The New Commonwealth Model of Constitutionalism: Theory and Practice. by Stephen Gardbaum. [Cambridge: Cambridge University Press, 2013. 270 pp. Hardback £60. ISBN 9781107009288.]

In his new book, Stephen Gardbaum introduces the reader to a new model of constitutionalism, an alternative to the traditional judicial supremacy on one side and legislative sovereignty on the other. If judicial supremacy insists on the legal nature of rights and expects courts to have the final say about the content and enforcement of constitutional limits, constitutions adopting legislative sovereignty allow the Parliament to define and determine the level of rights protection. Whilst the first model completely excludes or at least minimizes the role of the legislative branch in the making of rights and rights protection, the second model rejects any role for the courts, allowing the legislature to repeal its laws and treat rights as a political issue, often dependent on the distribution of powers in Parliament and the whims of the current majority. Yet, similarly, if courts are allowed to reign, then a small elite of judges lacking in legitimacy but also policy expertise is allowed to rule over the rest of the country. Judicial over-enforcement of constitutional limits can artificially legalistically constrain the work of the legislature and the executive and make governing impossible.

Having witnessed the two mutually exclusive discussions between scholars who favour the two traditional constitutional designs, Gardbaum seeks to find a new model which avoids the weaknesses of the two models and one that "occupies the intermediate ground between the two" options (p. 1). The search for the middle perspective is necessary, Gardbaum argues, because understanding constitutional arrangements in terms of the two polar opposites – the judicial or legislative supremacy – misses the opportunity to provide an "institutional form of constitutionalism that effectively protects rights whilst maintaining greater balance or equality of power between legislatures and courts than under traditional modes" (p. 88).

In order to achieve greater rights protection, Gardbaum insists that the new model not only involves all the branches into a discussion about the content and enforcement of rights but also allows for reasonable rights disagreements between them ("legal reality [is] that many of the most important rights issues … are inevitably the subject of reasonable disagreement among and between judges, legislators and citizens" (p. 60)). It is precisely from this disagreement that a better protection of rights results. The new model therefore seeks to set up a constitutional arrangement in which the interaction, dialogue, and rights disagreement is achieved and fostered. To achieve this, a relocation of powers between courts and legislatures is necessary, a relocation which combines the "core strengths of both traditional [approaches] whilst avoiding their major weaknesses" (p. 53).

In this context, Gardbaum embraces the importance of understanding rights both as a legal and a political issue. Political, "legislative reasoning about rights may often be superior to legal/judicial reasoning" (p. 53). Electorally accountable representatives are able to bring "a greater diversity of views and perspectives to bear on rights deliberations" (p. 54). Institutionalizing the limits on governmental power as political in nature, Gardbaum aims to enforce these limits through the mechanisms of electoral accountability and structural checks and balances. Yet, if rights are only considered as political and if political branches are allowed free reign over their definition and enforcement, rights (as limits on governmental power) may end up being understated or

under-enforced as a result of legislative blind spots (e.g. minorities). To redress this Gardbaum brings in judicial review. As the traditional model of judicial supremacy shows, the involvement of the judiciary in rights protection fosters public recognition and consciousness of rights. Judges can also better resist electorally induced risk of under-enforcement" and decide matters depending on the fact-specific situations. The involvement of courts can "enhance the overall political legitimacy of an otherwise reasonably democratic constitutional regime" (p. 56). The government is put to the task of explaining the burden imposed on the individual.

Whilst some scholars strive to find a balance between the two branches by encouraging courts to exercise weak review, Gardbaum does not want courts to be deferential or to participate in legislative under-enforcement. Such action by a domestic court would "give its seal of legitimacy to the [political] under-enforcement"; it would legitimate statute in a way that would not be the case without such confirmation. Instead, Gardbaum insists courts should forcefully and actively participate in rights discussion, employing merits rather than only reasonableness review. Through such action they can challenge "legislature's institutional monopoly of authoritative voice on rights issues" (p. 62) and create "strong incentive for legislatures to enter into constitutional modes of discourse" (p. 74).

Yet, Gardbaum does not give courts the final word. Courts can artificially constrain language of rights and limit the power of government to the point of making it unworkable in practice. If courts have the final word, then "judicial review within a legal constitutionalist framework results in the processes of political rights review being reduced or even bypassed altogether in favour of relying on the courts, which after all have the final word". From the position of the political branches, he asks "Why spend precious time on matters you do not decide?" (p. 58) In the new model, Gardbaum instead gives the final word to the branch that has the "net superiority", the legislature. Through the legislative override power (embodied through different mechanisms such as section 33 in Canada, acting on declaration of incompatibility or inconsistency), Gardbaum gives the legislature the discretion to exercise the final word in light of judicial review. Although this exercise is not mandatory for the new model, it is key to distinguishing it from judicial supremacy. The legislative final word allows the legislature time to suspend the judicial decision, debate the content and enforcement of the right, and come back with a response.

In contrast to the two traditional models, the new hybrid model seeks to bring together two systems of looking at constitutional arrangements and relocates power between the judiciary and the legislature in a manner that offers weaker judicial review and weaker legislative supremacy. In this context, the model contains "at least two wholly novel features" that are not part of either traditional model (p. 68). The first is that it confers upon courts a checking and altering rights protective role rather than giving them full veto power. The courts are not to exercise deferential review, they are merely deprived of having the final say. It is this latter characteristic that renders review "weaker", rather than the intensity with which the court is to engage in the interpretation of the right.

The second novelty is the dispersal of responsibility for rights among all three branches. The legislature, executive and the judiciary have to work together for rights protection. In his work, Gardbaum also specifies how this should happen. He sets out three sequential stages, blending and sequencing

political and legal rights deliberation: the pre-enactment rights review, judicial review, and the final legislative reconsideration. The *initial* stage imposes pre-enactment rights review, a review conducted by political actors including executive officials, legislators, administrators, subject to the normal oversight of media and citizenry. This review is to be undertaken "at the outset and during the legislative process and prior to judicial review" (p. 80). This initial stage is not voluntary as would be the case in constitutions adopting the traditional models, but rather mandatory, requiring political branches to engage in political and moral deliberation about rights, their content and their enforcement. The pre-enactment review is freer than the traditional judicial review, since the legislature and the executive are not yet constrained by the context, details and facts of a particular case.

Courts get involved at the *second* stage of Gardbaum's model because the political branches are unlikely to provide reasonable public justification for the burdens legislation imposes on individuals. The court's task is to determine on a case-by-case basis, depending on the facts, whether the protection of rights is sufficient and how the legislative approach should be altered. In this context, they ought to draw the attention of the political branches to the potential problems arising from the application of legislation and thus inform the legislative exercise of final word. Through such review, courts add an authoritative and independent legal perspective to the moral and political reading of rights adopted by the legislature and the executive.

The judiciary's decision creates or increases political cost for the legislature and thus at the *third* stage the political branches have to seriously consider whether to respond and how to judicial review.

By involving all the branches in the process of rights review and sequencing political and legal deliberation, Gardbaum takes advantage of the "respective strengths and weakness of courts and legislatures providing a significant and appropriate role for both" (p. 63). The model – as engineered by Gardbaum – fosters good faith deliberation involving everyone in discussion about rights and sequencing the three stages so that each stage builds on the previous one. The legislature and executive provide *ex ante* political review, then courts act as a check deliberating the legal content of rights. This second stage is not independent of the first. Courts have seriously to consider and take into account the political rights review conducted at stage one. The third stage – the *ex post* legislative deliberation – similarly has to be undertaken in light of judicial review. This hybrid model is therefore "inclusive" and "participatory", encouraging rights discussion by allowing for different – political, moral and legal – views and perspectives to be brought to light. Gardbaum argues that the model achieves a greater rights protection because it internalizes rights consciousness at the three stages by requiring justification of limits to rights at every stage of the process, including in relation to policy making. It also makes reasonable rights disagreement in a democratic rights culture common (p. 88), according no organ supremacy, but rather enabling the three-stage process to lead to a negotiated content and protection of rights.

Gardbaum's new model is based on the constitutional arrangements adopted by four commonwealth countries, which do not give the final word to the judiciary, but instead to the legislature: Canada, New Zealand, Australia, and the United Kingdom. By drawing on the experiences of these four jurisdictions, Gardbaum seeks to show how his model currently works in practice. It is this reference to the reality on the ground that raises questions

about the gap between the theory and the practice of the new model proposed by Gardbaum.

In relation to the legislative final word, for example, Gardbaum's analysis and comparisons of practice reveals that the new model is far from implemented in the jurisdictions examined. In Canada, where the legislature can rely on section 33 of the Charter to suspend a decision of the court for a period of five years, the relevant provision has never been used at a federal level. In addition, previous and current Prime Ministers have promised not to make use of it, arguably due to the high political cost. In the UK, where the courts can only issue a declaration of incompatibility, the Parliament has amended all legislation in light of decisions of the courts (apart from the single issue of prisoners' voting rights). If the legislature is not making use of its final word or even commits itself not to use it, Gardbaum is concerned that such non-use can create a constitutional convention to always follow judicial decisions. Would this not reduce the new model to a system of judicial supremacy?

Similar issues arise in relation to the first stage – the pre-enactment review. Whilst in Canada there is a complete lack of reports on compatibility with the Charter, in New Zealand the reports of the Attorney General and determinations of incompatibility are so numerous that they are regularly ignored by the government and the legislature in the drafting of the bill. If the first stage is a novelty of the new model, as Gardbaum suggests, does this not reveal a rejection of the theory by the institutions tasked to protect rights?

Whilst Gardbaum proposes reforms of the arrangements in four jurisdictions, what brings the feasibility of his model into question are the attitudes and strategies of the three branches. Until these institutions internalize the new model – the reasonable disagreement about rights, the sequencing of political and legal review, and the informed deliberation at each stage – the model "is unstable in operation" and does "not function as a distinct" alternative to the two traditional models (p. 47). Until then, it remains only a theory.

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Mistake and Non-Disclosure of Facts. by HUGH BEALE. [Oxford: Oxford University Press. 2012. 145 pp. Hardback £34.99. ISBN 978-0-19-959388-0.]

THE TOPIC OF NON-DISCLOSURE is a crowded field in which scholars since Cicero have been puzzling about the right answer. So what does Beale bring that is new? First, Beale offers us a presentation of contemporary common law approaches compared with those of France and Germany. He extends the range of comparison and this enables the reader to evaluate the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR) as the possible *via media* in which the aspirations and differences of legal systems can be reconciled. But secondly, and more fundamentally, he asks "What is the paradigm of contract with which each system is working?" He is concerned to ensure that comparison of legal systems