Parliamentary Bills of Rights: An Alternative Model?

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This paper examines the emergence of a new model for protecting rights (referred to as the 'parliamentary rights' model) in Canada, New Zealand, the United Kingdom, and the Australian Capital Territory. This parliamentary model is distinguished from the more traditional, judicial-centric, approach to rights protection in at least two ways. The first is that this parliamentary rights model incorporates the notion of legitimate political dissent from judicial interpretations of rights. The second way it challenges the court-centred model is by incorporating the systematic evaluation of proposed legislation from a rights perspective. Both of these features allow for the possibility of a broader range of perspectives on the appropriate interpretation of rights or the resolution of disagreements involving claims of rights than those arising from more judicial-centric bills of rights. The paper assesses whether this alternative approach to rights protection satisfies those sceptics who doubt the virtue or prudence of conceiving of political disputes as legal rights claims for which the judiciary has the dominant role in their interpretation and resolution.

Conventional wisdom suggests that liberal constitutionalism can take one of two rival paths. One path is to codify rights, representing a higher law than ordinary legislation, where the judiciary is empowered to interpret these and grant remedies for their infringement. This is the model influenced by American-style judicial review, and has been emulated and adapted in Western Europe after 1945 and in central and Eastern Europe after 1989.[1] Although significant differences exist in the nature of constitutional adjudication (relating to whether ordinary or constitutional courts are used, differences in the appointment, composition and tenure of judges, and how issues come before courts),[2] what unites this approach is the judiciary's capacity to nullify legislation that is deemed inconsistent with protected rights. And nullify legislation they have. In the past thirty years, the 'French, German, and Italian courts have, respectively, invalidated more national laws than has the US Supreme Court – in its entire history'.[3]

The second path emphasises the supremacy of legislative judgment. This is the approach of Westminster-modelled parliamentary systems that historically have

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1 S. Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707; W. Sadurski, 'Rights-Based Constitutional Review in Central and Eastern Europe' in T. Campbell, K. D. Ewing and A. Tomkins (eds), *Sceptical Essays on Human Rights* (New York: Oxford University Press, 2001).

2 For discussion of some of these differences, see J. Ferejohn and P. Pasquino, 'Constitutional Adjudication: Lessons from Europe' (2004) 82 Tex L Rev 1671; A. Stone Sweet, 'Why Europe Rejected American Judicial Review. And Why It May Not Matter' (2003) 101 Mich L Rev 2744.

3 Sweet, n 2 above, 2780.

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rejected the idea of construing political debates as legal conflicts that require a judicial role in their resolution. Rights are not foreign to this system and are protected through the rule of law and interpretations of the common law. Yet their function is different from the previous model. Individual rights do not provide independent checks to determine the validity of legislative judgment. Instead, the legitimacy of a political system is premised on the general right to participate in the political deliberations that characterise representative government. Political systems based on the supremacy of legislative judgment do not 'understand political rights in terms of the drawing of boundaries around autonomous individuals' but celebrate, instead, the 'right of rights'[4] in which 'large numbers of rights-bearers act together to control and govern their common affairs'.[5]

Those who are sceptical about the merits of using bills of rights as the central method to structure and evaluate political decisions are no doubt frustrated by the triumph of this first path of constitutionalism. Despite their persistent and dire warnings of the negative consequences of relying on legally interpreted rights to determine the validity of contested state actions, no indication exists of any intent amongst political communities to reverse prior decisions and discard their bills of rights.[6] Moreover, decisions to adopt bills of rights where judges determine the validity of impugned legislation have often been made without serious contemplation of what constitutionalising rights means for the democratic right of participation.[7]

Sceptics have had to resign themselves to the popularity of this juridical form of constitutionalism. They continue to comprise a minority perspective in doubting the prudence of utilising a bill of rights. And even if their criticisms were to motivate a political movement intent on discarding this new parliamentary bill of rights, the level of resistance and the political and legal difficulties associated with such a radical change would probably ensure constitutional inertia. Although sceptics may have resigned themselves to their inability to transform constitutional paths already taken, they continue to argue strenuously against the demise of this second model. Nevertheless, such resistance seems futile as parliamentary jurisdictions such as Canada (1982), New Zealand (1990), and the United Kingdom (1998) have adopted bills of rights. Once commonplace in the Commonwealth world, this second model now exists in an unqualified form in only one common law country – Australia[8] – and even this exception is qualified by the Australian Capital Territory's adoption of a statutory bill of rights in 2004. Moreover, one Australian state, Victoria, is actively engaged in a consultation exercise to consider adopting a statutory bill of rights.[9]

4 J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) 282. See generally chs 10–11.
5 *ibid* 233 (note omitted).
6 K. D. Ewing, 'The Case for Social Rights' in T. Campbell, J. Goldsworthy, and A. Stone (eds), *Protecting Human Rights. Instruments and Institutions* (New York: Oxford University Press, 2003) 323.
7 W. Sadurski, 'Rights-Based Constitutional Review in Central and Eastern Europe' n 1 above, 315–317.
8 K. D. Ewing, 'Human Rights' in P. Cane and M. Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 288.
9 Victoria Attorney General Rob Hulls announced on 18 April 2005 the creation of a Human Rights Consultation Committee. http://www.justice.vic.gov.au/CA256902000FE154/Lookup/HR_Consultation_project/$file/communityconsultationpaper.htm (Last visited 26 July 2005).

Yet not everyone believes it is appropriate to characterise the adoption of these bills of rights as the triumph of the first model of liberal constitutionalism, with its emphasis on American-style judicial review. Stephen Gardbaum argues instead that these recent conversions represent a new middle ground, which he characterises as the Commonwealth model of constitutionalism. Gardbaum, like others who recognise the emergence of an alternative or hybrid blend of political and juridical forms of constitutionalism,[10] emphasises the ability of parliament to disagree with judicial interpretations of rights as a distinguishing feature of this new model. Another important element of this new constitutional model is the adoption of political rights review,[11] which entails new responsibilities and incentives for public and political officials to assess proposed legislation in terms of its compatibility with protected rights. This innovation results in multiple sites for non-judicial rights review (government, the public service, and parliament), which distinguish this model from the American-inspired approach that relies almost exclusively on judicial review for judgments about rights. These two features, the ability to disagree with judicial interpretations of protected rights and political rights review, potentially represent a democratic rejoinder to sceptics. This rejoinder arises from this model's capacity to generate broader and more reflective judgments on how rights should influence or constrain legislative decisions and its acceptance, in theory, of legitimate political dissent from judicial interpretations.

This paper addresses the following question: does this parliamentary rights model differ sufficiently from American-style judicial review, with respect to the primacy given to judicial perspectives on the interpretation of and resolution of rights claims, to be able adequately to address sceptics' reservations? Before addressing this question, the paper first analyses the sceptics' concerns and then discusses the emergence of this alternative model in Canada and its adaptation in New Zealand, the United Kingdom, and the Australian Capital Territory.

SCEPTICAL CONCERNS OVER BILLS OF RIGHTS

Many commentators are troubled by the implications for liberal democratic communities of structuring and evaluating political debates through a judicially interpreted bill of rights. For purposes of this paper, discussion will focus on those sceptical positions that accept the legitimacy of the concept of rights yet reject the idea that legalised interpretations of individual rights claims should structure

10 J. Goldsworthy, 'Homogenizing Constitutions' (2003) 23 OJLS 483, 484; M. Tushnet, 'New Forms of Judicial Review and the Persistence of Rights – and Democracy – Based Worries' (2003) 38 *Wake Forest Law Review* 813; M. J. Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts?' (2003) 38 *Wake Forest Law Review* 635.

11 Elsewhere I have referred to the concepts of legislative or parliamentary rights review interchangeably. The concept of political rights review is broader and includes both executive and parliamentary rights review. J. Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review' (2005) 35 *British Journal of Political Science* 235; J. Hiebert, 'New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?' (2004) 82 Tex L Rev 1963.

political debates (rights sceptics), and those who accept the legitimacy of individual rights but doubt the prudence of giving courts final responsibility for interpreting and resolving political disagreements involving rights, for a range of reasons such as democratic concerns or institutional competence (court sceptics).

Rights sceptics criticise the ways in which a bill of rights influences notions of citizenship and political community. Richard Bellamy views politics as a constitutive process 'through which citizens struggle to promote their interests by ensuring that the character of the polity is such that it recognizes their evolving ideals and concerns'. He argues that citizenship should not be equated with a narrow concept of individuals being rights-holders against the state but comprises, instead, a 'continuously reflexive process, with citizens reinterpreting the basis of their collective life in new ways that correspond to their evolving needs and ideals'. This ideal is better achieved by a more political than juridical form of constitutionalism.[12]

Court sceptics argue that a bill of rights will distort debates about contested issues. Although a bill of rights implies that certain issues are no longer appropriately the subject of debate (since meritorious rights claims reflect prior commitments that should now prevail in the value hierarchy over conflicting 'non-rights' claims) the very notion that interpretation replaces debate contradicts the democratic imperative of ongoing deliberations about the role of the state, the nature of problems that affect a polity, and the propriety of specific social policies. But, as Jeremy Waldron argues, societal and academic discussion of judicial decisions is an adequate substitute for political debate.[13] Many reject that a bill of rights allows for the resolution of contentious issues in a correct or principled manner, even when judged by reasonable people who accept the primacy of rights. A bill of rights is not an objective template from which to evaluate legislation but resembles, instead, a normative framework that is dependent upon value-laden judgments about the appropriate role of the state and societal obligations to its more vulnerable members.[14] Yet the legal pretence of resolving contested issues in a principled manner makes it difficult to acknowledge openly the subjective nature of these interpretations, casting doubt on the legitimacy of contrary perspectives with debilitating effects on robust political debate.[15] A different concern is the likely ideological victory of a particular view of the state; one that is not necessarily beneficial to substantive notions of citizenship. Judicial resolutions of political conflicts typically emphasise negative liberty over substantive equality, treat the state as the principal enemy of liberty, and view the judicial role as that of a neutral arbiter to enforce the 'natural' outcome of the market place while failing to acknowledge that judicially created rules have led to non-neutral outcomes. Not only will a bill of rights undermine parliament's capacity to correct the ideological bias in the common law, but many of the rights protected reinforce 'the liberal

12 R. Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act' in Campbell, Ewing, and Tomkins (eds), n 1 above, 15.
13 Waldron, n 4 above, 290–291.
14 Hiebert (2005) n 11 above, 239–241.
15 M. A. Glendon, *Rights Talk. The Impoverishment of Political Discourse* (New York: The Free Press, 1991); R. Knopff, 'Populism and the Politics of Rights: The Dual Attack on Representative Democracy' (1998) 31 *Canadian Journal of Political Science* 702.

values of the common law at the expense of other political values and constitutional principles'. As a result, such a bill would give 'formal legal priority to liberty at the expense of equality'.[16]

NEW CONSTITUTIONAL IDEAS

As suggested above, the adoptions of bills of rights in Canada, New Zealand, the UK and, most recently, the Australian Capital Territory, have attracted interest because these are viewed as the emergence of a new model. Although commentators generally treat Canada as conforming to this model, this assessment must be seriously qualified. Canada is the only one of these four jurisdictions that has not rejected the American equation of judicial review with judicial supremacy.[17] Yet, the Canadian Charter of Rights and Freedoms has important differences from the American model. Provincial and federal legislatures can give temporary effect to legislation that has been ruled by courts as inconsistent with protected rights (with some exceptions).[18] This political capacity to disagree with judicial interpretations of the Charter, or pre-empt judicial review entirely, is authorised by the 'notwithstanding' clause of section 33. It is this possibility that commentators focus on when suggesting that Canada conforms to this new model. Nevertheless, the notwithstanding clause does not actually constrain the scope of judicial review. The ability to disagree with a judicial ruling is simply a delaying tactic. Short of amending the constitution, the judiciary is the ultimate authority when determining the constitutional validity of legislation. A final reason for questioning how comfortably Canada conforms to this new model is that the notwithstanding clause is extremely unpopular (although less so in Quebec) and governments generally believe that its use will be politically costly. For this reason, the power is used infrequently.[19]

Given the difficulty of portraying Canada as operating in conformity with this new model, it may seem ironic that Canada introduced the key ideas that have become central to this new parliamentary rights model. As the first of these four jurisdictions to introduce a bill of rights, Canada unwittingly gave birth to the two important constitutional ideas that distinguish this model. These ideas, once again, are firstly the concept of political rights review (a two-pronged concept that involves executive-based review of proposed bills from a rights perspective, combined with a requirement of alerting parliament about inconsistencies, thereby creating the stage for broader rights-based political and public scrutiny); and secondly the idea that a parliamentary system can recognise a judicial role to review legislation for its consistency with protected rights yet, at the same time, preserve opportunity for legislative disagreement with judicial interpretations.

16 K. D. Ewing, 'The Unbalanced Constitution' in Campbell, Ewing and Tomkins (eds), n 1 above, 104–108.

17 The combination of s 24(1) and s 52(1) of the Constitution make it clear that courts, not parliament, determine constitutional meaning as well as appropriate remedies for rights violations.

18 The 'notwithstanding' clause of s 33 applies to sections 2 and 7–15 of the Charter.

19 For comprehensive discussion of its uses see T. Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter' (2001) 44 *Canadian Public Administration* 255.

Political rights review

Canada's contribution to international constitutional ideas began with the 1960 statutory Canadian Bill of Rights, introducing what at the time seemed a novel (if not naïve) idea: creating a rights culture in governing that did not depend, exclusively, on judicial review. This idea was behind the establishment of a new statutory obligation of the federal Justice Minister to assess all government bills in terms of their compliance with newly protected rights, and to inform parliament about any inconsistencies.[20] The original intent of political rights review was to strengthen parliament's capacity to hold government (and wayward bureaucrats) accountable.[21] Although many were disappointed with how the Canadian Bill of Rights evolved, insufficient recognition has been paid to the innovation it represented in conceiving of institutional roles and relationships in judgments about rights. The idea it introduced was that protecting rights is not exclusively dependent on judicial review, but should encompass bureaucratic, governmental and parliamentary involvement. The goal, in other words, was not simply to correct rights abuses after the fact, but to prevent rights abuses from actually occurring. Twenty-two years after the 1960 Bill of Rights was introduced, Canada adopted the Charter, a constitutional bill of rights that significantly expanded the scope of judicial power. Within a decade, the systematic review of government bills by department of justice lawyers became far more rigorous, particularly after a number of Supreme Court decisions exposed the serious fiscal and policy consequences that would arise from judicial invalidation of legislation.[22]

Yet parliament remains on the periphery of political rights review. Moreover, there has not been a single report to parliament that a bill is inconsistent with the Charter. The explanation for why parliament is such a marginal actor in political rights review has three parts. The first arises from the political consequences of the judiciary's power under the Charter to grant remedies when legislation constitutes an unreasonable restriction of a protected right. Remedies have included declaring legislation invalid or altering the scope or intent of legislation to redress the perceived Charter problem. A direct consequence of this powerful judicial role is that the government looks to the judiciary, rather than to parliament, as the institution to whom legislation must be defended in terms of its implications for rights. Secondly, there is the emergence of a political culture in cabinet decision-making that forbids the introduction of any bill that would require the Minister of Justice to report an inconsistency to parliament. The criterion for determining that a report to parliament *is not necessary* is sufficiently wide to encompass a broad range of policy goals, and bills that do not satisfy it are withdrawn or amended (although this culture could change if a different political

20 I describe this in more depth in *Charter Conflicts: What is Parliament's Role?* (Montréal: McGill-Queen's University Press, 2002), and in 'New Constitutional Ideas' n 11 above.

21 W. R. Jackett, 'Memorandum for the Minister of Justice', 21 April 1958; E. D. Fulton, 'Memorandum for the Prime Minister' 29 April 1958, both referred to by C. MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929–1960* (Montréal: McGill-Queen's University Press, 2003) 121–123.

22 Hiebert, *Charter Conflicts* n 20 above, ch 1.

party formed government).[23] Pragmatism is the final part of the explanation. If the government were to pass a bill that prompted the Minister of Justice to alert parliament that rights were violated in a manner that is not consistent with a 'free and democratic society' (the standard for determining Charter consistency once a prima facie rights violation has been established), such legislation would be highly susceptible to litigation and judicial invalidation.

Although the Canadian parliament remains a marginal actor in the practice of political rights review, this concept has proven remarkably attractive. All three parliamentary jurisdictions discussed here have incorporated political rights review as a central element in their bill of rights projects.

Authorising judicial review with the option for political disagreement

The second Canadian innovation to influence this new parliamentary rights model was the decision in 1982 to authorise more expansive judicial review while establishing, at the same time, an option for political disagreement (via the notwithstanding clause). Although the 1960 statutory Bill of Rights also contained a notwithstanding clause, it has a different role under the Charter. Rather than function to constrain the scope of judicial review as it did in the earlier Bill of Rights, its incarnation in the Charter creates an opportunity for political disagreement with judicial review that otherwise could result in the invalidation of legislation. More importantly, it introduced a new way of looking at institutional relationships with respect to judgments about rights.

Although other parliamentary systems have not explicitly replicated this clause in their bills of rights, the idea it represents has been emulated in different ways: namely, that exposure to judicial review will exert significant (although not binding) influence on subsequent political behaviour where legislation has been called into question from a rights perspective.

ADAPTATION OF THESE IDEAS IN OTHER JURISDICTIONS

New Zealand Bill of Rights Act

New Zealand was the first jurisdiction to borrow the Canadian practice of political rights review. The New Zealand Bill of Rights Act, adopted in 1990, does not formally challenge the principle of parliamentary sovereignty. Support for a bill of rights grew out of concerns that parliament was too weak to check executive

23 This change can be traced to 1991 when, at the insistence of the deputy minister of justice, the clerk of the Privy Council wrote to all deputy ministers stressing that proactive Charter review must begin at the earliest stages of policy development. As a result the Tellier Memorandum called for Charter analysis to be incorporated into the Memorandum to Cabinet, and that this analysis 'had to include an assessment of the risk of successful challenge in the courts, the impact of an adverse decision, and possible litigation costs'. M. Dawson, 'The Impact of the Charter on the public policy process and the Department of Justice' (1992) 30 *Osgoode Hall Law Journal* 596. See also J. Kelly, 'Bureaucratic activism and the Charter of Rights and Freedoms: the Department of Justice and its Entry into the Centre of Government' (1999) 42 *Canadian Public Administration* 476.

dominance.[24] When substantial controversy arose about empowering courts to invalidate legislation,[25] the project was modified. Rights would be expressed in a statutory bill of rights and judges would be given a limited role of review. Judges are instructed 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'. The Bill of Rights expressly states in section 4 that no court shall 'hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective' because the provision is inconsistent with the Bill of Rights.

A direct consequence of opting for this more limited form of judicial review was the decision to borrow Canada's concept of political rights review. Then Prime Minister Geoffrey Palmer, who had recently visited Canada and been introduced to the idea of political rights review, thought this practice would be an effective way to enhance the vitality of a statutory bill of rights.[26] This idea of political rights review is embodied in section 7 of the New Zealand Bill of Rights Act, which requires that the Attorney-General advise parliament when bills are not consistent with its provisions.

As for the second Canadian innovation, the idea of allowing for political disagreements with judicial interpretations is not as central to New Zealand because of the limited scope of judicial review. But the idea still has resonance. Bill of Rights jurisprudence provides the context for executive-based evaluation of proposed legislation. Any statement by the Attorney-General that a bill is being introduced that is not consistent with protected rights is similar in intent to using the notwithstanding clause in Canada in a pre-emptive fashion. As in Canada, the extent to which these intentions are controversial, and therefore constrain political actions, will depend on how the bill of rights influences political culture.

A recent debate has emerged about the scope of judicial review, which could have a significant effect on political behaviour. Although the judiciary lacks the formal power to declare that legislation is inconsistent with rights, a decision of the Court of Appeal in 2000 indicated that the New Zealand judiciary may not only have the power but 'on occasions the duty' to state that legislation is not consistent with the Bill of Rights.[27] If the judiciary proceeds down this path, this could increase the pressure on government to remedy perceived deficiencies,[28] as

24 For a good discussion of the political evolution of the idea of a bill of rights, see 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 1993* (Wellington: Brookers, 1995) 1–27.

25 The Justice and Law Reform Committee reported that the proposed judicial power to invalidate legislation 'was clearly the principal reason' for the broad rejection of the Bill of Rights proposal. Interim Report of the Justice and Law Reform Committee, *Inquiry into the White Paper – A Bill of Rights for New Zealand* (tabled in Parliament 9 July 1987), as referred to by A. Butler, 'Judicial Review, Human Rights and Democracy' in G. Huscroft and P. Rishworth (eds), *Litigating Rights. Perspectives from Domestic and International Law* (Oxford: Hart Publishing, 2002) 63.

26 Geoffrey Palmer explains his change of reasoning in his *Unbridled Power? An Interpretation of New Zealand's Constitution and Government* (Wellington: Oxford University Press, 1979) 59–60.

27 *Moonen* v *Film and Literature Board of Review* [2002] 2 NZLR 9, 17.

28 Paul Rishworth suggests that the idea of judicial declarations of inconsistency under the Bill of Rights Act have now received legislative blessing. The basis for his assumption on this point is parliament's approval in the Human Rights Amendment Act 2001 of the concept of judicial

reflected by expectations that sometime in the future, 'the courts will get the power to strike down statutes incompatible with the Bill of Rights Act'. [29]

The United Kingdom's Human Rights Act

The HRA 1998 came into effect in 2000 and incorporates the European Convention of Human Rights into domestic law. Political proponents defended it as an alternative and better way to protect rights. Instead of relying on litigation, and judicial remedies for rights violations, the HRA would encourage widespread assessments of rights throughout government and public sectors. Some promised nothing less than a profound change to the political culture of the nation. As Lord Falconer has stated, 'we didn't bring in the Human Rights Act to get a litigation culture. We brought it in to get a human rights culture'.[30]

This ambitious project draws upon both of the Canadian innovations discussed above. Not only is the idea of political rights review an important component of the HRA, but the HRA overcomes the shortcoming incurred in Canada (where the absence of compatibility reports undermines parliament's scrutiny role) and imposes an affirmative reporting requirement on ministers to alert parliament about whether bills are consistent with protected rights.[31] Moreover, the UK has created a specific parliamentary committee, the Joint Committee on Human Rights (JCHR), with an explicit mandate to examine the rights-dimension of legislative bills. This increases the likelihood that political rights review will systematically occur at the parliamentary as well as executive level.

As for the second Canadian innovation, the idea embodied by the notwithstanding clause – of authorising judicial review and yet allowing for political disagreement – is also an important element of the HRA. UK judges are obliged to interpret legislation 'so far as possible so as to be compatible with Convention rights'. Where such interpretations are 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. But UK judges cannot invalidate inconsistent legislation, as can judges in Canada. Yet despite this limit on the scope of judicial power, the idea embodied in the notwithstanding clause is reflected in the HRA, in at least two ways. First, should a minister inform parliament that a bill is not compatible with protected rights, this will be roughly the political equivalent to a Canadian government relying on a pre-emptive use of the notwithstanding clause (as in New Zealand). Secondly, the political impact of a judicial ruling that legislation is not compatible with rights approximates the political influence of a judicial ruling of unconstitutionality in Canada. Expecta-

declarations of inconsistency. But this interpretation is contentious. P. Rishworth, 'Common Law Right and Navigation Lights: Judicial review and the New Zealand Bill of Rights' (2004) 15 *Public Law Review* 103, 115.

29 G. Palmer and M. Palmer, *Bridled Power. New Zealand's Constitution and Government* (Auckland: Oxford University Press, 4th ed, 2004) 318.

30 Lord Falconer, Speech to the Law Society and Human Rights Lawyers' Association, London, 17 February 2004, http://www.dca.gov.uk/speeches/2004/lc170204.htm (Last visited 27 July 2005).

31 An important distinction is that in New Zealand it is the Attorney-General who must make a report of inconsistency whereas in the UK individual ministers have this responsibility.

tions are that the UK parliament will and should pass remedial legislation when courts make a declaration of incompatibility.[32] Consistent with this expectation, the HRA incorporates an expedited procedure for passing remedial legislation.

Australian Capital Territory's Human Rights Act

The Human Rights Act which the Australian Capital Territory (ACT) passed in March 2004 incorporates both of these ideas. Political rights review arises from the requirement that for all bills, the Attorney-General make a statement as to whether the proposed legislation is consistent with protected rights and, where unable to declare consistency, to inform parliament how legislation is inconsistent. The Human Rights Act also stipulates that a relevant standing committee is required to report human rights issues that arise in legislative bills to the legislative assembly.[33] The idea represented by the notwithstanding clause is also replicated in the ACT's Human Rights Act. Ministerial reports of incompatibility have the potential to generate rigorous political scrutiny and ignite controversy, as would a pre-emptive use of the notwithstanding clause in Canada. Moreover, the Act reflects the expectation that parliament will and should revisit the merits of legislation in the face of a judicial finding of incompatibility.

This bill of rights envisages an even stronger tension between parliament and the judiciary than represented by the UK's process for remedial legislation. The judiciary is instructed that an interpretation of legislation that is consistent with rights is preferred but if the Supreme Court concludes that a law is not consistent with rights, it may declare this inconsistency. When such judicial declarations of inconsistency are made, the Attorney-General must immediately notify the legislative assembly of this declaration (within six sitting days of receiving the declaration) and, within six months, prepare and present the legislative assembly a written response to the declaration of incompatibility. This requirement clearly puts pressure on the Attorney-General to explain what the government intends to do with legislation that has been interpreted in this manner. Yet this dialogical potential may be constrained by the fact that the Human Rights Act does not create a separate right of action in the Supreme Court or authorise a specific remedy.

DIFFERENCES IN THE NATURE OF THE POLITICAL IMPERATIVE

All four jurisdictions permit political disagreements with judicial interpretations of rights. But the ability of the Canadian judiciary to nullify inconsistent legisla-

32 This is suggested by the statement of Lord Irvine, then Lord Chancellor, when he indicated that in the event of a judicial declaration of incompatibility, 'Parliament may, not must, and generally will, legislate. If a Minister's prior assessment of compatibility . . . is subsequently found . . . by the courts to have been mistaken, it is hard to see how a Minister could withhold remedial action'. HL Deb vol 582 col 1227–1228 (3 November 1997).

33 Some are sceptical about the effectiveness of parliamentary scrutiny: C. Evans, 'Responsibility for Rights: The ACT Human Rights Act' (2004) 32 *Federal Law Review* 291, 295.

tion, as opposed to merely declaring that it is inconsistent, represents a different dynamic than what occurs elsewhere, should parliament disagree with a judicial ruling.

In Canada, parliament and the provincial legislatures have to act assertively to disagree with judicial rulings, to ensure that their legislative objective can be realised despite a judicial finding of unconstitutionality. One way to do this is to amend the legislation in an attempt to satisfy judicial concerns. Legislation is rarely ruled inconsistent with protected rights because of an inappropriate objective. More often, the reason is that it fails judicially interpreted proportionality criteria. If, however, the intent is to protect a legislative objective that the judiciary has ruled invalid, or to ignore the judiciary's proportionality concerns because to comply would significantly undermine or distort the legislative objective, parliament can give temporary effect to its impugned legislation by enacting the notwithstanding clause; a decision that can be renewed. The assertive requirement for political disagreement contrasts with the other jurisdictions, where parliament can disagree by simply maintaining the status quo. In New Zealand, the UK and the ACT, parliament generally must legislate only if it wishes to give effect to a judicial decision and pass remedial measures. The exception to this is if the judiciary has altered the intention or effects of legislation, in an attempt to render legislation compatible with judicial interpretations of rights. Such judicial action would require an affirmative parliamentary response to restore the original intention or scope of legislation.

Although the triggering mechanism for disagreeing or complying with judicial rulings differs, a common idea animates all of these bills of rights. Whether they rely on ministerial statements of inconsistency, judicial declarations of incompatibility or on political invocation of a notwithstanding clause, they operate in a political environment that assumes political actors' disagreements with judicial perspectives will be significantly profound, and their commitment sufficiently robust, before being prepared to act contrary to judicial judgments. It is this inter-institutional dynamic that explains why many commentators characterise these new rights regimes as embodying dialogical potential. For example, then Home Secretary Jack Straw explicitly used the metaphor of dialogue when speculating about the institutional responsibilities and roles when interpreting the Human Rights Act.[34] The ACT's Human Rights Act is similarly conceived of in dialogic terms.[35] Several Canadian legal scholars have emphasised the dialogic potential of the Canadian Charter,[36] but the lack of political legitimacy surrounding the notwithstanding clause and the fact that the Charter allows for judicial supremacy seriously weaken the descriptive force of this claim (at least as political actors currently interpret their roles).

34 HC Deb [UK] vol 314 col 1141 June 1998.

35 Australian Capital Territory Bill of Rights Act Consultative Committee 'Towards an ACT *Human Rights Act*: Report of the ACT Bill of Rights Consultative Committee', at http://www.jcs.act.gov.au/prd/rights/documents/report/BORreport.pdf (Last visited 24 March 2005).

36 P. Hogg and A. Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75–124; K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

One can envisage debate about which approach is preferable for expressing political disagreement. If a political culture is sceptical about the legitimacy of legislative disagreements with judicial interpretations, this will undermine the political will to disagree with judicial review. Legislative inertia will be of greater significance to Canada precisely because parliament must react to overcome the effects of judicial review. Not only will 'corrective' legislation be highly contentious, by virtue of overturning the effects of a judicial ruling on rights, its supporters will have to incur the label of violating rights. Although the other parliamentary systems may incur significant political pressure to introduce remedial legislation in the face of a judicial declaration of incompatibility, it is less difficult to exercise political disagreement with judicial rulings when this simply requires maintaining the status quo than to actually legislate to negate the effects of a judicial ruling.[37]

Neither court nor rights sceptics will be easily persuaded to revise their assessment of the prudence of adopting a bill of rights merely because these new parliamentary bills of rights envisage political rights review or allow parliament to disagree with judicial interpretations of rights. Some court sceptics are doubtful about the sustainability of this model, predicting that political behaviour may either recede back to unadulterated parliamentary sovereignty or, alternatively, mirror the judicial dominance associated with American-style judicial review.[38] Others argue that although courts lack power to declare legislation invalid (other than in Canada), the interpretive techniques at their disposal are broad enough to fundamentally alter the intent and effects of legislation,[39] and the language of the bill of rights is sufficiently malleable (particularly the HRA) that there will be considerable contestation as to whether judicial declarations of incompatibility should be made frequently or as a measure of last resort.[40] Sceptics also doubt that the judiciary will feel bound to respect the political drafters' intentions with respect to the institutional division of labour anticipated by the rights project.[41] Some rights sceptics worry that framing issues in the language of rights will alter perceptions of institutional competence: even if the bill of rights allows for explicit disagreements with judicial perspectives, they argue, politicians and citizens will be unable to resist the equation of rights with law.[42]

37 Michael Perry disagrees with this assessment, arguing that the distinctions are not as significant as might be expected, particularly those between the UK and Canada. M. Perry, n 10 above, 671–672.

38 M. Tushnet, 'New Forms of Judicial Review', n 10 above, 813, 837.

39 T. Campbell, 'Incorporation through Interpretation' in Campbell, Ewing, and Tomkins (eds), n 1 above, 80, A. Young, 'Judicial Sovereignty and the Human Rights Act 1998' (2002) 61 CLJ 53, 64–65.

40 For debate on the nature of the judiciary's interpretative obligation see R. Elkins, 'A Critique of Radical Approaches to Rights-Consistent Statutory Interpretation' (2003) 6 EHRLR 641, 641–650; F. Klug, 'Judicial Deference Under the Human Rights Act 1998' (2003) 2 EHRLR 125, 128–133, T. Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] PL 306, 326-335, C. Gearty, 'Reconciling Parliamentary Democracy and Human Rights' 118 (2002) LQR 248, 250–269, D. Nicol 'Statutory Interpretation and Human Rights after *Anderson*' [2004] PL 274.

41 J. Allan, 'The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand' in Campbell, Ewing, and Tomkins (eds), n 1 above, 377–385.

42 Campbell, n 39 above, 87.

Canadian experiences

Of all the jurisdictions discussed here, Canada has had the most experience with judicial rulings that impugn the validity of legislation from a rights perspective. However, what is most relevant for sceptics is the profound change to political culture since the Charter was adopted. The following assessment reflects insights drawn from qualitative analysis of contested policy issues involving Charter claims,[43] a burgeoning literature addressing judicial and parliamentary roles with respect to Charter issues, and general observations about political behaviour on matters that give rise to rights claiming.

A clear picture emerges, revealing that the Charter is evolving in a manner consistent with a highly juridical orientation to constitutionalism. A robust rights culture has arisen, but it is one that privileges courts, as interpreters and defenders of rights, and reflects deep scepticism about whether representative institutions have a valid role to contribute to constitutional judgment, other than to anticipate judicial decisions and correct offending legislation within the parameters established by courts. This cultural change is significant because of the Charter's centrality to policy evaluation and political agenda-setting. The Charter influences political decisions at all stages of the policy process. But political actors have had little influence on the how these constraints are interpreted, as they rarely partake in independent debate about the scope of rights or how rights should influence a particular legislative decision. Instead, these constraints are shaped by the advice and influence of government lawyers who systematically assess bills and advise departments and ministers about the compatibility of proposed legislation, based on their interpretation of relevant jurisprudence.

The extent to which the Charter constrains political behaviour is also influenced by political decisions of how much risk a cabinet is willing to incur when pursuing legislation that may result in Charter litigation. But as these political decisions generally rule out any possible use of the notwithstanding clause in the event that legislation is declare invalid, the willingness of a government to question the hegemony of judicial judgment is often temporary. These political decisions are revised or abandoned when legislation is nullified.[44] A telling incident, and perhaps one of the best examples to confirm sceptics' concerns about a bill of rights, was the federal government's response to the invalidation of legislation that restricted tobacco advertising, passed to discourage young people from taking up an addictive and deadly habit. The government's response to the judicial invalidation of its legislation was exceedingly timid. It ruled out invoking the notwithstanding clause, despite the suggestion from its Health Minister that this would represent an appropriate action, and passed legislation that was far less robust or comprehensive than many believed necessary to achieve its purposes. Policy officials virtually cut and pasted court 'suggestions' revealed in the judicial reasons on

43 Hiebert, n 20 above.

44 This does not mean there has been no political will to challenge the primacy of judicial interpretations of the Charter. A good example occurred in the legislative response to a series of Supreme Court decisions that altered the rules of evidence or what comprises a relevant defence, in the context of sexual assault trials. This issue is discussed at length by Hiebert in *Charter Conflicts*, n 20 above, ch 5.

proportionality, even though marketing strategies and knowledge of addictive behaviour were far more relevant than any particular expertise judges could possibly have drawn upon.[45]

The juridical orientation of Canadian constitutionalism makes it hardly surprising that politicians are reluctant to make decisions that risk their being branded as insensitive to rights (in an environment where this label does not arise from public repudiation of the substantive arguments made so much as from the very fact that these contradict judicial interpretations). This particular form of rights culture negates the significance associated with this alternative model: of allowing for political contributions to judgments about rights or, in the language that many constitutional scholars find fashionable, engage in meaningful dialogue.

A cogent example of this reluctance to challenge the primacy of judicial Charter rulings is debate about same-sex marriage. Despite serious differences amongst parliamentarians (reflecting the contentious nature of this issue amongst the general public), the issue has been politically portrayed as not being amenable to any reasonable disagreement about whether same-sex unions must be labelled marriage, if this difference contradicts judicial interpretations. Consider, for example, how the federal government position has evolved. On two occasions (1999 and 2000) the government twice supported opposition motions to state that marriage would remain the lawful union of one man and one woman to the exclusion of all others. Both the sitting and future Prime Ministers (Jean Chrétien and Paul Martin) supported this definition. Yet after a number of provincial appeal courts rejected an exclusively heterosexual definition of marriage, both men subsequently changed their position, and that of their government's, and proposed legislation to recognise same-sex marriage, which in July 2005 passed into law. Although it is not clear whether these changes reflected a philosophical reassessment of their previous positions or instead occurred because of political reluctance to disagree with judicial interpretations of marriage, neither leader was willing to continue supporting a position that, almost certainly, would have required invoking the notwithstanding clause to give primacy to Parliament's earlier preferred definition.

This extreme reluctance to use the notwithstanding clause not only affects political decision-making, a stated aversion to this clause makes for 'smart' politics. This was evident in the 2004 federal election when the incumbent Liberal government scored precious political points by repeatedly criticising Stephen Harper, leader of the Conservative party, for failing to rule out the possibility of using the notwithstanding clause.[46] There is little public or political acceptance for the proposition that invoking the notwithstanding clause represents a legitimate Charter interpretation. Most Canadians construe the use of the notwithstanding clause both as an unjustifiable violation of rights in the particular circumstance, but also as act of defiance of the Charter project.

45 *ibid* ch 4.

46 Canadian Broadcasting Corporation (CBC) News, 'Harper Threat to Minority Rights, Martin Says' (7 June 2004) at http://www.cbc.ca/story/election/national/2004/06/07/elxnmartrights040607.html (Last visited 3 May 2005).

UK experiences

Although it is too soon to offer firm pronouncement on how the HRA is influencing political behaviour, early experiences suggest varied reactions. Notwithstanding bold governmental promises that the HRA would help usher in a culture of rights, so that a rights framework would guide policy evaluation and political deliberations, the government has been criticised for the perceived gap between this promise and actual practices. One reason for this criticism has been the government's delay in establishing a human rights commission, seen by many as performing a critical educational function about the importance and implications of governing within a rights framework.[47] A related criticism is insufficient follow-through on how to implement this culture of rights within governing and the delivery of public services. For example, one study of the impact of the HRA reports 'no serious attempt [has been made] from either government or the voluntary sector to use the Human Rights Act to create a human rights culture that could in turn lead to systemic change in the provision of services by public authorities'.[48] A second study, analysing conditions across 175 public bodies, reported that 'decision-makers . . . have yet to absorb and incorporate in their decision-making processes the values inherent in the Human Rights Act'[49] and that in 'many local authorities the Act has not left the desks of the lawyers'. The study identified a failure of public bodies to ensure that their contractors and partners 'are taking reasonable steps to comply with the Act'.[50] The JCHR has also criticised the government for failing to do enough to facilitate a culture of rights. Although the government should be 'commended' for the substantial training provided to the judiciary, this effort 'has not been matched by an equivalent effort to promote a wider culture of human rights in government, among the many diverse public authorities, and among the citizenry'.[51]

This perception that the government is not sufficiently committed to creating (and respecting) a culture of rights is reinforced by its record on anti-terrorism legislation, which suggests a willingness to subordinate respect for rights to the political project of being, and appearing, strong against terrorist threats and suspects. Soon after 11 September 2001, the government claimed new coercive powers were necessary to 'counter the threat from international terrorism'[52] and passed legislation authorising the indefinite detention of terrorist suspects, while imposing serious time restrictions that hindered parliament's ability to review or deliberate about whether these measures were justified in light of a rights

47 For a range of perspectives on why a human rights commission should be adopted see JCHR, Twenty-Second Report Session 2001–2002, HL 160, HC 1142, Appendices to the Minutes of Evidence (see now the Equality Bill currently in the Lords).

48 J. Watson, 'Something for Everyone: The impact of the Human Rights Act and the need for a Human Rights Commission' British Institute of Human Rights, December 2002, i, http://www.bihr/org/pdfs/SOMETHING%FOR%20EVERYONE.PDF (Last visited 12 August 2005).

49 Audit Commission, 'Human Rights. Improving public service delivery" 5, http://www.dca.gov.uk/hract/acrep03.pdf, (Last visited 21 July 2005).

50 *ibid*, 7–8.

51 Sixth Report of the JCHR, Session 2002–03, *The Case for a Human Rights* Commission, HL 67-I/HC 489-I, paras 33–34.

52 David Blunkett, HC Deb vol 390 col 923 (15 October 2001).

framework. The government's commitment to a culture of rights appeared no more robust in 2005 when, having been caught 'completely by surprise'[53] by the Law Lords' ruling in *A* v *Secretary of State for the Home Department*,[54] that the indefinite detention scheme was incompatible with Article 5 of the European Convention on Human Rights, it introduced a new range of coercive measures that raised many questions of their compatibility with human rights. Once again, concerns about the depth of the government's commitment to a culture of rights rested on the nature of these coercive powers, and its failure to give parliament sufficient time to review and debate these controversial measures.[55]

Reinforcing perceptions that the government's commitment to a rights culture is lukewarm have been pubic criticisms by prominent ministers of the judiciary's interpretation of the HRA and the HRA itself. Former Home Secretary David Blunkett repeatedly criticised judicial interpretations of the HRA, going so far as to characterise its adoption as 'the biggest mistake' the Blair government made in its first term in office[56] and indicated he was 'fed up with having to deal with a situation where Parliament debates issues and the judges overturn them'.[57] Prime Minister Tony Blair has done little to distance government opinion from this sentiment and has reportedly indicated a willingness to amend the HRA if it were interpreted so as to prevent the government from pursuing certain legislative goals, such as the passage of strong anti-terrorism legislation.[58]

Yet despite the above indicators of a perceptible gap between bold promises of a cultural change and actual modification to governmental behaviour, parliament has been considerably more receptive to this rights project, particularly in the House of Lords where '[p]eers fall over themselves to raise Convention points' when assessing proposed legislation[59] and by the JCHR. The JCHR has quickly established a reputation for its willingness to point out serious rights concerns, ask ministers hard questions about the implications and merits of measures that appear to violate rights, and report in a timely fashion to facilitate broader parliamentary and public deliberation. The best examples of its use of the HRA to check government behaviour occurred in its assessments of anti-terrorist measures, beginning in 2001, which included strongly-worded concerns about

53 'Chaos: how war on terror became a political dogfight' *The Guardian* 13 March 2005, http://observer.guardian.co.uk/focus/story/0,6903,1436421,00.html (Last visited 2 August 2005).

54 [2004] UKHL 56.

55 The bill sought to authorise the Secretary of State to make 'control orders' that would allow a suspected terrorist to be placed under house arrest, without prior judicial authorisation, and proposed a wide range of restrictions on suspects' movements, association, expression, and travel, again without prior judicial involvement.

56 As quoted by Bruce Anderson, column, 'Don't pity those foreigners who exploit our generosity' *Independent*, 12 November 2001, http://comment.independent.co.uk/columnists.a1/bruce.anderson/article143590.ece (Last visited 15 August 2005).

57 As cited in 'Blunkett vs. the bench: the battle has begun' *The Times* 4 May 2003, http://www.timesonline.co.uk/article/0,200-597757,00.html (Last visited 26 July 2005).

58 'Blunkett puts war before concerns for human rights' *Daily Telegraph*, 24 September 2001, www.telegraph.co.uk/news/main.jhtml?xml=/news/2001/09/24/nblunk24.xml (Last visited 12 August 2005).

59 Not all parliamentarians have embraced the HRA. Indeed a 'remarkable difference' arises between the Commons and the Lords. See D. Nicol, 'The Human Rights Act and the Politicians' (2004) 24 LS 451, 472–473.

indefinite detention for foreign terrorist suspects. The JCHR published a follow-up report two years later, warning the government and parliament that 'long term derogations from human rights obligations have a corrosive effect on the culture of respect for human rights' and published two additional reports assessing and criticising the government's response to the Law Lords' ruling that the indefinite detention provisions are incompatible with the European Convention of Human Rights. In these latter reports, the JCHR was extremely critical of the government's intent to propose a derogation clause for future possible use, and also expressed serious concerns about other deprivations of liberty that would be authorised with inadequate judicial safeguards.[60]

More research is required to ascertain whether and how the JCHR's reports affect parliamentary debate or generate political pressure on government to alter proposed legislation. Research is also required to determine what kind of rights culture animates the JCHR's review of proposed legislation. For example, if the JCHR's approach is consistently characterised by a 'culture of compliance',[61] where respect for protected rights is equated with replicating judicial assumptions about these, this would reinforce sceptics' concerns about more juridical forms of constitutionalism. Yet, at the same time, the gravity of the perceived rights infringement could challenge sceptics to reconsider whether an emphasis by parliament on legal perspectives is inherently undesirable.

Finally, another indicator that the HRA is changing political behaviour is the set of guidelines for ministers to determine whether or not to report that proposed legislation is compatible with Convention rights. Although some civil liberties' groups have criticised under-reporting of alleged inconsistencies,[62] the guidelines ministers utilise have a very legalist orientation. What is significant about them, particularly for a political community that wished to maintain parliamentary sovereignty, is that on their face they rule out the validity of ministers' claiming that legislation is compatible with rights if this advice is not consistent with legal assessments. Ministers are instructed they can only declare compatibility where, 'at a minimum, the balance of [legal] argument supports the view that the provisions are compatible'. This legal advice focuses on whether 'it is more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the Strasbourg Court'.[63] Thus, ministers are directed that even if they believe valid policy or political arguments support a claim that legislation is compatible with Convention rights, these assumptions do not constitute a 'sufficient basis' to claim compatibility if legal advisers do not believe that these arguments would 'ultimately succeed before

60 J. Hiebert, 'Parliamentary Review of Terrorism Measures' (2005) 68 MLR 677–679.

61 D. Nicol, n 59 above, 453–454.

62 Civil rights organisations Liberty and Justice have criticised the government's pre-legislative review for providing inadequate information for public evaluation of the merits of decisions that are claimed to be compatible with Convention rights. See Joint Committee on Human Rights, Second Special Report HL 66-I HC 332-I (2000–2001); and J. Cooper and R. Pillay, *Auditing for Rights: Developing Scrutiny Systems for Human Rights Compliance* (London: Justice, 2001) 78–79.

63 Department for Constitutional Affairs, 'The Human Rights Act 1998 Guidance for Departments' (2nd ed, February 2000, at http://www.dca.gov.uk/hract/guidance.htm See also Department for Constitutional Affairs, 'Section 19 Statements: Revised Guidance for Departments' at http://www.dca.gov.uk/hract/guidance/guide-updated.htm (Last visited 3 May 2005).

the courts'.[64] This emphasis on legal criteria raises questions about whether, and to what extent, ministers incur pressure to avoid introducing legislation that requires a report of non-compatibility, and whether the prospect of making such a report influences political priorities. It also raises questions about how public and political officials view their relative institutional roles and competence.

An early indication that the retention of parliamentary sovereignty may be little more than a constitutional formality is suggested by the following incident, which comprised the first instance of the government acknowledging that a bill it was introducing did not allow for a statement of compatibility.[65] The occasion for this ministerial report of incompatibility was the introduction of the Communications Bill in 2002, which, amongst other things, would have preserved a ban on paid political advertising on television and radio.[66] Paid political advertising on television or radio has not been permitted since the BBC came into operation in 1927.[67] Neither the government nor independent commissions[68] think it is desirable to remove this ban.[69] In defending the legislation, the responsible minister emphasised the importance for democracy of maintaining an advertising ban to prevent powerful groups from manipulating political debate.[70] But this reporting experience conveys mixed messages about how the government conceives of its role under the HRA. One message is that government is not willing to abandon legislation for which it has strong commitment, just because the legislation may not be compatible with protected rights. Thus, Tessa Jowell declared the government's intent to 'mount a robust defence' if the legislation were legally challenged.[71] Yet, a very different message was conveyed by her suggestion that if the

64 *ibid*.

65 Although this was the first government-introduced bill that required a statement of incompatibility, it was not the first occasion that a bill required such a report. The House of Lords decided to amend legislation that would have the effect of denying the government's decision to remove a legislative provision (Local Government Act, s 28) that had forbidden the promotion of homosexuality or banned any teaching that promoted the 'acceptability of homosexuality as a pretended family relationship'. In March 2000 the Government indicated that the amendments made by the House of Lords to the Local Government Bill required a statement that the legislation was not compatible with Convention rights.

66 In second-reading discussion of the bill, the minister indicated that the government concluded that a statement of incompatibility was required based on the interpretation of a European Court of Human Rights case, which involved a refusal to air a political advertisement on television. The case was *Vgt Verein Gegen Tierfabriken* v *Switzerland* (24699/94) [2001] ECHR 408.

67 M. Pinto-Duschinsky, *British Political Finance, 1830–1980* (Washington: American Enterprise Institute for Public Policy Research, 1981) 252–253.

68 The Committee on Standards in Public Life (Neill Committee) conducted an inquiry into the funding of political parties in the UK and recommended in its 1998 report that the ban on paid political advertising on television and radio be maintained, while continuing with the practice of broadcasters providing political parties with free air-time. Committee on Standards in Public Life, Fifth Report: The Funding of Political Parties in the United Kingdom, R94 cm 4057-I (1998), 173–175.

69 In January 2003 an independent Electoral Commission recommended the retention of this ban. It concluded that it is reasonable to believe a UK court would accept the justification of the ban if it were challenged. In its view a ban on political advertising is consistent with the 'public interest' of a democratic society 'Party political broadcasts – recommendations for the future' (14 January 2002) at http://www.electoralcommission.gov.uk/media-centre/newsreleasereviews.cfm/news/149 (Last visited 12 August 2005).

70 Tessa Jowell, HC Deb vol 395 col 787 3 December 2002.

71 *ibid* col 788–789.

legislation subsequently fails in the European court, the government will have to 'reconsider' its position and amend the legislation to comply with any judgment of the European Court of Human Rights, because the government takes its 'international obligations extremely seriously'.[72] What is so significant about this stated willingness to amend the legislation is an obvious inconsistency with an earlier admission that the government believes that the legislation is appropriate, as originally conceived, precisely because a less restrictive option would not be effective.[73] This intention to revisit the issue if unsuccessful in court reinforces the idea that parliamentary sovereignty will have little effect preserving legislation in the face of a negative judicial ruling, even when the government believes it serves a compelling democratic purpose.

If the political culture develops in a manner that assumes remedial legislation is required whenever a court rules under section 4 that legislation is not compatible with rights, the retention of the principle of parliamentary sovereignty may be no more significant than is the inclusion of a notwithstanding clause in Canada for preserving a political ability to disagree with judicial rulings. Moreover, if political compliance with the judicial rulings becomes the model of choice, the potential for judicial rulings to alter policy choices can occur even without judicial declarations of incompatibility or remedial legislation. This is because of the considerable latitude in how the judiciary approaches its interpretative obligations under section 3. How the judiciary generally approaches the issue of statutory construction under the HRA and, specifically, the relationship between its section 3 interpretative obligation and its section 4 power to grant a declaration of incompatibility, will have important consequences for parliament's ability to get its way.[74] If the judiciary does not feel inordinately constrained by the language or intention of legislation, and the political culture is one of compliance, this combination could result in substantial distortion of legislative intentions. As Danny Nicol suggests, judicial 'rewrites of legislation' under section 3(1) of the HRA 'constitute relatively invisible means of changing the law in contrast to headline-grabbing declarations of incompatibility'.[75]

New Zealand experiences

Of the jurisdictions discussed here (excluding the Australian Capital Territory, whose introduction of a bill of rights is too recent for assessment of its effects) New Zealand is the jurisdiction least prone to judicial influences. This is not to suggest that legal interpretations of the New Zealand Bill of Rights Act are not

72 *ibid* col 789.

73 In explaining why the legislation was conceived as it was, and not in a less restrictive manner, Jowell told parliament: '[W]e looked hard at the current ban to see whether some minor changes would make it more certain that it was human rights compatible. Unfortunately, any such change would still allow substantial political advertising . . . By denying powerful interests the chance to skew political debate, the current ban safeguards the public and democratic debate, and protects the impartiality of broadcasters'. *ibid* col 788.

74 For a good illustration of the judiciary's perspective on this see *Ghaidan* v *Godin-Mendoza* [2004] UK HL 30 and, in particular, Lord Steyn at paras 37–51.

75 Nicol, n 59 above, 468.

having a significant influence on policy development or evaluation. As one commentator indicates, the process of evaluating bills from a rights perspective has significantly influenced policy development. The inclination towards risk aversion in governing has culminated in public officials incurring strong incentives to formulate policy in a manner that avoids a report of inconsistency.[76] The criteria for determining whether a bill is consistent with the Bill of Rights Act are provided in the Legislation Advisory Committee Guidelines,[77] which have been endorsed by Cabinet.[78]

Nevertheless, it is not clear to what extent this rights framework for policy evaluation has penetrated political culture or influenced political behaviour once legislation is introduced. The Attorney-General frequently concludes that government bills violate rights in a manner that is not consistent with a free and democratic society (to date there have been 18 reports with respect to government bills, and 35 reports altogether). But neither the prospect of such a report, nor its eventual release, appears to be a serious disincentive for ministers to introduce and defend the impugned bill. Moreover, parliamentarians often dispute the conclusions of the legal analysis, that limitations on rights are not justified, or ignore the reports altogether.[79] This perception that legal interpretations of the Bill of Rights are having limited effects on political culture is reinforced by a recent comment by former Prime Minister Sir Geoffrey Palmer in 2004, that the Bill of Rights had not brought about a 'rights culture' in parliament.[80]

Substantial qualitative research is required to assess the extent to which political agenda-setting and interest group strategies have become more rights-conscious, and what influences legal interpretations of rights are having on political assumptions and values. But the Bill of Rights is not the only important institutional change affecting political behaviour. In 1993 New Zealand adopted a Mixed Member Proportional System (MMP) that has not only ensured governing will be done by coalition, but has increased the number of political parties and dramatically strengthened the influence of parliamentary select committees. To date, these reforms have likely had a greater transformative impact on political debates than the constraints imposed by a bill of rights where judges cannot nullify legislation.[81]

76 G. Huscroft, 'The Attorney-General's Reporting Duty' in P. Rishworth, G. Huscroft, S. Optican and R. Mahoney (eds), *The New Zealand Bill of Rights* (Melbourne: Oxford University Press, 2003) 196

77 Legislation Advisory Committee Guidelines, *Guidelines on Process and Content of Legislation*, 2001 edition, http://www.justice.govt.nz/lac/index.html (Last visited 15 August 2005).

78 Cabinet Manual 2001, Cabinet Office, Department of the Prime Minister and Cabinet, Wellington, 5.2.

79 J. Hiebert, 'Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes' forthcoming, (2005) 1 *New Zealand Journal of Public International Law.*

80 This comment was made at the second annual conference on the primary functions of government, Wellington, NZ, 29–30 October 2004.

81 Paul Rishworth makes a similar argument when he suggests that the adoption of MMP 'has proved the more direct answer to the sorts of concerns that fuelled the call for a bill of rights in 1984: a unicameral House dominated by government members and thus by Cabinet.' Rishworth, n 28 above, 119.

CONCLUSIONS

The question asked in this paper is: what significance can be attached to this new model's attempts to broaden the scope of rights review and the different structural capacities it offers to recognise political dissent from judicial rulings?

Canadian experiences demonstrate that supporters of judicial review have more reason for confidence in these new bills of rights than do sceptics whose support is contingent on the possibility that these bills of rights will evolve in a manner that does not result in judicial hegemony for defining and resolving conflicts involving highly contested moral and political claims. Although Canadian constitutional innovations may have provided the genesis for a new model to emerge, Canadians are remarkably insensitive about alternatives to American-style judicial review. Canada's response to the Charter has been largely shaped by prevailing assumptions at the time of the Charter's creation, which accepted the logic of judicial supremacy and expressed scepticism about the legitimacy of political disagreements with judicial interpretations, despite the fact that such disagreements are constitutionally permitted. After two decades of living with the Charter, the political culture that has emerged has become increasingly hostile to the idea that political disagreements with judicial interpretations of the Charter represent appropriate constitutional options. Moreover, one of the purported benefits of the new parliamentary rights model – the attempt to broaden the influence of judgments about rights – appears to be having the opposite effect to that intended. Although the intention of political rights review was to augment parliament's capacity to make judgments about rights, what is occurring instead is the introduction of judicial influence at early stages of policy development, long before judicial review occurs, resulting in the further isolation of parliament. What has emerged are bureaucratic and political cultures that try to 'Charter-proof' proposed legislation, by which is meant the project of anticipating litigation and amending or removing those aspects of a bill that could lead to successful constitutional challenges. But however laudable this idea of ensuring that bills are consistent with fundamental values, it is important to recognise that a consequence of this approach is the incorporation of legal perspectives about rights-compliance into the policy process and the dismissal of political judgement about how rights should constrain legislative choices.

It is too soon to conclude whether their scepticism in bills of rights should be revised for the remaining jurisdictions discussed here. New Zealand experiences reinforce the instability associated with this hybrid model.[82] Political behaviour could diminish the emphasis placed on rights in political deliberations or, alternatively, emulate the judicial influence associated with more traditional bills of rights. The process for evaluating bills on behalf of the executive is highly legalistic. Government lawyers base their assessments on interpretation of relevant jurisprudence and on expectations of what courts might say. Yet the government frequently proceeds with legislation that has been accompanied by an incompatibility report, acknowledging that the bill violates rights in a manner that is not

82 For discussion of the weakness of this hybrid model generally, see Tushnet, n 10 above, 831–837

consistent with a free and democratic society. Perhaps because of the frequency of these reports, along with the government's lack of inhibition to proceed with inconsistent legislation, rights-based scrutiny seems to have little effect on parliamentary deliberations about bills.[83]

Early expectations in the UK suggest sceptics may not have to worry about the legalisation of political claims if the hailed culture of rights does not emerge as was promised by political proponents of the HRA. But this provides only a partial measure of the HRA's effect on political behaviour. The criteria used by ministers to identify whether bills are compatible with rights and the exercise of parliamentary scrutiny are both heavily influenced by legal interpretations of relevant jurisprudence, indicating a more juridical form of constitutionalism is emerging. This is reinforced by prevailing political assumptions that judicial declarations of incompatibility will and should compel the government to redress the identified deficiencies, and by the emergence of a culture of compliance by some parliamentarians, particularly those in the House of Lords.[84] More time is required to ascertain what impact section 3 interpretations are having on political behaviour, particularly where these change the scope or effects of legislation. But, if a culture of compliance similarly diminishes political will to challenge judicial decisions, this could reduce significantly the difference associated with this model.

It hardly needs mentioning that not everyone shares the sceptics' reservations about bills of rights. A majority of legal scholars welcome the introduction of a more juridical form of constitutionalism in these parliamentary systems. For them, the more pertinent concern is whether the opportunities for political disagreement with judicial rulings will too often be used, thus negating the benefits they associated with judicial review. To this concern sceptics' likely reply is that when political debates are transformed into debates about rights, and the judiciary is given a role to interpret these and pronounce on the compatibility of legislation, it is difficult to maintain political will, or a sense of institutional competence, for public and political officials to do otherwise than to anticipate and emulate judicial interpretations. Indeed, early experiences with this parliamentary rights model in Canada and, to a lesser extent the UK, suggest that the significance of this 'innovative' structure does not lie in broadening the perspectives brought to bear on political questions involving rights claims, but merely in changing the manner by which judicial perspectives shape political decisions. Instead of waiting for litigation, and judicially-imposed remedies associated with more traditional bills of rights, judicial perspectives are incorporated in the development and evaluation of legislation.

83 This issue is explored at some length by Hiebert, n 79 above.
84 D. Nicol, n 59 above, 459–466.