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British Journal of Political Science / Volume 35 / Issue 02 / April 2005, pp 235 - 255
DOI: 10.1017/S000712340500013X, Published online: 21 February 2005

B.J.Pol.S. **35,** 235–255 *Copyright © 2005 Cambridge University Press*
DOI: 10.1017/S000712340500013X *Printed in the United Kingdom*

Interpreting a Bill of Rights: The Importance of Legislative Rights Review

JANET L. HIEBERT*

This article contests the widely held view that an effective bill of rights requires judicial interpretation of rights to prevail over political judgement. Most bills of rights reflect classical liberal assumptions that premise freedom and liberty on the absence of state intervention. Yet they govern modern welfare states that presume and require substantial state involvement, seen to various degrees as facilitating rather than restricting the conditions for robust and equal citizenship. Judges cannot provide answers that are so definitive or persuasive to questions about whether social policy is reasonable in terms of human rights that they rule out other reasonable judgements. Although these concerns are often used to justify rejecting a bill of rights, this article takes a different position. It argues that a political community can benefit from exposure to judicial opinions on whether legislation is consistent with rights, but should also encourage and expect parliament to engage in legislative rights review. The article discusses how three parliamentary systems have attempted to infuse more concern for rights in their processes of decision making, and concludes with suggestions on how legislative rights review can be strengthened.

The language and concept of human rights have increasingly gained prominence when evaluating the merits of state actions. Historically, political and judicial roles in parliamentary systems based on the Westminster model have been conditioned by constitutional assumptions that accepted parliament's judgement as final, provided that its actions were consistent with the rule of law. Whether or not the term 'rights revolution'[1] accurately characterizes the heightened emphasis now being placed on human rights in liberal democracies, parliamentary systems have not been immune from pressure to reassess political and judicial behaviour with respect to the treatment of individual rights. As these political systems alter or consider changing their constitutional traditions by adopting a bill of rights that is subject to judicial review, interested parties engage in spirited debate about the desirability of the changes associated with this legalized form of rights discourse and the prudence of giving the judiciary an authoritative role for addressing disputes where claims of rights clash with legislative judgement. Enthusiasts and sceptics of a bill of rights inevitably confront and respond to scholarly treatment of the US Bill of Rights, widely considered as the leading paradigm for 'taking rights seriously'.[2] One idea in particular stands out for its influence on how a community's commitment to rights is evaluated. This is that for a bill of rights to be effective, judicial interpretation must prevail over political judgement. The assumption underlying this idea is that only courts interpret rights: political decisions, when different from judicial perspectives, are not considered valid or reasonable interpretations of rights.

This article focuses on this influential idea; that an effective bill of rights is dependent upon judicial hegemony for defining rights and evaluating the constitutional merits of

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[1] Charles R. Epp, *The Rights Revolution* (Chicago: University of Chicago Press, 1998).

[2] This phrase is taken from Ronald Dworkin's influential book, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978).

legislative decisions. In so doing it questions the logic and justification for exclusive reliance on judicial interpretation of a bill of rights. The article makes the following arguments. The first is that although a political community may benefit from exposure to judicial perspectives about whether legislative or executive decisions are consistent with rights, an effective bill of rights requires more than judicial review. Robust protection of rights also requires that parliament engages in rights review. Secondly, the article argues that even if one is sceptical about judicial exclusivity for interpreting rights, this scepticism does not warrant rejecting a bill of rights altogether. This argument is followed by discussion of the experiments of three parliamentary systems (New Zealand, Canada and the United Kingdom) which have introduced bills of rights while also attempting to infuse the legislative process with normative assessments of whether rights have been unjustifiably infringed. The article concludes with suggestions to enhance the quality and effectiveness of legislative rights review.

RE-EXAMINING THE REQUIREMENT FOR JUDICIAL HEGEMONY

Political scholars suggest that liberal constitutional systems emphasize two different versions of constitutionalism: juridical and political. Richard Bellamy differentiates these approaches in terms of their rationale of politics. The former emphasizes a just ordering of politics, while the latter emphasizes civic freedom. In contrast to the former's emphasis on legal attempts to control abuses of power by securing a legally interpreted set of individual rights, a more political conception of constitutionalism 'focuses on the ways citizens continually renegotiate the dimensions of politics in order mutually to determine the rules and institutional processes governing their collective life. This striving for reciprocal recognition guards against groups or individuals being subjected to another's will'.[3] Although liberal democracies contain both juridical and political variants of constitutionalism,[4] political communities that adopt a bill of rights give more emphasis to the former, whether or not this is strictly required by the constitution. Debate about the relative merits of these alternative versions of constitutionalism is considerably beyond the scope of this article. But an issue central to that debate bears directly on the subject of this article; namely, how does the decision to adopt a bill of rights affect legislative judgement about what constitutes appropriate political decisions?

Reasons for utilizing a bill of rights often focus on the benefits of establishing constraints on what the state can do when using its coercive powers in a manner that adversely affects individual freedom. Most view a bill of rights as an explicit restraint on legislative and executive powers. Interestingly, this emphasis on granting protection from state-imposed constraints often reflects only a partial view of the state, one that treats the judiciary as the umpire or neutral arbiter of conflicts and not as a potential source for rights violations. Most commentators on bills of rights do not think it is necessary to envisage similar constraints on the judiciary itself, despite the fact that when making legal rules, developing the common law and interpreting the constitution, the judiciary also exercises state power. This confidence in the judiciary reflects the view of Alexander Hamilton who more than two centuries ago suggested that the nature of the judiciary's functions ensures that it 'will

[3] Richard Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act', in T. Campbell, K. E. Ewing and A. Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001), pp. 15–39, at p. 22.

[4] Bellamy, 'Constitutive Citizenship versus Constitutional Rights', p. 22.

always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them'.[5]

Even the lack of an express judicial power to determine the constitutional limits of legislative and executive decisions has not discouraged reliance on judicial answers to constitutional questions that are binding on other branches of government. For example, in the United States, the absence of an express judicial power to review legislative and executive actions has not prevented a virtual monopoly on this power from emerging.[6] In the United Kingdom, even though the Human Rights Act formally preserves the concept of parliamentary sovereignty, some sceptics nevertheless fear that judicial perspectives will have a significant impact on how the act evolves and on societal and political debates.[7] Whether or not the nature or scope of judicial review is made explicit, the adoption of a bill of rights is generally equated with the expectation that the judiciary will or should have primary responsibility for determining whether legislation imposes unjustified infringements on rights.

Although many reasons are given for emphasizing judicial over political resolutions to conflicts that involve rights, the most persuasive, judged by its influence on scholarly debates, is that judicial review places a higher priority on principled resolutions of conflicts than would otherwise be accorded by elected representatives. Ronald Dworkin, who is amongst the most prominent defenders of this view, conceives of constitutional review as requiring no less than a fusion of constitutional law and moral philosophy.[8] Although judges are not trained as political philosophers, the addition of a structured debate about principles is important enough to recommend judicial interpretation of a constitution.[9] Laurence Tribe defends judicial finality because he considers judges to have a unique capacity and commitment to engage in constitutional discourse. From his perspective, courts alone can interpret rights because the judiciary is the only 'dialogue-engaging institution' that is 'insulated from day-to-day political accountability but correspondingly burdened with oversight by professional peers and vigilant lay critics'.[10]

But defenders of an exclusive judicial role for interpreting rights have never fully overcome the challenges posed first by Legal Realists[11] and later by a diverse range of other critical perspectives proffered by the Critical Legal Studies movement,[12]

[5] Alexander Hamilton, 'No. 78' in *The Federalist Papers* (New York: New American Library, 1961), pp. 464–72, at p. 465.

[6] Once John Marshall's treatment of this question in *Marbury* v. *Madison* was accepted as authoritative, American scholarly debate has generally assumed that judicial review is both legitimate and paramount in terms of giving meaning to the Constitution. There are, of course, exceptions. See, for example, Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton, N.J.: Princeton University Press, 1988); Paul Brest, 'The Conscientious Legislator's Guide to Constitutional Interpretation', *Stanford Law Review*, 27 (1975), 585–601; and Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, N.J.: Princeton University Press, 1999).

[7] See Tom Campbell, 'Incorporation through Interpretation', pp. 79–101; Martin Loughlin, 'Rights, Democracy, and Law', pp. 41–60; K. D. Ewing, 'The Unbalanced Constitution', pp. 103–77, all in Campbell, Ewing and Tomkins, eds, *Sceptical Essays on Human Rights*.

[8] Dworkin, *Taking Rights Seriously*, p. 149.

[9] Ronald Dworkin, 'Constitutionalism and Democracy', *European Journal of Philosophy*, 3 (1995), 4–11, p. 11.

[10] Laurence Tribe, *American Constitutional Law*, 2nd edn (New York: Foundation Press, 1988), p. 15.

[11] See in particular Karl Llewellyn, 'The Constitution as an Institution', *Columbia Law Review*, 34 (1934), 431–65; 'A Realistic Jurisprudence – The Next Step', *Columbia Law Review*, 30 (1930), 1–40; and 'Some Realism about Realism – Responding to Dean Pound', *Harvard Law Review*, 44 (1931), 1222–56.

[12] See for example Duncan Kennedy, *A Critique of Adjudication (Fin de Siècle)* (Cambridge, Mass.: Harvard University Press, 1998); and Allan C. Hutchinson and Andrew Petter, 'Private Rights/Public Wrongs: The Liberal Lie of the Charter', *University of Toronto Law Journal*, 34 (1988), 278–97.

feminist,[13] critical race[14] and lesbian and gay scholarship.[15] All in their various ways have shown the fallacy of claiming that legal reasoning or method embodies objective principles that negate the political ideology of the judge or the influence of dominant social norms. Thus, the most difficult issue for those who defend the primacy of judicial interpretation of rights over the decisions of parliament is the inability of deriving from these statements of rights an obvious or uncontested resolution to a particular conflict. The adoption of a bill of rights underscores the difficult task liberal democratic political communities incur, of distinguishing the protected sphere of human activity from the legitimate sphere of state action. Any political community that chooses a bill of rights should be modest in its expectations about the capacity of this bill of rights to provide the context for determining clear and decisive answers to questions of whether legislative decisions are warranted, regardless of who is interpreting rights. Judgement about the content of abstract statements of rights and their application to specific legislative circumstances requires those involved to draw upon their philosophical understandings of equality and liberty, and to consider the appropriate role of the state in redressing social problems.

Those who argue judicial hegemony is justified by the superior principled-based judgement of courts also give insufficient attention to the nature of the judicial inquiry into whether rights have been *unduly* restricted. Courts cannot simply resolve an issue by deciding that a right has been adversely affected but must also determine whether the purposes and means of legislation are sufficiently meritorious to justify restricting a right in the manner intended. This inquiry is necessary regardless of whether or not a bill of rights contains a general limitation clause, such as section 1 in the Canadian Charter of Rights and Freedoms, or is silent on the issue of restricting rights, as in the case of the US Bill of Rights.[16] But this inquiry bears more resemblance to policy analysis than to the legal training associated with judging. Ascertaining the nature of a social problem and deciding on the appropriate means to combat it is not an objective exercise that allows policy makers to easily determine the best solution, whether from a rights perspective or from a practical one. Often, social policy decisions have to be made with conflicting, incomplete and sometimes unobtainable information. Yet if the development of legislation is subject to discretionary judgements, then so too must be its evaluation by others, including judges. But courts, unlike parliament, do not have the resources necessary for assessing the various dimensions of a complex social issue. Judges also cannot claim any particular expertise or unique insights to evaluate the nature of social harms that legislation intends to address,

[13] See for example Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989); Lynn Hecht Schafran, 'Is the Law Male? Let Me Count the Ways', *Chicago–Kent Law Review*, 69 (1993), 397–411; Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987).

[14] For a selection of this scholarship, see Kimberlé Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas, eds, *Critical Race Theory: The Key Writings that Formed the Movement* (New York: New Press, 1995).

[15] See for example Mary Eaton, 'Lesbians, Gays and the Struggle for Equality Rights: Reversing the Progressive Hypothesis', *Dalhousie Law Journal*, 17 (1994), 130–86; Didi Herman and Carl Stychin, eds, *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (Philadelphia: Temple University Press, 1995).

[16] These inquiries have become an explicit part of the Supreme Court of Canada's approach to section 1 of the Charter, which provides: 'The Canadian Charter of Rights and Freedoms gurantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. But Mark Tushnet confirms that they also comprise part of the American judiciary's contemplation of what constitutes a right and whether it has been infringed. See Mark Tushnet, 'Judicial Activism or Restraint in a Section 33 World', *University of Toronto Law Journal*, 53 (2003), 89–100, pp. 92–3.

to anticipate factors that may hinder the effective pursuit of a legislative goal, or to identify alternative, effective means for redressing a perceived problem.[17] Judges will be generalists in terms of their knowledge of social problems and thus may find themselves dependent upon the interpretation of technical or scientific materials by others who have an ideological or partisan commitment to a particular understanding.[18] In Canada, one member of the Supreme Court recently acknowledged this difficulty when addressing the particular problems that scientific materials present for judges. Justice Ian Binnie lamented the judiciary's 'scientific illiteracy', which is a growing problem because of the increased number of disputes with a basis in science that are coming before the court. Hardly reassuring is Justice Binnie's acknowledgement that judicial attempts to overcome this illiteracy, by attempting to 'sail into the Internet' to decipher the significance of this scientific evidence, may inadvertently lead judges to obtain 'all sorts of misinformation'.[19]

The philosophical and political nature of these inquiries ensures that no bill of rights can serve as a constitutional template for evaluating correctness. At best it provides normative guidance on some of the values that should be respected in the course of governing. Rather than construing a bill of rights as a set of binding legal principles, it is more accurately viewed as an authoritative statement of many of the important principles in a political community: a code of political conduct, of sorts, that should influence decisions and evaluations of how the power of the state is exercised and the benefits and burdens to which citizens will be subject. This analogy to a code of conduct is intended to convey the idea that the determination of whether a legislative act unduly interferes with a protected right is not exclusively or even particularly legal in nature. Despite the strongly held view that courts, alone, are capable of interpreting a bill of rights, the resolution of many rights conflicts are, at heart, philosophical and political. It is difficult to overstate the contrast between the objective qualities associated with the idea of declaring *the constitution's meaning* and the reality of ideologically, philosophically and culturally influenced judgement. Nevertheless, supporters of judicial hegemony seem undeterred in championing the judiciary as the exclusive body for resolving rights conflicts. While few dispute that interpreting rights entails some degree of discretion, they reject the idea that this warrants non-reliance on judges. The fear is that by allowing legislative judgement to prevail, it too easily caters to majoritarian concerns or cost–benefit considerations that give insufficient regard to the rights of minorities.

Many who question why judicial opinions on rights should prevail over political judgement reject the premise that a bill of rights is warranted.[20] Jeremy Waldron argues that since reasonable people differ on the meaning and scope of rights and on the proper resolution to rights conflicts, it is neither prudent nor democratic to confine this judgement to courts.[21] Reliance on courts undermines the most important right of all, that of self-governance.[22] Others reject the premise that rights provide useful constraints for

[17] The discretionary nature of these inquiries is discussed in more length by the author in *Limiting Rights: The Dilemma of Judicial Review* (Montreal: McGill–Queen's University Press, 1996).

[18] Donald L. Horowitz, *The Courts and Social Policy* (Washington, D.C.: The Brookings Institution, 1977), pp. 25–6.

[19] Quoted from 'Judges ignorant of science: Binnie', *Ottawa Citizen*, 8 March 2003, A6.

[20] James Allan, 'Bills of Rights and Judicial Power – A Liberal Quandary', *Oxford Journal of Legal Studies*, 16 (1996), 337–52.

[21] Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).

[22] Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights', *Oxford Journal of Legal Studies*, 13 (1993), 18–51.

evaluating state actions. Sceptics worry that the language of rights provides an alternative and more potent political vocabulary to raise demands, wants or interests that have failed in the political arena. But it is a language that distorts the democratic process and either trivializes the purpose of providing a conservative check on democratic change,[23] or undermines progressive state actions intended to redress inequalities, by wrongly viewing the state as the enemy of freedom or equality.[24]

My response to sceptics who reject a bill of rights because they are critical of judicial hegemony, is that they should resist assuming that a bill of rights requires only judicial review. Even if a political community decides to utilize a bill of rights, it is not compelled to give primacy to judicial answers over political judgement when resolving rights conflicts. Judicial review may play a contributing factor in ensuring that a political community is sufficiently sensitive to rights. But judicial review need not, and should not, occur to the exclusion of legislative rights review. Legislative review should also be considered an important element in a constitutional regime that chooses to use human rights as critical concepts for evaluating the merits of state actions. A bill of rights can be structured in a manner, and political and legal cultures can be nurtured to accept, that judges and parliament each have legitimate interpretive roles. What follows is an argument in favour of a bill of rights that is subject to legislative and judicial review.

RESISTING JUDICIAL HEGEMONY: NOT REJECTING A BILL OF RIGHTS

The argument in this article is that legislative review should supplement, but not necessarily replace, judicial review. Critics of a bill of rights that envisages judicial review give insufficient attention to the salutary benefits of hearing judicial opinions about whether rights have been unduly restricted and to the requirement that parliament justifies its decisions in terms of consistency with rights, even when a constitution does not recognize the judiciary as having the only valid perspective on interpreting rights and resolving conflicts. Political actors can benefit from exposure to the judgement of judges who have more liberty from the electoral, public and political pressures that may constrain political decision making and whose rulings may provide important insights into why legislation represents an inappropriate restriction on a protected right. This is particularly significant for parliamentary systems where a majority government may not otherwise face serious constraints on legislative decisions. The presence of judicial review, and its potential to generate public and political commentary about legislation that is perceived to inappropriately infringe upon rights, may contribute to a culture that gives more prominence to rights as constraints on political actions.

But despite the potential benefit of hearing judicial perspectives about the interpretation of rights and the reconciliation of conflicts, it is important to remember that it is unlikely that judges, any more than philosophers, can provide answers that are so definitive and persuasive that they rule out other reasonable interpretations. The contestability of rights claims has important implications for governing. A bill of rights does not negate political responsibility to legislate in the public interest. Notwithstanding the intellectual rigour that may go into the drafting of a bill of rights, it cannot represent a full and complete statement of the values that are considered fundamental to that community. Perhaps the most obvious

[23] F. L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), p. 41.

[24] Hutchinson and Petter, 'Private Rights/Public Wrongs'.

reason for this, apart from the difficult task of trying to resolve specific legislative conflicts by an appeal to an abstract statement of rights, is that most bills of rights continue to reflect classical liberal assumptions that premise freedom and liberty on the absence of state intervention. Yet these bills govern modern welfare states that presume and require substantial state involvement, seen to varying degrees as facilitating rather than restricting the conditions for robust and equal citizenship. Thus although rights may be important normative considerations when evaluating the merits of legislation, a bill of rights offers incomplete guidelines on the basic values that need to be respected when governing. Asserting that a right has been infringed rarely addresses the essential questions associated with evaluating legislation under a bill of rights, which are: how does the activity associated with a claim to a right relate to the normative reasons why a liberal community seeks to protect certain human activities from the coercive powers of the state; how important are the values or objectives that the impugned legislation seeks; are these consistent with a free and democratic society; and is the legislation justified, in the light of its effects and goal(s)? These are questions that may admit a range of reasonable interpretations and are not of a nature that would allows judges to claim any exclusive or superior insight.

If both parliament and the judiciary interpret rights, the possibility arises that they will reach differing judgements. Although this possibility need not result in a constitutional stalemate, the rule of law does require a final resolution when a court and parliament reach contradictory judgements. The decision in the United Kingdom's Human Rights Act that parliament will have the final say on whether to respond to a judicial declaration of incompatibility is one way of resolving a potential conflict over contrary judgements. The 'notwithstanding' clause in Canada's Charter of Rights and Freedoms is another method.[25] This clause (section 33) entertains the possibility of legislative disagreement with judicial rulings on most sections of the Charter. But these disagreements can initially last no longer than the longest period between elections (five years), after which parliament must renew its intent. In the absence of such a renewal, the judicial interpretation of the Charter stands as final.

The idea of accepting the merits of a bill of rights, and yet resisting judicial hegemony for its interpretation, is sufficiently contrary to widely held assumptions about how a bill of rights should operate that it requires a significant shift in mindset about how to approach a bill of rights. Most commentators assume that a bill of rights will only be effective if it allows judges to correct rights infringements that have occurred in legislation. Few contemplate legislative review and assume that the primary political obligation under a bill of rights is to redress judicially identified problems in legislation. For many, the idea that a bill of rights would be subject to legislative review seems to turn the very purpose of having a bill of rights on its head. At issue is the propriety of having the same body with responsibility to pass legislation also reviewing the merits of these decisions when subject to challenges that they violate rights. For example, Cécile Fabre argues that if individuals 'have rights against the legislature, the latter should not be judge in conflicts it has with rights-bearers'. Instead, 'these conflicts should be settled by an independent party'. She considers courts to be an independent party, which therefore should be entrusted with this

[25] The name 'notwithstanding clause' is taken from the constitutional provision in s. 33 of the Charter, which states: '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 therefore shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter'.

task.[26] But this position assumes that the exclusive focus of a bill of rights is to protect citizens from the harmful effects of legislative actions.

A more complete interpretation of the scope of a bill of rights is that it protects individuals from inappropriate state actions. The state comprises legislative, executive and judicial actors. It is curious that those who worry about the apparent lack of logic in having parliament evaluate its legislation do not have the same doubts in connection with the judicial role. It is fully expected that consideration for rights will change the common law,[27] yet few would question the propriety of the judiciary reviewing the merits of earlier generations of judge-made laws. Yet changes to common law rules, even when inspired by rights, are not necessarily benign. On at least one occasion in Canada, the federal parliament has passed legislation to negate a common law rule because it viewed that rule as in tension with fundamental rights.[28]

What is particularly troubling about the assumptions that only courts can interpret rights, and that parliament does not have to engage in rights review because courts will 'fix' things after legislation has been passed, are the messages conveyed to society; namely, that a singular correct or obviously better answer exists for rights conflicts and that judges alone can distil this answer. These messages lull a political community into a false sense of security that judges can objectively resolve complex dilemmas and, at the same time, make it harder for political communities to consider and debate alternative perspectives.[29] Yet as Jeremy Waldron reminds us, the likelihood of persistent disagreements should be regarded 'as one of the elementary conditions of modern politics'.[30] Moreover, the assumption that only judges are capable of interpreting the meaning and scope of rights may actually undermine judicial legitimacy. If courts are expected to provide *the constitutional answer* as distinct from an authoritative perspective, legal rulings may become suspect when they fail to produce unanimity or when they diverge substantively from the conclusion of other well-meaning, reasonable and tolerant voices in the political community.

The most significant benefit of a bill of rights is not the opportunity it provides for judges to set aside bad laws, but the incentive and pressures it provides for those developing legislation to give more attention to how their decisions affect rights. A bill of rights does not have a self-enforcing power to compel a government to abandon legislative goals for which it has strong commitment, upon hearing claims that rights may be violated. The effects of a bill of rights are more systemic and relate to the political culture of governing:

[26] Cécile Fabre, 'A Philosophical Argument for a Bill of Rights', *British Journal of Political Science*, 30 (2002), 77–98, p. 89.

[27] The Supreme Court of Canada has revised many common law rules to make these consistent with the Canadian Charter of Rights and Freedoms. Commentators anticipate that British courts will also alter common law rules under the Human Rights Act. See, for example, Gavin Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' *Modern Law Review*, 62 (1999), 824–49; Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act', *Public Law* (1998), 423–43.

[28] The legislation arose in response to a change to the common law in which the Supreme Court created a new defence in sexual assault trials: extreme intoxication. The legislative debate and response indicated that parliament believed that this defence violated women's rights of security of the person and equality. For more discussion, see Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill–Queen's University Press, 2002), pp. 96–107.

[29] See Rainer Knopff, 'Populism and the Politics of Rights', *Canadian Journal of Political Science*, 31 (1998), 683–705, p. 700; and Mary Ann Glendon, *Rights Talk: The Improverishment of Political Discourse* (New York: The Free Press, 1991), pp. 171–83.

[30] Waldron, *The Dignity of Legislation*, p. 153.

specifically, does sensitivity for rights influence the way legislative goals are translated into legislation or regulatory rules, does a bill of rights change how legislative bills are conceived and evaluated, and how does a bill of rights influence the way a government responds to criticisms that fundamental rights have been inappropriately compromised? The benefit of a bill of rights, in other words, is not that it guarantees rights but that it imposes obligations and pressures on those in power to reflect upon the implications of their decisions for fundamental rights, to conceive of alternative and less restrictive ways to accomplish important social objectives and, where rights are adversely affected, to explain and justify the merits of legislative decisions.[31]

If the vitality of a bill of rights depends, in large part, on how it affects the assumptions and approaches of all who exercise power, then a serious shortcoming with the conception that a bill of rights works best as an after-the-fact corrective instrument is that this diminishes political responsibility to reflect upon whether legislation is justified. This omission could have serious consequences for the vitality of a bill of rights. Only a small portion of the body of legislation passed in a political community will ever be litigated, which results in parliamentary hegemony for determining the validity of most legislative decisions. Thus reliance only on courts to protect rights may result in incomplete protection for rights. If the intent of a bill of rights is to ensure the coercive powers of the state are not used in a manner that unduly restricts rights, parliament should also be expected to engage in a rights review with respect to its own decisions. But passing legislation without regard for rights and waiting for a court to determine the validity and merits of legislation does not fulfil this obligation.

An important reason many prefer judicial to political judgement where rights are involved is lack of confidence in parliament as a forum for reaching principled decisions. Parliamentarians' desire to retain power may dissuade them from giving due emphasis to rights when it may not be politically expedient to do so. Contributing to scepticism about parliament's judgement where rights are involved is the general weakness of parliament within the Westminster tradition. Concerns about concentrated power in the offices of the prime minister and cabinet, which many consider as representing a potential threat to rights, are reinforced by electoral systems that easily produce majority governments, as is the case in Canada and the United Kingdom, strong party discipline, resulting in few checks on government power, and shortcomings associated with, or the absence of, an effective upper house.[32]

Yet those who reject the possibility of effective legislative review fail to recognize the potential of a bill of rights to alter the assumptions and behaviour of political and judicial actors and the expectations of a political community. Although some are sceptical about the relationship between a bill of rights and legal and political changes, because a bill of rights does not exist separately from, or in isolation of, societal values and institutional assumptions of governance,[33] a bill of rights can have a dynamic force that challenges

[31] Peter Russell put it slightly differently, when he argued that the significance of the Canadian Charter of Rights and Freedoms is not whether we will have rights but what limits it is reasonable to attach to them and how decisions about these limits should be made. See Peter H. Russell, 'The Political Purposes of the Canadian Charter of Rights and Freedoms', *Canadian Bar Review*, 61 (1983), 30–54, p. 43.

[32] New Zealand is a unicameral system while Canada and the United Kingdom have upper houses with legitimacy problems arising from the appointed rather than elected nature of members.

[33] Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago, 1991).

social, legal and political attitudes, particularly where it represents a recent addition to a constitution. If judicial rulings begin to question the validity of assumptions that influence the content of social policies, or the manner in which police powers are exercised, a bill of rights may encourage renewed and more critical thinking across institutions and society about the meaning of rights and the merits of state actions that pose tension with rights. These rulings also create incentives for social groups to frame their demands or strategies for change with a more conscious reference to rights.

Canada provides a good example of how judicial, political and civic cultures have changed significantly, and quickly. The Canadian experience suggests that the Charter was critical to, and not merely coincidental with, altered judicial attitudes about the nature and scope of rights and the judiciary's responsibility when interpreting rights.[34] This reorientation has been most apparent in how the judiciary has approached the legal rights of those accused of breaking the law and how it has interpreted the equality claims of lesbians and gay men. The judiciary overcame a previous reluctance to incorporate notions of trial fairness when providing remedies for those whose legal rights were violated and has increased substantially the importance attached to the privilege against self-incrimination. In the context of equality claims, the Supreme Court broached the Charter as an opportunity to reassess how equality and discrimination should be construed, resulting in heightened emphasis on human dignity. Encouraged by judicial sympathy with many of these claims, gay and lesbian activists have reoriented their equality demands to place more emphasis on legally-oriented strategies.[35] The judiciary is not the only institution whose behaviour has been affected by the Charter. Governments regularly evaluate legislative bills to ensure that these are consistent with the Charter before being introduced into parliament. As experience with the Charter increases, parliamentarians have also become more receptive or resigned to judicially-identified obligations and constraints that require substantial changes to social policies, even on controversial matters such as the reorientation of social benefits to recognize same-sex partners and their relationships. Parliamentarians have not always agreed with judicial interpretations of the Charter but the federal parliament has never and the provincial legislatures have only rarely exercised their constitutional power to temporarily set aside judicial rulings via the 'notwithstanding' clause.[36]

Those who reject the idea of legislative rights review, because it is not consistent with how parliament is perceived to operate, should not assume that parliament is immune to cultural changes associated with the introduction of a bill of rights. Arguably, the most serious barrier to legislative rights review is not structural but attitudinal; the assumption that respecting rights is only, or primarily, a judicial responsibility. Legislative rights review has not become a more important part of constitutionalism, in large part, because so few expect or require this of parliament or government. For many, the influence of American ideas about protecting rights renders the concept of legislative rights review

[34] In its very earliest Charter decisions, the Supreme Court indicated that it must reassess the conservative and reluctant character of its earlier rulings. See decisions such as *Hunter et al.* v. *Southam Inc.* [1984] 2 SCR 145 at 154–157; *R.* v. *Therens* [1985] 1 SCR 613 at 638–639; *Singh* v. *Minister of Employment and Immigration* [1985] 1 SCR 177 at 209; *R.* v. *Big M Drug Mart Ltd.* [1985] 1 SCR 295 at 331–332, 344–346.

[35] For discussion of how the Charter has influenced lesbian and gay political strategies, see Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971–1995* (Toronto: University of Toronto Press, 1999).

[36] For more discussion of how the Charter has influenced judicial and political behaviour on a range of policies, see Hiebert, *Charter Conflicts*.

unusual or irrelevant. Yet the idea is not completely foreign to ideas of liberal constitutionalism. The idea that a bill of rights should envisage judicial and political responsibility is reflected, to varying degrees, in a number of parliamentary systems that have consciously tried to introduce more sensitivity for rights in the political process. It also builds upon a long held, but often forgotten, expectation of a constitution dating from the ideas of James Madison, who thought in terms of co-ordinate review. This concept assumes that each branch of government has responsibility to interpret the constitution for itself in questions appropriately placed before it.[37] A different, and more recent, variant of the idea of shared responsibility for interpreting a bill of rights is contained in a burgeoning American and Canadian literature where scholars extol the virtues of constitutional dialogue.[38] But the argument made in this article differs from the perspective of most proponents of dialogue, who presume that the judicial part of the conversation will be dominant and give little regard to legislative rights review prior to judicial review.

LEGISLATIVE RIGHTS REVIEW

This argument for legislative rights review reflects the practices of at least three constitutional democracies: New Zealand, Canada and the United Kingdom. All three political systems have experimented with ways to infuse legislative review with normative assessments of whether rights have been infringed. All three systems envisage, to varying degrees, executive-based rights review before legislation is introduced, followed by legislative rights review, and then judicial review. It is difficult to assess how executive review influences decisions about legislative objectives and the means chosen to pursue these. Determining how policy goals are influenced before bills are introduced into parliament is not transparent because of conventions of cabinet confidentiality. Moreover, the effects of rights-based scrutiny may be indirect. The very existence of these external and internal checks provides incentives for senior public servants and ministers to reassess their policy choices to avoid possible delays or criticisms.

Legislative Review in New Zealand

New Zealand utilizes both judicial and political review to resolve rights conflicts. The New Zealand Bill of Rights Act 1990 contains limited judicial review. Courts are required to interpret legislative enactments, where possible, in a manner that is consistent with protected rights. But the Act stops short of allowing judges to nullify legislation that clearly conflicts with rights. Instead, it contemplates political review as the method for deciding whether legislation is justified. Section 7 of the Bill of Rights requires that the Attorney General report to the House of Representatives where legislative bills conflict with the Bill of Rights.

Despite the Bill of Right's emphasis on political scrutiny, robust parliamentary debate rarely occurs about the justification of bills that are accompanied by a s. 7 report. At the time the Bill of Rights was adopted, some recommended the creation of a parliamentary

[37] Christopher Wolf, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (New York: Basic Books, 1986), p. 94.

[38] For discussion of this idea that the judicial–legislative relationship should be conceived of in dialogic terms, see Alexander Bickel, *The Morality of Consent* (New Haven, Conn.: Yale University Press, 1975); Barry Friedman, 'Dialogue and Judicial Review', *Michigan Law Review*, 91 (1993), 571–682; and Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

standing committee to examine bills from a rights perspective.[39] Although no committee has yet been established, calls to create a specialized rights committee continue to be made.[40] Although it is difficult to predict to what extent a specialized parliamentary committee would facilitate broader parliamentary and public debate about the merits of legislation from a rights perspective, two other factors that contribute to the lack of fulsome parliamentary rights-debate are the frequency and nature of s. 7 reports.

The Attorney General regularly acknowledges possible violations of rights and yet ministers of the Crown continue to promote government bills, despite this admission of inconsistency. Since enactment, thirty-four reports of inconsistency have been made – eighteen in connection to government bills and sixteen in relation to non-government bills.[41] The fact that the government continues to promote its legislation, even after an acknowledgment of inconsistency with rights, raises questions about what purpose these reports serve. Grant Huscroft, a leading legal scholar on the New Zealand Bill of Rights, is critical of s. 7 reports being made in circumstances where a persuasive argument exists to justify the legislation as a reasonable limit on a right.[42] In his view, to report an infringement of a right without considering whether the limit is justified leads to over-reporting and diminishes the significance of these reports:

> The main consequence of over-reporting is that the seriousness of a report is diminished … Such reports [of inconsistency with the Bill of Rights] should be rare, but there is no surprise in this; after all, a report under s. 7 signifies the Attorney-General's opinion that proposed legislation would establish limits on fundamental rights and freedoms *that cannot be justified in a free and democratic society*. This is a strong claim to make – perhaps the strongest claim that can be made in opposition to a bill – and the Attorney-General who makes such a claim should be prepared to back it up with the force of his or her office, resigning if his or her advice is not accepted.[43]

A related problem is the nature of these reports. They reflect the legal advice of public servants rather than the political judgement of the executive on the reasons why legislation can or cannot be considered a justifiable restriction on a right. This emphasis on legal opinion rather than political judgements about whether legislation is consistent with the Bill of Rights can discourage political debate by presenting the relevant issue as a technical, legal matter that is beyond the capabilities of ordinary parliamentarians. Moreover, these reports read like dense legal briefs and often fail to provide parliamentarians with adequate information relating to the policy rationale and philosophical considerations that underlie the objective, or information about how concern for rights has influenced the choice of

[39] Philip A. Joseph, *Constitutional and Administrative Law in New Zealand* (Sydney: Law Book Co., 1993), p. 869.

[40] K. J. Keith, 'The New Zealand Bill of Rights Experience: Lessons for Australia' (paper presented to the Bill of Rights Conference, University of New South Wales, 2002).

[41] Huscroft argues that it is important to distinguish between government and non-government bills that receive s.7 reports. He is not surprised that a government is more likely to report inconsistencies with private member bills because sponsors of these bills do not have the same benefit of the support and advice as do ministers. See Grant Huscroft, 'The Attorney-General's Reporting Duty', in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (Melbourne: Oxford University Press, 2003), pp. 195–216, at p. 214.

[42] The New Zealand Bill of Rights has adopted the general limitation clause found in s. 1 of the Canadian Charter of Rights and Freedoms. See fn. 16.

[43] Huscroft, 'The Attorney-General's Reporting Duty', p. 215. Emphasis in original.

legislative means. Yet this information is extremely relevant when determining whether legislation is reasonable and justified from a rights perspective.

Not surprisingly, these reports have done little to facilitate parliamentary debate about whether or not legislation is sufficiently important and appropriately drafted in the light of its alleged adverse implications for rights. In two instances where questions of rights have arisen with respect to government bills, the issue of contention was not the decision to proceed with the legislation but the actual requirement for a report at all.[44] In three other instances where a government bill was accompanied by a report of inconsistency, the relevant bills were passed without amendment to address the provisions that prompted the report of inconsistency.[45]

The process of reporting inconsistencies with rights has not been entirely ineffective in terms of prompting changes. Parliamentary review resulted in rights-based changes to two government bills. In one, a mandatory reporting obligation to alert a social worker or the police about suspected child abuse, identified by the Attorney General as inconsistent with the Bill of Rights, was deleted at the suggestion of the select committee studying the bill. However, some are critical of the Attorney General's conclusion that this provision is not justifiable restriction of freedom of expression.[46] Another bill where an impugned provision was removed was the Electoral Amendment Bill (No. 2), which sought to ban the publication of public opinion poll results for twenty-eight days prior to an election. The Justice and Electoral Committee concluded there was insufficient cause to restrict citizens' right to freedom of expression as proposed in the bill.[47]

Reinforcing the weakness of parliament, as a locus for robust deliberation about the merits of legislation that gives rise to a s. 7 report, is the perception amongst legal scholars and public and political officials that the s. 7 reporting obligation is an administrative rather than parliamentary form of scrutiny.[48] Huscroft, for example, notes that 'although the purpose of s. 7 is to identify and alert the House to inconsistencies in proposed legislation', its actual significance lies in 'its impact on the policy development and legislative drafting processes'.[49] He concludes that despite the relatively large number of s. 7 reports to date, Bill of Rights considerations clearly 'are taken into account' when developing and drafting

[44] For example, in the Transport Safety Bill (1991) the Attorney-General reported that a provision authorizing random breath-screening of drivers infringed upon the right to be secure against unreasonable search and seizure and the right not to be arbitrarily arrested or detained, and could not be justified as a reasonable limit. The president of the Law Commission (who is now a justice of the Court of Appeal) challenged this report, arguing that mandatory breath-screening is consistent with the Bill of Rights. See K. Keith, 'Road Crashes and the Bill of Rights: A Response', *New Zealand Recent Law Review* (1994), 115–19. In the Films, Videos, and Publication Classification Bill (1992), which proposed a comprehensive scheme of censorship, the Attorney General's s. 7 report focused on a strict liability offence of possession of objectionable materials, as an inconsistency with the Bill of Rights. But this advice was challenged by the Legislation Advisory Committee, arguing that although the strict liability provision may be criticized as bad policy, it was not inconsistent with the Bill of Rights. For discussion of parliamentary evaluation of bills that have been accompanied by s. 7 reports, see Huscroft, 'The Attorney-General's Reporting Duty', pp. 202–15.

[45] See Huscroft's discussion of the Land Transport Bill, Casino Control (Moratorium) Amendment Bill, and the Electoral Amendment Bill (No. 2), and the Social Security (Residence of Spouses) Amendment Bill. See Huscroft, 'The Attorney-General's Reporting Duty', pp. 210–13.

[46] Huscroft, 'The Attorney-General's Reporting Duty', p. 210.

[47] Electoral Amendment Bill (No. 2), as reported from the Justice and Electoral Committee, p. 11, available at http://www.clerk.parliament.govt.nz/publications/committeereport/default.htm/

[48] Philip Joseph characterizes the s. 7 reporting obligation as 'an administrative mechanism for monitoring legislative proposals'. See Joseph, *Constitutional and Administrative Law in New Zealand*, p. 869.

[49] Huscroft, 'The Attorney-General's Reporting Duty', p. 213.

legislation and that this 'reporting duty has encouraged compliance with the Bill of Rights'.[50] But an important consequence of this emphasis on administrative rather than parliamentary scrutiny is that decisions about the justification of legislation are presumed to be matters for legal rather than political judgement (as administrative decisions are heavily influenced by legal opinion). Yet, as argued earlier, many questions about whether legislation is consistent with rights are contested; reasonable resolutions are not to be found only in legal opinion but through political and philosophical debates. An exclusive or disproportionate emphasis on administrative rather than political scrutiny can alter the way political conflicts are resolved.

Legislative Review in Canada

In 1982 Canada amended its constitution to include the Canadian Charter of Rights and Freedoms, giving the judiciary clear authority to declare legislation invalid upon a judicial finding that the restriction is inconsistent with the Charter. But before litigation occurs, Canada has a formal process of political rights scrutiny at the federal executive level, and most provincial governments also subject bills to Charter review before they are introduced into parliament. The federal minister of justice has a similar statutory reporting requirement under the Charter as that contained in New Zealand's Bill of Rights. This requirement actually pre-dates the Charter and was first developed in association with the 1960 statutory Bill of Rights. The reporting obligation requires the minister of justice to certify that bills have been assessed in the light of the Charter and, when inconsistent with its purposes and provisions, to report inconsistencies to parliament.

The Canadian Justice Minister has never made a report of inconsistency. The absence of reports does not mean a lack of meaningful rights review before legislation is introduced. In fact, some parliamentarians have been critical of the perceived influence that the government's lawyers have on policy development and believe that Charter risks are exaggerated, leading to overly cautious legislation.[51] The absence of reports is explained by a bureaucratic and political practice that requires necessary amendments to be made to a bill so that the minister of justice is satisfied that the legislation has a credible chance of surviving a Charter challenge. The prevailing assumption is that the government should not pursue legislation that is considered to be so patently inconsistent with the Charter that it would require the justice minister to report to parliament. Before reaching this stage, the bill should be either amended or withdrawn.[52]

The possibility that a court may declare legislation invalid has had an important influence on how proposed legislation is assessed. Rights scrutiny by the department of justice has become far more robust since the Charter was adopted than when undertaken under the 1960 Bill of Rights, where courts lacked the same mandate to declare legislation invalid. Interviews with lawyers involved in the process suggest that many departments initially were resistant to acting on advice that proposed bills be amended to redress likely Charter

[50] Huscroft, 'The Attorney-General's Reporting Duty', p. 213.

[51] A good example was the federal government's attempt to establish a national DNA data bank for resolving previously unsolved crimes. The opposition wanted stronger measures that would allow police to collect DNA samples from criminal suspects at the point of arrest. The federal government rejected this position, arguing that the judiciary would be likely to rule this unconstitutional, and promoted legislation that allows for DNA samples to be obtained only after individuals have been convicted of serious offences, such as murder, sexual assault, and break and enter. See Hiebert, *Charter Conflicts*, pp. 118–45.

[52] The process of executive review is discussed in more depth in Hiebert, *Charter Conflicts*, pp. 7–19, 195.

violations. But as the Supreme Court began invalidating legislation, the legitimacy and salience of internal Charter review increased.[53] A few significant setbacks, where the invalidation of legislation had significant policy and fiscal consequences, contributed to the development of a more receptive and robust rights culture across governmental departments.[54]

Unlike New Zealand, which does not have a parliamentary committee to evaluate legislation for consistency with rights, the Canadian federal parliament has a standing committee in both houses that regularly evaluates legislative bills that have legal or constitutional implications.[55] Yet legislative rights review is undermined by the lack of expectation that a government minister will publicly declare whether and how legislation affects rights. It is important to recognize that the political decision of not reporting to parliament is not predicated on there being no rights violation, but on a judgement that the government stands a reasonable chance of successfully defending its legislation if litigation arises. But parliament lacks independent legal advice and must ascertain the nature of the risk entailed or, alternatively, whether excessively risk-averse measures have been undertaken. Thus, the Canadian approach does not provide parliament with sufficient information for its task. Requests for access to information that explains the government's assumptions about relevant Charter concerns have been denied, leaving some committee members sceptical about their capacity to assess the constitutional implications of bills. The knowledge that the government has not reported to parliament about a bill's possible inconsistency with the Charter may be puzzling in the light of the testimony of individuals or groups raising what they consider to be serious Charter problems. As one member described the difficulty the committee encounters:

> We find ourselves in a terrible position where we are asked to pass legislation in respect of which we do not have the resources to make a judgment as to whether [it is] in accordance with the Charter. We take the word of the Minister of Justice, but we never have an opportunity to find out to what extent that word is based on reality.[56]

Canadian parliamentary review committees have had a limited influence on bills, largely because the government treats the issue of Charter consistency as an executive rather than parliamentary responsibility. Yet, ironically, the idea behind creating a statutory reporting obligation for the justice minister was to foster an enhanced parliamentary role to evaluate the rights dimension of legislation.[57] Nevertheless, there are a few instances of parliament

[53] Hiebert, *Charter Conflicts*, pp. 7–19.

[54] The most important of these early decisions, in terms of conveying the message that the Supreme Court would not be easily convinced of the justification of legislation that restricted rights, and that judicial rulings could have serious policy and fiscal consequences, were: *Law Society of Upper Canada* v. *Skapinker* [1984] 1 SCR 357; *Hunter et al.* v. *Southam Inc.* [1984] SCR 145: *Singh* v. *Minister of Employment and Immigration* [1985] 1 SCR 177; *R.* v. *Oakes* [1986] 1 SCR 103; and *R.* v. *Schachter* [1992] 2 SCR 679.

[55] These are the House of Commons Standing Committee on Justice and Legal Affairs and the Standing Senate Committee on Legal and Constitutional Affairs.

[56] Individual members have requested copies of reports from the Minister of Justice to explain conclusions reached from its process of evaluating bills. In the early days of the Charter, requests by committee members to speak to the person 'who has certified a bill' in terms of the Charter were met with various explanations of why this was not possible. Included in these were that the concept or word 'certify' is a 'misnomer' for the process undertaken; that the person certifying a bill is the chief legislative counsel but he or she acts on the advice that is provided by the department; and that 'ultimately, the guardian of our Charter advice is the human rights law section' (Canada: Senate Standing Committee on Legal and Constitutional Affairs, 21 June 1993, 50:44–8).

[57] The 1960 statutory Canadian Bill of Rights was expected to create a new impetus for government to be more sensitive of rights when developing legislation. This impetus arose from the requirement of having to examine

pressuring for Charter-inspired amendments to legislation. The most significant occasion occurred in a specialized committee established to study anti-terrorist legislation (Bill C-36) introduced in response to the events of 11 September 2001. The Senate committee focused heavily on the rights-dimension of the legislation and whether the increased emphasis on security was unduly curtailing liberty. It was particularly troubled by the broad definition of a terrorist suspect, and was persuasive in changing the definition to make clear that terrorism is not interpreted to include unlawful acts, such as illegal strikes and other actions of civil disobedience that bear no relation to terrorism. A second concern was the bill's creation of a new preventive detention measure, allowing a police officer to arrest and detain an individual if he or she has reasonable grounds to believe that a serious terrorist offence is about to take place and suspects that the arrest of a particular person will prevent this event from occurring. The Committee wanted the legislation changed to ensure that persons arrested had automatic and rapid referral to a higher court. The Committee also worried about the lack of checks on the Attorney General's discretion personally to issue a certificate prohibiting the disclosure of information for the purpose of international relations or national defence or security. It recommended that these certificates be reviewed by the Federal Court and be subject to a specific time limit, for example five years, which could be renewed if subject to the same review procedure. Other recommended amendments were the inclusion of a 'sunset clause' so that the legislation expires in five years, and greater parliamentary and judicial review of the discretionary powers contained in the act to ensure that these are not interpreted too broadly or exercised without cause.[58]

The government agreed to some of these suggested changes, including: an amendment to the definition of terrorist activity to make it clear that civil disobedience is not interpreted as a terrorist act unless it is intended to cause death, serious bodily harm, endangerment of life, or serious risk to the health or safety of the public; the inclusion of an interpretive clause to clarify that the expression of political, religious or ideological beliefs is not a terrorist activity unless it also constitutes conduct that meets the legislative definition of 'terrorist activity'; a recognition of judicial review of orders given by the Attorney General for prohibiting the disclosure of information; and a requirement that the Attorney General and Solicitor General of Canada table an annual report to Parliament on the use of preventive arrest and investigative hearings. The government also accepted the need for a partial sunset clause. This sunset provision applies only to measures related to investigative hearings and preventive arrests, which would expire five years after Royal Assent. After this time, this provision could be renewed for five more years through a resolution passed in both the House of Commons and Senate.[59] But the government was not prepared to accept a general sunset clause for the legislation, suggesting that parliamentary review provides a sufficient safeguard to ensure that the legislative provisions 'were being used fairly and wisely'.[60]

(F'note continued)

bills for their consistency with rights and report to parliament any fundamental inconsistencies. Together, these innovative features were expected to ensure that governments did not willingly violate rights and that if they did err, or exercise poor judgement, parliamentary scrutiny would use sufficient pressure to redress the problem. For discussion of this development, and why these salutary benefits did not materialize, see Hiebert, *Charter Conflicts*, pp. 4–7.

[58] Special Senate Committee on the Subject Matter of Bill C-36, First Report, Senate Journals, 1 November 2001, http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/sm36-e/rep-e/rep01 oct01-e.htm.

[59] Explanation for the government's amendment provided on Department of Justice website, 20 November 2001. http://canada.justice.gc.ca/en/news/nr/2001/doc, 27902.html.

[60] For more discussion of parliament's evaluation of this legislation, see Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill–Queen's University Press, 2003), pp. 56–84.

Legislative Review in the United Kingdom

The Human Rights Act (HRA) came into effect in the United Kingdom in 2000 and incorporates the European Convention of Human Rights (ECHR) into domestic law. The HRA represents an innovative contribution to the international array of rights-protecting instruments. The judiciary is not authorized to invalidate legislation that is inconsistent with rights. Instead, the HRA obliges courts to interpret legislation 'so far as possible so as to be compatible with Convention rights'. Where this is not possible the HRA 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. What is expected to dissuade a government from introducing legislation that is patently in conflict with protected rights is a desire to avoid criticism that may arise if legislation results in a judicial declaration of incompatibility. Where judicial rulings of incompatibility are made, the government can utilize a 'fast-track' procedure to amend legislation. Another incentive for executive rights review is the obligation of ministers to report to parliament on whether or not proposed legislation is incompatible with rights. The individual minister sponsoring a bill must report that legislation is either compatible with Convention rights (s. 19(1)(a)) or declare that he or she is unable to make a declaration of compatibility (s. 19(1)(b)).

Unlike Canada or New Zealand, where the parliamentary role for evaluating rights is relatively marginal, the United Kingdom parliament is expected to have an influential role evaluating legislation from a rights perspective. A new committee has been established, the Joint Committee on Human Rights, whose role is to advise both houses about whether rights have been fully respected in legislative bills. The committee has an independent legal adviser, who conducts a regular audit of legislative bills for possible rights violations. The committee receives representations and submissions from a variety of sources, including individuals who are affected by bills, specialized groups working in the field covered by the bill, and non-governmental organizations that have expertise and interests in protecting rights. The committee may canvass comments on the implications of bills for human rights and, after reflecting on issues, may seek an explanation or clarification from the department in question. Where a possible human rights violation is perceived, the commission drafts specific questions to the minister responsible to elicit information and arguments for its assessment of whether the provision in question is compatible with protected rights.[61] Thus, underlying the HRA is the ambitious ideal of promoting a political culture that is more sensitive towards human rights. The attainment of this ideal rests to a considerable extent on expectations that the HRA will bring about significant changes to governmental, parliamentary and judicial behaviour.

Although it is too early to offer a comprehensive assessment of the British model, at first glance it appears to overcome some of the obstacles that may undermine effective legislative review in Canada. For example, the British approach does not replicate the Canadian problem of no reports about how bills implicate rights, which places a high burden on parliamentary committees to both identify and ascertain whether rights are being unduly infringed.

[61] David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights', *Public Law* (2002), 323–48, pp. 333–4.

An affirmative reporting requirement is preferable to reliance on the discretionary decision of a minister about whether a rights infringement is sufficiently serious to warrant a report to parliament. The expectation that ministers must acknowledge their assumptions or state their intentions about whether legislation is consistent with a bill of rights coincides with a natural tendency of an opposition party to criticize a government. The adversarial nature of parliament, combined with the encouragement of more civil liberty-minded parliamentarians, should result in a healthy degree of scepticism even when a minister claims that a bill is consistent with rights. Alternatively, when a minister declares an explicit intent not to respect fundamental rights (which is not likely to occur frequently), this statement will inevitably generate scrutiny and controversy. Yet despite this affirmative reporting obligation, some critics allege serious rights violations have arisen, which have not prompted reports of incompatibility. Another concern is that the government makes bald statements of compatibility rather than provide more full explanations of its reasons or assumptions about why legislation is or is not consistent with rights.[62]

The Anti-Terrorism, Crime and Security Bill provides the best example to date of parliament putting pressure on the government to explain and defend legislation in terms of its effects on rights. The legislation was introduced in November 2001 and changes the law on immigration and asylum by providing for the indefinite detention of suspected international terrorists, a decision that required the government to derogate from the ECHR. The government interpreted its decision to report this derogation as otherwise allowing it to conclude that the legislation did not require a report of incompatibility under s. 19 (1)(b) of the HRA.[63]

The Joint Committee on Human Rights offered a vigorous critique of the government's proposed anti-terrorist measures. Yet despite pressure to amend the legislation, many of the impugned provisions remain. The committee was not convinced that the government had demonstrated that a public emergency existed that threatened the life of the nation, and reminded the government that the United Kingdom's 'armour of anti-terrorism measures is already widely regarded as among the most rigorous in Europe' and yet 'no other Member State of the Council of Europe has so far felt it to be necessary to derogate from Article 5 in order to maintain their security against terrorist threats'.[64] Other concerns raised by the committee were the overly broad definition of a terrorist, particularly in the light of the indefinite detention of suspects; the lack of due process when appealing a certificate identifying a person to be an international terrorist; the absence of requirement that suspicions or beliefs be reasonable when determining who constitutes a terrorist; the requirement that fingerprints be taken from immigrants and intending immigrants; the retention of these fingerprints after their cases are resolved; the lack of appropriate safeguards against abuse of the fingerprint database; insufficient safeguards on new police powers to detain and search suspects; and the creation of police powers to require anyone

[62] See Joint Committee on Human Rights, *Second Special Report: Implementation of the Human Rights Act*, 10 April 2001 (2000–01 HL 66–I, HC 332–I), Appendix 19, Memorandum by Justice. See also discussion by Liberty, 'Re: Proceeds of Crime Bill: Draft Consultation Paper,' www.liberty-human-rights.org.uk, and 'Anti-Terrorism legislation in the United Kingdom and the Human Rights concerns arising from it,' www.liberty-human-rights.org.uk/issues/terrorism.html

[63] For discussion of how the bill affects rights, see Joint Committee on Human Rights, *Second Report, Anti-Terrorism, Crime and Security Bill*, 16 November 2001 (2001–02 HL 37, HC 372).

[64] Joint Committee on Human Rights, *Second Report, Anti-Terrorism, Crime and Security Bill*, para. 30.

to remove items that may conceal identity, which may be a matter of sensitivity on religious grounds and disproportionate to the problem the legislation seeks to remedy.[65]

Many of the committee's concerns provided the context for robust parliamentary deliberation in both houses about the merits of the government's anti-terrorist measures. The government made some amendments in response to these concerns. For example, it introduced a legal requirement for reasonableness relating to a decision to certify a person as a suspected international terrorist,[66] modified the overly-broad definition of a terrorist suspect,[67] and introduced a sunset clause.[68] But the government refused to change its position with respect to the Derogation Order.

REFLECTIONS ON HOW TO STRENGTHEN PARLIAMENTARY REVIEW

All three political systems discussed here are still in the early stages of learning to live under a constitutional regime that accords more significance to rights when determining the merits or validity of political judgements. They face two serious challenges: the domination of parliament by the executive, and the influence of traditional orthodoxy with respect to bills of rights, which assumes that only lawyers or judges are capable of interpreting them.

All three countries share in common a new political commitment for government to alert parliament about its intentions and actions with respect to how legislation affects rights. This signifies recognition that political accountability is a vital aspect of ensuring that rights are duly respected. But governments should not assume that their own internal evaluations sufficiently discharge their responsibility to be accountable, or that reviewing how legislation affects rights is primarily an administrative responsibility. Parliament has a vital role in this process of accountability, by reviewing government decisions and facilitating discussion and debate about whether legislation is justified in the light of its implications for rights. To perform this task adequately, parliament requires more information about why the government believes a bill is justified or is compatible with rights. Government practices to date are generally insufficient, whether they take the form of a formal statement of compatibility with little explanation of the assumptions or values that led to the decision (United Kingdom), are confined to internal and confidential processes with no acknowledgement to parliament of any possible Charter conflict (Canada) or produce frequent reports that neglect difficult political judgement about whether restrictions on rights are justified (New Zealand). Ministerial statements should provide information relevant to debate about the merits and justification of the legislative

[65] Joint Committee on Human Rights, *Second Report, Anti-Terrorism, Crime and Security Bill*, paras 17–68.

[66] Nevertheless the Committee still has concerns about whether other changes, which could permit a person to be detained indefinitely, even after new evidence or a change of circumstances shows no basis for this detention. See Parliamentary Committee on Human Rights, *Fifth Report, Anti-Terrorism, Crime and Security Bill: Further Report*, 5 December 2001 (2001–02 HL 51, HC 420), paras 8–15.

[67] The original proposed definition referred to people who have 'links with' an international terrorist or international terrorist group. The amended version limits this to people who have links with international terrorist organizations, and includes a sub-clause that explains that a person has links with such an organization if he or she 'supports or assists' it. The Parliamentary Committee still was concerned by the reference to 'supports' and suggested that this meaning will have to be interpreted as meaning 'supports in a material or active way' to avoid infringing rights. See Parliamentary Committee on Human Rights, *Fifth Report, Anti-Terrorism, Crime and Security Bill: Further Report*, para. 19.

[68] Under this sunset clause, the detention provisions in clauses 21 to 23 of the Bill will cease to have effect at the end of 10 November 2006. See Parliamentary Committee on Human Rights, *Fifth Report, Anti-Terrorism, Crime and Security Bill: Further Report*, para. 20.

objective, such as the harm or social concern that the legislation seeks to address, the significance of the rights infringement, and why obviously less restrictive measures are not being utilized. The very idea of political scrutiny challenges traditional orthodoxy about a bill of rights, which assumes judgement about rights is exclusively or primarily a judicial responsibility. Hence it is important that these explanations avoid technical, legal language that excludes ordinary parliamentarians or portrays the relevant issues as strictly legal matters that are beyond the competence of non-constitutional lawyers.

Yet more is required than merely producing substantive ministerial statements about how bills affect rights. Parliament also requires sufficient opportunity to examine bills and hear from non-governmental witnesses and experts who provide different perspectives on whether the claimed objective is justifiable and whether the means contemplated are reasonable. It also requires commitments by ministers to address parliament's rights-based concerns and by the government not to rush a vote on legislation before parliament has had sufficient opportunity to assess and debate its merits.

The importance of responding to a committee's concerns should not be understated. This exchange will help frame parliamentary debate about whether a proposed course of action is consistent with constitutional norms. But it will also comprise an important part of the public record of debate that can be relied on by individuals and interest groups in their political activities and may be relevant for judges when reaching judgement about whether legislation imposes an unnecessary or undue restriction on a right. It is much harder to argue for an alternative judgement when confronted with counter claims of discrimination or other violations of fundamental rights. The importance of providing a government's reasons for concluding that a legislative bill is compatible with constitutional norms, or the reasons for departing from these norms, is even more important in political systems that do not give courts an ability to declare legislation invalid. The decision in New Zealand and the United Kingdom against giving the judiciary the final say when determining constitutional validity means that remedies for violating rights must come from the political process. This emphasis on political rather than judicial remedies reinforces the importance of a political culture that is sufficiently sensitive to rights. It is dependent, in other words, on expectations that a government is required to explain and justify when its judgement is contrary to other authoritative voices that suggest that legislative decisions might be incompatible with constitutional norms.[69] Otherwise, legislative rights review may too easily be dismissed as simply another set of objections, alongside the abundant criticisms that any political opposition can be expected to make.

Parliamentary rights committees (or in New Zealand's case the relevant standing committee) can facilitate more robust debate by providing a clear statement to parliament on concerns about a bill's consistency with fundamental rights. As rights committees will be comprised of members from differing political parties, including the governing party, it is important that members distinguish this task of identifying possible rights violations from undertaking qualitative or partisan judgements about the merits of the policy. The role of the committee should not be viewed as having to 'solve' the question of whether a legislative bill imposes an undue or unwarranted restriction on rights, but to provide a

[69] Canada's earlier experiment with a statutory bill of rights relied heavily upon expectations that legislative proposals would be evaluated before and after they were introduced into Parliament, and that political pressure to conform to these principles would ensure that a government did not deliberately violate rights. This bill of rights did not have an appreciable effect on government decisions. The biggest obstacles were that the political culture of the time did not compel the government to explain or justify the effects of its decisions in terms of rights, in parliament or in the courts.

framework to facilitate broader parliamentary and public debate on the justification of the proposed legislation. This distinction is important for both pragmatic and philosophical reasons. No matter how sincerely members interpret their responsibilities, the majority will have political affiliations. The philosophical and partisan association with a political party may influence some members' judgement about the seriousness of a possible rights infringement. Moreover, as argued earlier, few conflicts involving rights evoke obvious and uncontested resolutions. Therefore there is no reason to create an elite parliamentary body with the definitive judgement on how to resolve these issues.

Although Canada is the only political system of the three discussed here that risks having legislation declared invalid, all three political systems should reasses legislative decisions in the face of a contrary judicial perspective. It is not necessary to accept the claim that the judiciary is uniquely equipped to interpret rights to appreciate the significance of the judiciary's relative insulation from public and political pressures and the liberty this affords to identify legislative decisions that impose unwarranted or undue restrictions on fundamental rights. If a government is determined to continue with legislation that the nation's highest court believes is fundamentally inconsistent with constitutional norms, it should be expected to publicly defend its decision. In Canada, the ability to continue to act in a manner that is contrary to a judicial ruling (via the 'notwithstanding clause') should compel legislative review by a parliamentary rights committee before this power is utilized. In the United Kingdom, although a fast track procedure exists for a government to redress legislation that has been declared incompatible with rights, the government is not required to act. It is also not required to explain to parliament its reasons for disagreeing with a judicial finding of incompatibility. New Zealand's Bill of Rights does not address this situation. In justifying why parliamentary judgement should prevail over judicial judgement, those defending legislation should reflect upon the reasons and concerns in judicial opinion and be prepared to defend why their contrary opinion has more merit. The government should satisfy parliament that its judgement represents a reasonable and compelling interpretation of constitutional norms.

CONCLUSION

The adoption of a bill of rights signals a political community's decision to utilize rights to evaluate the appropriateness of state actions. No matter who interprets rights, a bill of rights cannot guarantee correct answers to the resolution of a perceived rights conflict. At best it can encourage more careful societal and institutional reflection on the effects and justification of state actions where rights are infringed. Instead of conceiving of rights as vetoes over legislative decisions, it is more constructive to view rights as normative obligations upon all state actors to satisfy themselves that their decisions are consistent with constitutional norms.

The idea that courts alone should interpret rights pays insufficient attention to the philosophical nature of conflicts about rights and legitimate differences about how to reconcile liberal concerns for protecting citizens from the coercive powers of the state with the more expansive role of government in a welfare state. The idea that rights will and can be protected only by courts also gives insufficient attention to the possible occurrence of rights infringements that may never be litigated. As a consequence, the overriding goal of a bill of rights, of ensuring that state actions are consistent with its normative values, may not be fully realized if legislative decision making is not sufficiently guided by respect for these same values.