

Annotated Bibliography: Parliaments and Bills of Rights

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Janet Hiebert, 'A Hybrid Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny' (1998) 26 *Federal Law Review* 115

Hiebert presents Australia's parliamentary scrutiny committees as an alternative model to Canadian judicial review for defining the scope of rights and ensuring that rights concerns receive sufficient consideration in policy-making. Hiebert contends that scrutiny is a function which can be well-performed by the parliament, in particular given the capacity of parliaments to weigh conflicting policy priorities and values. Nonetheless, it is argued that judicial review is a necessary complement, given the constraints which party discipline and executive dominance impose on parliamentary functions.

Peter Hogg and Allison Thornton, 'The Charter Dialogue Between Courts and Legislatures' (1999) *Policy Options* 19

Hogg and Thornton, among the leaders of the 'dialogue' model of interaction between courts and legislatures propound the thesis that in Canada the legislative body has the opportunity, in the exercise of its democratic powers, to respond to Supreme Court decisions. There are two mechanisms for this, according to Hogg and Thornton – the s 33 'notwithstanding clause' which permits the legislature to 'override' a judicial decision under the Canadian *Charter* and s 1, which provides that rights may be subject to 'reasonable limits'.

David Kinley, 'Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead' (1999) 10 *Public Law Review* 252

This article, written at the time the JCHR was created, analyses the Committee as part of parliament's responsibility to protect rights. Kinley notes that the impetus for the creation of the Committee was the enactment of the *HRA*. However, it is suggested that there is no necessary connection between the two and that Australia could modify its legislative scrutiny practices (which are briefly reviewed) even without incorporating the International Covenant on Civil and Political Rights (ICCPR) into domestic law.

Keith Ewing (2001) 'The Unbalanced Constitution' in Tom Campbell, Keith Ewing and Adam Tomkins (eds.) *Sceptical Essays on Human Rights* (Oxford: Oxford University Press)

Ewing reframes debate about parliamentary rights protection by assessing British constitutional history. The common law, Ewing argues, has traditionally prioritised liberty, especially economic rights. In particular, under the common law, strike action was illegal. The legislature, by contrast, advanced political liberty and social values into the British Constitution, a development which is now threatened by the hierarchy of rights under the *HRA* which incorporates only political and economic rights. This creates an additional hurdle for the legislature in promoting social values, while compromising liberty. The remedy, according to Ewing, may be the enactment of the European Union Social Charter, to enable parliament to reassert these values in its law making.

David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (2002) *Public Law* 323

Feldman, a former legal adviser to the JCHR gives detailed information about the operation and practices of the JCHR and its members. Feldman contextualizes the operation of the JCHR in modern parliamentary practice, focusing on the volume of legislation and the workload of parliamentarians. The result is that scrutiny work receives insufficient time. However, Feldman argues that the work of the JCHR is generally 'scrutiny' work, rather than being party-politically driven. Feldman also suggests ways of distinguishing 'scrutiny' amendments to legislation from 'political' amendments.

Jeffrey Goldsworthy, 'Judicial Review, Legislative Override and Democracy' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (2003) *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press) 263

Goldsworthy argues that opposition to bills of rights cannot be justified by reference to Jeremy Waldron's theory of equal participation rights, in models where parliament has the 'final word'. Using the example of s 33 of the Canadian *Charter of Rights and Freedoms* 1982, Goldsworthy instead suggests that the real question is the impact of judicial rights protection on democratic culture. Noting that further sociological evidence would be required on this point, the author canvasses various ways in which rights-based litigation may lead to political apathy or radicalisation of motivated minorities.

Paul Rishworth, 'The Attorney-General's Reporting Duty' in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (2003) *The New Zealand Bill of Rights* (Melbourne: Oxford University Press)

Rishworth elaborates on the impact of s 7 of the *Bill of Rights Act 1990* (NZ) ('BORA'), which requires the Attorney-General to report on the consistency of bills with the BORA when they are introduced into parliament. The chapter contextualises the responsibility under s 7 within the Attorney-General's broader duties and responsibilities, for example, not to mislead parliament. While s 7 does not require the Attorney-General to monitor bills for changes infringing the BORA, failure to do so could mislead parliament. The constitutional convention of the independence of the Attorney-General further assists him or her in performing duties under s 7.

Mark Tushnet, 'Non-Judicial Review' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (2003) *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press) 213

Tushnet considers three examples of non-judicial constitutional review: constitutional points of order in the United States Senate, bill clearances by the Office of Legal Counsel (also in the US) and ministerial statements of compatibility under the HRA in the UK. This examination identifies several benefits of non-judicial review, including the capacity of non-judicial institutions to balance competing interests. Non-judicial review also has the benefit of considering legislation holistically rather than 'as applied' to particular dispute.

David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 *Statute Law Review* 91.

In this article, Feldman argues that the *HRA* has caused parliamentary scrutiny processes (especially those of the JCHR) to become more concerned with human rights, with consequential effects on bureaucratic departments.

The author argues that due to institutional mechanisms in the *HRA* (such as the requirement on Ministers to table statements of compatibility), the legislative process is noticeably more human rights-oriented.

Feldman identifies seven factors which he argues affect the likelihood of human rights concerns impacting on legislation, including the stage at which human rights submissions are made during the legislative process and whether the human rights critique goes to the centre of a policy objective, or the means in which the policy is achieved.

Janet Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review' (2005) 35 *British Journal of Political Science* 235

Hiebert expounds a similar argument to the 1998 paper discussed above, but with a more empirical analysis of human rights scrutiny in New Zealand, the United Kingdom and Canada. In particular, Hiebert focuses on the task of interpreting rights in a welfare state, where rights must necessarily be balanced against other values. Parliamentary scrutiny can also play an important role in dealing with rights conflicts which would not otherwise be litigated and which would therefore escape judicial analysis.

James Kelly, (2005) *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press)

This book presents the history of the Canadian Charter in a different light. Rather than viewing the main impact of the Charter in the judicial realms (as for example, Christopher Manfredi does) or in legislative realm (as Janet Hiebert does), Kelly argues the most important impact has occurred in the bureaucratic realm. Kelly suggests that the *Charter* has caused a concentration of power in the Department of Justice where bureaucrats are concerned with '*Charter-proofing*' legislation to avoid adverse findings in litigation against the government.

Richard Worth and Debbie Angus, 'Orthodox or Heresy? How Scrutiny Committees Can Maintain Control of Delegated Legislation in the Face of Modern Legislative Practices' (Paper presented at Legislative Scrutiny in a Time of Rights Awareness, Legislative Assembly for the Australian Capital Territory, 2-4 March 2005)

Worth and Angus analyse the operation of scrutiny in New Zealand for the purpose of an Australian audience. The article describes the process for 'vetting' of legislation for *BORA* compliance, in particular the role of the Ministry of Justice, the effect on subordinate legislation and the Regulations Review Committee. Worth and Angus focus on the role of the Regulations Review Committee more broadly, and the challenges that arise where delegated legislation increases in volume and must be effectively 'controlled' by parliament.

Tom Campbell, 'Does Anyone Win under a Bill of Rights? A Response to Hillary Charlesworth's "Who Wins under a Bill of Rights"' (2006) 25 *University of Queensland Law Journal* 55.

Campbell argues that changes to the balance of institutional powers following the introduction of bills of rights is 'zero-sum'; where the judiciary gains an additional power, the right to self-government is accordingly diminished. This diminution would

be set-off by only a marginal benefit to human rights, while economic and social rights in particular are likely to be excluded by human rights instruments. Campbell notes the 'paradox of democracy' which requires democracies to be able to make decisions, even those which undermine democracy. Campbell instead proposes human rights instruments which would give judges the power to 'nudge' legislators towards consideration of human rights principles, without the power to overrule legislation.

Hilary Charlesworth, 'Who Wins Under a Bill of Rights?' (2006) 25 *University of Queensland Law Journal* 39

In this article, Charlesworth measures the current human rights performance of the Australian Parliament against the prescriptions of democratic legal positivists such as Jeremy Waldron and James Allen, arguing that current human rights performance is poor. Further, Charlesworth contends that the practice in jurisdictions such as New Zealand, where bills of rights are statutory, overcomes concerns about the democratic-deficit of judicial decision-making.

Carolyn Evans and Simon Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions on Human Rights' (2006) *Public Law* 785

Evans and Evans analyse differing conceptions of human rights among parliamentary scrutiny committees in the UK, the Joint Committee on Human Rights (JCHR) and Australia, the Senate Standing Committee for the Scrutiny of Bills. The authors contrast the focus on civil liberties of Australian scrutiny committees, which has its origins in the historical role of the committees with the more expansive human rights orientation of the JCHR. The JCHR, it is contended, was established as part of a broader government policy of promoting human rights, with the *Human Rights Act 1998* ('HRA') as its centrepiece. The article demonstrates the impact that bills of rights can have on the scope and practices of parliamentary committees.

Bryan Horrigan, 'Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds) (2006) *Protecting Rights Without a Bill of Rights* (Oxford: Oxford University Press)

Horrigan points out the range of institutional mechanisms that can operate to protect rights, irrespective of whether a bill of rights is enacted, listing at least fifteen such mechanisms. Horrigan argues that it is more difficult to create a human rights culture, without a formal bill of rights, but that parliamentary scrutiny can be effective even without one. The author surveys the scrutiny process in various Australian jurisdictions and the UK, concluding that parliamentary scrutiny is a valuable tool in the protection of rights which is complementary to the enactment of a statement of rights.

Christopher Manfredi, 'The Unfulfilled Promise of Dialogic Constitutionalism: Judicial-Legislative Relationships under the *Canadian Charter of Rights and Freedoms*' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.) (2006) *Protecting Rights Without a Bill of Rights* (Oxford: Oxford University Press)

Manfredi gives a 'sceptical' account of the capacity of parliament to engage in dialogue with the judiciary on human rights by arguing that ss 1 and 33 of the *Charter* do not provide a 'robust' way of enabling parliamentary participation in the dialogue. The chapter analyses s 1, the 'reasonable limits' clause with reference to important

Canadian Supreme Court decisions in which the Court not parliament makes policy choices. Section 33 is likewise of limited utility to parliament as it can be used only in a formalist, legal sense rather than in political reality. This leads to the conclusion that under the *Charter*, judicial policy decisions are incontestable, with consequential impact on democratic rights.

John Uhr, 'The Performance of Australian Legislatures in Protecting Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.) (2006) *Protecting Rights Without a Bill of Rights* (Oxford: Oxford University Press)

Uhr's chapter focuses on rights created in the course of the routine legislative process, rather than rights defined at a high level of abstraction, as occurs under international law. Uhr demonstrates the capacity of scrutiny committees such as the Senate Regulations and Ordinances Committee to be a rights 'watch dog' even in the absence of a bill of rights. The author identifies five factors contributing to the Committee's effectiveness, including the real power of parliament to disallow regulations, the system of bicameralism and the professional expertise of the members. Uhr argues that defenders of parliamentary supremacy need to identify more closely which elements of parliament should be supreme and how parliaments may vary in their capacity to protect rights.

Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon (2009) *Australian Bills of Rights: History, Politics, Law* (Sydney: UNSW Press)

This book contains an overview of debates around human rights instruments in the Australian context, as well as chapters specific to the ACT and Victorian Acts. In the context of the ACT, Byrnes, Charlesworth and McKinnon argue that the deepest effect of the *Human Rights Act 2004* (ACT) has been to foster a human rights culture in government and affect the legislative process, with participation of the Human Rights Commissioner and legislative Scrutiny Committee. The authors cite some nine issues which have sparked rights-oriented debate in the Legislative Assembly, notably the implementation of anti-terrorism legislation following the London bombings in 2005.

A separate chapter assesses the impact of the *Charter of Rights and Responsibilities 2006* (Vic). While conclusions are necessarily preliminary, the authors contend that the Victorian *Charter* has so far had only a limited impact on parliamentary debate. 'Dialogue' between the Scrutiny of Acts and Regulations Committee (SARC) and the statements of compatibility tabled by the Executive has occurred, for example on drug control legislation and police integrity. However, only one Bill had been amended in response to SARC's comments at the time of writing.

Brian Galligan and Emma Larking, 'Rights Protection – Comparative Perspectives' (2009) 44 *Australian Journal of Political Science* 1

Galligan and Larking survey existing literature on bills of rights and their effect on judicial and parliamentary institutions. This article demonstrates effectively the need for further empirical research, in particular into the impact of such instruments on parliamentary scrutiny and governmental agencies. The authors argue that the lessons from jurisdictions are inconclusive as to the merits of Australia adopting a bill of rights.

Francesca Klug, *Report on the Working Practices of the JCHR* (2006)
<<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/239/23907.htm>> (last accessed 1 September 2009)

This report, commissioned by the JCHR itself, assesses the working practices of the Committee, in particular the weight given to scrutiny as opposed to other activities. Klug surveys competing views about the purpose of the Committee, for example whether its role should be primarily 'technical' or whether it should go to the 'merits' of legislation under review and whether it should engage in political or legal assessments. Klug makes three alternative recommendations about the Committee's priorities for scrutiny and enquiries.

Michael Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 *Australian Journal of Political Science* 41

The JCHR is often discussed (for example, by Hiebert) to demonstrate the potential for parliamentary committees to contribute effectively to human rights scrutiny in policy making processes. However, Tolley points to numerous failings of the JCHR, including the lack of responses to declarations of incompatibility and remedial measures taken in response. Moreover, judges have only infrequently considered JCHR reports in their decisions. Ultimately, Tolley points out, the JCHR has recommendatory powers only which may limit its effectiveness.