Designing Human Rights Legislation: 'Dialogue', the Commonwealth Model and the Roles of Parliaments and Courts

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I INTRODUCTION

Legislative supremacy and the effective protection of fundamental rights have traditionally been viewed as necessarily and fundamentally incompatible.[1] Recently, however, new "hybrid" models of bills of rights have emerged with the explicit aim of providing effective protection for fundamental rights within the paradigm of parliamentary sovereignty.[2] These models provide some capacity for judicial review of legislation whilst preserving parliamentary sovereignty and enhancing Parliament's role in human rights protection. In this way, they claim to create a partnership between Parliament and the courts where both parties are committed to the effective protection of fundamental rights, and both have responsibilities to fulfil in this enterprise.

This development reflects broader shifts in constitutional theory. Traditional parliamentary sovereignty theory is being challenged, as commentators increasingly see the relationship between Parliament and the courts as one of equal partnership or collaboration, rather than viewing the courts as subordinates.[3] Rather than being in tension, courts and legislatures are increasingly viewed as participants in a "constitutional dialogue", engaging in an ongoing exchange of views in order to achieve optimal protection of human rights.[4] Proponents of this shift suggest that a dialogic model of human rights legislation provides a superior balancing of democracy and human rights than the traditional polarized positions

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1 Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49 Am Jnl Comp L 707.

2 See generally Goldsworthy, "Homogenising Constitutions" (2003) 23 OJLS 483 ["Homogenising Constitutions"].

3 See e.g. Elias, "Constitutions and Courts" (Paper presented at The Tenth Australian Institute of Judicial Administration Oration, Sydney, 16 June 2000) ["Constitutions and Courts"]; Elias, "Sovereignty in the 21st Century: Another Spin on the Merry-go-round" (2003) 14 PLR 148 ["Sovereignty in the 21st Century"]; Joseph "Parliament, the Courts and the Collaborative Enterprise" (2004) 15 KCLJ 321 ["Parliament, the Courts and the Collaborative Enterprise"].

4 See e.g. Hogg and 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 LJ 75 ["The *Charter* Dialogue between Courts and Legislatures"]; Hiebert, "Why must a Bill of Rights be a Contest of Political and Judicial Wills? The Canadian Alternative" (1999) 10 PLR 22 ["Why must a Bill of Rights be a Contest of Political and Judicial Wills?"].

of legislative and judicial supremacy.[5] This paper examines whether the new model provides a better, or at least equally appropriate, balance between human rights and democratic concerns. To the extent that hybrid bills of rights may be seen as facilitating a "dialogue" between courts and legislatures, is this to be seen as an improvement on the mutual exclusivity of systems of judicial or legislative supremacy?

II THEORETICAL FOUNDATIONS

Traditional Dichotomy Between Legislative and Judicial Supremacy

Until recently, constitutional arrangements worldwide appeared to fall into one of two categories. In the Commonwealth, the Diceyan view that "Parliament has the right to make or unmake any law whatever, and ... no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament" prevailed.[6] Thus attempts to constrain Parliament's decision-making by reference to human rights standards were anathema to Westminster parliamentary systems. Conversely, in constitutional systems the power of the legislature is limited by fundamental rights while the courts are recognised as having power to invalidate laws which do not conform to constitutional values.

Both systems have inherent advantages and disadvantages. Legislative supremacy creates the so-called majoritarian dilemma, where minority rights are susceptible to being overridden by the majority through the democratic process.[7] Judicial supremacy removes this difficulty, as the courts do not inherently favour the majority.[8] Its disadvantage, however, is the perceived "counter-majoritarian difficulty". The final power of decision in rights matters is given to courts constituted of unelected judges who do not represent the people and are not accountable to them. Consequently judicial review is a "deviant institution" in a democratic order.[9]

Shifts in Thinking on the Relationship Between Courts and Legislatures

Recently, a number of scholars have taken a different approach to the question of which institutions of government are best placed to ensure that human rights are respected and protected. There has been a move to a more integrative approach that seeks to combine the strengths of all branches

5 See e.g. Gardbaum, supra note 1.

6 Cited in Elliott, "United Kingdom: Parliamentary Sovereignty Under Pressure" (2004) 2 Icon 545.

7 See e.g. Tomkins, *Public Law* (2003) 20.

8 Ibid.

9 Kay, "Rights, Rules and Democracy" in Campbell, Goldsworthy and Stone (eds), *Protecting Human Rights* (2003) 119.

of government and sees the protection of human rights as a joint effort between them, rather than a process of tension and competition where one branch must prevail. This shift in emphasis has taken on slightly different form according to the particular constitutional context.

1 Constitutional Dialogue

In constitutional systems such as the United States of America and Canada, "constitutional" or "democratic dialogue" theory responds to democratic concerns about judicial supremacy by conceptualising judicial review as part of an ongoing exchange of ideas between courts and legislatures.[10] Although it does not entirely answer the counter-majoritarian objection, it changes the nature of the debate about the legitimacy of judicial review by positing a greater role for Parliament than was previously assumed.[11] In most cases, it is suggested, invalidation of legislation leaves room for a legislative response.[12] Many constitutional defects in legislation are not essential to the goal the legislation was designed to achieve, and therefore can be remedied without adversely affecting the legislation's ability to achieve its purpose. Thus a judicial decision to strike down legislation merely creates an opportunity for legislatures to design new legislation that achieves the same or similar policy goals while responding to the court's concerns about the original legislation, for example by developing a fairer procedure, or broadening under-inclusive laws to ensure equal treatment.[13] However, human rights values achieve a more prominent position in the debate and any further legislation by virtue of being highlighted by the court.[14]

Another aspect of dialogue, which can apply equally to constitutional or statutory human rights instruments, is that legislators may articulate an alternative view of the meaning of human rights or the reasonableness of limits placed on rights.[15] Definitions of the proper meaning and scope of human rights, and the importance and justification of limits on rights, are not uncontested or self-evident, and rights instruments themselves do not speak conclusively to these questions. Legislatures are not compelled to accept that a particular judicial decision necessarily reaches the 'correct' answer. Rather, they may enact legislation reflecting their own reasoned judgment of consistency with human rights. On this view, dialogue promotes the sharing of views between institutions to resolve complex and contested rights issues, rejecting the "judicial-centric" view that courts are the only branch of government whose perspectives are valid in resolving rights

10 See e.g. Devins and Fisher, *The Democratic Constitution* (2004); Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001); *Vriend v Alberta* [1998] 1 SCR 493 [119]-[122] ["*Vriend*"].

11 Hogg, "Discovering Dialogue" in Huscroft and Brodie (eds), *Constitutionalism in the Charter Era* (2004) 4 ["Discovering Dialogue"].

12 Ibid.

13 Hogg and Bushell, The *Charter* Dialogue between Courts and Legislatures, supra note 4, 81.

14 Ibid 75.

15 Hiebert,Why Must a Bill of Rights be a Contest of Political and Judicial Wills?, supra note 4.

conflicts.[16] Rather than seeing a bill of rights as creating or exacerbating tension between the judiciary and other institutions of government,[17] dialogue views the relationship created by a human rights instrument as one of collaboration in a joint responsibility for the protection of rights.

2 *Partnership*

In systems where Parliament is sovereign, there has not been as much explicit reference to the idea of 'dialogue' as a metaphor to explain the interaction between courts and legislatures. However, traditional parliamentary sovereignty theory is increasingly being challenged by more collaborative or 'dialogic' visions of the relationship between branches of government. In New Zealand, one of the leading proponents of this view is Philip Joseph, who argues that the relationship between the courts and Parliament is one of interdependence and reciprocity. In truth, neither branch is supreme but both are engaged in the "collaborative enterprise" of government. Each branch is committed to the same goals but works towards these goals in "different, task-specific" ways.[18] He sees the courts' role to declare and interpret the law as occurring within a context of on-going 'dialogue' with the other branches of government. Parliament may legislate to override or modify a judicial decision in response, and the courts then adapt their rulings to accommodate Parliament's legislation.

The idea of a "collaborative enterprise" between courts and Parliament has been seen as particularly apt in the context of human rights protection. Rights guarantees are capable of bearing multiple constructions, meaning that judicial law-making has a significant role to play in their interpretation and application. Furthermore, human rights adjudication often touches on questions of social and economic policy which have traditionally been seen as the province of the legislature, thereby giving rise to accusations that the courts are invading the proper sphere of the legislature. For this reason, Joseph sees orthodox sovereignty theory as "too blunt and dogmatic" to accommodate this enhanced judicial role.[19] Instead, it has been suggested that the protection of human rights should be seen as a co-operative enterprise between all institutions of government.[20]

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16 Kelly, "The Commonwealth Model and Bills of Rights: Comparing Legislative Activism in Canada and New Zealand" (Paper presented to Legislatures and the Protection of Human Rights Conference, Melbourne, Australia, 20–22 July 2006) <http://cccs.law.unimelb.edu.au/index.cfm?objectID=9E065F87-1422-207C-BAC23913D7DB519D> (at 15 July 2007); Hiebert, "Parliament and Rights" in Campbell, Goldsworthy and Stone (eds), *Protecting Human Rights* (2003) 234.

17 Williams "Constructing a Community-Based Bill of Rights" in Campbell, Goldsworthy and Stone (eds), *Protecting Human Rights* (2003) 249 ["Constructing a Community-Based Bill of Rights"].

18 Joseph, Parliament, the Courts and the Collaborative Enterprise, supra note 3, 322-323. See also Lord Cooke of Thorndon, "The Basic Themes" (2004) 2 NZJPIL 113; Cooke, "The Road Ahead for the Common Law" (2004) 53 ICLQ 273; Elias, Constitutions and Courts, supra note 3; Elias, Sovereignty in the 21st Century, supra note 3.

19 Joseph, Parliament, the Courts and the Collaborative Enterprise, supra note 3, 343 & 322. But see Goldsworthy, "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPIL 7.

20 See e.g. Elias, Sovereignty in the 21st Century, supra note 3, 162.

This movement towards dialogue and co-operation as an explicit feature when evaluating the comparative merits of courts and legislatures suggests an increasing sentiment that an "either/or" approach to human rights protection ought to be rejected. It is increasingly suggested that this approach "neither captures existing reality nor the variety of possibilities as to how the two institutions might be beneficially combined in the search for better ways to protect rights and foster democratic ideals."[21] To this end, it is interesting to note that in systems where the courts have had a strong role in assessing the rights implications of legislation, there has been a move to reassert a role for legislatures in the process. Conversely, in systems of legislative supremacy, the courts are asserting their role in protecting rights despite Parliament's sovereignty. Thus, arguably there is a discernible trend that recognises the strengths of involving both Parliament and the courts in human rights assessment.

In various Commonwealth jurisdictions, this trend has played out in the design of new human rights instruments — seen as a middle ground between legislative and judicial supremacy — which implicitly or explicitly seek to promote dialogue between courts and legislatures. The next section of this paper considers the experience of various jurisdictions that have adopted this approach to human rights protection, and the extent to which the idea of dialogue or cooperation between branches of government may be seen as having enhanced human rights protection in these jurisdictions.

III MODELS OF HUMAN RIGHTS LEGISLATION AND THE ROLES OF PARLIAMENTS AND COURTS

Recently commentators have noted the emergence of a new model of human rights legislation, variously termed "the Commonwealth model",[22] and "hybrid bills of rights",[23] among other descriptions. It may be seen as a self-conscious attempt to provide a new and better solution to the dilemmas associated with the legislative/judicial supremacy dichotomy, by providing for a balanced allocation of responsibilities for human rights protection as between legislature, executive and judiciary. In turn, this is expected to promote dialogue between branches of government.[24] Courts are given a limited power of judicial review, often referred to as weak-form review, which is thought to be more conducive to dialogue than strong-

21 McDonald, "Rights, 'Dialogue' and Democratic Objections to Judicial Review" (2004) 32 Fed LR 1, 26.

22 Gardbaum, supra note 1.

23 Goldsworthy, Homogenising Constitutions, supra note 2, 484.

24 Gardbaum, supra note 1, 748.

form review.[25] Parliament's power to have the final word on matters of human rights consistency is typically preserved. In addition, mechanisms for parliamentary scrutiny of legislation are strengthened to promote consistent legislation at the outset. Thus this model appears to offer the best of both worlds; consideration by judges in the forum of principle and determination in a democratic forum, and to mitigate the difficulties associated with both legislative and judicial supremacy.[26]

This article relies particularly on Janet Hiebert's analysis of this emerging model.[27] She characterizes new human rights instruments as parliamentary bills of rights, as she sees the key benefit of the model as being the enhanced role of legislatures and the executive in the process of evaluating legislation against human rights standards, which she terms "political rights review." While parliamentary models allow influence from judicial perspectives, judicial review is not equated with judicial supremacy. Parliament and the executive also have a role in, and a responsibility for, ensuring that legislation does not unjustifiably limit rights. Hiebert argues that the intra- and inter-institutional relationships created under this model create "dialectic tensions," which are beneficial in that rights questions are considered by a broader range of institutional actors, allowing the incorporation of a broader range of perspectives on these matters. The author agrees with Hiebert's analysis of the key features and assumptions of the model, and with the idea that processes of "political rights review" are an important and beneficial innovation. However, it is suggested that "dialectic tensions" and the incorporation of a broader range of institutional perspectives may not necessarily produce better outcomes.

In a number of jurisdictions legislation has been premised on the idea of dialogue as a major benefit to be expected from adopting this model.[28] The second part of this paper examines the extent to which dialogue has occurred in practice, and the connections between dialogue and the success of human rights instruments in protecting rights.

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25 See e.g. Huscroft, "Rights, Bills of Rights and the Role of Courts and Legislatures" in Huscroft and Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (2002) 14 ["Rights, Bills of Rights and the Role of the Courts and Legislatures"]; Williams, Constructing a Community-Based Bill of Rights, supra note 17, 256. But see McDonald, "New Directions in the Australian Bill of Rights Debate" (2004) 12 PL 22 ["New Directions in the Australian Bill of Rights Debate"].

26 Huscroft, Rights, Bills of Rights and the Role of Courts and Legislatures, supra note 25, 14. See also Goldsworthy, Homogenising Constitutions, supra note 2, 484.

27 Hiebert, "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?" (2003-2004) 82 Tex LR 1963 ["New Constitutional Ideas"]; Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" (2006) 69 MLR 7 ["Parliamentary Bills of Rights"].

28 See e.g. Australian Capital Territory Bill of Rights Consultative Committee *Towards an ACT Human Rights Act: A Report of the ACT Bill of Rights Consultative Committee* No 03/0068 (May 2003) <http://www.jcs.act.gov.au/prd/rights/documents/report/BORreport.pdf> (at 16 July 2007) 61; Human Rights Consultation Committee, "Rights, Responsibilities and Respect" <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb7b830e1793a4e/HumanRightsFinal_FULL.pdf > (at 13 September 2007).

Canadian Charter of Rights and Freedoms[29]

In some respects Canada does not fit easily within the Commonwealth model, as in practice the Canadian system is essentially one of judicial supremacy. However, the Charter introduced concepts which are central to the Commonwealth model: the ideas of preserving the possibility of legislative disagreement with the courts, and of human rights scrutiny within the political process.[30] Similarly, the idea of dialogue has perhaps been most influential in Canada, although more recently it has been increasingly doubted.

1 Implications for Parliament and the Courts

A number of structural features of the Charter are said to promote dialogue between the courts and legislatures. First, the rights contained in the Charter may be subject only to "reasonable limits".[31] The malleability of this concept leaves room for legislatures and the courts to articulate competing views of reasonableness, based on whether legislation pursues a "pressing and substantial objective" and whether it has been designed so that restrictions on rights are proportionate.[32] Generally, legislation will be invalidated only on proportionality grounds, leaving room for the legislature to enact new legislation where the means used are proportionate to the objective.[33] Secondly, legislatures are given power to override a judicial decision, or immunize a statute from future invalidation, by providing that the law is to operate "notwithstanding" certain sections of the Charter.[34] While in reality the override does not significantly constrain judicial supremacy,[35] as it is almost never used,[36] it does in theory provide some capacity for legislative disagreement with judicial decisions about rights.

Dialogue theorists point to empirical evidence of legislative and judicial behaviour to demonstrate that a dialogue is in fact occurring. One noticeable trend is that now Canadian legislation often includes a detailed preamble or purpose clause, discussing the "pressing and substantial" objective the legislation addresses and stating that the measures taken are intended to "reasonably limit" rights and freedoms.[37] For its part,

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29 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) ["Charter"].

30 Hiebert, Parliamentary Bills of Rights, supra note 27, 11.

31 Charter s 1.

32 *R v Oakes* [1986] 1 SCR 103, 138-139; Hiebert, Why Must a Bill of Rights be a Contest of Political and Judicial Wills?, supra note 4, 28.

33 Hogg and Bushell, supra note 4, 85.

34 Charter s 33.

35 Hiebert, Parliamentary Bills of Rights, supra note 27, 11.

36 Goldsworthy, "Judicial Review, Legislative Override, and Democracy" in Campbell, Goldsworthy and Stone (eds), *Protecting Human Rights* (2003) 275.

37 Hogg and Bushell, supra note 4, 101.

the Supreme Court of Canada has developed a practice of suspending declarations of invalidity for up to 18 months, to allow the legislature to respond to the Court's concerns before the legislation is struck down.[38]

There has also been a trend towards greater judicial deference premised on dialogue theory. This has been most pronounced where the courts have considered legislation that has been re-enacted in altered form following judicial invalidation of the original legislation. According to dialogue theory, courts ought to accord more deference to the legislature's views in this situation, as the legislature has had the benefit of the court's opinion on Charter consistency, and new legislation will represent its considered response.[39] For example, in *R v Mills*[40] the Court upheld legislation that had been re-enacted in response to a previous Supreme Court decision. Although the legislative response differed substantially from the rules proposed in the initial court decision, the Court stated that its prior decision did not represent the last word on the matter and that the relationship between the courts and the legislature should be one of dialogue. There may be a range of legislative options within the bounds of constitutional permissibility, and Parliament was free to depart from the court's decision provided that it met constitutional standards. In contrast to this deference premised on dialogue, however, there have been instances of judicial 'activism' justified on the basis that the legislature will have the opportunity to play a part in the ongoing dialogue.[41]

The use of the dialogue metaphor in Canada has been subject to criticism from all sides of the debate. Even the Supreme Court has recently doubted its utility.[42] First, the empirical basis of dialogue theorists' argument has been challenged on the basis that it overstates the extent to which dialogue actually occurs, and does not adequately explain the complexity of interaction between courts and legislatures.[43] Christopher Manfredi and James Kelly argue that in many cases legislatures simply amended or repealed legislation in line with judicial decisions, and that this cannot be regarded as dialogue in any meaningful sense.[44] This suggests a hierarchical relationship between courts and legislatures, rather than a relationship of equality which is necessary for true dialogue.[45] Once these examples are removed from the analysis, the extent of true dialogue between courts and legislatures is much smaller, although it has been argued that the idea of dialogue does not preclude a legislative choice to agree with the court's

38 Hogg, Discovering Dialogue supra note 11, 5.

39 Ibid.

40 [1999] 3 SCR 668 (SC).

41 See e.g. *Vriend*, supra note 10.

42 *Doucet-Boudreau v Attorney-General (Nova Scotia)* (2003) 232 DLR (4th) 577, [53].

43 Manfredi and Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall LJ 513.

44 Ibid 520.

45 Ibid 521. See also Morton, "Dialogue or Monologue?" (April 1999) Policy Options 23, 26.

judgment.[46] Further, it has been suggested that it is misleading to represent the legislative override provision as stimulating dialogue.[47]

Arguably, therefore, the Charter's design is not as effective in promoting dialogue as supporters of the dialogue metaphor have tended to suggest. Normative criticisms have also been made. On the one hand, critics have doubted the extent to which the idea of dialogue can overcome or mitigate democratic concerns about judicial review. It is suggested that judicial interpretations of the Charter are still treated as authoritative, despite the claim of dialogue theory to respect differing legislative perspectives on rights matters.[48] On the other hand, a number of scholars have criticized the Supreme Court's adoption of the dialogue metaphor on the basis that it encourages excessive deference to legislative judgments about rights. If courts regularly submit to the legislature's judgment in these matters, the entrenchment of constitutional rights may become illusory.[49] It has been argued that this is not dialogue but abdication of the judicial function as the arbiter of constitutional meaning.[50] Further concerns have been raised regarding the implications for principled Charter interpretation "when the power to decide important questions ricochets between institutions engaged in some *ad hoc* form of dialogue."[51]

2 *Implications for the Legislature and the Executive*

Canada also pioneered the idea of pre-enactment scrutiny of legislation, which has been significant in imposing human rights values on the process of policy and legislative development. However, Parliament's role in scrutinising legislation has tended to be minimal, as scrutiny largely occurs within the executive, rather than upon introduction of a bill to Parliament. Human rights lawyers from the Department of Justice are seconded to other agencies to ensure that legislative drafting complies with the Charter as much as possible. The Minister of Justice is then required to certify that legislation complies with the Charter upon introduction of a bill, although the House is not presented with any accompanying evidence demonstrating why the legislation is considered to be consistent with the Charter.[52]

While the unwillingness of successive governments to introduce legislation which is considered to violate the Charter would seem positive in terms of producing consistent legislation, the concentration of rights vetting within the executive leaves little room for Parliament to make

46 Hogg and Thornton, "Reply to 'Six Degrees of Dialogue'" (1999) 37 Osgoode Hall LJ 529, 536.

47 See e.g. Waldron, "Some Models of Dialogue between Judges and Legislators" in Huscroft and Brodie (eds), *Constitutionalism in the Charter Era* (2004) 36.

48 Manfredi and Kelly, supra note 43, 523.

49 Mathen, "Constitutional Dialogue in Canada and the United States" (2003) 14 NJCL 403, 459-460.

50 Cameron, "Dialogue and Hierarchy in Charter Interpretation: A Comment on *R v Mills*" (2001) 38 Alta L Rev 1051.

51 Ibid 1060.

52 See generally Kelly, supra note 16.

an independent assessment of legislation.[53] There is little evidence of challenges to the Minister's assessment of legislation, although scrutiny by parliamentary committees and the Senate has sometimes occurred on an ad hoc basis. Consequently, it has been argued that there is no effective check on executive scrutiny in Canada.[54]

3 Evaluation

The idea that the Charter institutes a process of dialogue between courts and legislatures has been highly contested, and the Canadian experience illustrates some of the limits and uncertainties of the metaphor.

The New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act ("NZBORA") has been viewed as a key example of the emerging Commonwealth model. However, the idea of dialogue as an explanation of the relationship between the courts and Parliament instituted by the Act has not, for the most part, been an explicit feature of rights discourse in New Zealand, as it has in the other jurisdictions surveyed.

Key features of the NZBORA which locate it within the paradigm of the Commonwealth model are the parliamentary scrutiny process centred on section 7, the limitation provision in section 5, the interpretive obligation on the courts in section 6, and the explicit preservation of parliamentary sovereignty in section 4. While the courts are prevented from invalidating legislation, the NZBORA institutes a system of weak-form judicial review, whereby courts strive to interpret legislation so as to only place reasonable limitations on the guaranteed rights.

1 Implications for Parliament and the Courts

On one view, the capacity of the NZBORA to facilitate dialogue between the branches of government is fairly limited. The combined effect of sections 4 and 6 is not, arguably, conducive to dialogue between the courts and Parliament, as the legislature continues to exercise supreme power and may defeat the interpretive obligation in section 6 if it is prepared to legislate sufficiently clearly.[55] The structure of the NZBORA may also encourage judges to simply apply section 4 without exploring whether a statute could be interpreted consistently with the NZBORA.[56] Furthermore, the NZBORA itself does not provide any mechanism for the courts to draw

53 Hiebert, "Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes" (2005) 3 NZJPIL 63, 92 ["Rights-Vetting in New Zealand and Canada"].

54 Kelly, supra note 16.

55 Waldron, supra note 47, 31.

56 Butler, "Strengthening the Bill of Rights" (2000) 31 VUWLR 129.

inconsistencies to Parliament's attention. This too limits opportunities for dialogue, as there is no systematic exchange of views between courts and Parliament. However, the courts have subsequently indicated that on appropriate occasions they will be prepared to declare that a statue is inconsistent with the NZBORA,[57] although this power has not been exercised to date. Dialogue may also occur through judicial interpretation, for example where the court interprets legislation so as to be consistent with the NZBORA, in a way that was not intended by Parliament. Parliament may then respond with new legislation making its intention clearer.[58]

Evidence suggests that under the NZBORA, the relationship between the courts and Parliament has become one of more overt partnership in law making.[59] This partnership has largely developed through the courts filling gaps in the NZBORA, which stems from the courts' expressed commitment to vindicate the guaranteed rights,[60] for example by implying new remedies into the scheme of the Act.[61] Interpretation has also been a significant aspect of the evolving interaction between Parliament and the courts. Techniques such as reading in rights protections not included on the face of a statute and reading down provisions to avoid possible rights-infringing interpretations may be seen as evincing a constructive interaction between institutions, such that Parliament's intention is respected while rights guarantees are augmented.

Parliament has responded in various ways to judicial decisions under the NZBORA, and experience to date suggests that legislators do not see themselves as necessarily constrained by judicial interpretations of rights, but rather assert competing interpretations of the reasonableness of limits on rights and the appropriate balance between rights where they conflict. Thus, for example, Parliament enacted the Prisoners and Victims Claims Act 2005 in response to an award of compensation to prisoners for breach of the NZBORA which it viewed as unacceptable.[62] Petra Butler points out that in some cases Parliament has been prepared to go further than the courts in promoting NZBORA values. The Civil Union Act 2004, in promoting greater equality for homosexual couples, went further than the Court of Appeal had deemed necessary in *Quilter v Attorney-General*.[63] However, in other situations Parliament has followed judicial decisions.

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57 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

58 Waldron, supra note 47, 31-32.

59 Butler, "Human Rights and Parliamentary Sovereignty in New Zealand" (2004) 35 VUWLR 341 ["Human Rights and Parliamentary Sovereignty in New Zealand"].

60 Joseph, *Constitutional and Administrative Law in New Zealand* (2 ed, 2001) 1054 ["*Constitutional and Administrative Law in New Zealand*"].

61 See e.g. *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA); *R v Butcher* [1992] 2 NZLR 257 (CA); *Martin v District Court at Tauranga* [1995] 2 NZLR 419 (CA).

62 *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (HC); affd [2006] 2 NZLR 457 (CA).

63 *Quilter v Attorney-General* [1998] 1 NZLR 523. See also Butler, "Australian Bills of Rights: The ACT and Beyond: Lessons from New Zealand" (Paper presented to the Australian Bills of Rights Conference, Canberra, Australia, 21 June 2006) <http://acthra.anu.edu.au/articles/Butler%20P-%20lessons%20from%20NZ.pdf> (at 17 July 2007).

For example, following the decision in *R v Pora*,[64] amendments were introduced to remove the retrospective penalty.[65]

The assertion of the power to make declarations of inconsistency can be seen as an example of inter-institutional dialogue under the NZBORA,[66] which may in turn promote further interaction between courts and the legislature. A practice of declaring inconsistencies recalibrates the balance that previously existed between courts and Parliament in rights matters, setting up a dynamic between the courts and Parliament that may encourage legislative change in response.[67] The extent to which declarations might create or enhance a partnership between the courts and Parliament in this area will largely depend on Parliament's responsiveness to declarations, as well as the courts' attitude. Comments in *Moonen*[68] asserted the importance of judicial interpretation of the NZBORA, suggesting a fairly one-sided exchange, with Parliament being guided by judicial decisions. As yet there has been no experience of declarations, so it is unclear how Parliament might respond. However, if it became common practice for Parliament to amend legislation in response to declarations, New Zealand's system of weak-form judicial review would be considerably strengthened. The structure of the NZBORA may however act as a disincentive for litigants to bring a case, limiting the capacity of declarations of inconsistency to effect inter-institutional dialogue. A declaration has little value as a remedy because it has no immediate effect, and does not oblige Parliament to take any action in response. There is no external constraint, comparable to the threat of a challenge in the European Court of Human Rights in the United Kingdom, to stimulate legislators to bring legislation into line with the NZBORA. It is not even clear that Parliament's attention will be drawn to the fact that a declaration has been made.[69]

2 *Implications for the Legislature and the Executive*

While opportunities for inter-institutional dialogue may be limited by the scheme of the NZBORA, an important aspect of the NZBORA is the way in which it facilitates dialogue within the legislative branch, and between the legislative and executive branches, by replacing judicial review of legislation with "legislative review" within the parliamentary process.[70]

This dialogue occurs primarily through the NZBORA's systems of executive and parliamentary scrutiny of legislation, centred on the

64 [2001] 2 NZLR 37 (CA).

65 Butler, Human Rights and Parliamentary Sovereignty in New Zealand, supra note 59, 364.

66 Huscroft, "Protecting Rights and Parliamentary Sovereignty: New Zealand's Experience with a *Charter*-inspired, Statutory Bill of Rights" (2002) 21 Windsor YB Access Just 111, 120 ["Protecting Rights and Parliamentary Sovereignty"].

67 Joseph, *Constitutional and Administrative Law in New Zealand*, supra note 60, 1060.

68 *Moonen*, supra note 57, 17; Huscroft, Protecting Rights and Parliamentary Sovereignty, supra note 66, 120.

69 Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 1115.

70 Kelly, supra note 16.

Attorney-General's obligation to vet bills and table a report in Parliament where a bill appears unreasonably to limit rights and freedoms contained in the NZBORA.[71] It was envisaged that this would act as a disincentive to introduce legislation inconsistent with the NZBORA, as governments would seek to avoid the embarrassment of adverse reports on their own bills.[72] Furthermore, the process ensures that Parliament is made aware that legislation may unreasonably limit rights, which is intended to spark a debate among legislators as to whether the stated legislative goals justify limiting rights, and whether such limits are reasonable.[73] It was also expected that a negative report would generate pressure to amend or withdraw the bill, further promoting the goal of rights-consistent legislation.

As a corollary of the section 7 vetting obligation, pre-legislative scrutiny procedures have also been developed within the executive branch, with the aim of ensuring that legislative policy and drafting produce rights-consistent legislation from the outset, mitigating the need for judicial review of legislation.[74] These scrutiny obligations have formalised the place of rights in the legislative process, ensuring that the NZBORA is an important part of policy formulation and legislative development.[75] Despite this accomplishment, however, it is not clear to what extent the structure of the NZBORA has been successful in producing a culture of respect for human rights within Parliament and the government.

James Kelly argues that New Zealand's legislative scrutiny processes have established a dialogue between the House of Representatives and the executive. He suggests that New Zealand's system of legislative review, with its greater commitment to parliamentary processes as mechanisms to enhance rights-compliance, achieves a more "balanced" dialogue than under models such as the Canadian Charter.[76] Evidence of this dialogue may be found in debates within the legislature as to whether a bill conforms to the standards set by the NZBORA, which have at times followed reports made under section 7. Members have not automatically accepted the Attorney-General's judgment that a bill is inconsistent with the NZBORA, and thus the fact that legislation has been passed despite an adverse section 7 report may signal that legislators in fact believe that there is no bill of rights inconsistency. For example, the House chose to pass the Transport Safety Bill 1991 into law notwithstanding an adverse section 7 report,

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71 New Zealand Bill of Rights Act 1990, s 7.

72 See e.g. Rishworth, "Human Rights" [2003] NZ Law Review 261.

73 See generally Fitzgerald, "Section 7 of the New Zealand Bill of Rights Act 1990: A Very Practical Power or a Well-intentioned Nonsense" (1992) 22 VUWLR 135.

74 Cabinet Office, *Cabinet Manual* (2001) Department of the Prime Minister and Cabinet <http://www.dpmc.govt.nz/cabinet/manual/index.html> (at 28 November 2006) ch 5; Legislation Advisory Committee, *Guidelines on Process and Content of Legislation* (2001) Ministry of Justice <http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/combined-guidelines-2005.pdf> (at 28 November 2006) ch 4.

75 See generally McGrath, "The Bill of Rights and the Legislative Process" in *The New Zealand Bill of Rights Act 1990* (1992).

76 Kelly, supra note 16.

preferring the view put forward by Sir Kenneth Keith in a submission to the select committee, in which he challenged the Attorney-General's assessment.[77] Such examples of disagreement or 'dialogue' between the legislative and executive branches can be seen as improving the quality of legislation, refining and improving the bill of rights analysis engaged in by the executive.

There is also some evidence of dialogue occurring in the context of the select committee process. For example, bill of rights consistency was raised as an issue in a number of submissions on the Climate Change Response Bill. Although the Attorney-General had concluded that the bill was consistent with the NZBORA, the select committee formed its own view of the bill's compliance with the NZBORA and departed from the Attorney-General's advice, amending the legislation so as to achieve what it viewed as a greater degree of compliance with the NZBORA.[78] This appears to be one of the few examples in New Zealand of legislators challenging a decision not to report.

Despite these examples, the extent to which dialogue occurs among legislators and the executive is doubtable. The efficacy of the section 7 reporting procedure in stimulating debate on rights matters is questionable, as reports have not often led to amendments to redress the identified inconsistencies,[79] and have not provoked debate within Parliament to the extent that was expected. Frequently a report is presented with little comment on it being made in the subsequent debate.[80] Consideration of bill of rights issues by select committees also appears to have been variable. At times select committees have questioned the need for reports, but despite some notable exceptions they often do not devote time to considering the substance of the Attorney-General's stated concerns about a bill.[81] On occasion committees have questioned government officials on issues of bill of rights consistency, and bill of rights claims now arise fairly frequently in submissions.[82] However, assessment by select committees of bills' consistency with the NZBORA appears to occur on an ad hoc basis, depending to a large extent on factors such as whether bill of rights issues have been raised as a concern in submissions and the interests and expertise of members.

The frequent lack of debate on bill of rights matters suggests that the NZBORA's standards for policy evaluation may not have been a

77 See generally Rishworth, "The Attorney-General, the Bill of Rights and the Public Interest" in Huscroft and Rishworth (eds), *Rights and Freedoms* (1995).

78 Foreign Affairs, Defence and Trade Committee, *Report on the Climate Change Response Bill* (14 October 2002).

79 Hiebert, Rights-Vetting in New Zealand and Canada, supra note 53, 88.

80 See e.g. (29 June 2004) 618 NZPD 14212-14227; (24 June 2004) 618 NZPD 13979-13986; (24 June 2003) 609 NZPD 6539-6542, 6668-6675, 6711-6717.

81 Hiebert, "Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?" (2006) 4 ICon 1["Parliament and the Human Rights Act"].

82 Butler, "Judicial Review, Human Rights and Democracy" in Huscroft and Rishworth (eds), *Litigating Rights* (2002) 41.

significant influence on political culture beyond the initial stages of policy formulation. Paul Rishworth suggests that the common law approach to rights which prevailed before the enactment of the NZBORA still tends to dominate legislators' assessment of rights questions. Rights, he suggests, are generally seen as beneficial but may be overridden by Parliament when it is satisfied that they should be. This approach fails to incorporate the role of the NZBORA in defining acceptable limits on rights.[83] To this end, Sir Geoffrey Palmer commented in 2004 that the NZBORA had not produced a 'rights culture' within Parliament.[84]

3 Evaluation

Many commentators have argued that the NZBORA has been as effective as a superior law bill of rights in protecting human rights in New Zealand.[85] Further, to some scholars its emphasis on legislative responsibility, and concomitant limits on judicial power, has meant that human rights protection has been achieved without the democratic legitimacy concerns associated with judicial review.[86]

However, the reliance on legislative responsibility for rights is not always sufficient to ensure compliance with the NZBORA. There is evidence to suggest that Parliament views section 4 of the NZBORA as giving it freedom to breach the Bill of Rights.[87] There may also be a nascent trend to enact legislation explicitly ousting the NZBORA. For example, the Prostitution Reform Act 2003 provides that "a bylaw may be made under section 12 even if ... it is inconsistent with the New Zealand Bill of Rights Act 1990."[88] In addition, the government's apparent willingness to introduce a bill where a section 7 report will be required can be seen as sending mixed messages to legislators as to how seriously the task of legislative review for rights consistency should be taken.[89]

Interaction seems to have occurred more between the courts and Parliament than within the legislature. Judicial decisions, especially controversial ones, have tended to draw a legislative response in some form, although such responses may not always be seen as adequately upholding NZBORA values. While the author does not wish to suggest that 'dialogue' between or within institutions should be seen as a measure of the success of human rights legislation, the seeming lack of dialogue in many cases, especially within Parliament, has wider implications for the NZBORA's effectiveness. A parliamentary bill of rights model depends

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83 Rishworth, "Common Law Rights and Navigation Lights: Judicial Review and the New Zealand Bill of Rights" (2004) 15 PLR 103, 119 ["Common Law Rights and Navigation Lights"].

84 Hiebert, Parliamentary Bills of Rights, supra note 27, 26.

85 See e.g. Rishworth et al, *The New Zealand Bill of Rights* (2003) 2 ["*New Zealand Bill of Rights*"].

86 Huscroft, Protecting Rights and Parliamentary Sovereignty, supra note 66.

87 Rishworth et al, *New Zealand Bill of Rights*, supra note 85, 2.

88 Rishworth, Common Law Rights and Navigation Lights, supra note 83, 118.

89 Hiebert, Rights-Vetting in New Zealand and Canada, supra note 53, 98.

upon effective scrutiny by legislators for its success. This complements Parliament's traditional role of scrutinizing executive action. Therefore, while there is no problem where Parliament makes a considered decision to disagree with the Attorney-General's view of a bill, ignoring a report is more problematic.

It has been suggested that structural features of the NZBORA may account for the lack of attention sometimes given to bill of rights questions within Parliament. Parliament may clearly draft legislation so as to override rights, pre-empting a judicial decision that the legislation unreasonably limits rights. The absence of a power of judicial review or an established process whereby courts may declare legislation inconsistent with the NZBORA significantly reduces the political costs of passing legislation despite potential inconsistencies, and thus the incentives to take human rights consistency seriously.[90] Furthermore, although MMP has made it more difficult for governments to force legislation through the House, there are few legal impediments to passing legislation which infringes human rights.[91]

The Human Rights Act 1998 (UK)

The Human Rights Act ("HRA") incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") into the United Kingdom's domestic law, and unlike the NZBORA, is explicitly premised on shared responsibility and 'dialogue' between all three branches of government.[92] It was envisaged that this design would achieve some reconciliation of parliamentary democracy with human rights principles.[93]

Many of the operational provisions of the HRA are similar to those found in the NZBORA, with the addition of a formal declaration of inconsistency procedure. Although the HRA does not affect the validity, continuing operation or enforcement of incompatible legislation,[94] judges are to interpret and give effect to legislation so as to be compatible with the Convention rights, so far as this is possible.[95] Where such a consistent interpretation is not possible, the higher courts are empowered to make a declaration that a provision is incompatible with a Convention right. While such declarations do not affect the validity of the legislation in question,[96]

90 Ibid 92; Gardbaum, supra note 1, 758.

91 See generally Leane, "Enacting Bills of Rights: Canada and the Curious Case of New Zealand's 'Thin' Democracy" (2004) 26 Human Rights Q 152, 167.

92 See generally Singh, "The Place of the Human Rights Act in a Democratic Society" in Jowell and Cooper (eds), *Understanding Human Rights Principles* (2001) 201; Klug, "The Human Rights Act — A 'Third Way' or 'Third Wave' Bill of Rights" [2001] EHRLR 361.

93 Gearty, "Reconciling Parliamentary Democracy and Human Rights" (2002) 118 LQR 248; Lord Irvine of Lairg, "The Impact of the Human Rights Act: Parliament, the Courts and the Executive" [2003] PL 308.

94 Human Rights Act 1998 (UK), s 3(2)(b) and (c).

95 Ibid s 3(1).

96 Ibid s 4.

it was envisaged that the making of a declaration would "almost certainly" lead the government to amend the impugned law.[97]

1 Implications for Parliament and the Courts

The courts have used the HRA's interpretive powers to achieve a high degree of compliance with the ECHR, and have tended to depart from the natural meaning of enactments in order to achieve consistency to a greater extent than has occurred under the NZBORA. In several cases, the English courts have been prepared to read in rights protections to the extent that they have effectively rewritten the statutes in question.[98] For example, in *R v A*,[99] the Court read a provision that evidence or questioning necessary to secure a fair trial was admissible into rape shield legislation which prohibited leading evidence or cross examination relating to the complainant's sexual history. The Court commented that the interpretation instructions in the HRA would sometimes require the adoption of a linguistically strained interpretation in order to achieve compatibility with the ECHR.

However, determining the boundaries of legitimate interpretation under the HRA has at times been problematic. There is tension between the need to give effect to the HRA's direction that legislation be interpreted consistently with Convention rights, and its preservation of Parliament's right to have the last word in relation to whether legislation complies with the ECHR. Judges have tended to emphasise one or the other aspect, leading to sometimes variable results. After initially taking a very strong approach to the interpretive obligation, exemplified by cases such as *R v A*, the courts appeared to retreat from this position towards one of greater deference to Parliament.[100] For example, the House of Lords overturned a decision of the Court of Appeal, which had determined that aspects of the Children Act 1989 did not adequately protect children's rights under article 8 of the ECHR, and had reinterpreted the act, introducing a new procedure for judicial supervision. Their Lordships held that this was not legitimate interpretation, but rather the Court of Appeal had introduced new rights and liabilities not sanctioned by Parliament, amounting to amendment of the legislation.[101]

Recently the courts' approach to interpretation appears to have shifted again to a more 'activist' position, exemplified in a recent decision of the House of Lords where the word "spouse" was interpreted as encompassing same-sex partners. Lord Nicholls commented that section 3 of the HRA imposed an "interpretative obligation of an unusual and far-

97 *Rights Brought Home: The Human Rights Bill* (1997) Official Documents <http://www.archive.official-documents.co.uk/document/hoffice/rights/righ ts.htm> (at 4 December 2006) [2.10].

98 See e.g. *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 (HL).

99 [2002] 1 AC 45 (HL).

100 Starmer, "Two Years of the Human Rights Act" [2003] EHRLR 14, 16.

101 *In Re S (Minors) (Care Order: Implementation of Care Plan)*, supra note 98.

reaching character,"[102] giving the courts power to "modify the meaning, and hence the effect, of primary and secondary legislation,"[103] limited only by the proviso that the court should not adopt a meaning "inconsistent with a fundamental feature" of a statute.[104]

In general, the courts' implementation of the principle that legislation is to be interpreted as far as possible so as to be consistent with Convention rights has been successful in achieving significant protection for rights within the parameters set by parliamentary sovereignty, although their approach has at times been criticised as overly deferential.[105] Whether it is promoting 'dialogue' is another question. Danny Nicol argues that, although the courts are not denying Parliament and the executive a measure of discretion in implementing their chosen policies, the decision as to how much discretion to allow in a given case remains with the courts. He suggests that this cannot be seen as advancing dialogue.[106] Furthermore, there are few indications that Parliament is actively engaging with the courts in a dialogue as to the meaning of rights, for example by challenging judicial interpretations through new legislation.[107]

The counterpoint of the interpretive provision in the HRA is the procedure for issuing a declaration of incompatibility where a compatible interpretation is not possible. In the first six years of the HRA's operation, 15 declarations had been made, while 14 cases had reinterpreted legislation so as to achieve consistency with the HRA.[108] Lord Steyn has argued that the frequent use of the declaration power reveals that the law has taken a "wrong turning," as interpretation under section 3, rather than a declaration, was intended as the primary remedial measure.[109] However, given the government's expressed desire that the HRA facilitate dialogue, this would suggest that the intended dialogue is in fact occurring.[110] Parliament has been responsive to the concerns raised by the judiciary through the declaration process, invariably repealing or amending relevant provisions in line with court decisions.[111] In this way, the power to make declarations seems to have been useful in facilitating an ongoing exchange between the courts and the other branches of government, which has resulted in increased protection for human rights within legislation.

However, it may be questioned whether declarations really contribute to a dialogue with the other branches of government. As noted,

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102 *Ghaidan v Mendoza* [2004] 2 AC 557, [30] (HL) ["*Ghaidan*"].

103 Ibid [32].

104 Ibid [33].

105 Ewing, "The Futility of the Human Rights Act" [2004] PL 829.

106 Nicol, "Are Convention Rights a No-go Zone for Parliament?" [2002] PL 438, 447.

107 Ibid 447.

108 Clayton, "The Human Rights Act Six Years On: Where are we now?" [2007] EHRLR 11, 13 ["The Human Rights Act Six Years On"].

109 *Ghaidan*, supra note 102, [40].

110 Klug and Starmer, "Standing Back from the Human Rights Act: How effective is it five years on?" [2005] PL 716, 721-722.

111 Ibid 721.

Parliament has not so far attempted to disagree with a judicial declaration of incompatibility. If it is the case that the government is simply legislating under judicial direction and does not see itself as having the option to disagree with judicial decisions, it would seem to be a rather one-sided and unequal interaction. However, it is important to note that external constraints are also operating in the United Kingdom. Implementation of declarations of incompatibility are necessary in order to comply with the United Kingdom's obligations under the ECHR, and failure to do so would leave the United Kingdom open to a challenge in the European Court of Human Rights.[112]

The demarcation between using interpretation to achieve compatibility and making a declaration of incompatibility has at times been problematic. The choice between the two has implications for the view that the HRA facilitates dialogue between the courts and Parliament, as it would be possible for the courts' interpretation of Convention rights to assume primacy if the courts are prepared to stretch the boundaries of legitimate interpretation in order to achieve consistency. While judicial interpretations do not exclude the possibility of dialogue, as Parliament may legislate to override interpretations with which it disagrees, arguably the opportunities for dialogue are more limited on this approach. In contrast to making a declaration of inconsistency, which gives Parliament the power to decide how to respond, judicial interpretations place the burden on Parliament to overrule them.

The European context of the HRA has also affected the extent to which 'dialogue' is occurring. It is not clear that judges view themselves as being engaged in a dialogue with Parliament in interpreting the Convention rights. Danny Nicol suggests that the courts tend to take an "incorporationist" view of the rights, following the jurisprudence of the European Court of Human Rights. This approach minimizes opportunities for meaningful 'dialogue' with Parliament, as courts have tended to view Strasbourg jurisprudence as definitive in matters of ECHR interpretation, and thus have not been receptive to attempts by Parliament to reinterpret the Convention rights or to assign priority among them.[113]

2 Implications for the Legislature and the Executive

The HRA has instituted processes within the executive and the legislature which have allowed rights principles to take on a significant role in policy and legislative development. Before the second reading of a bill in either House of Parliament, the Minister responsible for the legislation must make a written statement that in their view the bill is compatible with the Convention rights, or that they are unable to make a statement of

112 Pham, "Let's Talk about Rights: 'Dialogue' Bills of Rights" (2006) ACT Human Rights Act Research Project <http://acthra.anu.edu.au/articles/Kim%20Pham-%20ANIP%20report.pdf> (at 6 December 2006) 28.

113 Nicol, supra note 106, 442.

compatibility but that the government nevertheless wishes the House to pass the legislation.[114] Rights scrutiny procedures have been developed in order to facilitate this executive assessment of legislation.[115]

The statement of compatibility procedure was intended to create a mechanism for holding the executive responsible to Parliament.[116] Therefore, parliamentary processes have also been developed to allow Parliament to assess a bill's compatibility with the HRA, with the potential to engage in dialogue with the executive where the two institutions' views conflict. In this respect, a key innovation introduced by the HRA has been the formation of a parliamentary committee, the Joint Committee on Human Rights ("JCHR"), dedicated to examining bills for their compatibility with the HRA. This provides an important check on executive HRA scrutiny. Effectively, the JCHR acts as Parliament's legal advisor on human rights, its reports ensuring that Parliament is provided with adequate information to make a judgment on HRA compatibility.[117] The work of the JCHR, and the debate which it stimulates within Parliament, appears to have been influential in producing greater legislative compliance with the HRA. For example, a clause in the Asylum and Immigration (Treatment of Claimants) Bill 2003 which sought to oust judicial review of immigration tribunal decisions was removed following severe criticism by the JCHR, which argued the clause violated fundamental rights and the rule of law.[118] The Anti-Terrorism, Crime and Security Act 2001 also benefited from JCHR scrutiny, with amendments being introduced to achieve a better balance between national security and human rights concerns.[119]

Thus the work of the JCHR may be seen as having enhanced opportunities for constructive dialogue with the executive and as an effective check on the executive where it promotes rights-infringing legislation. It has been suggested that this, combined with the new rights scrutiny processes within the executive, has meant that "human rights scrutiny is now systematic, influencing the preparation of legislation in Whitehall and the legislative process itself."[120] However, the extent of this influence may be doubted, given that legislation which has been certified by the executive as being compatible with the ECHR is often subsequently considered incompatible by the JCHR, and in some cases declared to be so by the courts.[121]

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114 Human Rights Act 1998 (UK), s 19.

115 Hiebert, Parliament and the Human Rights Act, supra note 81.

116 Singh, supra note 92 , 198.

117 Hiebert, Parliament and the Human Rights Act, supra note 81.

118 Lester, "The Human Rights Act 1998 — Five Years On" [2004] EHRLR 258, 263.

119 Klug and Starmer, supra note 110, 718; Hiebert, Parliament and the Human Rights Act, supra note 81 .

120 Lester, supra note 118 , 262.

121 Klug and Starmer, supra note 110, 719.

3 Evaluation

It is submitted that the design of the HRA has ensured that, in general, legislation complies with the ECHR. The combination of the interpretation instructions to courts and the declaration of incompatibility procedure means that judicial decisions can have significant impact, either by ensuring legislation is interpreted consistently with rights, or by stimulating the government to change the law. In this respect, the declaration of incompatibility is an improvement on a model which relies on interpretation alone. Similarly, the development of a dedicated parliamentary committee has formalized the place of rights debate within Parliament, which is important if Parliament's obligation to scrutinize its own legislation is to be taken seriously. This has been contrasted with the "problematic lack of attention" given to the NZBORA by New Zealand select committees.[122]

A core goal of the HRA was to establish "dialectical tensions" between the courts and Parliament, and the executive and Parliament. It has been suggested the working of the HRA to date evinces a dialogue or "co-operative endeavour" developing between the three branches of government, each working within its own sphere of influence to uphold the values protected by the HRA.[123] To some extent, there have been constructive interactions between the branches of government. Judicial declarations of inconsistency have resulted in bringing the law into line with human rights standards, and parliamentary scrutiny by the JCHR has resulted in amendments to better incorporate human rights values in legislation. However, some aspects of the HRA have minimized dialogue. Its interpretive obligations, if aggressively pursued, can significantly alter the effect of legislation without substantial parliamentary involvement. Conversely, some commentators have argued that the courts have accorded so much deference to Parliament's policy judgments that the HRA is effectively worthless, as it does not prevent violations of rights.[124] In terms of Parliament's role, Janet Hiebert suggests that Parliament has failed to articulate a theory of when it ought to disagree with judicial decisions about rights, tending instead to defer to the courts' judgment.[125] Even the idea of dialogue as an explanation of institutional roles under the HRA has not been uncontested.[126]

Therefore, it is submitted that the United Kingdom's experience suggests that even where human rights legislation is designed with dialogue as a goal, this does not ensure that dialogue or cooperation between institutions of government will be the outcome. Perhaps this suggests that the idea of dialogue is more useful as a rhetorical device than as an actual explanation of what happens under a bill of rights. Further, in a system

122 Hiebert, Parliament and the Human Rights Act, supra note 81 .

123 Lord Irvine of Lairg, supra note 93.

124 Ewing, supra note 105.

125 Hiebert, New Constitutional Ideas, supra note 27 , 1979-1980.

126 Clayton, "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention under the Human Rights Act 1998" [2004] PL 33, 47.

of weak-form judicial review where Parliament retains the final power of decision, it is crucial that Parliament and the executive remain committed to the goal of advancing human rights values within legislation. Recently both the government and the opposition in the United Kingdom appear to have developed an attitude of hostility to the HRA, underlining the fragility of this system.[127]

IV EVALUATION OF THE COMMONWEALTH MODEL AND DIALOGUE

As has been outlined, the Commonwealth model institutionalises the view that 'dialogue' and cooperation between branches of government will produce desirable outcomes in terms of enhanced protection for human rights. The final part of this paper evaluates the extent to which this rhetoric is borne out in reality, through the experiences to date under the various permutations of the Commonwealth model discussed. It is the author's suggestion that the Commonwealth model's capacity to promote inter-branch 'dialogue' has been overstated, and that dialogue should not be a primary goal of human rights legislation.

To What Extent has the Commonwealth Model Achieved Better Human Rights Protection Through Dialogue?

1 Implications for Courts

A central feature of the Commonwealth model is the idea that weak-form judicial review enhances the capacity of legislatures and courts to interact with one another on rights issues, as the courts are not given the final power of decision. Recent bill of rights models have focused in particular on the concept of declarations of inconsistency to provide some mechanism to encourage legislative change in the absence of a power to invalidate statutes. However, the extent to which this would constitute dialogue may be exaggerated. In practice, it may be difficult for legislatures to disagree with a judicial decision, and it is generally expected that governments will accept declarations and legislate to implement them. If a practice develops that governments will invariably legislate in accordance with declarations, the Commonwealth model's claim to preserve parliamentary sovereignty may appear essentially meaningless. Furthermore, its claim that legislatures have an obligation to consider and articulate what rights mean and whether limits are acceptable cannot be sustained if legislatures are essentially legislating under the direction of the courts.[128]

127 See e.g. Clayton, "The Human Rights Act Six Years On", supra note 108, 11-12.

128 Huscroft, Rights, Bills of Rights and the Role of Courts and Legislatures, supra note 25, 15.

To this end, Mark Tushnet has argued that weak-form judicial review is inherently unstable, and will tend to collapse into either strong-form judicial review or simple parliamentary sovereignty.[129] On the one hand, weak-form review has the potential to revert to legislative supremacy through excessive judicial deference. In systems where there is a power of legislative override, habitual use of this power would also mean parliamentary sovereignty was essentially preserved. On the other hand, weak-form review in practice could be as final as strong-form review. Judicial interpretations are generally treated as authoritative, meaning that it could be difficult for legislatures to demonstrate legitimate disagreement.[130] On this view, declarations of inconsistency could be seen as leading towards judicial supremacy rather than the middle ground they supposedly represent. There are some indications that this is occurring in the United Kingdom. Conversely, New Zealand's experience tends towards maintaining legislative supremacy, albeit with some judicial influence. Thus it remains to be seen to what extent the Commonwealth model will be able to resist "the emphasis on judicial hegemony when interpreting rights and resolving legislative conflicts where rights claims arise."[131]

2 *Implications for Legislatures*

The Commonwealth model, relying as it does upon legislative as well as judicial review of legislation, "has the potential to encourage critical reflection on the merits of legislation from a broader spectrum of institutional actors than is normally associated with a bill of rights."[132] Arguably, this potential to stimulate political consideration of rights issues is more important than the supposed dialogue established between courts and legislatures.[133] 'Dialogue' within Parliament, and between the legislature and the executive, does seem to have had positive impact on legislation. This is particularly so where, as in the United Kingdom, executive proposals to enact rights-infringing legislation have been modified after critical examination by the legislature. Perhaps the idea of dialogue is more appropriate in this context, rather than between courts and Parliament, as it can be seen as an aspect of Parliament's existing function of scrutinizing executive action.

However, the experience to date of attempts to provide effective scrutiny within the political process illustrates the need for careful institutional design to ensure that critical reflection on rights questions by legislators does in fact occur. A comparison of the experience of legislative scrutiny in New Zealand and the United Kingdom illuminates this point. In New Zealand, no mechanisms have been put in place to encourage

129 Tushnet, "Weak-Form Judicial Review: Its Implications for Legislatures" (2004) 2 NZJPIL 7.

130 Ibid 17.

131 Hiebert, New Constitutional Ideas, supra note 27, 1980.

132 Ibid 1963.

133 Kelly, supra note 16.

consideration of NZBORA issues beyond the initial stage of a report of inconsistency by the Attorney-General. Legislative scrutiny has therefore been variable, resulting in doubts as to whether rights are regarded as a significant constraint on legislative action in New Zealand's political culture. In contrast, the establishment of the JCHR in the United Kingdom has ensured that scrutiny of legislation occurs systematically. The incidence of amendments to legislation being made as a result of consideration by the JCHR demonstrates the effectiveness of this approach.

However, the effectiveness of these parliamentary mechanisms should not be overstated. Parliamentary models of human rights legislation ultimately rely on a commitment on the part of legislators to uphold fundamental rights in legislation. Such commitment may not always exist, as suggested by recent United Kingdom experience. More fundamentally, it may be doubted whether the legislative process is a suitable mechanism to secure the protection of human rights. Legislators tend to focus on policy questions, and perhaps view human rights considerations as a distraction from these. Conversely, courts can direct themselves to individual situations and questions of principle. Furthermore, electoral accountability will always mean that legislators have an incentive to prioritise the majority's concerns where they conflict with minority rights. It appears that this tension will always be present in parliamentary bill of rights models, although institutional features may be able to mitigate some concerns.

The Concept of Dialogue

It is submitted that experience to date suggests that dialogue in itself may not be particularly helpful in achieving greater protection for human rights. It is an inherently malleable concept which can be seen as promoting better or worse outcomes. Rather, the focus should be on designing institutions which are responsive to rights concerns.[134]

Dialogue theory's major strength is that it fits well with the open-textured nature of human rights guarantees. Because human rights are necessarily couched in broad and general terms, their precise meaning, scope and application in a particular case may be highly contested. The 'correct' answer is not self-evident. The idea, therefore, that the interplay between differing institutional perspectives might create a more durable consensus around rights is an attractive one. It has been suggested that, because they institutionalize dialogue between the representative and non-representative branches of government, modern human rights instruments of the nature considered are most appropriate for a pluralistic society, incorporating a diversity of views, disagreement and uncertainty about democracy and rights.[135]

134 Tushnet, *Taking the Constitution away from the Courts* (1999) ["*Taking the Constitution away from the Courts*"].

135 Debeljak, "Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights" (2002) 26 Melb ULR 285, 302.

The pluralist character of dialogue-based models of human rights legislation, however, seems to contain its own inherent difficulties, seemingly requiring that we accept divergent interpretations in human rights matters as all being equally valid. United States constitutional scholars Larry Alexander and Frederick Schauer have argued that the absence of a "single authoritative decision-maker" leads to "interpretive anarchy". Law requires that an authoritative decision be made, to allow citizens and officials to co-ordinate their actions on matters where there is disagreement.[136] In response, however, Tushnet argues that rejecting judicial hegemony in interpreting rights does not mean that "the law is whatever anyone thinks it ought to be." Rather, what counts as a legitimate interpretation remains controlled by constitutional principle.[137]

There are significant conceptual difficulties surrounding the idea of 'dialogue' between institutions of government. Undoubtedly interaction does occur, however, the author doubts the extent to which the relationship created by recent human rights legislation represents anything significantly different from the institutional interactions that have always occurred under the common law. Furthermore, it is the author's suggestion that such 'dialogue' as does occur is more complex and contested than the theory suggests, and the nature of the interaction which emerges is heavily contingent upon factors such as institutional design and the surrounding legal culture. Concepts of judicial activism and deference have been particularly problematic in this area, as illustrated by the United Kingdom's experience, and it is not clear what, if any, normative standards are imposed by the idea of dialogue. On one view, dialogue requires a fair degree of judicial deference to allow room for Parliament and the executive to engage in the dialogue. On the other hand, it has been suggested that an overly deferential approach by the courts excludes the potential for dialogue, instead generating "majoritarian monologues" where Parliament is effectively given free rein.[138]

The alternative to dialogue is an approach premised on separation of powers, where competing institutions act as checks and balances on each other, restraining unconstitutional actions by the other branches of government. This view sees tension between branches of government as natural and desirable, as "checks and balances depend on maintaining a state of tension between institutions and their constitutional positions."[139] Furthermore, the rule of law requires that courts should properly evaluate the justifications advanced for interfering with rights. Lord Steyn has commented that the courts should not "become cozy" with government,

136 Cited in Tushnet, *Taking the Constitution away from the Courts*, supra note 134, 27-28.

137 Ibid 14.

138 McDonald, New Directions in the Australian Bill of Rights Debate, supra note 25, 30-31.

139 Feldman "Human Rights, Terrorism and Risk: The Roles of Judges and Politicians" [2006] PL 364, 383.

as this could "lead to a failure to subject the activities of governments and parliaments to proper legal analysis and evaluation."[140]

Conversely, however, it is noted that the idea of a dialogue between branches of government could itself be viewed as a mechanism providing a system of accountability and checks and balances. This view of dialogue was propounded by the Supreme Court of Canada in *Vriend.*[141] Iacobucci J argued that an important benefit of the judicial review and the consequent 'dialogue' was that the branches of government were made accountable to each other. The courts reviewed the legislature's actions and the legislature reacted to the court's decisions. This view is perhaps more persuasive in a constitutional system where judicial review of legislation is permitted.

Alternatives to Dialogue as a Mechanism for Protecting Rights

Mark Tushnet refers to the idea of an "incentive-compatible constitution" as a way to ensure that legislators take seriously their duty to legislate in accordance with human rights standards.[142] He argues that concern for the Constitution (or human rights legislation outside the United States) is generally not a significant priority for most politicians. Therefore, the legislature as an institution needs to be structured to provide incentives to give constitutional principles a higher priority. For example, making the process of enacting legislation more difficult tends to make it more difficult for legislation to violate rights, although this may not induce legislators to take positive action to protect rights.[143] Providing legislators with resources, such as expert advisors, and training to engage meaningfully in rights debates would also be likely to enhance the quality of legislation.[144]

External factors also act as incentives to produce rights-compliant legislation, and can significantly influence the extent to which a particular model of human rights legislation fulfills the goal of protecting rights and freedoms. For example, the United Kingdom's membership of the European Union has probably been a significant factor influencing the way in which the United Kingdom's government has tended to respond to human rights concerns raised by the judiciary. The possibility of appeals to Strasbourg increases the level of risk for the government if it wishes to overrule a judicial decision.[145] Similarly, in Canada the prospect of unconstitutional legislation being invalidated tends to encourage legislators to avoid

140 Feldman, "The Roles of Parliaments in Protecting Human Rights: A View from the UK" (Miegunyah Public Lecture delivered to Legislatures and the Protection of Human Rights Conference, Melbourne, Australia, 20–22 July 2006) <www.law.cam.ac.uk/docs/vie w.php?doc=3391> (at 15 July 2007).

141 *Vriend*, supra note 10, [120].

142 See generally Tushnet, *Taking the Constitution away from the Courts*, supra note 134, ch 5.

143 Ibid 124.

144 Ibid 61–62.

145 See e.g. McDonald, New Directions in the Australian Bill of Rights Debate, supra note 25, 29-30.

enacting such legislation. Alternatively, non-judicial bodies which engage in pre-enactment review of legislation may achieve similar outcomes in terms of encouraging rights-consistent legislation.[146]

V CONCLUSION

New hybrid bills of rights within the paradigm of parliamentary sovereignty provide an interesting counterpoint to traditional concepts of a dichotomy between constitutions instituting legislative or judicial supremacy, and represent a new attempt to reconcile democratic and human rights concerns. They do this by viewing the various institutions of government as having joint responsibility to protect human rights, and as being engaged in a 'dialogue' as to the best way to do so. While these models have undoubtedly been significant in achieving greater legal protection of human rights generally, this paper has suggested that, to the extent that protection of rights is seen as contingent on inter-institutional 'dialogue,' they may not have been entirely successful. The quality of the 'dialogue' is conditioned upon the precise configuration of human rights instruments, and the mechanisms they establish to protect rights. The idea of 'dialogue,' then, is ultimately a somewhat unhelpful concept, which has perhaps been over-emphasised at the expense of other beneficial innovations, such as the strengthening of representative institutions to encourage legislative responsibility for rights. In the author's view, 'dialogue' seems to have most to offer in the context of legislative-executive interaction. This is, however, perhaps best seen as an aspect of Parliament's existing role as a check on executive power. Finally, it is important that the emphasis on the collaborative aspect of 'dialogue' does not undermine the checks and balances which institutional disagreement provides, reflected in the fact that 'dialogue' appears to have been most successful where it has reflected conflict and disagreement between institutions, rather than cooperation.

146 See e.g. Winterton, "An Australian Rights Council" (2001) 24 UNSWLJ 792.