Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom

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Since the enactment of Canada's *Charter of Rights and Freedoms* in 1982, with its inclusion of the 'notwithstanding' clause found in section 33, there has been a growing interest in models of human rights protections which do not provide the judiciary with the final power to authoritatively determine the content of constitutionally protected human rights. This model, classified as the 'Commonwealth Model' by Stephen Gardbaum, [1] can be found, in different varieties, in New Zealand, [2] the United Kingdom, [3] and the State of Victoria [4] and the Australian Capital Territories [5] in Australia. To date, discussion of the model has focused predominantly on assessing its distinct nature and an evaluation of whether it can provide a viable means of maximising the advantages and minimising the disadvantages of traditional predominantly legal or political models of protecting human rights. Less work has been carried out to determine the extent to which the Commonwealth Model of rights protection achieves its aims in practice. Hiebert and Kelly's magisterial work expertly fills this gap, with a detailed and through assessment of what they term 'parliamentary Bills of Rights' in New Zealand and the United Kingdom. Their detailed evaluation is drawn from: open-ended interviews with parliamentarians, members of the Government and officials carried out between 2004 and 2012; an analysis of government documents, committee reports and debates; and media and academic commentary. It provides a thought-provoking criticism of the extent to which parliamentary Bills of Rights have succeeded in increasing pre-legislative political engagement with human rights, thereby indirectly criticising the distinctiveness, and one of the normative justifications of, the Commonwealth model.

The introduction justifies the focus of the book on parliamentary Bills of Rights and their choice of a comparison between the UK and New Zealand, before establishing the research methodology used in the book. Their reference to 'parliamentary Bills of Rights', as opposed to the 'Commonwealth model', rests on their correct assessment that most scholarly work on these Bills of Rights has focused on the restrained role of the judiciary as opposed to the role of the legislature. However, one of the key claims of these Bills is their assertion that they encourage deliberative engagement with human rights issues by legislatures. The authors' choice of New Zealand and the UK is because both have a Westminster-based system of democracy, facilitating a clear assessment of the extent to which parliamentary Bills of Rights may influence parliamentary behaviour. The book is not designed to compare the two systems. Nor would such a task necessarily be fruitful given the differences between the UK and New Zealand Nevertheless, their detailed discussion leads to

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[1] S Gardbaum, *The New Commonwealth Model of Constitutionalism*: *Theory and Practice* (CUP 2013).

[2] New Zealand Bill of Rights Act 1990 (New Zealand).

[3] Human Rights Act 1998 (United Kingdom).

[4] Charter of Human Rights and Responsibilities Act 2006 (Victoria, Australia).

[5] Human Rights Act 2004 (Australian Capital Territories, Australia).

the discovery of one common feature – the extent to which a strong executive, cabinet-style government and the party political system can undermine parliamentary protections of human rights.

The book divides into two parts, the first examining New Zealand and the second the United Kingdom. Each starts with the political origins; of the New Zealand Bill of Rights Act 1990 (NZBORA) (Chapter 2) and the Human Rights Act 1998 (HRA) (Chapter 6). Both were introduced by the Labour Party and were the result of a desire to create a stronger protection of human rights, whilst preserving parliamentary sovereignty. . Nevertheless, there are differences between the two. The NZBORA was initially envisaged as a component of a range of reforms designed to provide greater parliamentary control over the cabinet. It initially included strong human rights review by the court, which was rejected by the New Zealand Parliament over concerns as to parliamentary sovereignty. Ironically, as noted by the authors, its success was dependent upon the strength of cabinet government in New Zealand. The surprise resignation of David Lange led to his replacement by Geoffrey Palmer, whose strong backing of the Bill ensured its success. The HRA was a strong component of New Labour's policy reforms, backed by a manifesto pledge. Its adoption was less-dependent on strong Prime Ministerial leadership, although dependent on the recent election of a Labour government with a strong majority of seats. It was designed from the beginning to 'bring rights home', incorporating the European Convention of Human Rights, whilst preserving parliamentary sovereignty.

Following this account of political origins, each part of the book scrutinises the impact of parliamentary Bills of Rights in practice. The section on New Zealand focuses on the influence of the move to multi-member proportional representation (Chapter 3), before looking at the scrutiny of legislation where the Attorney General has used powers under section 7 of the NZBORA to notify the House of Representatives that a Bill appears to contradict the NZBORA, looking in particular at the Misuse of Drugs Act 1975 and the Misuse of Drugs Amendment Act (no 2) 2011 and prisoner disenfranchisement [6] (Chapter 4), before examining the rise of penal popularism and its influence on human rights scrutiny (Chapter 5). This detailed analysis argues that the main weakness in the NZBORA's ability to facilitate parliamentary scrutiny of human rights is the strength of cabinet government.

Chapters 3 to 5 reveal that there is little political engagement with human rights following notifications under section 7 of the NZBORA, with most engagement being found in statements in legislative debates from members of the Green Party and the Māori Party. Parties in government were more likely to use these notifications as a form of risk assessment, balancing the cost of being perceived as a weak government by modifying legislative proposals against the cost of enacting legislation which may harm human rights. Strong cabinet government exacerbates this lack of engagement. The government determines which parliamentary committee will scrutinise a Bill. Although the membership of parliamentary committees generally reflects the membership of Parliament as a whole, evidence in the book demonstrates how this is not perfectly achieved, with some committees composed in a manner that favours governmental interests. This leaves open the possibility for the government to send legislation to a committee that is less likely to carry out a detailed human rights-based scrutiny of the legislative provision, enabling legislation to be enacted

[6] The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010

without a detailed justification of why the legislation does not contravene the NZBORA, despite the concerns of the Attorney General, or why there is a strong justification for enacting the measure even if there are potential contradictions with the NZBORA.

In addition, multi-member proportional representation in New Zealand has led to a series of minority governments, with confidence and supply agreements with smaller political parties. These smaller political parties often campaign on single issues. In particular, the book refers to the rise of 'penal popularism', a penal policy focusing on the rights of victims of crime, favouring retribution. Small parties may make legislation favouring these issues part of their confidence and supply agreements. Legislation promoting penal popularism can be enacted with little legislative scrutiny to protect human rights that may be damaged by these policies, with the party in government voting for these measures as part of the confidence and supply agreement even if, were no such agreement in place, they would have voted against these measures. This detailed evaluation leads the authors to the conclusion that 'a parliamentary Bill of Rights is only as robust as parliament's ability to hold the cabinet to account through oversight mechanisms that, at a minimum, require the government to justify proceedings with a bill containing NZBORA incompatibilities.' (231-232).

The chapters on the United Kingdom provide a general analysis of pre-legislative human rights scrutiny (Chapter 7), before provide a detailed scrutiny of legislation on national security measures (Chapter 8) and equality and democratic measures (Chapter 9). This last chapter examines the regulation of political advertising, the reaction to the European Court of Human Rights' decision that a complete ban on prisoner voting contravened Convention rights, and legislative initiatives surrounding identity cards, in addition to legislation providing for same-sex civil partnerships same-sex marriages. The dominance of strong cabinet government is also present in the UK. Despite the role of the Joint Committee of Human Rights, rightly praised in the book for its detailed and wide-ranging reports on, inter alia, the compatibility of legislative proposals with Convention rights, the book explains how the government tends to rely more on its own legal advice than the reports of the Joint Committee. In addition, in a manner similar to that in New Zealand, the interviews carried out by the authors revealed a risk-management approach. Legal advice is often framed as a range of possibilities. This empowers the government to choose from a range of possible interpretations, with evidence of mindfulness towards judge-proofing and of balancing the risks of a possible future critical judgment in the courts against the risk of failing to deliver a governmental policy. There is also evidence of reluctance to pursue unpopular legislation in order to achieve a good protection of human rights – the most notable being the continued failure to introduce legislation to enfranchise some prisoners, despite repeated criticism from the Council of Europe, a parliamentary debate and a report from the Joint Committee established to examine draft legislation. Despite these problems, the book notes the enactment of legislation to permit same-sex civil partnerships, and later same-sex marriages, despite these measures being politically unpopular to some members of the governing party. However, this success is linked to the theme of executive-dominance. This legislation was enacted because of the strong commitment of David Cameron, the Prime Minister, who overrode potential opposition from his own party. In the words of the authors 'parliament's rights-protecting role can only be effective if party leaders take seriously the idea that legislation should be subject to compatibility-based assessments' (400).

Does this critical analysis create a crisis for the Commonwealth model? The authors conclude that their research adds to concerns surrounding the latent instability of the

Commonwealth model, questioning its characterisation as a distinct model of human rights protections. This is the opposite conclusion to that reached by Stephen Gardbaum. [7] The authors are also critical of Gardbaum's method of distinguishing the Commonwealth model from other models, with its focus on constitutional engineering and design. It is hard to conclude that the Commonwealth model can transform political behaviour in the light of the book's convincing conclusion to the contrary, where the parliamentary scrutiny of human rights has not been significantly enhanced due to the dominance of strong executive governments and party-politics. However, it is important to recognise the extent of the book's critique. If parliamentary Bills of Rights have failed to alter political behaviour and encourage greater pre-legislative political scrutiny, this may be explained by the relatively short-life of these legislative measures. Arguably, politicians have not yet had sufficient time to adjust their behaviour so as to ensure the model can deliver on its promises. However, this explanation seems insufficient. Anyone aware of the extent to which the HRA has changed the landscape of judicial review in the UK is likely to be unconvinced by any argument that all the Commonwealth model needs is a little more time. A more convincing explanation is perhaps found in the metaphor that one can take a horse to water, but one cannot make it drink. In a similar manner, one can provide parliamentarians with the opportunity to engage more effectively in pre-legislative human rights scrutiny, but one cannot force them to do so. Either other incentives are required, or further reforms are needed to transform executive-dominated legislatures and reduce the power of political parties.

Hiebert and Kelly's conclusion suggests a further explanation. Although both the UK and New Zealand demonstrate a similar pattern in terms of their experience of parliamentary Bills of Rights, there are nevertheless differences between the two. Specifically, there are more notifications of potential incompatibility from the Attorney General in New Zealand compared with the small number of Ministerial statements in the United Kingdom questioning whether proposed legislation is incompatible with Convention rights. The authors suggest four possible reasons for this disparity – the different nature of the author of such statements (the Attorney General in New Zealand and the Minister in charge of a Bill in the United Kingdom); more limited post-legislative judicial review in New Zealand compared to the United Kingdom; the greater role of party-voting in New Zealand following multi-member proportional representation compared with the greater ability of the House of Lords to propose human rights-compatible amendments and the higher possibility of backbench rebellion in the United Kingdom, and the lack of a human rights committee in New Zealand. These differences hint at a slightly better future for the Commonwealth model if a greater role can be played by parliamentary committees, public interest groups (often consulted by the UK's Joint Committee on human rights) and the electorate writ large in pre-legislative human rights scrutiny.

It is also important to recognise that Hiebert and Kelly's criticism is of the extent to which Commonwealth models have changed political behaviour, enhancing political pre-legislative human rights scrutiny. However, this is not the sole distinguishing feature of Commonwealth models, which aim to provide a stronger judicial protection of human rights than that found in models with no Bill of Rights, albeit one which stops short of empowering the judiciary to strike down legislation without also providing the legislature with the possibility to respond. It is important to note here the stronger judicial power of the UK judiciary compared to their New Zealand counterparts in addition

[7] Gardbaum, *The New Commonwealth Model* n 1 above.

to the role of the European Court of Human Rights. Judge-proofing may be far from ideal, but it may provide a partially effective means of counter-balancing executive dominance and party-politics, both in terms of engineering at least some engagement in pre-legislative human rights scrutiny by politicians as well as forcing further scrutiny in the face of declarations of incompatibility or negative judgments of the European Court of Human Rights.

The history of the Commonwealth model/ parliamentary Bills of Rights is only just beginning. There still remains a great deal of uncertainty as to their long-term ability to provide a distinct model of constitutionalism or to encourage greater political engagement with human rights. One thing that is certain is that any scholar wishing to learn more about how these novel human rights models operate in practice – whether motivated to reject the model; to reject the role of any form of political protections of human rights; or to modify the model to strengthen political pre-legislative scrutiny of human rights – will be returning to the excellent scholarship found in this book for years to come.