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Introduction

The marriage of a Westminster-based parliamentary system with a bill of rights represents a political path that, in the not too distant past, seemed implausible. Nevertheless, New Zealand enacted the New Zealand Bill of Rights Act (NZBORA) in 1990, and the UK passed the Human Rights Act (HRA) in 1998. By enacting these statutory bills of rights, both countries not only introduced a new domestic judicial authority to evaluate legislation for its consistency with protected rights; they also embarked on an ambitious attempt to use a bill of rights as an instrument to alter the norms of legislative decision-making.

Historically, few considered a bill of rights to be an attractive or viable option for either jurisdiction. This perspective was influenced by opinions that rights were adequately safeguarded by parliament, by a common law tradition that recognized the freedom of individuals to do as they wish unless expressly prohibited by law and by judicial enforcement of the rule of law. In any event, the conventional expectation that a bill of rights not only authorizes courts to review legislation but also imposes remedies that can veto the effects of otherwise duly enacted legislation is regarded as fundamentally incongruent with parliamentary sovereignty, which has long been considered an essential constitutional characteristic of Westminster-based parliamentary systems.

Two ideas borrowed from Canada helped shape New Zealand and UK reformers' assumptions that it was possible to conceive of a bill of rights to improve the protection of rights without contradicting the constitutional principle of parliamentary sovereignty. The first borrowed idea was to envisage judicial review with constrained remedial powers, or what Mark Tushnet refers to as 'weak form judicial review'.[1] The second idea was to introduce a new ministerial obligation to report to parliament

[1] M. Tushnet, 'New Forms of Judicial Review', (2003) 38 *Wake Forest Law Review* 813; M. Tushnet, *Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008).

on whether bills are consistent with rights. Both ideas were expected to ensure the NZBORA and HRA function in a more parliamentary-centred manner than is associated with more conventional bills of rights (ironically, in ways in which the Canadian Charter of Rights and Freedoms, as it has evolved, does not).[2]

The concept of judicial review with constrained judicial remedial power was associated with the logic of Canada's 'notwithstanding clause'[3] – a power that allows provincial legislatures or the federal parliament to dissent from judicial interpretations of most sections of the Canadian Charter through ordinary legislation (or to pre-empt judicial review altogether) for periods of up to five years (and by implication until the next election). For reformers in New Zealand and the UK who were not prepared and/or lacked sufficient political support to relinquish the principle of parliamentary sovereignty, the notwithstanding clause demonstrated the possibility to design a bill of rights that introduces judicial review while nevertheless preserving parliament's ability to dissent from courts and preserve the legality of its legislation.[4]

[2] It is ironic that Canada gave birth to these ideas, neither of which has evolved in the way framers intended. The first idea, of legislative rights review, has not functioned particularly well because parliament rarely engages in review of whether the Charter is consistent with protected rights. The second idea, of allowing for political dissent from judicial rulings, has rarely been considered a political option for Canadian legislatures because of deep scepticism about the legitimacy of political judgment prevailing over judicial rulings. See J. Kelly, *Governing with the Charter. Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005); J. Hiebert, *Charter Conflicts. What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002); J. Hiebert, 'Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts our Understanding', in J. Kelly and C.P. Manfredi (eds.), *Contested Constitutionalism: Reflections on the Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009), pp. 107–28.

[3] Although Canada's earlier experiment with a bill of rights, the 1960 statutory Canadian Bill of Rights, might be considered the first rights-protecting instrument to inspire subsequent experimentation, uncertainty about what remedies the Supreme Court was authorized to impose in circumstances where it was not possible to interpret legislation in a rights-compliant manner, and the meek judicial response interpreting the Canadian Bill of Rights, make it an unlikely subject for constitutional borrowing.

[4] The influence of the notwithstanding clause was at the idea level, rather than its being a specific mechanism to emulate or adapt. Political reluctance to conceive of judicial power as authorizing courts to invalidate inconsistent legislation negated the need to adopt an explicit mechanism to reverse the effect of a judicial ruling. Thus, the triggering mechanism for political dissent from judicial rulings in New Zealand and the UK differs from that in Canada, where parliament must act affirmatively to dissent from a judicial ruling by passing legislation that invokes the notwithstanding clause to either pre-empt judicial review or to justify legislation that dissents from a judicial ruling on the Charter. In contrast, in New Zealand and the UK, parliaments can voice their disagreement with

The NZBORA, in section 6, instructs judges that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the bill of rights, this 'meaning shall be preferred to any other meaning'. However, judges are not formally empowered to rule that other enactments have been impliedly repealed or revoked, or to decline to apply any provision considered inconsistent with any provision in the Bill of Rights. In the UK, section 3 of the HRA instructs judges that 'so far as it is possible', primary and subordinate legislation 'must be read and given effect in a way which is compatible with the Convention rights'. Where such interpretations are not possible, the HRA in section 4 empowers a superior court to make a 'declaration of incompatibility' if primary legislation cannot be interpreted in a manner that is consistent with Convention rights (a power which New Zealand courts lack). As is the case in New Zealand, UK judges lack the power to declare that inconsistent legislation is invalid. Thus, unlike the more traditional view that a bill of rights invokes 'the machinery of the courts to set binding constraints on political decision-making',[5] both the NZBORA and the HRA ensure parliament's judgement prevails in decisions about how rights will guide or constrain legislation.

However, the innovative character of these bills of rights goes well beyond their attempts to conceive of judicial power in a manner that is consistent with the principle of parliamentary sovereignty.[6] Equally significant is the second idea borrowed by reformers, which we refer to as legislative rights review (it is also referred to in the literature as political rights review).[7] Legislative rights review arises from the implications and

judicial rulings by ignoring these rulings, unless courts have used their interpretive powers to alter the intent or scope of legislation to arrive at rights-compliant interpretation, after which the legislatures could simply pass ordinary legislation to reinstate their preferred intentions with respect to the scope or effects of legislation.

[5] S. Choudhry, 'Bills of Rights as Instruments of Nation Building in Multinational States: The Canadian *Charter* and Quebec Nationalism', in J. Kelly and C.P. Manfredi (eds.), *Contested Constitutionalism. Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) p. 239.

[6] Stephen Gardbaum similarly emphasizes the potential of these bills of rights, and others associated with what he refers to as the Commonwealth model, to alter how political and judicial actors review legislation from a rights perspective. For Gardbaum, the Commonwealth model has the potential to represent the optimal techniques for protecting rights. S. Gardbaum, *The New Commonwealth Model of Constitutionalism. Theory and Practice* (Cambridge: Cambridge University Press, 2013).

[7] Stephen Gardbaum refers to this practice as political rights review. S. Gardbaum, *The New Commonwealth Model of Constitutionalism. Theory and Practice* (Cambridge: Cambridge University Press, 2013), pp. 25–26. In previous work, Hiebert has referred to this concept

consequences of introducing a new statutory requirement that a government minister apprise parliament if a legislative bill is not consistent with protected rights. This ministerial requirement on compatibility was borrowed from the Canadian Bill of Rights in 1960,[8] and subsequently adapted for the Canadian Charter of Rights and Freedoms.[9] New Zealand and UK reformers anticipated that adopting this ministerial reporting obligation on compatibility would promote proactive engagement with rights when developing and approving legislation. If robustly interpreted, legislative rights review would prioritize the need to confront whether and how legislative initiatives implicate rights and assess their justification where protected rights are adversely affected, from the earliest phase of bureaucratic development and advice on a government's policy objectives, through to government's approach to and approval of its legislative agenda, and on to parliamentary deliberation and voting on bills. Viewed in this manner, the introduction of legislative rights review is tantamount to an attempt to fundamentally alter the norms of legislative decision-making.

in terms of both legislative rights review and political rights review. Upon continued reflection, we have decided to refer to the concept as legislative rights review to emphasize the institutional context in which these assessments are done, as we worry that the term 'political rights review' might misleadingly suggest these decisions are entirely based on the kinds of philosophical or political differences that distinguish political parties. Although judgment about compatibility will be inevitably influenced by different political views on the role of the state or the scope of rights, we worry that 'political rights review' diverts attention from the significant changes for assessing bills before and during cabinet, and after this in parliament (particularly in the UK where bills are assessed by a specialized rights committee), that arise from the requirements that the New Zealand Attorney General or the relevant UK Minister apprise parliament when bills are not consistent with protected rights.

[8] This idea originated in the 1960 statutory Canadian Bill of Rights. Then Progressive Conservative Prime Minister John Diefenbaker viewed a bill of rights as an instrument to revitalize parliament's role as a protector of Canadians' rights. Diefenbaker did not believe that rights were vulnerable because of inappropriate parliamentary intentions so much as to expedient bureaucratic actions that 'sacrificed [freedom] in favour of administrative or other advantages' and executive reliance (by the previous Liberal government) on order-in-council decisions that were inconsistent with rights, and which bypassed parliament. From his perspective, a key reform for improving the protection of rights was to reinvigorate Parliament's role as a custodian of rights: W.R. Jackett, 'Memorandum for the Minister of Justice', 21 April 1958; E.D. Fulton, 'Memorandum for the Prime Minister' 29 April 1958, as referred to by C. MacLennan, *Toward the Charter. Canadians and the Demand for a National Bill of Rights, 1929–1960* (Montreal: McGill-Queen's University Press, 2003), pp. 121–23.

[9] This requirement is contained in section 4(1) of the Department of Justice Act. *Department of Justice Act* R.S., 1985, c. J-2, s. 4.1(1); 1992, c. 1, s. 144(F)

The NZBORA requires (in section 7) that the Attorney General alert parliament when he or she is of the opinion that legislative bills are not consistent with the NZBORA. New Zealand borrowed this compatibility-reporting requirement in an attempt to strengthen the influence of the NZBORA on legislation, both with respect to how bills are developed and as they progress through parliament. As we argue in Chapter 2, then Prime Minister Geoffrey Palmer would have preferred to adopt a constitutional bill of rights that authorizes strong judicial remedial powers. However, when it became obvious that he lacked sufficient political support for such a radical constitutional reform and would have to settle for a statutory bill of rights with heavily constrained judicial remedial powers, Palmer thought it would be beneficial to adopt this reporting obligation, which he had learned about in an earlier visit to Canada. In his account of the reasons for adopting this mechanism, Palmer expected that this practice would serve two purposes. First, this reporting obligation would place a statutory obligation on government to act in accordance with the NZBORA, and cabinet would revise policy processes within the bureaucracy to ensure that bills were compatible with protected rights when introduced into parliament. Palmer's expectation was that this reporting requirement would function as 'a set of navigational lights for the whole process of Government to observe'.[10] Second, the requirement for the Attorney General to report to parliament when bills were inconsistent with rights would deter such practices because of the anticipated critical reaction in and beyond parliament.[11]

The UK similarly borrowed this idea of a statutory reporting obligation on compatibility, which is contained in section 19 of the HRA. However, rather than locate responsibility with the Attorney General, it is vested instead with individual ministers. UK political proponents of this reporting obligation similarly expected that this statutory obligation to report on the compatibility of legislative bills would discourage the introduction of inconsistent legislation, but thought that a more decentralized approach would better promote rights sensitivity throughout government and across departments. The UK reporting requirement also broadens the scope to cover all government bills (indicating either

[10] G. Palmer, *A White Paper for New Zealand* (New Zealand: House of Representatives, 1985), p. 6.

[11] G.W.R. Palmer, *New Zealand's Constitution in Crisis* (Dunedin, New Zealand: John McIndoe, 1992), pp. 59–60.

an affirmative claim of compatibility or inability to claim compatibility) and adapts this reporting requirement to the bicameral nature of the UK parliament. The UK has also created a specialized parliamentary rights committee, the Joint Committee of Human Rights (JCHR), to enhance parliament's capacity to scrutinize ministerial claims of compatibility.

Explaining our focus on legislative rights review

Both the NZBORA and HRA have garnered increasing attention from a largely sympathetic international scholarly community that is interested in the normative implications and sustainability of what they consider a new model for a bill of rights.[12] These bills of rights have been characterized in varied ways, including the Commonwealth model,[13] hybrid approach,[14] weak-form model[15] and parliamentary rights model.[16]

To date, the majority of scholarly attention has focused on the significance of constrained judicial power, which sympathetic commentators

[12] See for example, M.J. Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts?', (2003) 38 *Wake Forest Law Review* 635–95; J. Goldsworthy, 'Homogenizing Constitutions', (2003) 23 *Oxford Journal of Legal Studies* 482–505; M. Tushnet, 'New Forms of Judicial Review'; M Tushnet, *Weak Courts, Strong Rights*; G. Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope', (2006) 30 *Melbourne University Law Review* 880–905.

[13] S. Gardbaum, 'The New Commonwealth Model of Constitutionalism', (2001) 49 *American Journal of Constitutional Law* 707; 'Reassessing the New Commonwealth Model of Constitutionalism', (2010) 8 *International Journal of Constitutional Law* 167; *The New Commonwealth Model of Constituitonalism*.

[14] P. Rishworth, 'The Birth and Rebirth of the Bill of Rights', in G. Huscroft and P. Rishworth (eds.), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act* (Wellington: Brookers, 1995), p. 4; J. Goldsworthy, 'Homogenizing Constitutions', (2003) 23 *Oxford Journal of Legal Studies* 483.

[15] Mark Tushnet characterizes these bills of rights as incorporating weak form judicial review because judicial decisions do not determine the legal authority of legislation, and can be ignored or set aside through ordinary legislative means. He contrasts the scope of judicial powers in New Zealand and the UK with the American form of judicial review, which he describes as strong form review because it is assumed by the Supreme Court and others that this Court is supreme in the exposition of the law and the Constitution, and that its decisions impose a duty on legislatures to follow the Court's interpretation. M. Tushnet, 'New Forms of Judicial Review'; *Weak Courts, Strong Rights*.

[16] J. Hiebert, 'New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?', (2004) 82 *Texas Law Review* 1963; 'Constitutional Experimentation: Rethinking How a Bill of Rights Functions', in T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011), pp. 298–320.

believe addresses democratic objections to judicial review.[17] We do not dispute the importance of understanding how courts interpret rights, the significance of how protected rights are formulated in legal language or how bills of rights conceive the scope of judicial authority, rules of standing or judicial remedies. However, we believe it is also important to appreciate how bills of rights influence legislative decision-making. Only a small portion of the legislation that parliaments pass will ever be subject to litigation. Thus, even under more conventional bills of rights, parliaments effectively have the final say for the majority of legislation passed, regardless of whether and how rights-based considerations have shaped legislative outcomes.

Although bills of rights are expected to influence how political actors and citizens assess the legitimacy of proposed state actions, the accumulated ways in which judicial rulings more generally influence political and societal debates over time, particularly around contested issues, cannot be equated with a deliberate intent to promote legislative engagement with questions of rights as a regular element in the day-to-day legislative decision-making process. The framers of the NZBORA and HRA envisaged a more substantive parliamentary role to protect rights, both in a proactive sense of holding government to account for decisions that potentially infringe upon rights and, in the UK, in a reactive sense by revisiting legislation upon a judicial finding that legislation is not compatible with protected rights. As such, the marriage of a bill of rights with an expectation of legislative rights review is potentially a far-reaching way of guarding against rights infringements by assuming that all legislation will have been subject to rights-based compatibility review, and not just the relatively small subsection that is litigated under more conventional bills of rights and eventually subject to judicial review.[18]

This parliamentary-centred focus to rights protection explains and justifies our interest in how the NZBORA and HRA are influencing legislative decision-making processes and outcomes. Moreover, we believe the best way to characterize the NZBORA and HRA is to refer to them as *parliamentary bills of rights*, which is the term that we will be

[17] Stephen Gardbaum is an exception and focuses on the significance of both ideas, which he characterizes as constituting 'novel, and arguably more optimal techniques for protecting rights within a democracy': S. Gardbaum, *The New Commonwealth Model of Constitutionalism*, p. 1.

[18] This argument was made earlier in J. Hiebert, 'Constitutional Experimentation'.

using hereon. Our judgement on this issue reflects the importance of the political and institutional contexts associated with the Westminster-based parliamentary systems in which these bills of rights operate. Our attention to political and institutional variables differentiates our approach from the more court-centred ones that generally focus on judicial review or on the structural or textual design of a bill of rights.

In the chapters that follow, we examine the extent to which the ministerial requirement of reporting on compatibility has influenced bureaucratic development, evaluation and advice about legislative initiatives prior to their approval by cabinet and introduction to parliament. We also examine parliament's willingness and capacity to demand better explanations or evidence to justify a government's intent to pursue legislation that implicates rights adversely and, where consensus does not exist, the extent to which deliberation reflects good-faith disagreements about the scope of rights or how rights considerations appropriately guide or constrain the legislative objective in question.

We are not alone in recognizing the potential significance of introducing a compatibility-based focus for legislative decision-making. Aileen Kavanagh characterizes the combined effects of constrained judicial remedies and legislative rights review as a collaborative approach to protect rights.[19] As she argues, the central purpose of the HRA was to 'strength[en] the ability of the courts to protect rights, whilst at the same time encouraging greater parliamentary sensitivity to, and engagement with, human rights concerns'.[20] Stephen Gardbaum also conceives of the combination of constrained judicial remedies and legislative rights review as a significant change in how rights are protected – a change that he believes has potential to provide the optimal way to protect rights, by reallocating powers between courts and legislatures in a more balanced manner than occurred under either parliamentary supremacy or what is associated with judicial supremacy. Gardbaum argues that this approach, which he refers to as the Commonwealth model, combines the strengths of both polar models while avoiding both of their principal weaknesses. As a result, citizens will benefit from improved legislative reasoning about rights, while also being protected by judicial oversight that will

[19] A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), pp. 406–11.

[20] A. Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog', in Murray Hunt, Hayley Hooper and Paul Yowell (eds.), *Parliament and Human Rights: Redressing the Democratic Deficit* (Oxford: Hart Publishing, 2015).

help counter legislative under-enforcement of rights.[21] David Feldman also emphasizes the significance of this shared responsibility for confronting how proposed legislation implicates rights, suggesting that 'systematic engagement with human rights in a democratic political process can come about only when it is seen as a goal of all institutions, executive, legislative and judicial, working towards a common goal when exercising their different but complementary functions'.[22]

This attempt to broaden responsibility for judgements about rights, and to focus bureaucratic and political attention on whether legislation is justified in light of its implications for rights, addresses a concern that has long been associated with bills of rights: the temptation for parliamentarians to avoid tackling contentious issues that implicate rights and threaten to undermine party cohesiveness and divide society and, through their inaction, to pass responsibility for the resolution of these issues to courts.[23] What makes this concern particularly potent is the frequently contested nature of judgements about how rights-based principles appropriately guide or constrain complex policy debates, which for many raises democratic concerns about why courts rather than parliament should resolve these thorny issues. However, a different concern is that since only a fraction of legislation will ever be subject to judicial review, if parliamentarians abdicate political responsibility for judgements about rights, this raises the distinct possibility that many contentious issues will not be subject to any form of reasoned deliberation about the justification of legislation in light of their impact on rights. Concerns about abdicating the public and political responsibility to work through contested issues about the meaning and scope of fundamental public norms have led to calls in the United States for a more 'populist constitutional law' that leaves 'a wide range open for resolution through principled political discussions', rather than equating judicial rulings with strict constitutional requirements.[24]

Although others have addressed the significance of the new statutory obligation for ministerial reports on compatibility, there is an absence in

[21] S. Gardbaum, *The New Commonwealth Model of Constitutionalism*, pp. 68–69.
[22] D. Feldman, 'The Impact of Human Rights on the UK Legislative Process', (2004) *Statute Law Review* 91.
[23] James Bradley Thayer warned of this problem more than a century ago: J.B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (Boston: Little, Brown and Company, 1893).
[24] M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999), p. 185.

the literature of substantive and qualitative research on the differences made by this concept of legislative rights review for how public officials evaluate and advise on bills, how governments broach their legislative decisions and how parliament evaluates bills. Our intent is to address the substantial gap between optimistic assessments of the significance of this concept and its practical effects for legislation.

Initially, we framed our research as a study of whether and how ministerial reporting obligations in the NZBORA and HRA are influencing legislative decision-making. However, as our research progressed and we sought to explain how the concept of legislative review was altering government and parliamentary behaviour, we realized our initial framing of the research questions was misplaced. The more appropriate way to frame our queries is to ask: how do Westminster parliamentary factors influence the nature and impact of legislative rights review?

Our study gives priority to the institutional and political contexts in which the NZBORA and HRA operate – Westminster-based parliamentary systems where the executive generally dominates parliament and where cohesive parties structure how parliament functions. As we argue, these Westminster factors constrain and ultimately complicate ambitious attempts to introduce a compatibility-based framework as a way of influencing how government decides its legislative agenda, or how parliament scrutinizes and votes on bills.

Westminster-based parliamentary systems generally operate on the basis of what Christopher Kam refers to as a 'double monopoly of powers', in the following two ways. First, cabinet has a near monopoly over executive and legislative power; second, a single party has monopoly over the cabinet. Where the electoral system fails to produce a majority government, coalition governments can change the dynamics of political behaviour by allowing party leaders to use the possibility of dissent to constrain the demands of coalition partners.[25] In New Zealand the adoption of MMP (mixed member proportional representation) makes electoral majorities highly improbable, and thus cabinet decision-making must maintain support from other parties or key players in parliament. Nevertheless, cabinet remains the central driver of political decision-making, for which the Prime Minister is the most important and influential member. As in Rhodes, Wanna and Weller's description of the political significance of cabinet in Westminster-based parliamentary systems, including both

[25] C.J. Kam, *Party Discipline and Parliamentary Politics* (Cambridge: Cambridge University Press, 2009), pp. 6–7.