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## Introduction

As a recent and ongoing experiment in constitutional design, the new Commonwealth model of constitutionalism may be something new under the sun. It represents a third approach to structuring and institutionalizing basic constitutional arrangements that occupies the intermediate ground in between the two traditional and previously mutually exclusive options of legislative and judicial supremacy. It also provides novel, and arguably more optimal techniques for protecting rights within a democracy through a reallocation of powers between courts and legislatures that brings them into greater balance than under either of these two lopsided existing models. In this way, the new Commonwealth model promises to be to forms of constitutionalism what the mixed economy is to forms of economic organization: a distinct and appealing third way in between two purer, but flawed, extremes. Or, it may prove to be, as some have claimed, more like a comet that shone brightly and beguilingly in the constitutional firmament for a brief moment but quickly burned up, a victim of the inexorable law of the excluded middle. In developing the theory and exploring the practice of the new Commonwealth model, this book assesses whether ink or eraser is the better response to its current pencilled-in status on the shortlist of alternatives from which constitutional drafters everywhere make their momentous decisions.

‘The new Commonwealth model of constitutionalism’ – ‘the new model’ for short – refers to a common general structure or approach underlying the bills of rights introduced in recent years in Canada (1982), New Zealand (1990), the United Kingdom (1998), the Australian Capital Territory (2004) and state of Victoria (2006). This approach self-consciously departs from the *old* or traditional Commonwealth model of legislative supremacy, in which there is no general, codified bill of rights. Rather, particular rights are created and changed by the legislature through ordinary statutes on an ad hoc basis. Under this traditional model, courts have no power to review legislation for infringing rights, as rights are not limits on legislation but its product, and are changeable by it. In this way, legislatures are supreme

because they determine what legal rights there are and how rights issues are resolved. The judicial function is limited to faithfully interpreting and applying whatever laws the legislature enacts.

At the same time, however, the new model also contrasts with the alternative standard option for institutionalizing basic constitutional arrangements: namely, judicial or constitutional supremacy. Here, there is a general, codified bill of rights, which imposes constitutional limits on legislative power. These limits are enforced by authorising courts to review legislation for consistency with the bill of rights and to invalidate statutes that, in their final view, infringe its provisions. As a result, courts are supreme because they have the last word on the validity of legislation and the resolution of rights issues, at least within the existing bill of rights.

As we shall see in detail in the following chapter, the new model's novel third approach calls for the enactment of a bill of rights – although not necessarily one that imposes constitutional limits on the legislature – and its enforcement through the twin mechanisms of judicial *and* political rights review of legislation, but with the legal power of the final word going to the politically accountable branch of government, rather than the courts. In this way, the new model treats legislatures and courts as joint or supplementary rather than alternative exclusive protectors and promoters of rights, as under the two traditional models, and decouples the power of judicial review of legislation from judicial supremacy or finality.

## I

If comparative constitutional law, as a recently revived and dynamic academic subject, is a child of the 'rights revolution'<sup>1</sup> that has taken place domestically and internationally since the end of the Second World War, then the new Commonwealth model is a second-generation product – a grandchild – of that revolution in two senses.

First, at the domestic level, the rights revolution was manifested and institutionalized in a massive switch from legislative to judicial supremacy in many parts of the world between 1945 and the late 1970s. Entrenched constitutional bills of rights, enforced through the judicial power to invalidate conflicting legislation against which parliaments were powerless to act by ordinary majority vote, became a central pillar of the 'post-war

<sup>1</sup> For this term, see M. Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000); S. Choudhry, 'After the Rights Revolution: Bills of Rights in the Post-Conflict State' (2010) *Annual Review of Law and Social Science* 301.

paradigm<sup>2</sup> of constitutionalism. By contrast, the new model is, in many ways, a second-generation response on the part of certain countries that, starting in the 1980s, embraced the spirit of the revolution but resisted this aspect of the new paradigm as its necessary institutional means.

Prior to World War II, the general model of legislative supremacy, as exemplified not only by the British/Commonwealth doctrine of parliamentary sovereignty but also by the French doctrine that acts of the legislature are the supreme expression of the people's general will,<sup>3</sup> was the dominant model of constitutionalism throughout the world, especially in Europe and with respect to the issue of individual rights and civil liberties.<sup>4</sup> Outside of the United States and a group of newly independent Latin American countries which viewed it as the inspiration for their own revolutionary wars against colonial rule, the very few courts that had the power to review the constitutionality of national legislation for violations of fundamental rights fell into one or more of three categories: they were recent or brief experiments; their claims to such power were heavily contested; or they exercised it in theory but not in practice. Thus, Ireland expressly established judicial review of legislation under its 1937 Constitution,<sup>5</sup> which included protection of fundamental rights. The first two specialized constitutional courts were established in the new republics of Czechoslovakia (1920–38) and Austria (1920–34), but the jurisdiction of the latter was limited until 1929 to petitions from the other branches of government and in practice dealt only with separation of powers issues.<sup>6</sup> Its founder's opposition to

<sup>2</sup> L. Weinrib, 'The Postwar Paradigm and American Exceptionalism' in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press, 2005).

<sup>3</sup> Article 6 of the Declaration of the Rights of Man, 1789, states that statutes (*lois*) are the supreme expression of the general will. This was interpreted as meaning that Parliament's enactments enjoyed the status appropriate to the expression of the will of the sovereign. See J. Bell, *French Constitutional Law* (Oxford: Clarendon Press, 1992), p. 225.

<sup>4</sup> The fact that the model of legislative supremacy has sometimes been the vehicle for absolutist or authoritarian regimes should not mislead one into denying that it is a form of constitutionalism. Many Latin American countries adopted the model of constitutional supremacy during the nineteenth century, but this did not prevent some of them descending into dictatorship in. See A. Brewer-Carias, *Judicial Review in Comparative Law* (Cambridge University Press, 1989), p. 156. What both of these facts suggest is that constitutionalism is not a matter of form alone. In Canada, Australia, Germany and Switzerland, some form of judicial review of the federalism boundaries between central and provincial governments appeared before 1945, but not with respect to individual rights.

<sup>5</sup> Irish Constitution, Article 34.

<sup>6</sup> Discussing the work of the Austrian Constitutional Court, Cappelletti and Cohen observe that 'laws which curtailed individual liberties remained practically speaking outside the

a bill of rights is famous.<sup>7</sup> In Spain, a specialized court, the Court of Constitutional Guarantees, operated from 1933 to 1936 under the ill-fated Second Republic.<sup>8</sup> In Weimar Germany, the two highest general courts on occasion claimed for themselves the power to review legislation despite silence on this issue in the Constitution, but in practice rarely exercised it, and never with respect to individual rights.<sup>9</sup>

Once the rights revolution was underway, the obvious and catastrophic failure of the legislative supremacy model of constitutionalism to prevent totalitarian takeovers, and the sheer scale of human rights violations before and during World War II, meant that, almost without exception, when the occasion arose for a country to make a fresh start and enact a new constitution, the essentials of the only other available model of constitutionalism were adopted.<sup>10</sup> This is the model of judicial or constitutional supremacy first established in the United States in deliberate and direct rejection of the fundamental British principle of parliamentary sovereignty which, whatever the general merits of its claims to adequately protect liberty, was adjudged by its former American colonial subjects to have utterly failed to protect their common law rights and freedoms. This then-new model inverted the twin principles of the sovereignty of Parliament so that legislative power is legally limited and courts are empowered to enforce these limits.<sup>11</sup>

ambit of [court] control'. M. Cappelletti and W. Cohen, *Comparative Constitutional Law* (Indianapolis: Bobbs-Merrill, 1979), p. 87.

<sup>7</sup> H. Kelsen, 'La Garantie Juridictionnelle de la Constitution' (1928) 4 *Revue du Droit Public* 197.

<sup>8</sup> On the structure and jurisdiction of this court, see Brewer-Carias, *Judicial Review in Comparative Law*, pp. 225–6.

<sup>9</sup> The decision of the *Reichsgericht* of 4 November 1925 asserted the power of judicial review most clearly. But as one commentator describes the situation, German courts 'did not [use the power] to protect fundamental rights': L. Favoreu, 'Constitutional Review in Europe', in L. Henkin and A. Rosenthal (eds.), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1990). See also Brewer-Carias, *Judicial Review in Comparative Law*, p. 204 ('nevertheless, the situation of the system of judicial review [in Germany] up to 1933 was not completely clear so that judicial review of federal laws by all courts was not always accepted and was frequently criticized').

<sup>10</sup> On the 'fresh start' as one of several paradigms explaining the growth of constitutional supremacy after 1945, see B. Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771.

<sup>11</sup> These limits were first that a few legislative powers are denied to both federal and state governments, then the total remaining legislative powers were divided between nation and states in the federal system under the doctrine of enumerated powers. Federal legislative power was further limited by the doctrine of separation of powers, and

Accordingly, in order effectively to protect, and express their new commitment to, fundamental human rights and liberties, country after country abandoned legislative supremacy and switched to an entrenched, supreme law constitution with a bill of rights that was judicially, or quasi-judicially, enforced. These included the three former Axis powers, Germany (1949), Italy (1948) and Japan (1947); Spain (1978), Portugal (1982) and Greece (1975) when they emerged from authoritarian dictatorship; France under the current Fifth Republic (1958),<sup>12</sup> as well as Cyprus (1960) and Turkey (1961). Currently, within Western Europe, only the Netherlands and Switzerland do not permit any form of judicial review of national legislation.<sup>13</sup> Until 2000, Finland was a fellow member of this exclusive group, but under its new Basic Law, a limited power of constitutional review is granted to the courts.<sup>14</sup> This brings it more or less into line with the three other Nordic countries of Sweden, Denmark, and Norway, which essentially share a tradition in which an ultimate, residual power of constitutional review is acknowledged in theory, but in practice gives way to *de facto* legislative supremacy.<sup>15</sup> A second concentrated burst of constitutionalization took place in central and eastern Europe after the break-up of the Soviet system

from 1791 also by the Bill of Rights. The Fourteenth Amendment was ultimately interpreted to incorporate almost all of the limits contained in the Bill of Rights against the states. Of course, the US Constitution itself contains no clear grant of the power of judicial review to the courts, but was inferred by Chief Justice Marshall from the status of the Constitution as supreme law, itself (with respect to federal legislation) a structural inference from its written nature: *Marbury v. Madison* (1803) 5 US 137.

<sup>12</sup> In France, the *conseil constitutionnel* has exercised review powers with respect to individual rights only since 1971, when it interpreted the preamble to the 1958 Constitution as incorporating both the 1789 Declaration of the Rights of Man and the rights contained in the preamble to the 1946 Constitution of the Fourth Republic. CC decision no. 71–44 DC of 16 July 1971. Its powers were extended from abstract *a priori* review only to include concrete review from the *Conseil d'État* and the *Cour de cassation* under the 2008 constitutional amendments.

<sup>13</sup> 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts', Netherlands Constitution, Article 120. 'Federal statutes and public international law are authoritative for the Federal Supreme Court and the other judicial authorities', Swiss Constitution, Article 190. Luxembourg (1997) and Belgium (1988 and extended in 2003) made the change relatively recently.

<sup>14</sup> Section 106 of Finland's Basic Law 2000 provides that 'if in a matter being tried by a court, the application of an Act would be in evident conflict with the Constitution, the court shall give primacy to the provision in the Constitution.' This innovation complements the existing *ex ante* review conducted by the Constitutional law Committee of the legislature. See J. Husa, 'Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective' (2000) 48 *American Journal of Comparative Law* 345; K. Tuori, 'Judicial Constitutional Review as a Last Resort' in T. Campbell, K. Ewing and A. Tomkins, *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011).

<sup>15</sup> Husa, 'Guarding the Constitutionality of Laws in the Nordic Countries', p. 365.

in 1989. Here, the creation of constitutional courts has been a universal phenomenon, alongside new constitutions and entrenched bills of rights, extending to Poland (1986),<sup>16</sup> Hungary (1990), Russia (1991), Bulgaria (1991), Czech Republic (1992), Slovak Republic (1992), Romania (1992) and Slovenia (1993).<sup>17</sup> Outside Europe, the same phenomenon has occurred in Asia,<sup>18</sup> in post-junta Latin America<sup>19</sup> and in several African countries, most notably South Africa (1994).

To be sure, both the contents of the fundamental rights protected and the forms of constitutional review adopted in Western Europe after 1945, and again in the former Soviet bloc, Latin America, Africa and Asia since the late 1980s, differ in interesting and well-known ways from the situation in the United States.<sup>20</sup> Notwithstanding these important differences – differences which are central objects of study in comparative constitutional law courses and texts – they ultimately constitute variations within, not from, the American model of constitutional or judicial supremacy as they all share its essential structural features. A specific set of fundamental rights and liberties has the status of supreme law, is entrenched against amendment or repeal by ordinary legislative majorities, and is enforced by an independent institution (usually though not necessarily a ‘court’), which has the power to strike down legislation that it finds in conflict with these rights and against whose decisions the legislature is legally powerless to act by ordinary majority. These essentials once again define a constitutional arrangement that in each respect the polar opposite of the situation in which legislative

<sup>16</sup> Poland was the only country in the former Soviet bloc to have a constitutional court, which was established in 1986 with very limited powers to try and head off opposition to the regime. After the fall of the Communists, the court’s powers of judicial review were enlarged in 1989. Until 1997, parliament could override a court decision invalidating a statute by a two-thirds majority, but the override power was abolished in the 1997 Constitution.

<sup>17</sup> On the general developments in constitutionalism in central and eastern Europe, see H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: University of Chicago Press, 2000).

<sup>18</sup> For example, new constitutional courts were created in South Korea (1988), Mongolia (1992) and Thailand (1997). See T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003).

<sup>19</sup> For example, in Colombia (1991) and Argentina, where the Supreme Court has become independent of the executive and more prominent since the constitutional reforms of 1994 and 2003.

<sup>20</sup> As to forms of constitutional review, most notably the differences are between (1) centralized or concentrated and decentralized or diffuse judicial review; (2) abstract and concrete-only review; (3) *a priori* and *a posteriori* review; and (4) anonymous and unanimous judgments of the court versus individual, dissenting and concurring judgments.

supremacy reigns. The terms legislative and judicial supremacy thus describe not only which institution has the final word on any constitutional issue, but also which institution is primarily entrusted with the tasks of declaring and protecting citizens' rights and liberties.

Like the other countries just discussed, Canada, New Zealand and the United Kingdom, as well as the sub-national entities of the Australian Capital Territory (ACT) and the state of Victoria, have in recent years sought to create greater legal protection for fundamental rights than under their traditional systems of legislative supremacy. But unlike the others, these five jurisdictions have attempted to do so while deliberately refusing to embrace the opposite model of constitutionalism, with its perceived excesses of judicial power. In its place, they have sought to create greater institutional balance and joint responsibility for rights, and thereby to establish a new third model of constitutionalism in between a fully constitutionalized bill of rights and full legislative supremacy, the only two pre-existing options.

There is a second way in which the new Commonwealth model is a less direct, more distant product of the post-1945 rights revolution. Although this revolution was constituted by developments at both the domestic (constitutional bills of rights) and international (international human rights law) levels, for the most part these were parallel developments that took place separately. Comparative constitutional law emerged as an academic subject in significant part to study these domestic developments, comparing the contents of the new bills of rights and their judicial interpretation and application by new constitutional courts – among themselves and with older systems, such as the United States. In both substantive and methodological respects, however, the new model is characterized by more recent trends in the theory and practice of human rights, and is more deeply influenced by international and comparative constitutional law.

Like the bills of rights in several new or extensively amended post-military junta constitutions in Latin America,<sup>21</sup> but unlike the first generation of post-1945 bills of rights, the new model, especially in its most recent instantiations, employs international human rights law to provide much of its content. The preamble to the New Zealand Bill of Rights Act 1990 (NZBORA) states that one of its two purposes is 'to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

<sup>21</sup> Argentina is perhaps the leading example, giving ten specific international human right treaties and instruments domestic constitutional status. Constitution of Argentina, section 75(22).

(ICCPR)', and most of the included rights correspond to ones contained in that treaty. The UK's Human Rights Act 1998 (HRA) declares that its purpose is 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights',<sup>22</sup> and the wording of the included rights is identical to those in this treaty.<sup>23</sup> Indeed, the content of these rights is given only by reference to the text of the European Convention on Human Rights (ECHR), which is appended to the HRA as Schedule 1. The Australian Capital Territory's Human Rights Act 2004 (ACTHRA) states that 'the primary source of these rights is the International Covenant on Civil and Political Rights'<sup>24</sup> and the content of the rights in the state of Victoria's Charter of Human Rights and Responsibilities Act 2006 (VCHRR) is similarly largely drawn from the ICCPR.

Methodologically, the new model has also increasingly taken a self-consciously comparative approach by looking at, and learning from, jurisdictions deemed most similar and relevant. Not only, to be sure, in the subsequent interpretation of the document, as we shall see on many occasions, but also in its creation. This is part of what gives it the sense of being a shared work in progress. Thus, once the constitutional strategy had been rejected, framers of the NZBORA were highly conscious of, and keen to avoid, what Paul Rishworth has referred to as the 'anti-precedent' of the statutory Canadian Bill of Rights 1960 (CBOR), with its implied judicial power to invalidate inconsistent legislation.<sup>25</sup> The finished product was well-known and discussed at the time the UK's HRA was enacted,<sup>26</sup> and the two Australian bills have self-consciously attempted to improve on what are perceived as some of the weaknesses of the latter. In this way, as a leading example of comparative rights jurisprudence in action, the new model has helped to move comparative constitutional law out of the study.

## II

On the general politics of the new model, all five bills of rights were enacted by left-of-centre governments – Liberals in Canada and Labour

<sup>22</sup> HRA, preamble.

<sup>23</sup> A few provisions of the ECHR are omitted from the HRA, namely Articles 1 and 13.

<sup>24</sup> ACTHRA, Part 3, note.

<sup>25</sup> P. Rishworth, 'The Inevitability of Judicial Review under "Interpretive" Bills of Rights: Canada's Legacy to New Zealand and Commonwealth Constitutionalism?' (2004) 23 *Supreme Court Law Review* (second series) 233, 266.

<sup>26</sup> See, for example, A. Butler, 'The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain' (1997) 17 *Oxford Journal of Legal Studies* 323.



elsewhere – and opposed by right-of-centre opposition parties. This political alignment itself reflects a realignment of sorts, as traditionally, left-of-centre parties in these countries had been deeply suspicious of judicial power as a conservative, if not reactionary, check on their electoral mandates for democratic reform. What significantly prompted this paradigm shift was the impact of the rights revolution, with its generally progressive aura and sense of constituting the new norm, together with the growing perception that civil liberties were under serious threat and needed greater protection.<sup>27</sup> In addition, there were certain country-specific factors at play, including the more idealistic fresh start of ‘repatriating’ the constitution in Canada and the more pragmatic concerns in the UK about the country’s embarrassingly poor record before the European Court of Human Rights (ECTHR).<sup>28</sup>

The opposition of the centre-right parties in each jurisdiction has continued since initial enactment, with the exception of the currently governing National Party in New Zealand. This opposition took the form of an overt promise to repeal the statutory bill of rights in the UK, and somewhat more veiled and ambiguous threats in Victoria and the ACT. In Canada, faced with the hugely popular<sup>29</sup> – not to mention entrenched and constitutionalized – Canadian Charter of Rights and Freedoms 1982 (the Charter), the governing Conservative Party maintains a studied hostility to it and periodically reaffirms its option of employing the distinctive section 33 legislative override mechanism.<sup>30</sup> By contrast, at least two Liberal Prime Ministers have declared section 33 a mistake and vowed never to use it.<sup>31</sup> Accordingly,

<sup>27</sup> In the UK, this was the result of the perceived erosion of civil liberties during the Thatcher era, see K. Ewing and C. Gearty, *Freedom Under Thatcher* (Oxford University Press, 1990); in Canada, the sense of a need for greater protection arose because of the ineffectiveness and dilution of the Canadian Bill of Rights, 1960.

<sup>28</sup> For a detailed study of the origins of each of the bills of rights, see D. Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford University Press, 2010).

<sup>29</sup> In two public opinion polls, the latest in 1999, 82 per cent of respondents rated the Charter ‘a good thing’. F. L. Morton (ed.), *Law, Politics and the Judicial Process in Canada*, 3rd edition (Calgary: University of Calgary Press, 2002), at 490.

<sup>30</sup> ‘Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.’ Canadian Charter of Rights and Freedoms 1982, section 33(1). For detailed discussion of section 33, see Chapters 2 and 5 below.

<sup>31</sup> Jean Chrétien and Paul Martin. In addition, Conservative Prime Minister Brian Mulroney, whose proposed Meech Lake and Charlottetown Accords were undermined

although the Charter provokes deeply divided partisan politics, its future does not appear to be seriously at stake.

With the most recent electoral victories of the Conservatives in the UK and the Liberal-Nationals in Victoria, the same is not true of the HRA and VCHRR. Fuelled by a combination of enhanced national security concerns post 9/11 and 7/7, media-induced perception of the HRA as a 'rogues' charter' and growing hostility to European interference in domestic affairs, Conservative plans to repeal it have been thwarted by their Liberal-Democratic coalition partners. Currently, the whole issue has been delegated to an independent commission that is scheduled to report by the end of 2012,<sup>32</sup> and so remains up in the air. The situation is somewhat similar with the VCHRR. The Liberal-National majority on the parliamentary committee conducting its mandatory four-year review recently recommended stripping the courts of their limited enforcement powers, and it is uncertain whether the Baillieu government will take up this recommendation in its response to the review.<sup>33</sup> The ACTHRA appears safe as long as the current Labor government remains in office, whereas at the national level the wafer-thin Labor majority's political fear of bill of rights scepticism has mostly resulted in a stand-off on the issue.<sup>34</sup> Only in New Zealand is the bill of rights generally supported by both of the major political parties.

### III

At this point, a few clarifying words on nomenclature and associated matters are in order. I first employed the term 'the new Commonwealth model of constitutionalism' in an article published in 2001<sup>35</sup> and, as already mentioned, intended by it to identify and distinguish a new model of constitutionalism adopted in these Commonwealth jurisdictions for the protection of basic rights that self-consciously departed from the *old* or traditional Commonwealth model of parliamentary sovereignty. To avoid possible confusion, I was not and am not using the term in the sense of 'the new' versus 'the old Commonwealth'; that is,

in part by the backlash caused by Quebec's use of section 33, also expressed public opposition to section 33.

<sup>32</sup> For more details, see Chapter 7. <sup>33</sup> For details, see Chapter 8.

<sup>34</sup> Although, as detailed in Chapter 8, there has been one recent legislative development at the national level: enactment of the Human Rights (Parliamentary Scrutiny) Act 2011.

<sup>35</sup> S. Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707.