Dialogue Theory

What is 'Dialogue Theory'?

'Dialogue theory' is a particular thesis that describes the relationship between the legislative and judicial branches of government. Put most simply, it is the idea that "Canadian legislators are engaging in a self-conscious dialogue with the judiciary." This is an ongoing process that, over time, can result in a variety of responses.

Charter dialogue originated in Canada from the introduction of the *Charter of Rights and Freedoms, 1982*. According to this theory, interaction "resembles a tennis match between branches about the compatibility of the policies at stake with the bill of rights." The judiciary's role is to give meaning to constitutional text by determining a given law's consistency with the Constitution and *Charter*. The government is then able to engage with court judgments and respond accordingly. Parliament may choose to re-work or abandon legislation altogether. Thus, legislative and judicial institutions participate in a dynamic exchange.

One of the ways dialogue can be measured is by looking at legislation that has been passed by Parliament and subsequently rejected by the Supreme Court. For example, from 1982 to 1995, Hogg, Thornton & Wright found 82% of laws struck down by the Court caused some sort of legislative response. Whether they were revisions, amendments, or scrapping of the bill altogether, lawmakers responded to what judges had to say.

Criticism

Dialogue theory is not without controversy. Criticism comes from the perception that dialogue is one-sided. For example, Hogg, Thornton & Wright found that legislation that went back to the drawing board was often re-drafted to reflect the same objective as the first attempt. In these cases, Parliament was perceived not to have fulfilled its end of the exchange; lawmakers neglected to listen to judicial advice. Further, because the 'notwithstanding clause' gives Parliament the final say for breaches of certain sections of the *Charter*, there is no guarantee that lawmakers will comply with judicial advice. This potential, along with decisions by Parliament that ignore Court decisions, undermine the theory that there is an ongoing dialogue.

Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall LJ at 101.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 .

Emmett Macfarlane, "Conceptual Precision and Parliamentary Systems of Rights:

Disambiguating 'Dialogue'" (2012) 17(2) Review of Constitutional Studies at 75.

Charter, supra note 2; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited – Or 'Much Ado About Metaphors'" (2007) 25 Osgoode Hall LJ at 196.

Ibid.

Section 33(1) of the *Charter* states that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of *Charter.*"