Do Courts Have to Show Deference: Notes on Paul Craig's View on the HRA

By Lorenzo Zucca
Suggested Citation: Lorenzo Zucca, *Do Courts Have to Show Deference: Notes on Paul Craig's View on the HRA*, 2 German Law Journal (2001), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=115
[1] The 1998 Human Rights Act (HRA) has incorporated the European Convention of Human Rights into English law. Undoubtedly, it constitutes a very important event since it purports to create a new system of rights protection. In order to achieve this aim, the act also introduces some norms empowering the courts to review acts of the legislative and executive branches. The main vehicle for this provision is Section 3 of the Act, (1) which establishes a *presumption* of compatibility between national legislation and rights laid out in the articles of the European Convention on Human Rights (ECHR). Such a presumption requires courts to systematically attribute to legislation and executive acts the meaning that is most consistent with the protection of rights. Article 3 has been very controversial, (2) particularly concerning the scope of the power it attributes to the courts.

[2] Professor Paul Craig (3) elucidates the HRA, especially in light of some recent cases of the House of Lords, which discuss the nature of the dispositions of the HRA. His main concern is to explain the relationships between legislative, executive and judicial power after the HRA. For this purpose, he introduces the concept of "deference", deemed to be the national version of the doctrine of the margin of appreciation, which plays such a significant role in the ECHR jurisprudence. The concept of deference has the task of locating "an area of judgement within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose actual decision is said to be incompatible with the Convention". (4)

[3] The concept of deference, as presented, is quite puzzling. First, it proves to have no relation with the doctrine of margin of appreciation. The latter is an international doctrine, aiming to limit the degree to which international institutions may interfere with the national institutions. Therefore, it seems natural that a national concept of deference, referring as it does merely to the relations between national institutions, can hardly be grounded on an international doctrine. Second, it does not really provide a clear set of guidelines for judges. Its formulation simply reminds the judge to act in a self-restrained way, and to avoid taking decisions over matters the competence for which rests with the legislature or the executive. The question raised here is to know why both judges and academics have felt the need to develop such a concept. The problem of justifying of deference will be addressed first. Subsequently, it will be argued that the concept of deference merely begs the question of the nature of the "interpretative powers" of the courts under Section 3. Finally, it will be pointed out that, both in the judicial and in the academic discourse, there are inconsistent conceptions of rights at stake, which make it more difficult to determine the extent of the power of review on the grounds of rights.

1. The lack of justification

[4] Parliamentary debates show that the doctrine of the margin of appreciation has been debated largely within parliament in order to know whether it should be translated into the domestic system. (5) Nonetheless, the majority came to the conclusion that that doctrine had been created to enable international judicial review to give due weight to local political and cultural traditions; and to take into account the distance between the judges in Strasbourg and local institutions. (6) Professor Craig acknowledges this point and seems quite convinced that the margin of appreciation doctrine is "integrally connected with the supranational nature of the ECHR". (7) However, Professor Craig goes on to state that: " It was nonetheless argued that the courts should develop their own concept of deference to the legislature and the executive when deciding cases under the HRA". (8) It is very difficult at this point to understand what forms the basis for this statement. As a normative background, Professor Craig explains that the courts should "respect the executive's expertise, and Parliament's democratic credentials, when making decisions". (9) Does this mean that, without a concept of deference the courts would be able to freely substitute freely their judgement for that of the political institutions? After all, the history of the doctrine of separation of powers in the common law stresses the point that the courts must not challenge the political authority of the legislature. (10) Why then, is it so important to develop yet another concept in order to keep the relationship in balance?

[5] Professor Craig has no doubts as to the fact that courts have *already* developed an autonomous concept of deference. He draws on Lord Hope of Craighead in the *Kebilene* Case. (11) His Lordship made three arguments. First, the margin of appreciation doctrine does not apply in and of itself, since it concerns mainly the relationship between national and international systems of protection of rights. Second, national courts should, however, recognise that difficult choices might have to be made between the rights of the individual rights and "needs of society", which are, taken by themselves, however, still in need of further clarification. (12) Third, as a consequence, courts will develop an area of deference toward the legislative power.

[6] It should be noted that the core of the argument lies in the second point. Here the rights of individuals are opposed to the needs of society; it is unclear what Lord Hope thinks the needs of society are. Is he thinking about the

arguments grounded on a public interest? If this was so, it would be difficult to explain what is the nature of the rights at stake, since by definition individual rights claims cannot be overweighed by claims grounded on public interest. Craig himself refers to the problem of conflict between legislation and rights, and he adds that the concept of deference will affect the likelihood that any such conflict would arise. (13) In other words, the more often deference will be invoked, the fewer conflicts will be made apparent, even if they exist. Thus, for the "unqualified rights" such as the right not to be tortured, the courts will not defer to the legislative the decision. On the contrary, for those rights, which require a balance to be struck, the courts should be, in Professor Craig's opinion, keener on leaving the decision to political institutions.

[7] It appears from the previous point that the role of deference is to withdraw from the courts the power of assessing **technical-political** cases, where a right is likely to contrast with the enforcement of policies of the government. In substance, the courts would seem to have a power of review mainly for "hard", **moral** cases, e.g. those that touch upon the right to life or the right not to be tortured; (14) in the this line of cases, the parliament would merely abstain from intervening. If the latter characterisation holds true, then a very basic observation can be made: Generally speaking, the courts are very well placed to review political choices, and are less equipped for the cases involving moral issues. The reason for this is simple. While courts have a wide range of legal technical devices, such as the control of proportionality, that can be of a great help in assessing matters of balancing, courts are, conversely, not very well situated to state what is the substantive moral position of a society concerning issues like the meaning of "life" in the right to life. Craig's argument for deference tends on the contrary to strengthen the power of review of the courts when dealing with moral cases and to lessen their power when dealing with cases that involve the competence of the executive or of the legislative.

[8] The final source of puzzlement as to the matter of the determination of general interest is Lord Hoffmann's dictum. His Lordship argues that the public interest is determined either by the legislature or by the government. Sometimes, he holds, Parliament would be able to lay down the general policy in advance through legislation. In others areas it is not possible to formulate general rules, and the question of what is required by the general interest would have to be decided on a case-by-case basis by the ministers. (15) It follows that deference does not only mean that the courts should, as it is generally understood in rights adjudication, evaluate carefully the limits of the rights stated by legislation, but it also means that the courts should **avoid** to raise those issues. In order to understand those puzzles, we are now turning to the issue of the power granted to the courts under the HRA.

2. Two kinds of "interpretative power"

[9] In order to assess this issue, we need to reflect upon the weakness of the HRA's system of protection of rights. The whole debate about rights in Britain has been biased by the interplay of arguments in defence of the doctrine of parliamentary sovereignty and the need of "bringing rights home" from Strasbourg. Those two goals are conflicting. On the one hand, the defenders of parliamentary sovereignty sought to protect the independence of their state from international institutions such as the European Court for Human Rights. On the other hand, the human rights advocates claimed a stronger protection of individuals *vis-a-vis* severe encroachments of public powers upon individual liberties. These two approaches gave rise to the impossibility of reaching a solution. On the one side, it seems to be impossible to protect effectively individual rights without considering them as a constraint of the legislative power. On the other side, the long-standing British doctrine of parliamentary sovereignty does not seem to allow a limitation of the legislative power, even on the ground of rights protection. (16)

[10] Many authors hold that a solution has been found through the mechanism of Section 3 HRA 1998, which gives to the courts a "power of interpretation" over legislation. On a spectrum of possible solutions, we may identify two opposing kinds of interpretative powers. (17) In the first possibility, Section 3 can be considered as a weak protection of rights. Within this perspective, the judge would simply stick to the literal meaning of legislation and would decide case by case whether the limitation of a right was sufficiently motivated on grounds of public interest. Given that the public interest can be determined only by the Parliament (as Lord Hope holds it (18)), it follows that the court would show deference each time that the boundaries of the public interest are not clear. The second possible interpretation of the "interpretative power" entails a strong form of review. Many have interpreted Section 3 as granting a power for the courts to stretch the meaning of legislation in order to make it comply with the requirements of individual rights. (19) In other words, the courts will adjust and modify the text as long as the statute itself does not say clearly that it intends to frustrate an individual right.

[11] The majority of commentators on the doctrine have sided with a rather strong interpretation of Section 3. Lord Irvine, the Lord Chancellor, (20) characterises as purposive or teleological the nature of the power granted under Section 3. (21) Lord Lester, and Prof. D. Pannick insist that the courts should give a "generous" interpretation to the legislation. In their view, legislation can be considered as overriding a right only when it puts forward very compelling reasons. (22)

https://doi.org/10.1017/S2071832200004181 Published online by Cambridge University Press

[12] Within this context, we understand that Section 3 is regarded as a powerful means in the hands of the courts. *Deference* comes into play at this level, performing an ideological function. Many judges and many authors perceive Section 3 as extremely far-reaching. In other words, *the strength of an individual right is made dependent upon whether the courts are willing to stretch the terms of legislation.* The concept of deference serves to remind the judicial power that it should not act as a legislator or as the executive, though the reminder is rather loose.

[13] It may appear that Section 3 confers a "strong interpretative power" upon the courts, but there is considerable uncertainty on the nature of the rights incorporated in the British legal system.

3. Two conceptions of rights

[14] Professor Craig seems to accept the distinction of two categories of rights that is implicit in the opinions of Lord Hoffmann and Lord Hope . On the one side, there is the category of "unqualified rights" (23) underlined by a conception of rights which stresses the pre-eminence of rights over claims of public interest". (24) On the other side, there is the category of the "to be balanced rights" (25) supported by a weaker conception of rights, which does not acknowledge a primacy of certain rights over public interest arguments. (26)

[15] This distinction seems to be arbitrary and inconsistent with the position of the European Court of Human Rights. It is arbitrary because it does not use a proper criterion to distinguish between the first and the second categories of rights. Professor Craig refers to certain rights of high constitutional importance. However, this does not help in identifying what is important and what is not. Moreover, nowhere in the HRA is it said that the regime of protection of rights should depend on a supposed deeper nature. In fact, depending on the "importance" of the rights, the deference of the courts should play a more or less broad role.

[16] The previous distinction is equally inconsistent with the position of the ECHR. The European Court of Human Rights has never upheld such a distinction between the rights contained in the charter. The limitations on the ground of public policies are clearly possible, but it must be acknowledged that when a claim falls within the scope of a right, this claim will have pre-eminence over any other legislative claim. (27) Professor Craig's position is in considerable contrast to that of the court in Strasbourg according to which arguments of public policy could determine not only the limitations of these rights, but also the scope and the initial applicability of those rights. (28)

[17] In conclusion it seems that the concept of deference developed by Professor Craig is in serious need of further methodological elaboration. It does not satisfactorily shed light on Section 3 of the HRA, since the final outcome still depends on the way the courts will decide to use their "interpretative power". Finally, it appears that the distinction drawn between "unbalanced rights" and "rights to be balanced" entails far too wide-reaching consequences as to the power of review attributed to the courts. Indeed, it would seem that the courts could exercise a constitutional review over unqualified rights and only a very deferential judicial review over the rights to be balanced.

---

(1) Section 3 (1): So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
(2) Cf. For example, G. Marshall, "Two kinds of incompatibilities: more about Section 3 of the HRA", …
(3) P. Craig, "The Courts, the HRA and Judicial Review", LQR, October 2001, p. 590.
(4) P. Craig, "The Courts, the HRA and Judicial Review", LQR, October 2001, p. 590.
(5) N. Lavender, "The problem of the margin of appreciation", 1997, EHRLR, p.380.
(6) J. Wadham & H. Mountfield, Blackstone's guide to the Human Rights Act 1998, 2000, London, Blackstone Press, p.18.
(7) P. Craig, Cf supra n°1, p.590.
(8) Ibid., p.590.
(9) Ibid., p.590
(10) Cf for example, R v Home Secretary, ex p Fire Brigades Union [1995] 2 AC, p. 513; Duport Steels Ltd v Sirs, [1980] 1 All ER, p.529.
(11) R. v. D.P.P., ex p. Kebilene, [2000] 2 A.C., p.326.
(12) P. Craig, ibid., p.590.
(13) Ibid., p.589.
(14) Ibid., p.590.
(15) R (Alconbury Developments Ltd) v. Secretary of the State for the Environment, Transport and the Regions, [2001] 2 Weekly Law Reports, p.1389.
(16) N. Bamforth, "Parliamentary Sovereignty and the HRA 1998, Public Law, Autumn 1998, p. 287.
(17) G. Marshall, "Two Kinds of compatibility: more about section 3 of the H.R.A 1998", Public Law, 1999, p.377-383.
(18) Cf, footnote n°10.

(19) Lord Lester & D. Pannick (ed.), Human Rights- Law and Practice, London, Butterworths, 1999; Lord Irvine (The Lord Chancellor), "Constitutional reform and a Bill of Rights", European Human Rights Law Review, n.5, 1997, p.483-489.
(20) The Lord Chancellor is the highest judicial charge within the British systems. He covers at the same time the function of minister of Justice, and of the president of the higher judicial court of the country, the House of Lords.
(21) Cf footnote n° 19.
(22) Cf footnote n°19.
(23) P. Craig,ibid., p.590.
(24) Cf footnote n° 15, para. 70.
(25) P.Craig, ibid., p.591.
(26) P. Craig, ibid., p.590.
(27) Cf for instance the Court's ruling in *Ruiz Mateos v. Spain*, 16 EHRR 505, where the ECtHR affirmed the pre-eminenceof rights over legislation; the decision is available at:
http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/423.txt (last visited 4 December 2001).
(28) P. Craig, ibid., p.592.