- So – begin to understand that the criticism that Parliament always responds may be a little displaced
- BUT not enough in and of itself. So, to try and help make the claim that dialogue may work, want to point out one instance in which dialogue did work
- *Bellinger v Bellinger* – case is a classic example of how dialogue CAN work.
- *Facts of the case*: Section 11(c) Matrimonial Causes Act 1973 permitted marriages between a man and a woman. Gender determined at birth. Mrs Bellinger was a male to female transgender individual. She had married Mr Bellinger in a religious ceremony. She wished to have this marriage legally recognised. Claimed that to not do so breached her convention rights under article 8 (privacy) and 14 (equal treatment).
- *Non contestable right:* Clear that not allowing her to marry would contravene her convention right. Why clear? *Goodwin v UK* although not on marriage had made it clear that the margin of appreciation regarding transgender individuals was narrowing and to fail to allow them to be recognised as the opposite gender would breach article 8 and article 14; Parliament had recognised this and legislation being debated to remedy this

situation, statement from LC department of recognition that to fail to recognise change in gender for the purposes of marriage would breach the ECHR.

- *Contestability regarding the solution*:
  - Difficulty of determining gender to come up with a precise legal test as to when an individual has changed from a male to female, and social and practical ramifications of this choice – i.e. encouraging individuals to have unnecessary surgery in order to be recognised
  - Ramifications of this determination beyond marriage – e.g. sex discrimination, and need to think through connection of legal meaning in range of different spheres
  - Ramifications given the nature of marriage and whether the change here would have consequences across society regarding the definition of marriage
- *LOT of Discussion in Parliament that aimed to resolve this issue and come up with a viable solution*
  - *Scrutiny in chambers, chamber of whole house of HL to discuss this, large amount of hours spend debating the Bill in its progression through the two houses; lots of reports on this issue leading up to the drafting of the Bill*
  - *Wide range of experts and discussion surrounding the definitional aspects – in the end panels decided to determine how to determine when gender had changed*
    - *Lord Robert Winston for medical expertise and definitional aspects*
    - *Also specific groups – large discussion of ramifications regarding existing marriages of those wishing to change gender and also with regard to pension rights*
  - *JCHR reports, and wide consultation process*
    - *46 submissions included in the JCHR report; wide range from individuals to organisations; including a submission by Mrs Bellinger; general human rights and specific interest groups; general policy groups and ngos. Gvt amended the Bill inresponse to comments from the JCHR, particularly regarding the impact of gender recognition certificates and its application to other legal provisions and name change of the register to ensure no offence is caused; not willing to change on marriage element give wider impact and instead element of recognition of civil partnerships for those who are now of different sex and married, change gender and are now of same sex and married, need to dissolve marriage and then get civil partnership instead; not on pension element either;*
  - *Able to go beyond analysis of marriage to other social issues, linking this in to other policies*
    - *Sport angle here - lots of discussion of the implications for sports competitions which were not even mentioned in the judgment*
  - *MP and HL expertise in specialist areas, and also through their constituents and personal knowledge*
  - *Also reference to judgment as prompting change in this area – reference to long campaigns for change that seem to have gained momentum from the judgment*

        - *Admittedly, there were comments here regarding the fact that it it's the job of the court to tell us what rights are, but ok in this context.*
- This provides a partial response to the criticism of dialogue – but does it go far enough?
- CRITICISM OF THE ROLE OF THE COURT
    - What is the nature of the criticism – that courts do not give a full enough account of rights. Instead of defining Convention rights according to their own convictions, they are deferring when defining the right.
    - Is there any truth in this claim?
    - *A v Home Secretary (Belmarsh)* seen in a sense as providing a good protection of rights, given that the declaration of incompatibility was made and Parliament responded to this by enacting legislation.
    - *BUT*
        - Only 1 out of 9 law lords was willing to challenge the definition of a national emergency (Hoffmann) the others were willing to merely accept the opinion of the executive as to whether a national emergency existed or not.
        - The decision was struck down on a narrow reading of 'necessity'. Element of deference in the application of the proportionality test? Met the aim, but was not necessary, therefore did not need to get to the balancing element. Not sure therefore whether the court would have been willing to go further if this had no been necessary.
        - Legislative response – through enacting the provisions of the Prevention of Terrorism Act 2005 and establishment of derogating and non-derogating control orders. Removing yet more protections as opposed to establishing new protections.
        - Court response, Ewing critical of the way in which the court considers the control order cases.
        - Different element of deference sneaking in. Here, not an application of proportionality balancing due to the application of article 5 an absolute right. Yet the element of deference sneaks in through the way in which the right to liberty is defined. Definition includes situations of extensive periods of home arrest and deprivation of contact and liberty that had large consequences in practice on those who were detained in this manner.
        - Criticism – that courts are not defining rights fully and therefore not playing their role in deference
    - *Animal Defenders* s 321(2) Communications Act 2003 prevented the broadcasting of political or religious advertisements. This prevented ADI from broadcasting an advertisement entitled 'My Mate's a Primate' which showed a four year old child and then a chimp locked in a cage, explaining that chimps had the same mental age as a four year old child.
        - *VGT* case context – similar law, here with regard to its application to an advertisement for a campaign to encourage less meat eating in order to promote animal welfare.
        - *Section 19 statement* – Gvt was not sure whether the 2003 Act was or was not compatible with ECHR given the *VGT* judgment, but decided to enact the legislation. Also, evidence of discussion of JCHR, and Parl to determine whether

it would be possible to regulate without a complete ban and the difficulty of finding a formula to distinguish between different types of campaign.

- *Deference elements in the judgment* – came into the definition of the right:
  - Institutional expertise – democratically elected politicians are going to be sensitive to the needs of democracy! [Bingham]
  - Parl had taken the decision in knowledge of the background of ECHR decisions and had decided to go along with the legislation despite not being fully aware of whether this complied with ECHR or not. Therefore there is the element of not taking this section 19 statement lightly.[Bingham, Hale]
  - Need for general rule in the legislation and not able to be framed to take account of particular causes (e.g. distinction between political advertising and social advocacy). Seemed to suggest that section 3(1) can be used to reinterpret legislation to help give rise to the limited exceptions to the broad rule where these limited exceptions would be required to ensure Convention compatibility. [Bingham]
  - Element of not issuing declaration – where it may be that the legislation is only incompatible with Convention rights in some circumstances and it is not the case that there is clearly a breach of Convention rights as regards the applicant before the court [Scott]

❖ Possible explanation of this – lies in the misunderstanding of what is meant by dialogue!
  - Dialogic model of rights protections – where dialogue is built in to the system, which does not give the court the power to make an authoritative determination of the content of rights. Reason, to recognise that parl may be better at protecting rights in certain instances and also to recognise that parl may be better placed to remedy these rights either through institutional or constitutional features
  - Dialogic interpretations of existing protections of rights – where courts do have the power to strike down legislation, but for similar concerns, propose that courts do not fully exercise their powers – e.g. through defining the right so as to provide more space to the legislature or through applying proportionality tests less stringently.
  - Courts appear to be doing the latter, but there is no need.
  - Glimmer of hope – because the concern for both dialogic interpretations and dialogic models is the same, so see this as possible to get the courts to perform this function better and define the right??
  - Does this require me to ditch the Yorkshire roots and be a bit more of an optimist?

❖ CRITICISM OF THE ROLE OF THE ECHR AND DECISIONS OF THE ECTHR
- How have the courts interpreted section 2(1) HRA?
  - Requirement that the courts are guided by the jurisprudence of the ECtHR when taking decisions concerning the definition of the ECHR
  - Seen this as establishing a ceiling – in that the courts are required to ensure that Convention rights are protected, but are not required to go beyond the provisions of the ECHR – *Ullah* and *Animal Defenders*

        - May go beyond the current decisions of the ECHR when the court is happy that this is in line with developing principles within the decisions of the ECtHR – eg *Re P* where the court held that, although decisions of the EctHR had not conclusively determined that it would breach articles 8 and 14 ECHR not to allow unmarried couples to adopt, recent decisions, particular the decision of *EB v France* which overturned *Fretté v France* would suggest that the court would hold that this was contrary to convention rights. Therefore, possible to rule that the law forbidding adoption by unmarried couples was contrary to Convention rights.
    - Problems with this for dialogue – seem to suggest that the decisions of the HL and of the ECHR are always in tandem and, therefore, helps to reinforce the impression that the court tells you what the law is, Parliament has to go along with this and, if not, will face liability before the ECtHR. Therefore, really, given these pressures, a form of strong review in all but name, defeating the possibility of dialogue.
    - Glimmer of hope as to overcoming this problem?
        - *Animal Defenders*
        - *Section 2(1) comments*
            - Wide margin of appreciation here, but used to give more leeway to Parl when defining the right [Bingham]
            - Fact-specific application here and how ECHR decisions are decided on specific facts, so able to make a distinction with VGT on the facts [Hale
            - Ability of the decisions of the HL to diverge from the ECHR and this is not a problem, given that the HRA is domestic legislation incorporating domestic rights into the system and recognising the margin of appreciation arguments. Did not arise here. [Scott]
        - *Purpose of DOI*
            - Warn Parl of future incompatibility issues with ECHR [Bingham, Hale]
            - Also element of warning that it is contrary to domestic interpretation of rights [Scott]
    - *Re P*
        - Section 2(1) refinement
            - Not matter if the ECHR were to reverse its previous rulings and the court, thinking that there was a clear line of authority and therefore developed the law, found that the ECHR did not go in this direction. This is because *Ullah* doctrine ought not to apply so stringently when the ECtHR itself has declared that the subject matter carries a large margin of appreciation. It may be that the court and not the legislature is the best institution in the MS to determine how the margin of appreciation is to be applied in a particular area [Hoffmann]
            - "Nevertheless, as Lord Bingham of Cornhill indicated, there are good reasons why we should follow the interpretation adopted in Strasbourg. The best reason is the old rule of construction that when legislation is based upon an international treaty, the courts will try to construe the legislation in a way which does not put the UK in breach of its international obligations. If Strasbourg has decided that

> the international Convention confers a right, it would be unusual for a UK court to come to the conclusion that domestic Convention rights did not. Unless the Strasbourg court could be persuaded that it had been wrong (which has occasionally happened) the effect would be to result in a finding that the UK would be in breach of the Convention. Thus s 2(1) of the 1998 Act allows for the possibility of a dialogue between Strasbourg and the courts of the UK over the meaning of an article of the Convention but makes this likely to be a rare occurrence." [Hoffmann[35]

- Also, same element of margin of appreciation, but mere fact that this is within an area of social policy does not mean that it would be for the legislature to decide how to implement the Convention right within this margin of appreciation, given that this involves minority rights and it is for the court to protect minority rights [Hope
- Not seeing Ullah possible refinement, and it should be for Parl to make this change because not clear there is a breach, this is for democratic resolution (not sure why) and this requires something more refined than the blunt instrument of judicial interpretation (Walker
- Not sure whether in margin of appreciation or not to develop the law on the facts, but recognising margin of appreciation wiggle room and if within margin of appreciation, seems to be suggesting that you can use section 3(1) but not section 4
- It's really difficult to decide!! [Hale]
- Margin of appreciation exception and may be for Parl or legislature to decide [Mance]

  - Glimmer of hope of being able to see this in a more dialogic manner
  - Also for Parliament too – given the legislative history of the 2003 Act, awareness of VGT case, JCHR reports and consideration of different situations.

❖ CONCLUSION

  - Dialogue is not perfect
  - There are teething problems and that are issues that need to be ironed out
  - But I'd like to think that this is not impossible and that it does offer a better means of dealing with legitimate concerns than through deference as illustrated by giving a loose definition of a right, or through narrowing the scope of application of the right.