Judicial Review as 'No-fault' Insurance: The New Zealand Bill of Rights Act, 1990

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This paper is entitled "Judicial Review as 'No-Fault' Insurance: the New Zealand Bill of Rights Act, 1990," in an effort to make an important distinction between the reasons why judicial review is *established* in new democracies (Ginsburg 2003; Hirschl 2004) or advanced Westminster systems such as New Zealand (Erdos 2007) and secondly, the *functioning* of the insurance policy once it is introduced (Erdos 2009). The reasons for establishing judicial review is well addressed in the literature and this paper will focus on the functioning of a 'parliamentary' bill of rights in an advanced Westminster system. According to Ginsburg, judicial review is adopted in new democracies by constitutional drafters as an insurance policy to preserve a level of political influence in post-transition democratic states (Ginsburg 2003; 18). In the 'insurance model' approach, the particular structure and influence of a constitutional court is determined by the confidence that constitutional drafters have in their level of influence in post-transitional democratic regimes, "with optimistic politicians preferring less vigorous and powerful courts so they can govern without constraint" (Ginsburg 2003; 18). Hirschl's 'hegemonic preservation thesis' provides an explanation very similar to that of Ginsburg with the added dimension of a class-based understanding of judicialization, arguing that powerful conservative elites transfer decision making to judicial elites, drawn from similar social and economic backgrounds, in an effort to constitutionalize their preferred approach to the market and state and to prevent new political hegemons from changing this neo-liberal orientation (Hirschl 2004; 11-16).

In the case of New Zealand, Erdos suggests 'political insurance' in reverse and introduces the model of 'aversive constitutionalism' to understand the political origins of the NZBORA that was introduced in 1990. Whereas Ginsburg and Hirschl argue that the introduction of judicial review is an attempt to preserve a degree of political influence in post-transition regimes (Ginsburg) or the former hegemon's preferred approach to the market and state (Hirschl), Erdos argues that the political origins of bills of rights in Westminster democracies such as Canada, New Zealand and the United Kingdom are the result of the negative experiences of political parties while in opposition. In the case of New Zealand, the fourth Labour government (1984-1990) introduced a statutory bill of rights in 1990 largely in response to the authoritarian approach by Prime Minister Robert Muldoon (1975-84), as well as the growing concentration of power with the executive and the decline of Parliament as an effective check on Cabinet (Palmer 1992; 52-52). In a convincing account of the political origins of the NZBORA, Erdos argues that it was the 'aversive' reaction to the Muldoon government by Labour party elites such as Geoffrey Palmer – first as Minister of Justice and later as Prime Minister and the chief architect of the NZBORA – that provided the 'trigger event' (Erdos 2009) leading Palmer to first advocate for the introduction of an entrenched bill of rights during the 1984 Labour Party election manifesto and secondly,

to accept a simple statutory bill of rights because of opposition against an entrenched document within the Labour caucus, the National Party, and large segments of society, including the New Zealand Law Society: opposition emanating over of concerns with judicial empowerment and the implications for parliamentary supremacy. Erdos has also applied this framework to understand the emergence of the Canadian Charter of Rights and Freedoms in 1982 and the United Kingdom's *Human Right Act*, 1998, as well as to understand the failure of a national bill of rights in Australia (Erdos 2008)

In this paper, the framework of 'no-fault' insurance is employed to analyze weak-form judicial review in New Zealand after 20 years (Tushnet 2008). This adaption of Ginsburg's framework is used to suggest that, in the case of New Zealand, when Parliament legislates contrary to the NZBORA, which it can do because it is a statutory document, a limited price is paid by political actors, suggesting that judicial review is a weak form of insurance against political encroachment on rights and freedoms. Instead of acting as a constraint on the actions of political actors and insuring against future 'aversive' actions in respect to rights, the NZBORA has created a 'no-fault' approach to rights violations, where the political cost borne by parliamentarians is so low that judicial review functions as an insurance policy with very limited coverage.

To demonstrate this, I will focus on the 2007 Supreme Court of New Zealand's (NZSC) decision *Hansen*, the Section 7 report issued by the Attorney General in relation to the *Misuse of Drugs Act (Classification of BZP) Amendment Bill* notifying Parliament that the bill was, in the opinion of the Attorney General, inconsistent with *Hansen*, and finally, the parliamentary decision whether to amend the *Misuse of Drugs Act (Classification of BZP) Amendment Bill* to address the identified NZBORA implications. In the end, the *Misuse of Drugs Act (Classification of BZP) Amendment Bill* was passed by Parliament without amendment despite the Attorney General's report indicating that it was a clear infringement of the NZBORA and inconsistent with the Court's decision in *Hansen*. A number of factors account for the emergence of a 'no-fault' insurance model in New Zealand. First, the structure of the NZBORA and the absence of 'triggers' within the document inviting the judiciary to be activist in its interpretation; second, the cautious approach to the NZBORA by the judiciary, which significantly reduces the political cost borne when parliamentarians legislate contrary to the bill of rights; third, constitutional principles that constrain judicial review leading to 'no-fault' insurance because of the deep importance of parliamentary sovereignty (Palmer 2007); and finally, the parliamentary reaction when notified by the Attorney General that legislation may be inconsistent with the NZBORA. Although the NZBORA was argued by Palmer to be an insurance policy because it would serve as a 'set of navigation lights for the whole process of government to follow' (Palmer 1985), the functioning of the NZBORA suggests that judicial and political actors either fail to see the navigation lights, ignore

them, or use other markers when piloting legislation through Parliament and the judicial system. For this reason, the NZBORA functions as a 'no-fault' insurance policy and, perhaps, supports Geddis's concern regarding the 'comparative irrelevance' of the NZBORA (Geddis 2009).

'No-fault' Insurance, Parliamentary bills of Rights and the need for Political Triggers

As originally conceived by Geoffrey Palmer in the early 1980s, an entrenched bill of rights was viewed as insurance against the return to aversive constitutionalism that marked the Muldoon years (Erdos 2007). In this sense, a supreme bill of rights, in addition to other institutional changes introduced by the fourth Labour government, such as an empowered committee system within Parliament and electoral change resulting in Mixed Member Proportional (MMP) voting in 1993, would serve as important checks on executive power that were missing in a unicameral parliamentary setting with strong party discipline (Palmer and Palmer, 2004). Facing internal opposition within the Labour caucus to a supreme bill of rights, as well as the National Party and large segments of New Zealand's population, Minister of Justice Palmer was unable to gain support for an entrenched bill of rights with full judicial review after issuing the government's White Paper, *A Bill of Rights for New Zealand*, in 1985. Reporting to Parliament in 1987, the Select Committee noted the tremendous opposition to a supreme bill of rights, and in its final report to Parliament in 1988, simply recommended the introduction of a bill of rights as an ordinary statute (Rishworth 1995).

As Minister of Justice, Geoffrey Palmer received the Select Committee Report in 1988 and set about to introduce a draft bill of rights into Parliament, a development which occurred on October 10, 1990. Palmer, however, introduced the NZBORA into Parliament as Prime Minister, having succeeded David Lange as Labour leader on August 8, 1989. This may, however, represent the decisive event in the passage of the NZBORA into law. There was little parliamentary support for an entrenched bill of rights, and limited support within the Labour caucus for a bill of rights as ordinary law. Indeed, the statutory NZBORA was passed into law by a narrow parliamentary majority (36 to 28) that divided along party lines, with the Prime Minister leading the parliamentary debate instead of the Minister of Justice. Palmer, however, expended a large amount of his personal political capital on this issue, and was replaced as Prime Minister and Labour leader by his parliamentary caucus on September 4, 1990, two weeks after the NZBORA received Royal Assent.

The NZBORA, 1990 contains a number of important sections that limit judicial review as an insurance policy against rights violations by Cabinet or Parliament. In

particular, Sections 4 to 7 constitute the 'fine print' of New Zealand's insurance policy. Sections 4-6 provide guidance to judicial actors in interpreting the NZBORA and Section 7 is a political 'trigger' that requires the Attorney General to notify Parliament when, in the opinion of this law officer, legislation is inconsistent with the NZBORA. What is not provided for – and explicitly prohibited – is the ability of the judiciary to declare legislation inconsistent with the NZBORA and to issue remedies when legislation violates rights and freedoms. As will be argued later, these provision result in the NZBORA emerging as a 'no-fault' bill of rights: a development that is reinforced by judicial review involving rights and freedoms, a political culture of parliamentary supremacy that is deeply embedded (and which greatly reduces the political cost of passing legislation that is inconsistent with the NZBORA), and a parliamentary engagement of rights issues that cannot, despite best intentions, be characterized as an example of an insurance policy through the dialogue model (Butler 2004; Joseph 2004).

Before discussing key provisions of the NZBORA in greater detail, the limitations of the NZBORA as an insurance policy are very similar to those that faced the 1960 Canadian Bill of Rights. Although Canada has a supreme law Charter that was entrenched in the constitution in 1982, the first attempt at a national bill of right was introduced in statutory form by Prime Minister John Diefenbaker. Several features of the Canadian Bill of Rights undermined its effectiveness as an attempt to prevent 'aversive constitutionalism' that occurred in Canada after the Second World War. Indeed, the political origins of the Canadian Bill of Rights are consistent with Erdos's 'aversive constitutionalism' framework, with some differences. Diefenbaker's motivation for a national bill of rights was not the result of the experiences of the Progressive Conservative Party during its long period in opposition, with the Liberal Party governing uninterrupted from 1935-1957, but the human rights abuses of racial minorities that occurred through orders-in-council during an after WWII. For instance, the internment and deportation of Japanese-Canadians, as well as the treatment of Canadians of Italian origin, was not authorized by Parliament but by Cabinet through orders-in-council, which do not require parliamentary review or approval. Much of Diefenbaker's motivation for a national bill of rights was to prevent such activities through orders-in-council and to reinvigorate Parliament as a check on the executive (MacLennan 2003). Indeed, the preamble declared that Parliament 'affirmed and protected' the rights outlined in the Canadian Bill of Rights and required the Minister of Justice to examine every order-in-council and law for their relationship to the Canadian Bill of Rights and to report any inconsistency to Parliament "at the first convenient opportunity."

The most limiting feature of the Canadian Bill of Rights was the failure to authorize a judicial role protecting rights and freedoms from legislative encroachment.

This led legal commentators in Canada, such as future Chief Justice of the Supreme Court of Canada Bora Laskin to conclude that the bill of rights "is disappointing in its approach, unnecessarily limited in its application and ineffective it its substance." The Canadian Bill of Rights only applied to the national government and not the provinces, and did not contain a judicial remedy for legislation that was inconsistent with the document (Laskin 1958). In fact, it did not authorize judicial review of the Canadian Bill of Rights at all, though the courts would engage in judicial review involving rights and freedoms to disappointing ends. For instance, during the period before the statutory bill of rights was replaced by the entrenched Charter of Rights (1960-1982) as the principle instrument of rights protection, the Supreme Court of Canada only supported the rights claimant in 5 of 35 cases, and only found 1 statute partially inconsistent with the Canadian Bill of Rights in *Drybones*: a 1969 case involving a provision of the *Indian Act* that made it illegal for Aboriginals – and only Aboriginals – to be intoxicated off-reserve. Although this is an example of judicial activism, as the SCC created a judicial role where none existed in the Canadian Bill of Rights, it was a limited example of non-interpretivist review, as the SCC did not authorize judicial invalidation of federal legislation, but provided for judicial declarations that statutes were *inoperative* in relation to the Canadian Bill of Rights. As the Canadian Bill of Rights was not supreme law but ordinary legislation (despite being elevated by the SCC in 1975 to a 'half-way house between a purely common law regime and a constitutional one' in Justice Bora Laskin's reasons in *Hogan*), the judicial declaration in *Drybones* did not repeal the *Indian Act* in the manner in which a declaration of unconstitutionality would have done.

In many regards, the absence of political authorization of judicial review in the Canadian Bill of Rights suggests that this 'parliamentary' document manifested elements of 'no-fault' insurance in regard to judicial review and the protection of rights. The momentum for an entrenched Charter of Rights was, in many ways, an attempt to provide for a fully insured document with effective judicial review. The Canadian Charter of Rights and the *Constitution Act*, 1982, include explicit triggers authorizing judicial review that were inserted by parliamentarians to prevent the endurance of 'no-fault' insurance that existed under the statutory Canadian Bill of Rights. In particular, the *Constitution Act*, 1982 included section 52, the supremacy clause, which states "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." By virtue of being the first 35 amendments to the *Constitution Act*, 1982, which replaced the *British North American Act*, 1867 as Canada's constitution, the Canadian Charter of Rights is part of the supreme law of Canada.

Unlike the Canadian Bill of Rights, the Charter of Rights explicitly authorizes or 'triggers' judicial review as insurance for rights and freedoms in two regards. Section 24(1) allows individuals to apply to a 'court of competent jurisdiction' to seek a remedy for a rights violation considered by the court to be 'appropriate and just in the circumstances.' This has seen the courts employ a range of judicial remedies for legislation determined to be 'of no force or effect' in Canada: immediate judicial invalidation (*Ford. v. Quebec*), suspended declarations of unconstitutionality (*Nguyen v. Quebec*), and finally, judicial amendment of legislation by 'reading' legislation constitutional (*Vriend v. Alberta*). Secondly, section 24(2) allows the courts to decide whether to exclude evidence gathered by the agents of law enforcement if, in the opinion of the court, the evidence would 'bring the administration of justice into disrepute.' This is not an automatic exclusion of evidence rule, but a highly discretionary judicial test for deciding whether to include – or exclude – evidence gathered in a manner that violates rights and freedoms (Kelly 2005).

The structural features of the Canadian Charter allowing judicial review as an insurance policy for rights protection is important when considered in light of the statutory NZBORA, as it exhibits the 'no-fault' features of the statutory Canadian Bill of Rights. Four provisions of the NZBORA prevent the judiciary from engaging in substantive bill of rights review (sections 4 to 7). As the next section will argue, restrictive judicial approaches to the NZBORA and the dominance of parliamentary supremacy as *the* constitutional principle in New Zealand reinforce the importance of political triggers and the relative unimportance of judicial review as part of the insurance policy. Section 4 of the NZBORA[1] establishes Parliament's preferred approach to judicial interpretation and clearly establishes that courts cannot repeal or revoke statutory law "by reason only that the provision is inconsistent with any provision of this bill of Rights (NZBORA, cited in Butler and Butler 2005). Unlike the Supreme Court of Canada, which has invoked the 'living tree metaphor' as a justification to engage in expansive review, the judiciary in New Zealand, operating in a political culture where parliamentary sovereignty is "an ultimate principle of New

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[1] **Section 4** **Other enactments not affected**
No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b) Decline to apply any provision of the enactment—
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

Zealand's constitution" (Palmer 2007; 586) have accepted the limited role provided to the courts by Parliament under section 4 of the NZBORA (Butler 2000; 130).

Similar to the Canadian Charter of Rights and Freedoms, the NZBORA has an explicit limitations clause, section 5.[2] This limitation clause, however, is different as it is internally qualified by section 4 of the NZBORA, which prevents courts from declaring any provision to be "impliedly repealed or revoked, or to be in any way invalid or ineffective...or decline to apply any provision of the enactment." Finally, Section 6 of the NZBORA directs the courts to prefer an interpretation of a legislative enactment that is consistent with rights and freedoms.[3] As a result, there is much confusion over the boundaries of judicial review and the appropriate methodological approach to NZBORA inquiry. For instance, does section 4 constrain judicial review to such a degree that it is inappropriate for judges to engage in section 5 analysis? If judges are permitted to engage in section 5 analysis and find an enactment constitutes an unreasonable limitation, must the courts then read the limitations consistent with the NZBORA under section 6? Finally, if judges cannot read an enactment consistent with the NZBORA, is the judiciary permitted to issue a 'declaration of inconsistency' under section 5? If the judiciary can issue a 'declaration of inconsistency' under section 5, does section 4 of the NZBORA require the court to adopt Parliament's intended meaning, despite the declaration of inconsistency?

Although the Court of Appeal, before being replaced by the SCNZ as the highest domestic court in 2004 following abolition of appeals to the Judicial Committee of the Privy Council, established an approach to section 5 in *Moonen* (1999), it has only recently been clarified in *Hansen* (2007) that the correct methodological approach to judicial review requires the courts to: first, ascertain Parliament's intended meaning; second, ascertain whether the meaning is inconsistent with the NZBORA; third, consider whether an apparent inconsistency is reasonable under section 5; fourth, if the inconsistency is unreasonable, whether the court can find an interpretation that is consistent with the NZBORA under section 6; finally, if this is not possible, section 4

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[2] **Section 5** **Justified limitations**

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[3] **Section 6** **Interpretation consistent with Bill of Rights to be preferred**

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

requires Parliament's intended meaning be adopted despite the section 5 engagement (*Hansen*; Tipping J. at para. 92).

Despite segments of the academic community suggesting that the Court of Appeal established a judicial declaration of inconsistency in *Moonen* (Rishworth 2007), a unanimous Court of Appeal (2009) reiterated in *Boscawen v. Attorney General* that the "question as to whether a declaration of inconsistency is an available remedy under the NZBORA is still to be resolved" (*Boscawen*, O'Regan J. at para. 56). As a result, the NZBORA is a politically – and not judicially – insured document. Unable to convince parliamentarians of the importance of judicial review and remedies, Prime Minister Palmer settled on what Hiebert refers to as 'political rights review' (Hiebert 2005). Under section 7 of the NZBORA,[4] the Attorney General is required to notify Parliament when, in the opinion of the Attorney General, legislation introduced at first reading appears to be inconsistent with the NZBORA. To date, the Attorney General has issued 53 Section 7 Reports to Parliament and 27 have involved government bills. In contrast, the judiciary has not issued a declaration of inconsistency in relation to the NZBORA but has issued one in relation to the *New Zealand Human Rights Act*, 1993 – a statutory document addressing matters of discrimination. The HRA, unlike the NZBORA, provides for judicial declarations of inconsistency as an appropriate judicial remedy for discrimination.

As the judicial culture of New Zealand is deeply influenced by the principle of parliamentary supremacy (Palmer 2007; Erdos 2009), the presence of an explicit *political* declaration of inconsistency has acted as a significant deterrent on a the establishment of a judicial declaration of inconsistency (Geiringer 2009). Indeed, the intention of Parliament was to authorize political declarations of inconsistency by the Attorney General under Section 7 of the NZBORA, and, unless it is established through parliamentary amendment the NZBORA, the judicial creation of a declatory power is, according to Geiringer, 'a road to nowhere.' In *Boscawen*, the Court of Appeal argued

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[4] **Section 7** **Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights**

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—
(a) In the case of a Government Bill, on the introduction of that Bill; or
(b) In any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

that it could not create a declaration of inconsistency in the abstract, and relied on the Attorney General's Advisory Group on the establishment of a Supreme Court rejection of a 'reference procedure' for this court as support for this position. Although the NZSC did not rule out the future creation of this remedy, it concluded that "[w]e prefer to leave the question to be decided in a case in which the outcome depends on the answer" (Boscawen, O'Reagan J. at para. 56).

Constitutional Realism, Judicial Approaches, and 'No-Fault' Bills of Rights

The absence of a judicial declaration of inconsistency, either authorized by Parliament or created by the courts through section 5, suggests that the NZBORA is insured almost exclusively through political mechanisms. Although section 5 provides for the possibility of judicial declarations of inconsistency, there are several factors that suggest that a judicially created one is rather unlikely; judicial discussions of declarations of inconsistency in the abstract, that, if a declatory power was established, would render it rather ineffective; judicial culture that is shaped by New Zealand's political culture, with the courts reluctant to challenge the intention of Parliament (Palmer 2007; Erdos 2009); and finally, the minimalist nature of the NZBORA as a 'first generation' bill of rights focusing on civil and legal protections.

Although the New Zealand courts have not established a judicial declaration of inconsistency, they have created judicial rules on its operation that would significantly hamper the transition to judicial review as insurance policy under the NZBORA if such a rule were established, either by Parliament (unlikely) or the courts (even more unlikely). Claudia Geiringer has identified 7 judicial hurdles created around implied declarations of inconsistency (Geiringer 2009), and I will focus on the 3 most significant: a declaration of inconsistency must be raised at the court of first instance; a declaration of inconsistency is only a civil remedy and not a criminal remedy; and finally, a declaration of inconsistency is not available if Parliament is 'engaged' with the issue. Unlike Canada, where the equivalent of a 'declaration of inconsistency' via section 52(1) of the *Constitution Act*, 1982 and section 24(1) of the Charter applies to all breaches (civil and criminal) and does not need to be raised at the court of first instance, the New Zealand judiciary has severally reduced the possibility of a declaration of inconsistency as a central institutional mechanism in rights-based dialogue between courts and legislatures.

I do not have any empirical evidence for this position, but I would hypothesis that bill of rights issues are not generally raised at courts of first instance, as the judicial proceedings center on the establishment of factual and legal guilt and the 'live issue,' not abstract academic debates about rights infringements, reasonable limits and

declarations of inconsistency as appropriate remedies. This approach was established by the NZSC in *Taunoa v. Attorney General* (2006) where an attempt to declare the *Prisoners' and Victims Claim Act* as inconsistent with the NZBORA was dismissed by the NZSC because it had not been previously raised, and would, in the opinion of the Court, represent a 'new' case and not an appealed decision of a lower court. The implications of this procedural hurdle are significant, as the ability of declarations of inconsistency to be raised to the level of the Supreme Court are rather limited. Further, this judicial approach significantly undermines the development of a central objective of declarations of inconsistency in parliamentary bills of rights: an important mechanism to facilitate institutional dialogue between courts and legislatures, where courts notify Parliament of legislative infringements and Parliament decides whether and how to respond. Thus, an important aspect of dialogic constitutionalism has been significantly undermined by the *Taunoa* principle in the event a declaration of inconsistency is established.

A more serious judicial hurdle was established by the Court of Appeal in *Belcher v. Chief Executive of the Department of Corrections* (2007). In *Belcher*, the Court of Appeal determined that a judicial declaration of inconsistency is a civil remedy that cannot be granted in criminal proceedings. This approach to declarations of inconsistency departs markedly from the practice of advanced Westminster systems with bills of rights, such as Canada, the United Kingdom, and Victoria's modified remedy (declarations of inconsistent interpretation), where declarations are permitted in any area of law covered by the bill of rights. The *Belcher* principle will seriously undermine the value of a declaration of inconsistency if established, as criminal procedure is the majority of the NZBORA cases reviewed. Indeed, if a declaration of inconsistency is established, much of the NZBORA will continue to be a 'no-fault' bill of rights because of the *Belcher* principle, which, according to Geiringer, is likely to endure in the long term, as the NZSC refused to grant leave to hear the jurisdictional issue raised by the Court of Appeal.

The final procedural hurdle established that reinforces the NZBORA as a 'no-fault' bill of rights is the *Boscawen* principle that the courts cannot consider declarations of inconsistency in the abstract. In *Boscawen*, a declaration of inconsistency was sought against the *Electoral Finance Bill 2007* that was introduced into Parliament without a Section 7 Report. The plaintiffs' contended that the *Electoral Finance Bill* 2007 clearly violated freedom of expression by imposing spending restrictions on third parties in election campaigns, and the Attorney General's failure to notify Parliament was a breach of his duties under the NZBORA. The NZSC dismissed both arguments, claiming that Section 7 was a parliamentary reporting duty, and the courts could not review the Attorney General's reasoning why the act was considered consistent with

the NZBORA "as it would place the Court at the heart of a political debate actually being carried on in the House. It would effectively force a confrontation between the Attorney-General and the court, on a topic in which Parliament has entrusted the required assessment to the Attorney-General, not the courts" (*Boscawen*, O'Reagan J. at para. 36). On the question of abstract review, as previously discussed, the NZSC rejected it, claiming that the Attorney General's Advisory Group on the Supreme Court of New Zealand provided clear guidance: by rejecting advisory opinions for a future NZSC, the courts had no authority to consider declarations of inconsistency in the abstract.

Erdos argues that judicial approaches do not operate in a vacuum, and that political culture and the development of a politico-legal opportunity structure are strong determinants on how a court approaches a bill of rights (Erdos 2009). Evidence for the importance of political culture is found in judicial constraints placed on declarations of inconsistency established in *Tauuoa*, *Belcher* and *Boscawen*. Matthew Palmer argues that constitutional realism in New Zealand – the beliefs and behaviour of constitutional actors – reinforce the principle of parliamentary supremacy and act as a serious constraint on judicial creativity under the NZBORA as "[s]uspicion of judges' ability to frustrate the will of a democratically elected government taps into a deep root in the New Zealand national constitutional culture" (Palmer 2007; 586). This is evident in the *Hansen* methodology established by the NZSC for approaching judicial review under the NZBORA. Unlike the SCC which first investigates whether there is a rights violation in a legislative scheme, and then considers the intention of Parliament under the reasonable limits clause, as a violation must be based on a 'pressing and substantial' legislative objective, the NZSC first attempts to discover the intention of Parliament. Part of the methodological differences is related to the statutory nature of the NZBORA and that it is equal in status to other enactment.

In particular, the *Interpretations Act 1999* states that "[t]he meaning of an enactment must be ascertained from its text and in light of its purpose" and this approach clearly signals to the judiciary, when interpreting the NZBORA, that the courts must be deferential to Parliament's stated purpose and not the effect of legislative enactments on rights and freedoms. As governments generally legislate with the purpose of protecting rights and freedoms, and the *Interpretations Act 1999* limits judicial discovery of intention to "the indications found in the enactment" the principle of parliamentary supremacy severally curtail judicial participation in rights protections in New Zealand.

The political culture limitations on judicial review as insurance policy are significant in New Zealand. Unlike the courts in Canada, which engaged in limited forms of 'declarations of inconsistency' under the federal division of powers, possessing

since 1867 the ability to declare government action *ultra vires* as a violation of the division of powers, which was expanded to include declarations of unconstitutionality under section 52(1) of the *Constitution Act*, 1982 in relation to the Charter, no such judicial review function exists in New Zealand because of its unitary status and its largely unwritten constitution. This clearly has complicated the judicial function under the NZBORA and suggests the importance of explicit political triggers authorizing the courts to engage in substantive judicial review. Indeed, even with Canadian courts engaged in federalism review since 1867, it required the inclusion of explicit political triggers in the Canadian Charter empowering the courts to engage in substantive rights review, that saw the politico-legal culture of parliamentary supremacy within a federal framework be replaced as *the* constitutional principle in Canada (Kelly 2005).

Geiringer concludes that the emergence of implied declarations of inconsistency is "a road to nowhere" because of restrictive judicial approaches to this issue, a judicial culture that avoids confrontations with Parliament, and a populace that embraces the principles of parliamentary supremacy without reservation (Geiringer 2009, 636; Palmer 2007). Indeed, Geiringer states that "we cannot rely on the implied declaration of inconsistency jurisdiction to found a robust dialogue of the kind that is emerging in the United Kingdom between the judicial and political branches of government" (Geiringer 2009, 647). Short of Parliament amending the NZBORA to include a declaration of inconsistency, which is an unlikely development, given that the NZBORA has not been amended since it was introduced in 1990 and there is no political interest in doing so, it appears unlikely that the judiciary will engage in robust review any time soon through implied doctrines. As well, the transition to MMP in 1993 may rob the NZBORA of a 'triggering event' leading to the strengthening of the document, as MMP has addressed what Geoffrey Palmer viewed as the cause of 'aversive constitutionalism' under Muldoon: the concentration of power within the office of Prime Minister through the dysfunctions of the SMP electoral system, and party discipline in a unicameral Parliament (Palmer 2004; 209).

As MMP has resulted in coalition governments or, at a minimum, supply-and-confidence agreements, the abuses of 'aversive constitutionalism' leading to the adoption of the NZBORA are unlikely to reoccur and re-orient the NZBORA toward fully insured judicial review. Substantive judicial review under the NZBORA is most likely to involve legal rights, given that this is the vast majority of cases heard by the courts, as their is a general reluctance to focus on issues of discrimination and social policy (Erdos 2009). This would most likely undermine the creation of a 'triggering event' leading to the strengthening of the NZBORA, as it would reinforce the belief that the courts have prioritized a 'rogues bill of rights': a perception that Parliament would

not want to be associated with by strengthening the bill of rights to include explicit judicial declarations of inconsistency.

This is directly related to the final element that reinforces New Zealand as a 'no-fault' insurance model – its characterization as a 'first generation' bill of rights. The NZBORA largely focuses on civil and political rights, as well as the rights governing criminal procedure and prosecution. As Erdos has argued, the New Zealand courts have "prioritized rights that it sees as its special institutional responsibility; principally, those that raise personal civil liberty issues already cognizable under the common law and, secondly, freedom expression rights, which are seen as connected to the policing of legal and parliamentary processes" (Erdos 2009; 96). Judicial reluctance to create an implied declaration of inconsistency, therefore, reinforces the limited judicial insurance provided under the NZBORA as the document, and the cases considered by the courts, are overwhelmingly in the area of criminal procedure. Thus, several constraints exist that compound the judicial role under a 'first generation' bill of rights: judicial deference to the principle of parliamentary supremacy manifested in the *Interpretation Act 1999* when reviewing the NZBORA; a reluctance to challenge Parliament's stated intent when reviewing legislation for its relationship under the NZBORA; and finally, the decision by the Court of Appeal to rule out an implied declaration of inconsistency as a remedy in matters involving criminal procedure.

Political Review and 'Uninsured' Bills of Rights: *Hansen*, Section 7 and Parliament

By parliamentary intention and the politico-legal principles structuring judicial review, the NZBORA is largely insured by political rights review (Hiebert 2005; Kelly 2009). Although the Attorney General is required under Section 7 of the NZBORA to notify Parliament when, in the *opinion* of the Attorney General, legislation is inconsistent with the NZBORA (Huscroft 2009), this reporting duty is the outcome of pre-introduction BORA vetting by the Ministry of Justice and the Crown Law Office. The objective of BORA vetting, as it is referred to during the pre-introduction stages of policy development, is to subject the government's legislative agenda to 'bureaucratic' rights review to ensure, where possible, that it is consistent with the NZBORA before it is introduced into Parliament by the responsible minister.

This bureaucratic review is, in theory, complemented by political rights review when the Attorney General issues a Section 7 Report to Parliament (Bromwich 2009). Under New Zealand's dialogic model, the notification by the Attorney General is intended to facilitate parliamentary engagement on the merits of legislation flagged as inconsistent with the NZBORA. As a result, political review as insurance for the NZBORA requires parliamentary engagement by the Cabinet justifying to Parliament

why it intends to proceed with legislation that has been flagged by the Attorney General, and secondly, by parliamentarians engaging the Attorney General's report as a point of reference when requiring the government to defend its legislation before Parliament before it is passed into law.

As I will argue in the remainder of this paper, political rights review in New Zealand fails to live up to these expectations for a number of reasons. First, it would require parliamentarians to challenge executive encroachment on the NZBORA by defending the rights of the accused, or those already incarcerated. As much of the NZBORA involves legal rights protections, and many Section 7 Reports have involved legislative attempts that limit the rights of the accused and the incarcerated, political rights review would require parliamentarians to defend an unpopular segment of society. In the present Parliament, the National government, along with its supply-and-confidence partner the ACT Party, was elected in 2008 on a 'law and order' agenda. At the present time, this has resulted in Attorney General Christopher Finlayson issuing five Section 7 Reports against government legislation (or government supported legislation, *Electoral (Disqualification of Convicted Persons) Amendment Bill*), four which involve 'law and order' issues.[5] This is a significant constraint on political rights review, as it suggests that the level of insurance varies depending on the policy context, with 'law and order' issues generally resulting in parliamentary reluctance to demand an approach that is consistent with the NZBORA for fear of appearing 'soft' on crime. Claire Charter has argued that the New Zealand Parliament fails to protect rights in 'hard cases' such as minority rights, and uses the extinguishment of Maori title in the recently repealed *Foreshore and Seabed Act* to demonstrate this (Charters 2006). I would argue that 'law and order' issues also represent 'hard cases' where parliamentarians are reluctant to prevent their passage despite clear NZBORA implications. Indeed, parliamentarians may not shy away from passing legislation with an Attorney

[5] Section 7 Reports have been issued in regard to the following government bills since 2008 by Attorney General Christopher Finlayson of the National Party: Criminal Investigations (Bodily Samples) Amendment Bill; Interim Report - Sentencing and Parole Reform Bill; Parole (Extended Supervision Orders) Amendment Bill; Electoral (Disqualification of Convicted Persons) Amendment Bill; Misuse of Drugs Amendment Bill

General's Report under the NZBORA, as it demonstrates their commitment to protect the community from this unpopular 'discrete and insular' minority.

The second constraint on political rights review as a robust insurance policy is the limited evidence, to date, of parliamentarians using Section 7 Reports to facilitate a dialogue with the Cabinet on the merits of its legislative agenda. There are a number of factors to account for this; first, the dominance of 'law and order' issues on the legislative agenda and the desire to appear 'tough on crime'; secondly, the reality that political rights review is the responsibility of the opposition parties, who may not be interested in political rights review or who lack the institutional resources to engage in a substantive and effective way; finally, the implications of MMP for parliamentary scrutiny. Although MMP was established to provide a check on prime ministerial power, it may serve as a further constraint on political rights review in 'hard cases'. As the government's legislative agenda requires prior approval and consultation with its parliamentary partners, the points of genuine parliamentary engagement from the opposition benches are significantly reduced. Specifically, the voting system under MMP, where the 'whips' simply submit votes on behalf of their entire caucus at first, second and third readings of bills, reduces the impact of parliamentary scrutiny as individual members do not vote but parties vote through the whips. Once deciding on the architecture of a bill, and having gained the support of a majority of the members of Parliament through supply-and-confidence agreements, political rights review, like Parliament itself, has been reduced to theatre – a prepared script performed by actors with clear outcomes and directions from the front benches. Andrew Geddis concludes that political rights review has generally failed in New Zealand, as 19 out of 21 (91 per cent) of government bills introduced in Parliament with a Section 7 Report have been passed without amendment *despite* the introduction of MMP (Geddis 2009; 479).

To illustrate the limitations of judicial and political rights review in hard cases, I will focus on the 2007 *Hansen* decision by the NZSC and the parliamentary response to the Attorney General's Section 7 Report against the *Misuse of Drugs (Classification of BZP) Amendment Act* – an enactment that clearly departed from the Court's approach in *Hansen*. At issue in *Hansen* was a reverse onus provision in the *Misuse of Drugs Act 1975* that, under section 6(6), provided that a person found in possession of a prescribed amount of cannabis was engaged in trafficking "until the contrary is proven" (*Hansen*, Elias C.J. at para. 1). This reverse onus provision, by a 4:1 decision, was determined by the NZSC to be inconsistent with section 25(c) of the NZBORA – the right to be presumed innocent until proved guilty according to law – and further, was considered an unreasonable limitation under section 5. However, unlike the House of Lords, which read down an equivalent reverse onus provision to be consistent with the *Human Rights Act*, 1998, the NZSC refrained from such a practice, as Justice Tipping concluded

that "whether (such an approach) is appropriate in England is not for me to say, but I am satisfied that it is not appropriate in New Zealand" (*Hansen*, Tipping J. at para. 158). Therefore, the NZSC simply indicated that it could not give the *Misuse of Drugs Act 1975* a consistent reading with the NZBORA and refrained from either issuing an implied declaration of inconsistency under section 5, or 'reading' the provision consistent via section 6. In essence, the NZSC left it to Parliament to address the NZBORA issue identified by the Court in *Hansen* regarding the level of possession that indicated a willingness to engage in supply.

Although not a direct legislative response to *Hansen*, the former Labour government introduced the *Misuse of Drugs (Classification of BZP) Amendment Bill 2007* two months after *Hansen*. The 2007 amendment to the *Misuse of Drugs Act* added Benzylpiperazine (BZP) – a drug initially used to control parasites in farm animals but with psychoactive properties – to the list of controlled drugs subjected to section 6(6) of the Act: the reverse onus provision that could not be read by the NZSC as consistent with the NZBORA in *Hansen.* Under the 2007 changes, an individual found in possession of 5 grams or 100 tablets of BZP would be deemed to be engaged in trafficking "until proved to the contrary." What is most interesting about this example is that the Labour government introduced this amendment with full knowledge that the NZSC could not read the provision consistent with the NZBORA. This resulted in the Attorney General issuing a Section 7 Report to Parliament on the *Misuse of Drugs (Classification of BZP) Amendment Bill*, indicating that the amendment departed from *Hansen* and constituted an unreasonable limitation on section 25(c) of the NZBORA. The Attorney General did, however, indicate his disagreement with *Hansen* and the threshold requirement suggested by the Court as necessary to demonstrate an individual engaged in trafficking: "[t]he judgment of the Supreme Court in *Hansen* suggests that the threshold required to avoid an inconsistency with the Bill of Rights Act must be so high as to make it highly probable or nearly certain that the purpose of possession is supply" (Report of the Attorney General, 2007). Despite this, the Attorney General did conclude that the Act was inconsistent with the NZBORA and noted that, to clarify the issue of possession for the purposes of supply, the Government had requested that the New Zealand Law Commission undertake a review of the *Misuse of Drugs Act 1975*.

Under a politically insured bill of rights, Section 7 of the NZBORA is suggested to facilitate vigorous parliamentary scrutiny of the government's legislative agenda, leading to substantive amendments in committee that ensure greater consistency with rights or freedoms. Alternatively, the government simply provides a parliamentary case that defends the legislation as addressing a pressing and substantial public goal that necessitates its passage despite NZBORA implications identified by the Attorney

General. This is, unfortunately, not the legislative experience of the *Misuse of Drugs (Classification of BZP) Amendment bill* as it was passed without amendment. After first reading, this bill was reviewed by the Health Committee, which recommended that it be passed without amendment by a majority vote despite receiving 38 submissions opposed to the bill and only 14 supporting it (Report of the Health Committee 2007; 10). Although the Health Committee possessed the Attorney General's Report, the majority report did not engage the Section 7 analysis by the Attorney General but simply indicated that "[m]any submitters were concerned that the presumption for supply limit set by the bill contravenes the New Zealand Bill of Rights Act 1990" (Report of the Health Committee 2007; 6). The majority report accepted the government's position that a 'pressing' public health issue was addressed by the BZP classification and that the Act should "not be delayed to address concerns about the presumption for supply provisions of the Act" (Report of the Health Committee 2007; 6). In perhaps the strongest indication that political review in hard cases is not a sufficient method of protection, the Report of the Health Committee, like the Attorney General's Report, alluded to the forthcoming review of the *Misuse of Drugs Act 1975* by the New Zealand Law Commission. For the Health Committee, "[t] majority of us are satisfied that the review will address the New Zealand Bill of Rights Act 1990 issues associated with this bill" (Report of the Health Committee 2007; 7). In effect, parliamentarians were satisfied that any BORA issues would be identified by the Law Commission at some later stage and suggestions for consistency would be considered at this point. The Law Commission received the request to review the *Misuse of Drugs Act 1975* in 2007 but has yet to report to Parliament. The only parliamentary party to engage the Attorney General's report in a substantive way was the Green Party, which did not support classifying BZP under the *Misuse of Drugs Act 1975*, suggesting that there was no evidence of a public health concern associated with this product: "[w]e are alarmed that Parliament is allowing this significant breach of the New Zealand Bill of Rights Act 1990 on the basis of such flimsy evidence. In our view, setting a presumption of supply at 5 grams – or possession of one hundred tablets – is arbitrarily low , and cannot be justified rationally" (Report of the Health Committee 2007; 8).

The parliamentary debate on *the Misuse of Drugs Act (Classification of BZP) Amendment Bill* does not demonstrate the characteristics of inter-institutional dialogue involving the NZBORA suggested by Butler and Joseph. Similar to the Health Committee, parliamentarians generally ignored the Attorney General's report during the second and third reading debates on the bill. In fact, it is difficult to discern any influence the Attorney General's report had on the parliamentary debate, as this bill was passed into law by a vote of 109 to 11, and was supported by the two parties likely to form government after the 2008 election: Labour and the National Party. Instead of

debating the merits of the Attorney General's report, the parliamentary debate supporting this bill simply reiterated the need to address the ills of drug use in New Zealand society. The tenor of this debate, therefore, did not reflect upon the Court's decision in *Hansen* or the Attorney General's opinion that the bill was inconsistent with NZBORA. What structured the debate was the reluctance of parliamentarians to insure the NZBORA through political rights review because the *Misuse of Drugs (Classification of BZP) Amendment Bill 2007* represented a 'hard' case. In turn, parliamentarians were happy to allow the New Zealand Law Commission to make non-binding recommendations on this issue at some future date.

Recently, Attorney General Christopher Finlayson issued a Section 7 Report against the *Misuse of Drugs Amendment Bill 2010*, which classified ephedrine and pseudoephedrine as controlled drugs (Report of the Attorney General 2010, 2). Pseudoephedrine is an essential ingredient for the production of methamphetamine and ephedrine can be converted into pseudoephedrine. Similar to the previous amendments of the *Misuse of Drugs Act*, the bill established that possession of 10 or more grams of either product would be presumed for the purposes of supply "until the contrary is proved": thus, a reverse onus provision considered by the NZSC and the Attorney General to be an unreasonable limitation on section 25(c) of the NZBORA since *Hansen* in 2007. In selecting a level of 10 grams as evidence of supply, the Ministry of Health stated this represented an individual possessing two prescriptions in one month. Based on the *Hansen* principle, the Attorney General concluded that the reverse onus provision violated section 25(c) and did not represent a reasonable limitation because it is "apparent the threshold of 10 grams was not selected on the basis that possession above this level would correspond with a high probability or near certainty that the ephedrine or pseudoephedrine was possessed for the purposes of supply" (Report of the Attorney General 2010, 4).

What is most significant about the *Misuse of Drugs Amendment Bill* and the Attorney General's report is that it was drafted after the Law Commission submitted its position paper on the *Review of the Misuse of Drugs Act 1975* that tentatively suggested that the reverse onus provision in section 6(6) should not be retained (New Zealand Law Commission 2010). Although the *Misuse of Drugs Amendment Bill* has yet to be passed into law, as it has simply been introduced into Parliament, it is unlikely to be amended or to address the tentative position of the Law Commission headed by former Prime Minister Geoffrey Palmer, given that the National Party is less reliant on its supply-and-confidence partners than the former Labour government. If it passes without amendment, it will simply reinforce that in 'hard' cases the NZBORA functions as a 'no-fault' regime that potentially borders on being an 'uninsured' bill of rights.

Conclusion

Judicial review as insurance is a valuable framework to understand the transition to democracy in authoritarian regimes, or alternatively, to understand the introduction of bills of rights in 'internally stable, advanced democracies" such as New Zealand (Erdos 2009, 798). In this paper, I have adapted Ginsburg's framework to understand the functioning of a statutory bill of rights that is largely insured through political rights review. Although dialogue theory suggests that the 'parliamentary' model can allow for fully insured bills of rights through political rights review, this paper questions whether this in true in 'hard' cases such as the rights of the accused. Unlike the United Kingdom which has a more advanced parliamentary architecture for engaging in political rights review, such as the Joint Committee on Human Rights, and which is buffeted by EU case law, New Zealand, with the exception of MMP, remains a Westminster parliamentary system with very few checks on either the principle of parliamentary supremacy or executive control over the parliamentary setting. This is the politico-legal environment that the NZBORA operates within, leading to rights review, in either the judicial or parliamentary settings, to be characterized as 'no-fault' insurance in 'hard' cases.

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