Legal and Political Protections of Fundamental Rights: Strengths and Weaknesses – a Comparative Study

Lara Michelle Pratt
Bachelor of Arts (Macquarie University), Bachelor of Laws (Honours) (Macquarie University)
Post Graduate Certificate of Research Preparation (Macquarie University)

Macquarie University, School of Law

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Contents

Abstract

The protection of fundamental rights is an important concern of modern legal systems. Fundamental rights are representative of basic, core interests which are viewed as being so important that they should not be infringed except in limited, clearly defined circumstances. This thesis investigates the ways in which four jurisdictions – Australia, Canada, the European Union (EU) and the United Kingdom (UK) - have sought to ensure that primary legislation does not unduly restrict fundamental rights and it assesses the strengths and weaknesses of the various approaches.

The protection of fundamental rights against legislative encroachment is secured by legal protections and political protections. The former involve a judicial consideration of the rights-compatibility of legislation, while the latter require that the executive and legislature devote attention to the rights-implications of legislative proposals prior to their enactment into law. Legal protections take four forms and each of the four jurisdictions is broadly representative of one of these forms.

The inclusion of fundamental rights as part of the general principles of Union Law and the inclusion of the *Charter of Fundamental Rights of the European Union* within the constitutional Treaties have resulted in the EU offering strong-form judicial review, whereby rights are given a status which allows courts to find rights-incompatible legislation invalid. In Canada, weak-form judicial review (constitutional) derives from the constitutional *Canadian Charter of Rights and Freedoms.* Courts can find rights-incompatible legislation invalid, but the legislature is able to override the judicial decision and re-enact the legislation, notwithstanding the rights-incompatibility. The UK has a bill of rights which is a legislative instrument and offers weak-form judicial review (legislative) as the legal protection of rights. A strong interpretative obligation is imposed on the courts to interpret legislation in a rights-compatible manner, so far as it is possible to do so. While the court can declare that legislation is unable to be interpreted in a manner compatible with rights, the legislation will remain valid despite the incompatibility. Finally, in the absence of a specific rights instrument and judicial review as to compatibility with fundamental rights, the legal protection of rights in Australia relies primarily on a rebuttable presumption that legislation is intended to be rights-compatible. This presumption influences the interpretation of statutes.

This thesis will explain the strengths and weaknesses of legal protections. It will also demonstrate that legal protections can be viewed as situated along a spectrum of strengths and weaknesses. Adoption of a form of legal protection which emphasises the strengths of legal protections carries the cost of similarly emphasising the potential weaknesses. Conversely, the forms of legal protection which most mitigate the weaknesses similarly fail to realise its potential strengths.

There are two main forms of political protection that are considered in this thesis – executive certification of Bills and committee-based legislative scrutiny of Bills. These are protections which seek to prevent (or discourage) the passage of rights-incompatible legislation by ensuring that matters relating to rights are considered by the political branches of government. Both of these forms of political protection are present, in various forms and with different emphasis, in each of the jurisdictions. The thesis will examine the strengths and weaknesses of these political protections and the features that must be present in order to maximise the potential strengths (and minimise the potential weaknesses).

This is not a thesis that suggests that any particular form of legal protection is 'better' or 'worse', or which promotes a particular form of judicial review over another. Instead, this thesis acknowledges that there are fundamental political, structural and philosophical differences which may influence, or even dictate, the form that legal protections take in any particular jurisdiction. In acknowledging this, the thesis will show that regardless of the form of legal protection present in a legal system, political protections ought to play a substantial role. Where legal protections are of ostensibly the 'strong' kind, the weaknesses of the legal mechanism are similarly emphasised and thus robust political protections are necessary to fulfil a role relating to expanding the breadth of rights-discourse, improving the quality of legislation and minimising the potential for political issues to be shifted from the political to the legal arena. While political protections alone cannot achieve the strengths of legal protections, where legal protections are 'weak', 'unclear' or otherwise lacking in strength, political protections push rights into the forefront of political debate and discourage (or at least hold law-makers answerable for legislative encroachment which may otherwise have slipped through the cracks.

Statement

I certify that the work in this thesis 'Legal and Political Protections of Fundamental Rights: Strengths and Weaknesses – a Comparative Study' has not been submitted for a degree at any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and the preparation of the thesis itself have been appropriately acknowledged.

In addition, I certify that all information sources and literature used are indicated in the thesis.

_____ Date:_____

Lara Pratt. Student No: 30615119

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CHAPTER 1. Introduction

The protection of fundamental rights is an important concern of modern legal systems. Fundamental rights are representative of basic, core interests which are viewed as being so important that they should not be infringed except in limited, clearly defined circumstances. They are, essentially, and in the first instance, moral claims against the state and delineate the extent of legitimate law-making power.[1] Whether or not fundamental rights limit the legal authority of law-makers will depend on whether and in what way they are given legal status within a jurisdiction.

While fundamental rights may be affected by the decisions and actions of all branches and levels of government, the core concern of this thesis is the interaction of primary legislation with fundamental rights. Specifically, this thesis investigates the way in which four jurisdictions – Australia, Canada, the European Union (EU) and the United Kingdom (UK) - have sought to ensure that legislation does not unduly restrict fundamental rights. Each of these jurisdictions exhibits a different approach to the protection of rights against legislative encroachment and their experiences will be compared, throughout the thesis, to demonstrate both the potential and practical strengths and weaknesses of the various approaches.

This thesis looks at the ways in which the jurisdictions protect 'fundamental rights', not 'human rights'. While the two terms are clearly related, and particular rights will often be identifiable as both 'human' and 'fundamental', the terms should not be considered as simply interchangeable[2] and the preference for 'fundamental rights' in this thesis requires a brief explanation.

'Human rights' are best understood as moral rights common to all individuals by virtue of their common humanity. Human rights are, to a large extent, abstract moral claims. There exists no universally accepted list of human rights. While the body of

[1] The protection of rights can also extend as against non-state actors. That is, however, outside the scope of this thesis.

[2] For discussion of the conceptual differences between fundamental rights and human rights which goes beyond the scope of this thesis, see: Gianluigi Palombella, 'From Human Rights to Fundamental Rights - Consequences of a Conceptual Distinction' (2006) 34 *European University Institute LAW Working Paper* <http://ssrn.com/abstract=963754>; Gerald L. Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55(5) *Stanford Law Review* 1863, 1865; Lammy Betten and Nicholas Grief, *EU Law and Human Rights* (Longman, 1998), 6-8.

international human rights treaty law provides a useful starting point, it is not exhaustive. At the very least, this body of rights-based treaty-law is not static and is subject to ongoing expansion. Even if the list of 'human rights' is narrowed to only those rights included within the 'international bill of rights' (the *Universal Declaration of Human Rights,* the *International Covenant on Civil and Political Rights* and the *International Covenant on Social, Economic and Cultural Rights*), these rights do not directly parallel the rights protected within the jurisdictions. Jurisdiction-specific rights protections do not necessarily encompass all of the 'human rights' within these international instruments. This can be seen, for example, with the *Human Rights Act (HRA)*[3] in the UK. Despite the title, the *HRA* applies only to particular civil and political rights derived from the *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).*[4] The protection does not encompass all of the international human rights instruments to which the UK has committed (notably, social, economic and cultural rights are not included amongst the *HRA*-protected rights). Similarly, fundamental rights ought not be viewed as necessarily confined to human rights recognised within international treaties. Jurisdictions may offer protection to 'fundamental rights' which are not 'human rights' at all. For example, Australia's protection of the right not to be discriminated against on the basis of out of state residence reflects the specific federal arrangements of the particular jurisdiction, as opposed to being representative of a universal human right. Consequently, the protections considered in this thesis are better understood not as attempts to protect human rights in general, but instead as ways that each jurisdiction has offered protection to particular rights which are perceived as fundamental interests within the jurisdiction.

This brief comment is not intended to offer an exhaustive definition of fundamental rights. There has been much written about the meaning of the various terms utilised in rights-jurisprudence and it is clear that there is, as yet, no single, universally accepted definition of either 'human rights' or 'fundamental rights' which allows for an exhaustive and uncontested list of such rights to be formulated.[5] At the same time such lists *have* been formulated in almost all states and within the context of international

[3] *Human Rights Act 1998* (UK) c 42 (*'HRA'*)

[4] *Convention for the Protection of Human Rights and Fundamental Rights,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (*'ECHR' or 'European Convention'*).

[5] See, eg. above n 2.

institutional arrangements. Thus, within the context of the debates about 'bills of rights', 'fundamental rights' is here used to distinguish those rights – informed by both the human rights commitments of the jurisdiction and the specific needs of the jurisdiction – which have been distinguished from rights in general and have been offered a special protection within a jurisdiction. A protection not offered to 'rights' in general. The Australian situation (in the absence of a specific rights instrument) poses a greater challenge to identifying the specific rights which are included within that category of rights. Yet, as will be discussed in chapter 2, it is clear that this absence of formalised protection does not suggest that those rights are less than fundamental. The existing (albeit limited) legal protections which rely on interpretative presumptions and the proposed political protections routinely identify 'fundamental rights' in Australia which go beyond those few rights listed in the 1901 *Australian Constitution*.[6]

Before proceeding to define the four forms of legal protection of rights of interest to this thesis, a small comment is necessary. Legal protections of fundamental rights may take other forms and may protect rights against limitation other than by legislative instrument. For example, anti-discrimination legislation protects against discriminatory conduct and administrative law protects against rights encroachment by the executive. However, these kinds of legal protection are not the focus of this thesis and will therefore not warrant significant consideration in this thesis (except to the extent that it is necessary to mention them in Chapter 2, when explaining Australia's approach to rights protection in the absence of a specific rights instrument).

The adoption of a specific rights instrument represents a commitment to a particular form of rights protection within a jurisdiction. The existence of a specific rights instrument does not preclude jurisdictions adopting additional or supplementary protections, for example anti-discrimination statutes, which may offer protection to particular rights, introduce specific forms of protection for those particular rights or seek to extend protections of particular rights and freedoms as against non-state entities. These additional protection mechanisms are, however, limited both in terms of the form and scope of protection they offer and they are not representative of a general protection of fundamental rights within the jurisdiction. The specific focus of this thesis is the

[6] *Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict, c 12* s 9 *('Australian Constitution').*

ways in which jurisdictions have sought to protect against legislative encroachment of fundamental rights and thus while other legislative instruments may exist in particular jurisdictions they will not be examined in any detail in this thesis and term 'legal protection' is used instead to specifically refer to 'legal protection against legislative encroachment'.

The terms used to distinguish between forms of legal protection draw on Mark Tushnet's definitions of 'strong-form' judicial review and 'weak-form' judicial review.[7] This thesis further distinguishes between the two main types of 'weak-form' judicial review based on the legal status of the relevant instrument – constitutional or legislative.[8]

At the other end of the spectrum, there is the fourth form of legal protection, principles of interpretation which consist of rebuttable presumptions regarding the legislature's intent not to enact rights-incompatible legislation. While these principles can be considered as a form of judicial review – the courts do engage in an assessment of the rights-compatibility of the legislation within the context of determining whether the presumption has been effectively rebutted – it is a very weak form of judicial review. It is so weak that, as Tushnet states, it 'may perhaps not deserve the name of [judicial] review at all,'[9] and in this thesis it will be referred to as 'principles of interpretation' rather than a category of judicial review.

The forms of protection considered in this theisis – both legal and political – will be explained in greater detail in Chapter 1.1, but they can generally be described as:

1) Legal protections which involve a judicial consideration of the rights-compatibility of legislation. These take the form of:

    a. Strong-form judicial review whereby rights are given a status which allows courts to find rights-incompatible legislation invalid.

[7] See for example Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781; Mark Tushnet, 'The Rise of Weak-form Judicial Review' (2010) *ANU College of Law Seminars* <http://law.anu.edu.au/news/2010_College_Seminars/Tushnet_Paper.pdf>.

[8] The terms 'judicial review' and 'constitutional review' are often used as interchangeable, referring to courts holding legislatures (and executives) to account to the basic constitutional standards of the jurisdiction. Given that this thesis specifically engages with non-constitutional instruments, judicial review is preferred.

[9] Tushnet, Mark, 'The Rise of Weak-form Judicial Review' (2010) *ANU College of Law Seminars* <http://law.anu.edu.au/news/2010_College_Seminars/Tushnet_Paper.pdf>, 7.

b. Weak-form judicial review (constitutional) which allows for courts to find rights-incompatible legislation invalid but also allows the legislature to specifically override the judicial decision and re-enact the legislation despite the judicially identified incompatibility.

c. Weak-form judicial review (legislative) whereby a strong interpretative obligation is imposed on the courts to interpret legislation in a rights-compatible manner, so far as it is possible to do so. While the court can declare that legislation is unable to be interpreted in a manner compatible with rights, the legislation will remain valid despite the incompatibility.

d. Other ways in which rights are given a role within the legal system - for example, the presumption that legislation is intended to be rights-compatible influences the interpretation of statutes. These protections fall short of a comprehensive approach to rights-protection.

2) Political protections, which require that the executive and legislature devote attention to the rights-implications of legislative proposals prior to their passage into law. These take the form of:

a. Executive certification of legislative proposals prior to, or as part of, their submission to the legislature.

b. Legislative scrutiny committees, which scrutinise the rights-implications of legislation prior to the legislature's decision as to whether or not to pass the Bill into law.

As Figure 1 shows, implementation of the various forms of rights protection, particularly legal protections, is often associated with the enactment (or entrenchment) of a specific rights instrument, which catalogues those rights recognised as fundamental rights and, in doing so, secures a common legal status and form of protection for them. Three of the jurisdictions considered in this thesis have adopted this approach of

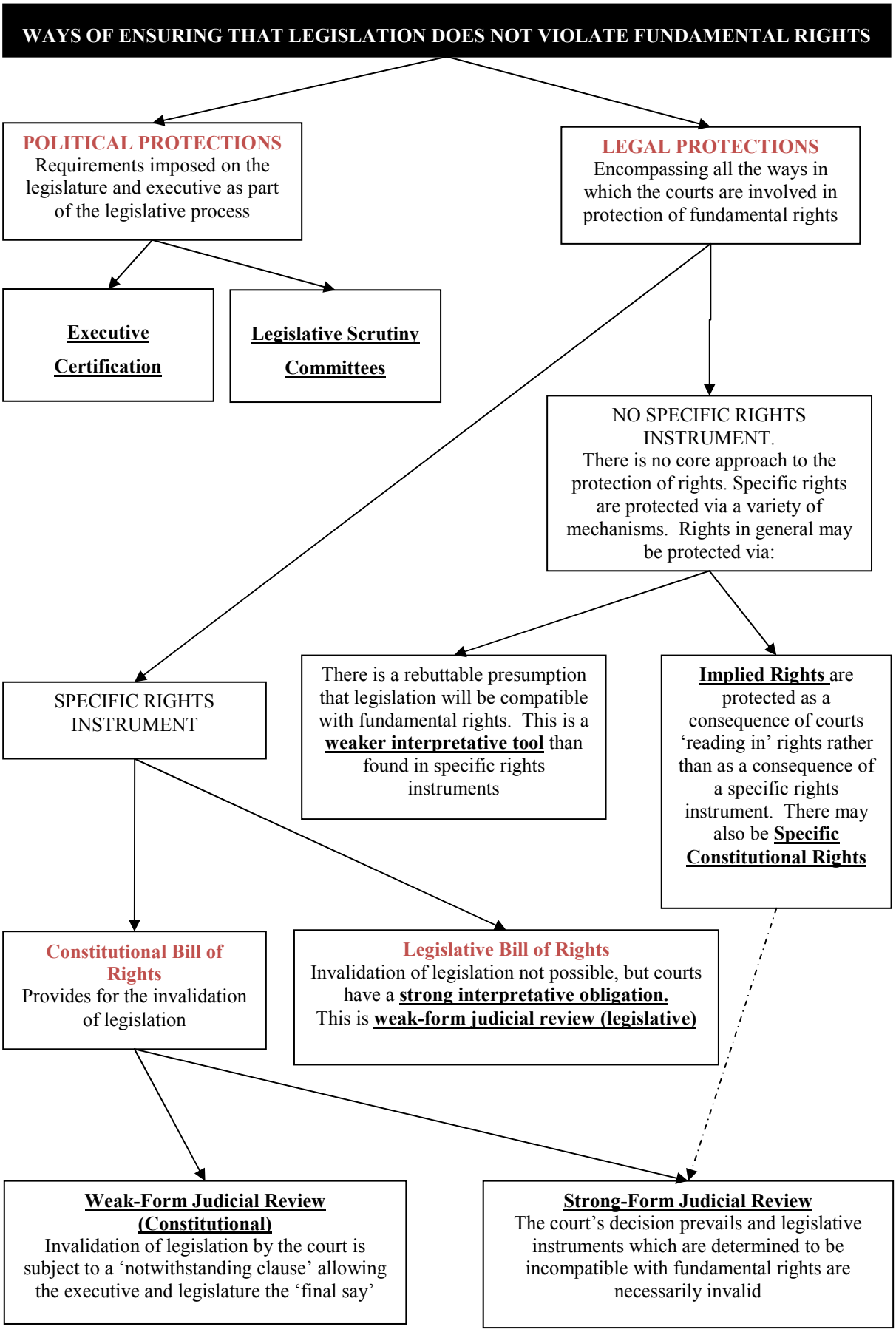
WAYS OF ENSURING THAT LEGISLATION DOES NOT VIOLATE FUNDAMENTAL RIGHTS
POLITICAL PROTECTIONS
Requirements imposed on the legislature and executive as part of the legislative process
LEGAL PROTECTIONS
Encompassing all the ways in which the courts are involved in protection of fundamental rights
Executive Certification
Legislative Scrutiny Committees
NO SPECIFIC RIGHTS INSTRUMENT.
There is no core approach to the protection of rights. Specific rights are protected via a variety of mechanisms. Rights in general may be protected via:
SPECIFIC RIGHTS INSTRUMENT
There is a rebuttable presumption that legislation will be compatible with fundamental rights. This is a weaker interpretative tool than found in specific rights instruments
Implied Rights are protected as a consequence of courts 'reading in' rights rather than as a consequence of a specific rights instrument. There may also be Specific Constitutional Rights
Constitutional Bill of Rights
Provides for the invalidation of legislation
Legislative Bill of Rights
Invalidation of legislation not possible, but courts have a strong interpretative obligation.
This is weak-form judicial review (legislative)
Weak-Form Judicial Review (Constitutional)
Invalidation of legislation by the court is subject to a 'notwithstanding clause' allowing the executive and legislature the 'final say'
Strong-Form Judicial Review
The court's decision prevails and legislative instruments which are determined to be incompatible with fundamental rights are necessarily invalid

Figure 1

enshrining rights protection into a specific rights instrument: Canada, with the *Canadian Charter of Fundamental Rights and Freedoms* (the *Canadian Charter*);[10] the EU with the creation of the *Charter of Fundamental Rights of the European Union* (*EU Charter*);[11] and the UK with the adoption of the *HRA*. These specific rights instruments, or 'bills of rights', clearly identify the main ways in which rights will be protected against legislative encroachment in each respective jurisdiction.

There lack of clarity as to the precise meaning of the term 'bill of rights'. Specifically, there is some debate as to whether the term refers exclusively to those specific rights instruments which have constitutional legal status, or whether it may appropriately be used to describe a wider range of rights-instruments.[12] Similarly, there is some inconsistency in usage of the term 'charter of rights', with the term sometimes used as a synonym for 'bill of rights' and at other times used precisely to distinguish a particular non-constitutional rights instrument from the constitutional form. However, given the range of instruments – constitutional and legislative – which are collectively and individually referred to as 'bills of rights', and the frequent use of both terms in the debates about the desirability of a 'legislative' and 'constitutional' bills or charters of rights, and when assessing particular specific rights instruments (regardless of legal status), this debate over language is unhelpful and impractical. Instead, it is useful to adopt a broad definition such as that suggested by David Erdos. Erdos states:

> [A bill of rights] is an instrument which sets out a broad set of fundamental human or civil rights and grants these rights an overarching status within the national legal order. [13]

This definition of bills of rights allows the term to be used to refer to specific rights instruments of varying legal status, provided the instrument meets the dual criteria of establishing a catalogue or 'set' of protected rights which are perceived as fundamental

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[10] *Canada Act* 1982 (UK) c11, sch B pt I, *Canadian Charter of Rights and Freedoms* ('*Canadian Charter').*

[11] *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/01, as adapted in 2007, [2007] OJ C 303/01, as annexed to *Treaty on European Union,* opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) as amended by *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) ('*EU Charter*').

[12] David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford University Press, 2010), 11.

[13] Ibid.

within a jurisdiction, and the instrument sets out or creates a special legal status for those protected rights. Therefore, in this thesis, while 'specific rights instrument' refers more generally to the approach of creating a single, coherent instrument which identifies both the rights and their legal status, bill of rights (or 'legislative bill of rights'/'constitutional bill of rights') is used to describe the instruments themselves.

The dominance of the specific rights instrument approach to the protection of fundamental rights reflects some of the benefits associated with having a clear and 'overarching' form of legal protection. Regardless of the form of protection that a bill of rights seeks to confer, the creation of a single, coherent approach to the protection of rights makes clear what the role of rights is and to what extent these bills limit the authority of the legislature to pass rights-infringing legislation.

This thesis will consider both the strengths and weaknesses of various types of legal protection as embodied in the bills of rights of Canada, the EU and the UK, as well as drawing on the experiences of Australia as a jurisdiction without a specific rights instrument. These strengths and weaknesses relate not only to the efficacy of the various forms of legal protection, insofar as their ability to prohibit or effectively limit rights-violating legislation is concerned, but also to the implications of the various forms of protection for participation in the law-making process and in facilitating discourse about rights.

In addition to considering the legal protections, this thesis goes outside of the bill of rights structure and considers the political protections which have developed in the jurisdictions. Of the four jurisdictions, only the UK builds such protections into its specific rights instrument. In Australia the bills of rights adopted by Victoria and the ACT have followed the UK approach. Although these state and territory approaches are peripheral to the central concern of this thesis, which is Australia's approach at the national level, the Victorian approach will be drawn as a contrast to the national approach. As with legal protections, the strengths and weaknesses of various political protections, which seek to prevent rights-infringing legislation from being passed, will be considered.

This thesis suggests that greater significance ought to be accorded to political protections as a way of responding to the weaknesses associated with legal protections –

regardless of the form that legal protection takes. While not suggesting that political protections are an absolute cure for deficiencies in, or the absence of, particular legal protections, this thesis argues that they serve a valuable role in mitigating the effect of the weaknesses which are associated with legal protections generally. Specifically, these political mechanisms decrease the likelihood that weaknesses associated with legal protections will eventuate. Political protections cannot result in the invalidation of rights-infringing legislation, but can, for example, require that substantial consideration be given to the rights-implications of legislation and ensure that such considerations are made public, thus making it politically unattractive to support legislation which overtly violates fundamental rights. By ensuring that the rights-implications of legislation are given attention during the law-making process, political protections also have the potential to reduce the passage of inadvertently rights-infringing legislation, decreasing the reliance on legal protections as the primary form of protection for rights.

While legislative bills of rights, such as the *HRA* in the UK, generally create both political and legal protections, there has been less attention given to political protections as fulfilling this role in constitutional bill of rights jurisdictions, where they tend to be very much subsidiary measures. This thesis argues that rather than viewing legal protections and political mechanisms as alternative approaches to the protection of fundamental rights, legal and political protections ought to be viewed as complementary protections of equal importance. They each serve important roles as distinct forms of protection but when viewed co-operatively are able to support each other as part of an overall commitment to the protection of rights.

1.1 Types of Rights Protection

The core concern of this thesis is the examination of ways of ensuring that legislation does not violate fundamental rights. While these will be examined in detail in Chapters 3 and 4, it is useful from the outset to set out a working understanding of the different forms of protection being considered – legal and political.

Each of the jurisdictions chosen for comparison roughly represents one of the four forms of legal protection of rights – strong-form judicial review, weak-form judicial review (constitutional), weak-form judicial review (legislative) and presumptions used in statutory interpretation. This section will also introduce how these protections align

with each jurisdiction. However it should be acknowledged, as will become apparent in later chapters, that it is not possible to exactly align jurisdictions and forms of protections. Similarly, the political protections that are broadly divided into executive certification and legislative scrutiny models are found in various forms and to different effect within each of the four jurisdictions. Accordingly, the jurisdictions, or more accurately the experiences of the jurisdictions, demonstrate particular aspects and implications of forms of protection rather than a 'perfect fit'.

1.1.1 Legal Protections

As previously mentioned, legal protections of rights which seek to ensure that legislation does not violate fundamental rights take four distinct forms – strong-form judicial review, weak-form judicial review (constitutional), weak-form judicial review (legislative) and the principles of interpretation (in particular, protection of rights via presumptions used in statutory interpretation). Each of these forms of protection has distinct strengths and weaknesses and differently limits the ease with which legislatures can encroach upon rights.

Before proceeding to define the four forms of legal protection of rights of interest to this thesis, a small comment is necessary. Legal protections of fundamental rights may take other forms and may protect rights against limitation other than by legislative instrument. For example, anti-discrimination legislation protects against discriminatory conduct and administrative law protects against rights encroachment by the executive. However, these kinds of legal protection are not the focus of this thesis and will therefore not warrant significant consideration in this thesis (except to the extent that it is necessary to mention them in Chapter 2, when explaining Australia's approach to rights protection in the absence of a specific rights instrument).

Strong-form judicial review

Strong-form judicial review, which will be discussed in 3.1.1, derives from constitutional guarantees of fundamental rights. Constitutional protections deny legislatures the authority to pass laws which violate fundamental rights. Consequently, the court will find legislation which is incompatible with fundamental rights invalid. The strong-form constitutional guarantee of rights against legislative encroachment

means that the court's decision cannot be overridden by the legislature. The only way in which the court's decision can be rejected and the rights-infringing legislation passed is via constitutional amendment – a substantially more onerous burden for law-makers seeking to encroach on rights.

Strong-form judicial review is generally associated with a constitutional bill of rights[14] although there are some exceptions, where constitutional protection is offered to fundamental rights generally, rather than to specified rights within a bill of rights. The EU, which is used as an example of strong-form judicial review, does have a bill of rights with constitutional status, or, more accurately, the *EU Charter* is given equal status to the *Treaty on European Union (TEU)*[15] and thus has a status, and offers a protection of rights, analogous to that granted by a constitution. However, the EU's strong-form judicial review protections pre-dated the entry into force, in December 2009, of the *Lisbon Treaty*[16] amendments to the *TEU,* which gave the *EU Charter* this status. Initially these constitutional-type guarantees were identified as forming part of the general principles of European Union Law (previously Community Law) rather than as derived from a bill of rights *per se* (as will be explained in Chapter 2.3.1). Consequently, the experiences of the EU prior to the formal entrenchment of a constitutional bill of rights are equally of relevance when considering strong-form judicial review.

Although a constitutional guarantee of fundamental rights is clearly a strong protection, it is not without controversy. In particular, because the defining feature of strong-form judicial review is that the judiciary has the final determination as to the rights-compatibility and consequent validity of legislation, concerns have been raised as to the democratic legitimacy of the mechanism. The strengths and weaknesses of this form of legal protection will be addressed in Chapter 3.

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[14] It is often termed as 'constitutional review' for this reason.

[15] *Treaty on European Union,* opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) as amended by *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) ('*TEU*').

[16] *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) (*'Lisbon Treaty')*.

Weak-form judicial review (constitutional)

The other form of constitutional rights protection considered in this thesis is weak-form judicial review (constitutional). This will be explored in greater detail in Chapter 3.1.2. Like strong-form judicial review, this form of rights protection derives from the constitutional status of the protected, fundamental rights, generally within a constitutional bill of rights. This review process acts as a limitation on the authority of legislatures to pass rights-encroaching legislation. Also, as in strong-form judicial review jurisdictions, the courts can find rights-incompatible legislation to be invalid. However, weak-form judicial review (constitutional) falls short of being an absolute prohibition on the passage of rights-infringing legislation and can be best distinguished from strong-form judicial review by one defining feature. This is that the legislature retains the ability to reject the finding of incompatibility by the court and to re-enact the legislation, notwithstanding the incompatibility. In some cases, the legislature may also pre-empt a finding of incompatibility and shield legislation from rights-based judicial review, preventing the exercise of the protection that would usually be offered.

The 'notwithstanding clause' found in s 33 of the *Canadian Charter* is the mechanism by which the Canadian legislatures (both provincial and federal) can override judicial decisions as to rights-compatibility. As will be addressed in the later consideration of Canada's experiences, the use of the 'notwithstanding' shield against rights-based judicial review may be used not to encroach on rights *per se* but to secure a particular interpretation of what constitutes a reasonable limitation of *Canadian Charter*-rights. The democratic law-making branch of government rather than the unelected judiciary is retaining its right to have the 'final say' about the desirability of enacting the particular statute.

Weak-form judicial review (legislative)

Not all legal protections of rights derive from constitutional instruments. Weak-form judicial review (legislative) is the product of a bill of rights which has the status of ordinary legislation. This will be explained in greater detail in 3.1.3. A form of judicial review is provided which falls short of empowering the judiciary to find rights-incompatible legislation invalid and instead focuses on a strong interpretative mandate in favour of fundamental rights. Where it is not possible to interpret legislation in a

manner compatible with fundamental rights, the court must still apply the legislation, but can offer some indication of the incompatibility. Section 4 of the *HRA* in the UK, for example, allows for a 'declaration of incompatibility.'[17]

The strong interpretative obligation imposed on the courts under weak-form judicial review (legislative) bills of rights, allows the judiciary a wide mandate to interpret statutes so as to identify and apply a rights-compatible meaning. Although falling short of a constitutional guarantee of fundamental rights, and retaining legislative supremacy, weak-form judicial review should not be underestimated as a way to protect rights against legislative encroachment. Although rights-incompatible legislation remains valid, the court's interpretative mandate may mean that the legislation is interpreted in a manner which diverges from the legislature's original, otherwise-rights-incompatible, intended meaning.

Principles of Interpretation

The final form of legal protection which seeks to ensure that legislation does not violate fundamental rights is via reliance on principles of interpretation. This is discussed in greater detail in 3.1.4. This is a weaker interpretative tool than found in weak-form judicial review jurisdictions (legislative) and does not derive from a specific legislative instrument or from a bill of rights. Although interpretative principles are used in all four jurisdictions, Australia provides the most interesting jurisdiction for consideration because, in the absence of a bill of rights, the principles of interpretation are the primary legal protection to be identified in Australia.

The interpretative principles are based on a presumption that the legislature does not intend to violate fundamental rights – in particular, those rights which are viewed as fundamental within the common law and those to which Australia has committed in international treaties. This presumption is not a guarantee and is rebuttable.

[17] It should be noted here that not all legislative bills of rights include a specific 'declaration of incompatibility'. For example, the *New Zealand Bill of Rights Act 1990* (NZ) did not originally include a provision allowing for a judicial declaration of incompatibility, although the New Zealand made clear that they were able to make such a declaration. This has subsequently been amended by ss 92 J & K. See Petra Butler, 'Human Rights and Parliamentary Sovereignty in New Zealand' (2004) 35(2) *Victoria University of Wellington Law Review* 341.

Additionally, rather than providing the courts with the authority to review legislation as to rights-compatibility, or creating a strong interpretative mandate for the courts, these interpretative principles are relevant primarily when the language of the statute is ambiguous. They fall short of offering a robust protection against rights-infringing legislation and instead provide a limited way in which legislation may be interpreted in a rights favourable manner.

1.1.2 Political Protections

Political protections are requirements that are imposed on the legislature and executive to give consideration to fundamental rights as part of the legislative process. These political protections cannot impose an obligation on the legislature not to breach fundamental rights but only to devote attention to the potential rights-consequences of proposed legislation. The presence of particular types of legal protection within a jurisdiction may, of course, place the passage of rights-violating legislation outside of the authority of the legislature and in some cases the political protection is a mechanism to assist the legislature and executive in meeting their constitutional obligations.

There are two main forms of political protections against the legislative encroachment of rights which are considered in this thesis. These are the requirement of executive certification of rights-compatibility of a Bill and the creation of legislative scrutiny committees which examine Bills as to their compatibility with rights or, more generally, bring attention to the ways in which the Bill may impact on fundamental rights if it is to become law.

There are, of course, other forms of political protections within legal systems that may play a role in the protection of rights. For example, jurisdictions have introduced commissions or agencies tasked with various functions relating to the protection of fundamental rights outside of the law-making process. This can include reporting on the effectiveness of rights protections within the jurisdiction or the development of education programmes. In addition, these agencies, which are generally intended to be

independent and expert bodies, can provide advice and information about fundamental rights to the branches of government, including the courts.[18]

Rights may also gain an indirect protection as a consequence of the form or structure of law-making institutions. In Westminster systems, where the lower house features a strong executive presence, the principle of responsible government combined with bi-cameral decision-making, with an upper house actively engaged in challenging executive-proposed Bills, may serve as a 'check' against rights-infringing legislation, albeit one which has substantial limitations.[19]

Executive Certification

The executive certification model of rights protection requires that the executive take measures to determine the rights-compatibility of legislation prior to presenting the Bill to the legislature. This may mean that the executive must make a statement as to the compatibility of the legislation (or incompatibility, as the case may be). Alternatively, it may mean that if there are uncertainties as to the rights-compatibility of proposals, that this is acknowledged and that the executive must therefore justify the proposal despite the presence of such uncertainties. This form of political protection seeks to ensure that issues concerning the rights-compatibility of legislation are brought to the attention of the legislature during the legislative process. It seeks to ensure that legislation with known rights-incompatibility is not passed covertly and it places political pressure on the executive to justify its legislative proposals.

Executive scrutiny is by no means a 'guarantee' of rights-compatible legislation. Political protections can only reduce the likelihood, not prevent the passage of, rights-encroaching legislation. Instead, by ensuring that rights are a regular part of the law-making process at the earliest possible stages (during the drafting of the proposal) and by creating a degree of political accountability for those proposing legislation, this form of political protection is aimed at improving the rights-quality of legislation and reducing the occurrence of rights-incompatible legislation within the jurisdiction.

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[18] Rhonda Evans Case, 'Friends or Foes? The Commonwealth and the Human Rights and Equal Opportunity Commission in the Courts' (2009) 44(1) *Australian Journal of Political Science* 57, 58 - 59.

[19] Andrew C. Banfield and Rainer Knopff, 'Legislative Versus Judicial Checks and Balances: Comparing Rights Policies Across Regimes' (2009) 44(1) *Australian Journal of Political Science* 13, 17-19.

Legislative Scrutiny Committees

Legislative committees can also play an important role as a form of political protection of rights. The functions of this form of rights protection are three-fold. Firstly, scrutiny committees have a similar aim to executive certification, namely, to bring to light issues of compatibility of Bills with fundamental rights and, by implication, to discourage the passage into law of those that conflict with rights. To this end, legislative scrutiny committees tend to operate in conjunction with executive certification models by examining the statements made by the executive. Secondly, this form of political protection seeks to expand the way in which rights are considered within the legislative process. Rather than being confined to 'rights-compatibility', legislative committees have the potential to consider the rights-implications of Bills more generally. While legislative scrutiny committees cannot prevent the passage of legislation which conflicts with fundamental rights, they can bring attention to how legislation has the potential to impact on rights.

The third function of legislative scrutiny committees is to encourage greater, and wider, engagement with fundamental rights. This may be via the publication of parliamentary committee reports, but more important, is the opening up of the parliamentary committee investigations for public submissions. In this way, interested or expert parties may ensure that their opinions about the meaning of rights, and what constitutes a reasonable limitation of rights, are considered in the law-making process.

1.2 Context

The question of how rights ought to be protected in a jurisdiction is one of persistent concern to law-makers, academics and citizens. In the past five years, two of the jurisdictions considered in this thesis – Australia and the EU - have been faced with the question of how best to reform the law so as to protect rights against legislative encroachment and each has come to a very different conclusion. Even after an approach has been adopted by a jurisdiction, the questioning of the way in which rights are, or should be, protected does not end there. Consequently, the literature in the area of fundamental rights protection is large and continues to grow.

Much of the academic debate that has surrounded bills of rights fits into three related debates:

1) Are constitutional bills of rights and judicial review – whether strong or weak-form - a legitimate way of protecting rights?[20]

2) How effectively can rights be protected in a system which retains parliamentary sovereignty?[21]

3) Can rights be adequately protected in the absence of a bill of rights?[22]

These debates will inform the discussion in the following chapters regarding both the strengths and weaknesses of legal and political protections and the assessment of the experiences of the particular jurisdictions. However, this thesis can be broadly placed within an emerging fourth category of debate:

4) In what way can political protections supplement particular legal protections to facilitate a better standard of rights protection?[23]

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[20] See, eg James Allan, 'The Victorian Charter of Human Rights and Responsibilities: exegesis and criticism' (2006) 30(3) *Melbourne University Law Review* 906; Jeffrey Goldsworthy, 'Judicial Review, Legislative Override, and Democracy' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) ; Mark V. Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press, 1999); Michael Zander, *A Bill of Rights* (Sweet and Maxwell, 4th ed, 1997).

[21] See, eg Julie Debeljak, 'Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights' (2002) 26(2) *Melbourne University Law Review* 285; Ian Cram, 'Judging rights in the United Kingdom: the Human Rights Act and the New Relationship between Parliament and the Courts' (2007) 12(1) *Review of Constitutional Studies* 53(30); Alison L. Young, 'Judicial Sovereignty and the Human Rights Act 1998' (2002) 61(1) *Cambridge Law Journal* 53; Janet Ajzenstat, 'Reconciling Parliament and Rights: A. V. Dicey Reads the Canadian Charter of Rights and Freedoms' (1997) 30(04) *Canadian Journal of Political Science/Revue canadienne de science politique* 645.

[22] See, eg Tom Campbell and Nicholas Barry, 'A Democratic Bill of Rights for Australia: A Submission to the National Human Rights Consultation' (2009) *National Human Rights Consultation* <http://www.humanrightsconsultation.gov.au/>; Anthony Lester QC, 'The Magnetism of the Human Rights Act 1998' (2002) 33(3/4) *Victoria University of Wellington Law Review* 477.

[23] See, eg. Janet L. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' (2006) 4(1) *International Journal of Constitutional Law* 1; Janet Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review' (2005) 35(2) *British Journal of Political Science* 235. These issues were discussed extensively in the submissions to the National Human Rights Consultation (2010) which are available at the *National Human Rights Consultation Website* (2010) <http://www.humanrightsconsultation.gov.au/> and the submissions to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions]* (2011).

This area of debate has been of particular relevance with the development of legislative bills of rights in the UK and in New Zealand and at the sub-national level in Australia,[24] where the development of political protections within a specific rights instrument has been associated with the adoption of the weak-form judicial review (legislative) model.[25] In Australia, in light of recent developments at the national level (which will be explained in Chapter 2.4.2), the way in which political protections can protect rights in the absence of a specific rights instrument has also been extensively debated.[26] There has additionally been some consideration of the efficacy of the political protections which have developed to supplement bills of rights in particular jurisdictions.[27]

It is to this field that this thesis seeks to add. However, rather than focusing on the value of political protections as a supplement to the *particular* legal protections found in the jurisdictions, the suggestion is that political protections have an important role to play in mitigating the weaknesses that are inherently associated with legal protections *in general.* Rather than being merely subsidiary or secondary protections, political protections ought to be viewed as complementing legal protections, fulfilling important functions and reflecting an overall commitment to the protection of rights in the jurisdiction.

Comment on the EU as a Comparative Jurisdiction

Some jurisdictions readily lend themselves to comparison. Australia, Canada and the UK, with their shared common-law history yet significantly different approaches to the protection of fundamental rights, are three such jurisdictions.[28] Other jurisdictions

[24] *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT).

[25] Jeremy Webber, 'A Modest (but robust) Defence of Statutory Bills of Rights' in Tom Campbell, Jeffrey Denys Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 2006; Butler, above n 17.

[26] Campbell and Barry, above n 22.

[27] Simon Evans and Carolyn Evans, 'Evaluating the Human Rights Performance of Legislatures' (2006) 6(3) *Human Rights Law Review* 545; David Kinley, 'Parliamentary Scrutiny: Duty Neglected?' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Clarendon Press, 1999) 158; Michael Ryle, 'Pre-legislative Scrutiny: A Prophylactic Approach to Protection of Human Rights' (1994) (2) *Public law* 192; George Winterton, 'An Australian Rights Council' (2006) 24(3) *University of New South Wales Law Journal* 792.

[28] For other comparisons using two or more of these jurisdictions see, eg: Andrew C. Banfield and Rainer Knopff, 'Legislative Versus Judicial Checks and Balances: Comparing Rights Policies Across Regimes' (2009) 44(1) *Australian Journal of Political Science* 13; John Chesterman and Brian Galligan, 'The Politics of Rights Protection in Western Democracies' (2009) 44(1) (March 2009) *Australian Journal of Political Science* 29; Jennifer Curran and Fiona Martin, 'Separated children : a comparison of the

provide a less obvious basis for comparison. In this study, that is the case when considering the EU.

As a non-state entity which relies heavily on the governments of its member states for the creation of both its constitutive treaties and legislative instruments there is a blurring of authority between the EU and its Member states. Similarly, the law-making processes of the EU lack the clear division of authority amongst branches of government. Additionally, the engagement of the population in the law-making process has been hindered by the so-called 'democratic deficit' arising from both the historically limited role of the European Parliament in the law-making process and lack of citizen engagement with the EU as a political and law-making entity (discussed, for example at 3.5.3 and 4.2.1). These are concerns not shared by the other three jurisdictions with established democratic processes and clearly defined division of powers amongst the branches of government and between national governments and the federal units (or, in the UK, the devolution of power to the 'devolved nations' under Westminster).

These structural and jurisdictional concerns about engaging in comparative law with the EU as a jurisdiction relate not to lack of relevance to Australia, Canada and the UK, but to comparison with the law of *any* state. However, the EU *is* increasingly referred to in comparative studies, such comparisons becoming increasingly common.[29] Moreover, the EU's approach to the protection of fundamental rights has been the subject of comparison against state jurisdictions, both when examining comparative approaches to the protection of specific rights, and when considering the appropriateness of a specific rights instrument - both for the EU and elsewhere.[30] Indeed, closer examination of the development and history of EU human rights law (at 2.3.1) shows similarities between

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treatment of separated child refugees entering Australia and Canada' (2007) 19(3) (October 2007) *International Journal of Refugee Law* 440; Rosalind Dixon, 'A minimalist charter of rights for Australia : the UK or Canada as a model?' (2009) 37(3) (2009) *Federal Law Review* 335; Kent Roach, 'A comparison of Australian and Canadian anti-terrorism laws' (2007) 30(1) (2007) *University of New South Wales Law Journal* 53.

[29] See for discussion of the relevance of the EU as a comparison to state jurisdictions: John Erik Fossum, 'Conceptualizing the European Union Through Four Strategies of Comparison' (2006) 4 *Comparative European Politics* 94; John Erik Fossum, 'On democratizing European constitution-making: possible lessons from Canada's experience' (2007) 37(2) *Supreme Court Law Review* 1.

[30] See, eg: David L. Baumer, Julia B. Earp and J. C. Poindexter, 'Internet privacy law: a comparison between the United States and the European Union' (2004) 23(5) *Computers and Security* 400; Armand de Mestral and Jan Winter, 'Mobility Rights in the European Union' (2001) 46 *McGill Law Journal/Reveu de droit de McGill* 979; Matt Harvey, 'Australia and the European Union : some similar constitutional dilemmas' (2001) 6(2) (2001) *Deakin Law Review* 312; Jane, McAdam, 'Asylum seekers : Australia and Europe: worlds apart' (2003) 28(4) (August 2003) *Alternative Law Journal* 193.

the EU and the common law jurisdictions (particularly Australia and the UK) with regard to the important role that the judiciary had in identifying rights protections in the absence of a specific rights instrument.

Rather than looking at the obvious structural differences between the EU and state entities as barriers to a meaningful comparison, they should be considered as facilitating greater insight into the forms of rights protections. Importantly, as this thesis considers both legal and political protections, and the strengths and weaknesses of each, it will become apparent that the experiences of the EU highlight some of the difficulties associated with overcoming the weaknesses of particular forms of protection, and similar difficulties in achieving their respective strengths. In particular, the weaknesses of particular mechanisms may be exaggerated by the EU's unique structures and be more difficult to overcome. However, these differences do not undermine the value of the EU as a comparator but instead serve to highlight where *potential* weaknesses are more overtly apparent than is the case in some of the state jurisdictions.

1.3 Structure and Methodology

1.3.1 Comparative Law as a Methodology

Given the wide range of meanings ascribed to 'comparative law' it is useful to provide some explanation of comparative law as a methodology before proceeding to explain how it will apply to the thesis. While there is no single comparative methodology, there is a widely (although not universally) accepted core. As described by Konrad Zweigert and Hein Kötz '[t]he basic methodological principle of comparative law is that of functionality.'[31] The functional method seeks to compare alternative solutions adopted by different jurisdictions facing similar social/legal problems.

The functional method of comparative law suggests that rather than simply comparing rules, the comparativist is equally comparing processes and outcomes. The 'function' is associated with the identification of a socio-legal problem common to (at least) the jurisdictions under consideration. Proponents of the functional method suggest that in

[31] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Clarendon Press; Oxford University Press, 2nd ed, 1987), 31.

order to be meaningfully comparable, the rules and institutions must be 'functionally equivalent' – that is, having identified the problem, the comparativist must then consider the rules and institutions in each jurisdiction which seek to solve that problem.[32]

Merely identifying the 'functionally equivalent' institutions and rules would, however, result in a rather banal comparison. One of the reasons that the functional method is frequently used in law-reform or law-harmonisation projects[33] is that the functional method of comparative law involves an assessment of the efficacy of different approaches to common problems.[34] In making such an assessment, the comparativist can engage in consideration of the consequences or implications of mechanisms and their comparative efficacy in fulfilling the 'function' for which they were designed. This is not to suggest that comparison necessarily involves a perceived 'ranking' of the mechanisms in terms of their ability to fulfil the common function (although realistically, this is often the case where the comparative method is used in law-reform or harmonisation projects). Instead, the comparison can be used to give insight into the implications and consequences of the various mechanisms being used to fulfil the same or similar purposes.

The work of John C Reitz is useful in understanding this approach. He emphasised that the functional method may be expanded to consider how various jurisdictions have taken different approaches in order to comply with an 'ideal' goal, rather than a more general common function.[35] In this thesis, the 'ideal' relates to taking advantage of the strengths offered by particular forms of rights protection whilst seeking to mitigate acknowledged weaknesses in the chosen form of protection.

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[32] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (2nd ed. ed, 1987); John C. Reitz, 'How to Do Comparative Law' (1998) 46(4) *The American Journal of Comparative Law* 617; For discussion and critique of the functional method of comparative law see: Esin Örücü, 'Methodological Aspects of Comparative Law' (2007) 8 *European Journal of Law Reform* 29.

[33] 'Function' with regards to comparative law is often associated not only with the 'functional method' but also with comparative law as serving particular functions – including both law reform and law harmonsiation. Hiram E. Chodosh, 'Comparing Comparisons: In Search of Methodology' (1999) 84 *Iowa Law Review* 1025.

[34] Roman Tokarczyk, 'Some Considerations on Comparative Law' (1991) 59 *Revista Juridica Universidad de Puerto Rico* 951, 951-953; O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) *Modern Law Review* 1, 6-7; Chodosh above n 33.

[35] Reitz above n 32, 623.

It is important to note that comparison involves more than merely listing the laws of two or more jurisdictions.[36] This largely 'textual' comparison is often described as comparative law, but it is more accurately termed comparative reference and is better considered as 'listing' different laws (or alternative approaches to similar problems) rather than substantively comparing.[37] The comparative method requires that the comparativist proceed beyond mere acknowledgement of the laws serving similar purposes in other jurisdictions. Equally important are the effects of those laws and whether the textual differences result in substantively different consequences. Additionally, if one is to draw meaningful conclusions from a comparison (more than merely identifying the similarities and differences), then acknowledgement of the social context and political structures in which the particular law is located is equally important in assessing the efficacy of various approaches.[38]

The functional method is not without its critics. Criticism comes mainly from a group of comparativists who may be loosely grouped together as advocating a 'hermeneutical' approach to comparative law. This body of thought seeks to engage in comparison far beyond the rules and even beyond the particular socio-economic pressures which may influence the making and application of laws. Instead, these hermeneutical comparativists seek to better understand not only the similarities and differences in specific legal *rules* but to better understand the differences in the legal systems and the philosophies which inform those systems. While an interesting and valuable task, this hermeneutical comparative method presumes that the important questions have to do with the similarities and differences in the legal systems rather than focusing on the legal rules *per se*. In this thesis, the important questions relate not to the jurisdictions *per se* – this is not an attempt to make judgements about which jurisdiction has adopted

[36] Peter De Cruz, *A Modern Approach to Comparative Law* (Kluwer, 1993), 37.

[37] There is much criticism levelled at 'comparative law' on the basis of this very visible form listing the different (or similar) rules in different jurisdictions, something which is perhaps better termed 'comparative reference'. Comparative reference can be particularly controversial where courts engage in such comparisons. However, this form of comparative reference, which does not go beyond a mere acknowledgement of existence of various approaches and does not engage in substantive consideration of the jurisdictions themselves or the implications of particular measures, should be viewed as distinct from 'comparative law' as a methodology. For discussion of this criticism see: Krishanu Sengupta, 'Cost of the Citation of Foreign Law: The Impact of *Roper, Atkins,* and *Lawrence* on *Sosa*' (2006) 4 *Dartmouth Law Journal* 36; A. Mark Weisburd, '*Roper* and the Use of International Sources' (2004) 45 *Virginia Journal of International Law* 798.

[38] William Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"' (1998) 46(4) *American Journal of Comparative Law* 701.

a superior approach to the protection of rights. Instead, this thesis uses the experiences of the jurisdictions to help in answering questions about how to approach the common 'problem' of rights protection. The social and philosophical underpinning of a legal system may indeed tell us *why* a jurisdiction chose a particular approach to rights protection over other alternatives, but they are less helpful when trying to understand the strengths and weaknesses of the various possible forms of protection.[39]

Zweigert and Kötz's functional method will be drawn upon in this thesis. However, rather than identifying a broad functional problem (ie. each jurisdiction is faced with the question of how to protect fundamental rights), more specific concerns are being targeted. Specifically, attention is being given not to what is the *best* way to protect rights, or even the best way to protect rights within a particular jurisdiction, but instead to the strengths and weaknesses inherent to various forms of protection - legal and political. For example, in considering legal protections, the comparative experiences of the jurisdictions will provide insight into whether perceived strengths of the judicial mechanism are necessarily achieved via the introduction of a constitutional bill of rights or whether they represent only potential strengths, dependent on other factors to offer the suggested standard of rights protection. Similarly, in acknowledging that each of the forms of protection is imperfect and has associated weaknesses, the experiences of Australia, Canada, the EU and the UK will assist in determining whether these weaknesses are able to be mitigated via careful design of legal protections or whether these weaknesses can only be mitigated by complementary political protections.

The context in which each jurisdiction has adopted and applied the particular forms of legal protection – the constitutional structures and some of the political pressures – will be described in the following chapter so as to ensure that the lessons learned from the comparisons are not limited by the requirement of a particular legal or constitutional structure. With these issues in mind, the comparisons that are being undertaken in the bulk of this thesis (Chapters 3-5) will involve the following:

1) Identification of the strengths and weaknesses which are, in theory, associated with the each form of protection.

[39] See, eg Geoffrey Samuel, 'Epistomology of Comparative Law: Contributions from the Sciences and Social Sciences' in Mark van Hoecke (ed), *Epistomology and Methodology of Comparative Law* (Hart, 2004) 35.

2) Using the experiences of the four jurisdictions to highlight how and to what extent the strengths and weaknesses associated with particular forms of protection are (or are not), in practice, realised.

3) Drawing conclusions as to the relationship between the strengths and weaknesses of the various forms of rights protection and in particular the way in which the maximisation of strengths impacts on the realisation of weaknesses and vice versa.

Having addressed the above questions in relation to each of the two main forms of rights protection (legal and political), the thesis will then consider how the various forms of rights protection may interact. That is, in what way may judicial and political mechanisms be viewed as co-operative rather than alternatives in order to better realise potential strengths and mitigate inherent weaknesses?

1.3.2 Structure of the Thesis

Following this introductory chapter the structure of the thesis is divided into four Chapters. In Chapter 2, attention is given to the existing mechanisms for the protection of rights against legislative encroachment in each of the jurisdictions. When faced with the question of whether the protection of rights would be best served via the introduction of a specific rights instrument, and if so, what status it should have, each of the jurisdictions has answered differently. In addition to explaining the form that the rights protection mechanisms take in each jurisdiction, this Chapter will also provide some explanation as to why each jurisdiction has adopted the particular approach, including a brief acknowledgement of some of the historical issues, political considerations and the structure of the legal system, which had an influence on the form of the protection adopted. Chapter 2, therefore, 'sets the scene' for the later separation and analysis of legal and political protections by explaining both the core structure of the protections available in each of the jurisdictions, as well as acknowledging the different aims of the mechanisms and the motivations of the drafters.

Chapter 3 will expand on the brief overview of the various forms of legal protection which was set out in 1.1 and examine each in greater detail. Particular attention will be devoted to the strengths and weaknesses of each of the forms. Following the

methodology explained in the previous part, this chapter does not seek to promote a particular form of legal protection. It will instead highlight those strengths which are associated with legal protections in general and explore how effective each form of legal protection is in achieving those strengths. Similarly the weaknesses of legal protections will be explained and the relationship between the realisation of strengths and the mitigation of weaknesses will be highlighted. It will be demonstrated, through the use of comparative examples, that where jurisdictions have taken measures to diminish the weaknesses associated with a particular form of legal protection they risk similarly diminishing the potential strengths of that form.

In analysing how the strengths and weaknesses of legal protections are, or may potentially be, realised, the experiences of the four jurisdictions will be compared. Of particular interest in this Chapter is the comparison of the legal mechanisms derived from specific rights instruments in Canada, the EU and the UK. However, there are also lessons which may be drawn from Australia's experiences with legal protections in the absence of a bill of rights.

Chapter 4 provides an analysis of political protections of fundamental rights and follows a similar structure to the comparisons in Chapter 3. The strengths and weaknesses of political mechanisms in their own right (as opposed to how they can support legal protections) will be considered. It will be shown that while political protections seek to minimise the occurrence of rights-incompatible legislation, they also fulfil other roles in relation to the protection of rights. In addition to discouraging the passage of rights-infringing legislation, political protections aim to improve the rights-quality (rather than simply rights-compatibility) of legislation and to facilitate a 'culture of fundamental rights. This is achieved, for example by increasing the overall discourse about rights within the law-making processes and, more broadly, increasing awareness about fundamental rights amongst the population at large.

While the aims of political protections may initially appear somewhat idealistic, dealing with goals rather than strict standards, political mechanisms ought to be seen not as an immediate 'fix' for perceived deficiencies in rights protection. Instead, these aims reflect an overall commitment to fundamental rights within a jurisdiction. The examples of the UK, Canada and Australia – and the consideration of the procedural mechanisms which fulfil similar functions in the EU – will be used to draw attention to

the way in which the strengths of political mechanisms can be maximised, but also to acknowledge the areas in which they are unable to overcome inherent weaknesses.

Finally, in Chapter 5 it will be demonstrated, by consideration and comparison of the approaches taken by the four jurisdictions, that the interaction of legal and political protections is at the heart of a comprehensive commitment to the protection of rights within a modern, democratic legal system. By highlighting how political protections can respond to the weaknesses of legal protections, it will be argued that the two forms of protection ought not to be viewed as alternative, but rather as complementary mechanisms.

CHAPTER 2. Jurisdictions

Each of the jurisdictions has adopted a different approach to the protection of fundamental rights. This section will provide an outline of each of these approaches including recognition of where the approach to rights protection involves more than one formalised mechanism. Whereas later chapters will consider the mechanisms individually, this chapter allows for the jurisdictions' approaches to the protection of fundamental rights to be viewed in a more comprehensive manner. In addition to explaining the core mechanisms of, for example, a bill of rights, the supplementary protections which have been introduced will also be considered.

Additionally, these overviews allow for the mechanisms to be viewed within their historical contexts. In Canada and the UK, this will involve an acknowledgement of the motivations surrounding the entrenchment of the *Canadian Charter of Rights and Freedoms (Canadian Charter)*[1] (at 2.1) and the enactment of the *Human Rights Act (HRA)*[2] (at 2.2) respectively. With regard to the EU, which is the topic of consideration in 2.3, the 2009 ratification of the *Lisbon Treaty*[3] changed the legal status of the *Charter of Fundamental Rights of the European Union (EU Charter*)[4] and, in doing so, changed the formal basis of rights protection in the EU. However, rather than a distinct change in the manner in which rights are protected, the *EU Charter* ought to be understood as the product of several decades of developments and debates about fundamental rights protection in the EU (and the European Communities before it). As a result the overview of EU rights-protection will involve substantial consideration of the history of rights protection under Community law prior to the shift to 'Union Law' in 2009. Chapter 2.4 explains the protection of rights in Australia, where there is no focal 'defining moment' of rights protection or any instrument which purports to offer

[1] *Canada Act* 1982 (UK) c11, sch B pt I, *Canadian Charter of Rights and Freedoms* ('*Canadian Charter')*.

[2] *Human Rights Act 1998* (UK) c 42 (*'HRA'*).

[3] *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) (*'Lisbon Treaty')*.

[4] *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/01, as adapted in 2007, [2007] OJ C 303/01, as annexed to *Treaty on European Union,* opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) as amended by *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) ('*EU Charter*').

protection to fundamental rights generally. Several mechanisms have developed over time, none of which claims to offer a comprehensive approach to the protection of fundamental rights. Australia's experiences with rights protection in the absence of a bill of rights are useful, however, in highlighting both the strengths and weaknesses of such an *ad hoc* approach to rights.

2.1 Canada

The Canadian approach to the protection of fundamental rights is centred on the *Canadian Charter* which is consequently the focus of this overview. Included in the *Canadian Constitution,* the *Canadian Charter* introduced judicial review leading to invalidation of legislation as the core mechanism by which rights are guaranteed in Canada. This overview begins with a brief discussion of some of the controversies that surrounded the inclusion of the *Canadian Charter*. Acknowledgement of these controversies provides explanations for the ultimate form of protection and, more importantly, the availability of exceptions to that protection. The protections under the *Canadian Charter* will then be outlined – both in terms of the protections as expressed within the *Canadian Charter* and the way in which the judiciary has interpreted those rules. Next, the s 33 'notwithstanding' clause will be explained. Here it is important to acknowledge that the s 33 'notwithstanding' has had limited use and as such both the actual effect of s 33's use and the potential implications of its inclusion within a constitutional rights-protection instrument will be examined. Finally, this overview of Canadian protections makes reference to supplementary protections which either influence the operation of, or facilitate the more effective operation of, the core protections.

2.1.1 Background to the Canadian Charter of Rights and Freedoms

Prior to the *Canadian Charter,* there were, in Canada existing rights protection mechanisms in place: at the federal level, the *Canadian Bill of Rights*[5] (a legislative bill of rights) directed the approach of the Canadian Parliament and the courts when dealing with federal legislation and the provinces each adopted mechanisms designed to guarantee rights protection within the separate provincial jurisdictions. The

[5] *Canadian Bill of Rights* SC 1960, c. 44.

entrenchment of a Canadian 'bill of rights' with constitutional status was to initiate a shift in the way that rights were protected. Rights protection was centralised under a single 'Canadian' mechanism binding on both federal and provincial law-makers. It also served to secure invalidity as the consequence of legislative encroachment of rights.

The core controversy surrounding the entrenchment of the *Canadian Charter* was not the new availability of judicial review directed against the invalidation of legislation *per se* – although it was not an insignificant issue of debate – the issue instead was that the judicial review was to be conducted at the federal level. Concerns were raised by the Premiers of several provinces – most vocally René Lévesque, the Premier of Quebec- regarding the appropriateness of a single, constitutional mechanism which allowed for invalidation of legislation, given the social and cultural differences amongst provinces.[6] Specifically, it was suggested that the consequence of introducing judicial review which allowed courts to find legislation *invalid*, risked imposing a single 'Canadian' interpretation of rights and thus undermining the ability of provincial governments to adopt province-specific legislative programmes based on legitimate but differing understandings of 'rights' and 'reasonable limitations'.[7]

In the early 1980s, Pierre Trudeau – the then Canadian Prime Minister and a major advocate of the *Canadian Charter* - required the consent of Provincial Premiers to effect the constitutional reforms. The reticence of Provincial Premiers impacted on the form of rights protection ultimately enshrined in the *Canadian Charter*. The s 33 'notwithstanding clause'- which will be explained in 2.1.3 – creates an 'exception' to the general protection offered by the *Canadian Charter* and allows Provincial legislation (and also federal legislation) to be shielded from judicial review as to compatibility with the *Canadian Charter.* The inclusion of s 33 successfully gained the support of sufficient Provincial Premiers to allow the constitutional reforms to proceed.

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[6] For an account of the drafting of the *Canadian Constitution* see: Roy McMurtry, 'The Search for a Constitutional Accord - a Personal Memoir' (1983) 8(1/2) *Queen's Law Journal* 28.

[7] See for discussion James B. Kelly, 'Toward the Charter: Canadians and the Demand for a National Bill of Rights' (2005) 38(03) *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 771;Walter S. Tarnopolsky, 'The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms' (1981) 44(3) *Law and Contemporary Problems* 169.

Lévesque did not agree to the amended *Canadian Constitution* and the *Canadian Charter* and refused to include his signature on the new *Constitution*. Indeed Quebecois determination to maintain autonomy in determining how rights were to be protected within the province resulted to use of the s 33 'notwithstanding clause' as a regular part of Qubecois law-making in the early years of the *Canadian Charter.*[8] This was not an overt attempt to infringe on fundamental rights that would otherwise be protected under the *Canadian Charter per se*, but instead to 'shield' the legislation and prevent Supreme Court oversight of Quebecois interpretation.

2.1.2 Protection of Rights under the *Canadian Charter*

The core protection of rights guaranteed by the *Canadian Charter* comes by virtue of its inclusion as part of the *Canadian Constitution.* According to s 52(1) *Canadian Constitution:*

> 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.

In order for legislation to be invalid, the encroachment on the *Charter*-right must be an unreasonable limitation of that right. Despite the provincial wariness during the drafting of the *Canadian Charter*, the s 1 limitation clause does not suggest that there is only one possible *Charter*-compliant solution to any particular problem. Section 1 states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This limitation clause has two significant functions. Firstly, s 1 recognises there may be some limitation of rights necessarily associated with the governance of societies. It allows governments to limit rights, but at the same time it establishes that they must be prepared to justify any such limitations. Secondly, implicit in s 1 is the recognition that there may be a range of possible legislative initiatives compliant with the *Charter* provisions. This suggests that provinces are able to adopt differing approaches, and

[8] Ibid.

may differently limit rights in undertaking legislative programmes, so long as any limitations are 'demonstrably justified'.

With regard to the first of the above functions, once the judiciary has determined that there is a *prima facie* limitation of rights they must determine whether such a limitation meets the criterion of being 'demonstrably justified in a free and democratic society.' The basic test for determining whether this criterion has been satisfied was expressed by Dickson CJ in *R v. Oakes*[9] in 1986. The *Oakes* test involves 2 stages: identification of a substantial legislative or policy objective[10] and the need for proportionality between the limiting measure and the objective. The legislature must first show that a limitation of the *Canadian Charter* right is reasonable due to the specific policy objective having due respect for those values and principles inherent in a society founded on democracy and liberty. In order to be proportionate, the legislature must show that:

i. a connection exists between the measure and objective so that the former cannot be said to be arbitrary, unfair or irrational;

ii. the measure impairs the Charter right or freedom at stake no more than is necessary; and;

iii. the effects of the measure are not so severe as to represent an unacceptable abridgement of the right or freedom.[11]

This feature of *Canadian Charter*-based judicial review, which seeks to determine the justifiability of rights-limitations with specific reference to the policy objective of the challenged legislation is part of what is known as the 'dialogue' between legislators and courts under the *Canadian Charter.*[12] Kent Roach, for example, explains this 'dialogue' as an active conversation between the courts and the political branches. He says:

[9] *R v Oakes* [1986] 1 SCR 103(*'Oakes')*. In expressing the test, Dickson J extensively references *R v Big M Drug Mart Ltd.* [1985] 1 SCR. 295.

[10] *R v Oakes* [1986] 1 SCR 103[69] - [70].

[11] The *Oakes* test as stated in *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892, 291 per Dickson CJ for the majority.

[12] Kent Roach, 'Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience' (2005) 40 *Texas International Law Journal* 537, 541.

> The courts make sure that legislatures pay attention to guaranteed rights, but the legislature has an opportunity to explain to the courts the reasons and justifications for limiting rights.[13]

It has been largely accepted that there is a wide range of objectives which may fulfil the first part of the test. Consequently, it is the proportionality requirement that is of primary concern.[14]

There is no single formula, nor is there a single authority for determining what is reasonable in a 'free and democratic society' in any given circumstance. In *Oakes*, a broad measuring stick was suggested. Both the purpose served and the extent of the limitation need to be considered in the context of values and principles essential to a society that is 'free and democratic'. These include (but are not limited to):

> [R]espect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[15]

While these standards are broad, non-exhaustive and, of themselves, contested concepts they provide a guideline for governments seeking to defend their legislative initiatives against *Charter*-based challenges.[16]

With regard to the second consequence of s 1 – the recognition of a range of possible legislative programmes with differing but still potentially legitimate limitations on *Charter*-rights – the Canadian Supreme Court has consistently acknowledged that individual provinces can, and indeed often should, adopt laws which differ from the other provinces.

R v Edwards Books[17] in 1986 established this trend. *R v Edwards Books* involved a challenge to a provincial statute in Ontario which prohibited businesses opening on

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[13] Ibid.

[14] See, eg: Peter W Hogg and Allison A. Thornton, 'The Charter Dialogue between Courts and Legislatures' (1999) April *Policy Options* 19, 22.

[15] *R v Oakes* [1986] 1 SCR 103 [64].

[16] Janet Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (McGill-Queen's University Press, 1996), 62 - 65. Hiebert also goes on to discuss specific examples of contestable judicial interpretation of what constitutes 'value' of such strength to outweigh policy objectives.

Sundays. The challenge was made on the basis of freedom of religion guaranteed in s 2(a) of the *Canadian Charter*. The court found in this instance that the Act in question was not intended to promote or enforce particular religious tenets and that it had attempted to address any potential conflict with sincere religious beliefs.[18] The Court went on to say that the Act was an instrument of economic and social policy attempting to secure employee well-being and any potential limitation of the s 2(a) right was both reasonable and justifiable. That other provinces did not have parallel legislation was not considered to undermine the legitimacy of the Ontario statute. Specifically, Laforest J said, '[…] what may work effectively in one province…may simply not work in another.'[19]

The availability of provincial differences under s 1 was potentially undermined by s 15 of the *Canadian Charter* which guarantees equality for all Canadians.[20] Such an interpretation of the *Canadian Charter* would have likely been the death knell for Canadian federalism and realised the concerns expressed by the Provincial Premiers during the drafting process. However, the Court has been decisive in its rejection of this claim. Lamer J in *R v S(S)* stated:

> […T]he federal system of governance … not only permits differential treatment based on province of residence, it mandates and encourages geographical distinction. There can be no question, then, that unequal treatment which stems solely from the exercise, by provincial legislatures, of their legitimate jurisdictional powers cannot be subject to an s 15(1) challenge [on the basis of distinction between provinces]…to find otherwise would be to completely undermine the value of diversity [on which federal governance is based.][21]

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[17] *R v Edwards Books and Art Ltd.* [1986] 2 SCR 713.

[18] Jewish small business owners were able to open on Sundays provided that their businesses were closed on Saturday to secure the 'day of rest' for employees but still maintaining religious practices.

[19] *R v Edwards Books and Art Ltd.* [1986] 2 SCR 713.

[20] Section 15 of the *Canadian Charter* states:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[21] *R v S(S)* [1990] 2 SCR 254, [255] - [256] per Lamar J.

Thus despite concerns regarding the potential 'dangers' of a constitutional rights charter, in particular with respect to the role of the courts, it is evident that s 1 has served to preserve provincial autonomy with regard to legislative and policy choices. Imposed homogenisation of policy and legislative initiatives, as a result of centralised judicial review, has not eventuated.

2.1.3 Exceptions to the General Protections – Section 33 the 'Notwithstanding Clause'

In order to secure the support of the provinces, s 33 was included in the *Canadian Charter* as a 'shield' guaranteeing that provinces (and also the federal legislature) would be able to shield legislative programmes from judicial scrutiny as to rights.[22] Section 33 states:

> (1) 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.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

This ability for Parliament and provincial legislatures to expressly exempt legislation from rights-based judicial review (or at least those rights found in s 2 or ss 7 to 15 of the *Canadian Charter*)[23] for a renewable period of five years, even in the face of judicial

[22] A detailed account of the drafting process and the political debates resulting in the inclusion of s 33 can be found in R. McMurtry, above n 6.

[23] The Legislature cannot shield legislation from rights-based judicial review with regard to those rights found in sections 3 – 6 of the *Canadian Charter* which are identified as democratic rights (the right to vote and stand in an election and a five-year limitation on the term of the Parliament) and mobility rights relating the to the rights of citizens to reside in and move within Canada.

disapproval, is another way in which the Canadian model of rights protection may be described as a 'dialogue' model of constitutionalism.[24]

A constitutional bill of rights would normally protect rights by making rights-encroachment outside of the constitutional authority of any branch of the government. Section 33 appears, at least on a textual reading, to undermine this protection. [25] However, in order to fully understand s 33 it is necessary to recognise the divide between the *potential* effects of s 33 and the *actual* experiences in Canada – both will be addressed below.

Section 33 seeks to return the final word in constitutional rights matters to the legislatures – thus re-establishing the 'legislative supremacy' which is generally not a feature of constitutional bills of rights. The Parliament or provincial legislatures may utilise the s 33 notwithstanding clause in two ways. It may be used as a 'protection' clause, which exempts legislation from challenge in the courts on the grounds of *Charter* incompatibility. Alternatively it may be used as an 'override' where a court has determined that a *Charter* violation exists. That is, the legislature may re-enact the offending legislation with the inclusion of an s 33 clause. This indicates that despite apparent constitutional incompatibility the policy objectives of the legislation are perceived to be so important that the legislation should still remain. The law is no longer unconstitutional as the s 33 override is within the constitutional authority of the legislatures.

With the exception of Quebec – which adopted a 'blanket' use of s 33 (where a provincial statute was passed applying applied a notwithstanding clause to all existing statutes)[26] and which subsequently has used s 33 in relation to issues such as pensions, education and language statutes – use of s 33 is rare. Saskatchewan was the only other province to effectively utilise a notwithstanding clause, when it amended the

[24]Peter W Hogg and Allison Bushell, 'The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights isn't Such a Bad Thing After all)' (1997) 35 *Osgoode Hall Law Journal* 75. It should be noted that Hogg and Bushell's dialogue model does incorporate more than s 33, referring also to s 1 limitations, ss 7-9 and s 12 qualified rights and the judicial approach to s 15(1) which has allowed a wide range of policy measures.

[25] 'What a government does must accord with what, from a legal perspective, it is entitled to do', John D Whyte, 'On Not Standing for Notwithstanding' (1990) 28 *Alberta Law Review* 347, 350.

[26] *An Act Respecting the Constitution Act,* SQ 1982 c 21.

Saskatchewan Government Employees Union Dispute Settlement Act[27] after the provincial Appeals Court had found certain provisions to violate the freedom of association guaranteed by s 2(d) of the *Charter.*[28] The amendment was undertaken concurrently with an appeal from the provincial decision to the Supreme Court which was ultimately successful and no breach of the *Charter* was found. Even debate about whether to include an s 33 clause is confined to sporadic and isolated examples.[29]

Section 33 could be used to create exceptions to *Canadian Charter* rights as opposed to simply securing a legislative interpretation of those rights. While the scarcity of examples as to the use of s 33 to deliberately place unreasonable limitations of rights suggests a political reticence to violate the *Canadian Charter,* the availability of the notwithstanding clause leaves open the possibility that legislatures retain the authority to do so.[30] Unlike s 1 which requires demonstrable reasons and justifications for legislative limitation of rights, there is no review of s 33. The existence of a sunset clause under s 33(3) of the *Canadian Charter* could be argued to be a form of self-regulation for the legislature. That the s 33 declarations associated with the Quebecois 'blanket' statutes were not re-enacted five years later, after a change in government in that province could be used to imply the potential efficacy of a sunset clause as a form of self-review by the legislature. There is, however, no guarantee of regular or required, independent review of the appropriateness of s 33 use.

It is apparent that s 33 does return the ultimate 'sovereignty' regarding decisions as to the legality of encroachments on human rights to the Parliament. However, the practice in Canada has been for legislatures to respect judicial *Charter* interpretation rather than enforcing politically motivated interpretations of what constitutes a reasonable limitation or deliberately (and 'unreasonably') limiting rights.

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[27] *Saskatchewan Government Employees Union Dispute Settlement Act*, SS 1984-85-86, c. 111, s 9.

[28] *RWDSU v Government of Saskatchewan*, [1985] 5 WWR 97.

[29] Alberta attempted to use Section 33 in the *Marriage Act*, RSA 2000, c M-5. This Act limited the marriage as only allowed between heterosexual partners. Section 2 of the *Marriage Act* was a *Canadian Charter* override provision. However in *Re Same-Sex Marriage*, [2004] 3 SCR 698 it was confirmed that the capacity to marry was solely within the legislative competence of the Federal Parliament and thus the Alberta legislature had no authority to pass the legislation. Thus, although s 33 was used, the legislation was invalid on other constitutional grounds and thus the attempt to circumvent the *Charter* protections was ineffective.

[30] Tsvi Kahana, 'Understanding the Notwithstanding Mechanism' (2002) 52(2) *University of Toronto Law Journal* 221, 235.

2.1.4 Supplementary Rights Protection Sources

It is useful to make mention of the 'supplementary' mechanisms which exist in Canada that influence the operation of the *Canadian Charter* protections. While these warrant only a brief mention, inclusion in the 'overview' of rights protection allows for a more complete understanding of the way in which rights protection is realised in Canada. First, executive and legislative procedures have been introduced which scrutinise bills as to *Charter*-compatibility prior to their enactment. Second, international commitments and influences play an important role in the operation of the *Canadian Charter*.

Procedural and Political Mechanisms

Although the Canadian Charter does not itself provide for any political mechanisms, the current form of this requirement is found in *Department of Justice Act* (2006) (*DJA*).[31] This is a requirement that the Minister of Justice consider Charter-compliance prior to a Bill being put before Federal Parliament . Section 4.1 of the *DJA* states:

> …[T]he Minister shall…examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the Statutory Instruments Act and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity

Importantly, the *DJA*, like the *Canadian Bill of Rights* before it, is applicable only to the Federal Parliament. The Provincial legislatures have developed their own mechanisms.

Significantly, the requirement of reporting only inconsistencies places this legislated political protection solely within the control of the Canadian Executive (and specifically, the Minister of Justice). This results in the pre-enactment scrutinisation occurring largely outside of the legislative process, prior to the executive finalising the Bill and prior to the consideration of the Bill by Parliament. Additionally, the *DJA* requirement is based on a compatible/incompatible dichotomy: Bills inconsistent with

[31] *Department of Justice Act,* RSC 1985, c.J-2 (as amended 12 December 2006).

the *Canadian Charter* are outside the competency of the legislature to pass (except where an s 33 clause is included), thus via the silence of the Minister, compatibility is implied.

Further, executive scrutiny occurs 'behind closed doors'. Janet Hiebert has strongly criticised the lack of answerability associated with the *DJA*.[32] She highlights the lack of information as to how the Minister of Justice reaches his conclusion regarding the compatibility of Bills. Whereas Peter Hogg and Alison Bushell point to the increasing reference to the *Charter* within legislative proposals,[33] it must be acknowledged that what they term '*Charter*-speak' is *ad hoc* rather than reflecting a formal requirement to include such statements within legislative proposals. This will be discussed again in 4.4.1.

As a response to the inability of the *DJA* mechanisms to adequately bring to light issues of genuine rights-based concerns, the Canadian Legislature has developed supplementary protections. These supplementary protections are aimed at encouraging open debate in Parliament and requiring Ministers to justify their belief in the compatibility of their proposals with the *Canadian Charter*.

In particular, political scrutiny of Bills by the Standing Senate Committee on Human Rights (SSCHR) has been introduced as a subsidiary form of political protection of rights. Rather than accepting the position of the Minister of Justice, the SSCHR has a mandate to scrutinise particular Bills for compatibility with human rights. Much like the UK's JCHR – which will be discussed at 2.2.2, the SSCHR is responsible for the consideration of all potential rights-implications of legislation (not only *Charter*-compatibility but also as to Canada's obligations under, for example, the *International Covenant on Civil and Political Rights (ICCPR))*[34]. This measure places the debate about fundamental rights within the legislature – encouraging a more robust consideration of fundamental rights at the pre-legislative stage.

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[32]Janet Hiebert, 'A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny' (1998) 26(1) *Federal Law Review* 1; Janet Hiebert, 'Resisting Judicial Dominance in Interpreting Rights' (2004) 82 *Texas Law Review* 1963; Janet Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review' (2005) 35(2) *British Journal of Political Science* 235.

[33] Hogg & Bushell above n 24.

[34] *International Convenant on Civil and Political Rights,* opened for signature 16 December 1966, 993 UNTS 171 (entered into force 23 March 1976) (*'ICCPR')*.

International Influences

The role of international sources in the operation of the *Canadian Charter* will not be of substantial concern in this thesis. It is, however, interesting to acknowledge in light of the role of international sources in other jurisdictions. In particular, Canadian Courts have referred to the ever-expanding body of international and foreign rights jurisprudence when interpreting the rights included within the *Canadian Charter*.[35] Although these sources are not binding, they provide a valuable insight into what 'free and democratic societies' consider to be fundamental values, and how other jurisdictions have approached the problems of balancing policy objectives and human rights.

Various justifications for utilising non-domestic sources have been suggested including the influence that various international conventions have had on the wording of the *Canadian Charter* which implies intended consistency of interpretation[36] and the fact that the *Canadian Charter* is an indirect implementation of international obligations. Although the Court has rejected this, there remains a presumption that the Court should, if not adhere to existing jurisprudence regarding (for example) the *ICCPR,* it should endeavour to at least not be incompatible with the *ICCPR* jurisprudence.[37]

Lamer J in *Re BC Motor Vehicle Act*[38] expressly recognised that, the rights themselves (and thus any potential limitations) are founded on principles and values expressed internationally. For example, he said that s 7 of the *Charter* which guarantees 'the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice' has an international aspect:

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[35] *Thomson Newspapers Co. v Canada (Attorney General)* [1998] 1 SCR 877, [83]. The Supreme Court specifically refers to the jurisprudence of the European Court of Human Rights and European Commission on Human Rights in interpreting the obligation of states to hold free elections under Art. 3 of *Optional Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Rights,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (*'ECHR' or 'European Convention'*), when determining the scope of the s 3 of the *Charter* which guarantees effective representation.

[36] M. Ann Hayward, 'International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications' (1985) 23 *University of Western Ontario Law Review* 9, 9; Errol Mendes, 'Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights' (1982) 20 *Alberta Law Review* 383, 390-397.

[37] Hayward, above n 36, 10.

[38] *Re BC Motor Vehicle Act,* [1985] 2 SCR 486.

> [Principles of fundamental justice] represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.[39]

To consider the rights in s 7 outside the context of existing international jurisprudence would be to undermine the legal expression of the values on which the *Charter* right is based. Further, as Sopinka J indicated (in dissent) in *Kindler v. Canada,*[40] 'the Charter, the judicial pronouncements upon it and the international statements and commitments made by Canada reflect Canadian principles. [The Supreme Court's decision affects] the preservation of Canada's integrity and reputation in the international community'[41] and thus the international jurisprudence must be considered when the court engages in the interpretation of *Canadian Charter*-rights which have parallels in international human rights law.

Kindler dealt with the legality of extradition to a country where there was a likelihood that the individual would be subject to capital punishment. The question for the court was whether this would constitute a violation of various *Canadian Charter* rights including the right not to be deprived of life except in accordance with principles of fundamental justice, or alternatively (or in addition to) the freedom from cruel and unusual punishment which are protected by s 12 of the *Canadian Charter.* Although Sopinka was in dissent in *Kindler*, a similar approach in *United States v. Burns*[42] (which effectively overturned the *Kindler* decision) highlights how international commitments are important but should not be viewed in isolation but as an aide in defining rights under the *Canadian Charter.*

In addition to the Canadian precedent and accession to various treaties, the majority in *United States v Burns* considered existing case law from the European Court of Human Rights (ECtHR), the approaches to the problem taken in democratic nations and even Canada's role in the formation of existing international initiatives to combat capital

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[39] Ibid.

[40] *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779.

[41] Ibid.

[42] *United States v Burns*, [2001] 1 SCR 283.

punishment.[43] It thus becomes evident that international sources have an important role in the interpretation of *Canadian Charter* rights.

In *United States v Burns,* the Court went on to discuss how factual developments both in Canada and 'relevant foreign jurisdictions' could impact both on defining a right and considering what constituted a 'reasonable' limitation on that right. Thus when the *Oakes* test is applied to determine whether a limitation is 'reasonable' in a free and democratic society, international sources again have a potentially significant role.

One common practice of the Court in determining whether the policy objectives are reasonable, necessary and proportionate to the limitation of a particular right is to consider alternatives. As has already been discussed in regard to *Charter*-based challenges to Provincial legislation, the Court may consider the legislative or executive initiatives in other provinces to achieve similar policy objectives. The existence of alternative initiatives with lesser limitation on rights is not *necessarily* determinative of an unreasonable breach, but it may have substantial weight. International practice has also been considered when determining whether a limitation is reasonable under s 1.

United States v Burns again provides a solid example of how this occurs in practice. While recognising the validity of a range of policy objectives put forward by the Minister, the Court gave substantial weight to the 'routine' requesting by European states and of Mexico for assurances that the death penalty would not apply to extradited criminals.[44] Foreign experiences were subsequently addressed as to their appropriateness to the Canadian situation. The significance is that the *Canadian Charter* is used to review legislation or executive action not only to a domestic, but also potentially to an international standard.

The consideration of international jurisprudence appears to have entered into the Canadian Supreme Court's approach to *Canadian Charter* interpretation with little controversy. There is however a degree of inconsistency in how the court has utilised international materials. Although these extradition cases show examination of a wide range of international and foreign materials, this should be taken to mean that such they will be given such extensive consideration will be given in every *Canadian Charter*

[43] Ibid [80] – [89].

[44] Ibid [138].

case. However, despite some inconsistency as to the role given to international instruments and jurisprudence, it is important to acknowledge that international approaches to rights do have an influential role in *Canadian Charter* jurisprudence.[45]

2.1.5 Conclusions: Canada

The inclusion of the *Canadian Charter* in the *Canadian Constitution* heralded a fundamental change in the way Canada approached human rights protection. The *Canadian Charter* introduced a specific rights instrument, applicable at both federal and provincial levels, which made the infringement of fundamental rights an unconstitutional exercise of legislative and executive power. The inclusion of judicial review shifted the balance towards judicial responsibility for the protection of fundamental rights. This judicial power is mitigated by s 33. The 'notwithstanding clause' of the *Canadian Charter* allows the legislature to reclaim the ultimate decision-making authority and to decide what constitutes a reasonable and legitimate exercise of legislative powers. While it has not been used with any frequency, there is little or no pressure generated by formal mechanism (such as legislative instruments) to limit its use. Where it is used, rights are left (at least with regard to the specific legislation) absolutely without formalised protection at the national level: it operates as a complete shield to rights-based judicial scrutiny of legislation. Various pressures short of a formal or comprehensive political mechanism have developed within the Canadian system in order to supplement the *Canadian Charter* protections. These domestic, international and foreign influences both on the content and the interpretation of the *Charter* have allowed for the ongoing development of rights protection in Canadian law.

2.2 The United Kingdom

In the UK, the *Human Rights Act (HRA)*[46] is the source of the key mechanisms for the protection of fundamental rights. The *HRA* was enacted in the context of broader constitutional reforms in the UK, and its primary purpose was to improve the protection of those rights found in the *ECHR* within the domestic jurisdiction. A brief discussion

[45] Hayward, above n 36, 11.

[46] *Human Rights Act 1998* (UK) c 42 (*'HRA'*).

of the background to the enactment of the *HRA* will be discussed first in 2.2.1. Then, in 2.2.2, the actual protections under the *HRA* will be explained, including the implications of the statutory legal status of the *HRA*, the obligations on the executive, the role of the judiciary, and the availability of 'fast-track' amendment procedures for legislation which the judiciary declares incompatible with fundamental rights. Finally, some of the additional influences on the protection of rights in the UK will be addressed so as to ensure a more complete picture of the approach to rights in the UK.

2.2.1 Background to the Enactment of the *Human Rights Act*

To understand the nature of, and the form of protection offered by, the *HRA* it is useful to consider why the *HRA* was enacted, and the influences on its form. The *HRA* was enacted only after decades of debate as to the appropriateness of a modern bill of rights,[47] in any form, for the UK.[48] The mechanisms were designed both to offer a formalised protection of rights within UK law and to meet international obligations, specifically under the *ECHR*, while still maintaining the existing status quo within the British legal system, which lacks a constitutional document and features a strong preference for the maintenance of parliamentary sovereignty.[49]

The UK was one of the original signatory states to (and was heavily involved in the drafting of) the *ECHR* in 1950.[50] Although Article 1 of the *ECHR* requires Member States to 'secure to everyone within their jurisdiction the rights and freedoms defined', there is no specific direction as to how these rights must be secured. The British approach prior to the *HRA* had been that 'securing' rights did not require specific legislative action.

Those wary of a British bill of rights, and desirous of retaining the status quo, argued that such an instrument was both unnecessary and inappropriate. Rights were viewed as

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[47] Although the English *Bill of Rights 1689* could arguably be said to form the basis of modern bills of rights, it is a product of its time and of interest in this thesis are charters of rights reflecting the post-WWII commitment to fundamental rights.

[48] For an explanation of the changes in the nature of the debate surrounding the enactment of a UK Bill of rights, see Francesca Klug, *Values in a Godless Age: The Story of the United Kingdom's New Bill of Rights* (Penguin, 2000) Chapter 6.

[49] Michael Zander, *A Bill of Rights* (Sweet and Maxwell, 4th ed, 1997).

[50] Geoffrey Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950' (1993) 42(4) *International and Comparative Law Quarterly* 796.

sufficiently protected within the existing 'constitutional structure' of the state and within the common law,[51] without need for express enactment. Moreover, it was argued that the codification of rights was 'un-British',[52] undermining the parliamentary sovereignty which lies at the heart of the British legal system, and shifting the ability to make decisions as to the appropriate balancing of rights against the public interest away from the branch of government best suited to the task.

Despite strong advocates for a British bill of rights in the 1960s and 1970s, most famously expressed in the writings and speeches of Lord Scarman,[53] it was not until the arguments of the anti-bill-of-rights movement began to lose legitimacy in the mid-late-1990s that a British bill of rights became a real possibility.[54] In particular, the growing divide between European and British standards of rights protection was increasingly evident, and protection in Britain was found to be deficient.[55]

Additionally, the UK was facing a large number of cases being brought before the ECtHR in which the UK was found in breach of one or more rights included in the ECHR (the Convention rights) - by 1995 there had been 35 adverse decisions at Strasbourg[56] - suggested that Parliamentary action and the common law were insufficient safeguards for Convention rights.[57] Further, the absence of legislative implementation of the *ECHR* meant that UK courts were unable to test legislation

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[51] Lloyd of Hampstead, 'Do We Need a Bill of Rights?' (1976) 39 *Modern Law Review* 121.

[52] See, eg: Zander above n 49, 70.

[53] See, eg: Leslie Scarman, 'Fundamental Rights: The British Scene' (1978) 78(8) *Columbia Law Review* 1575.

[54] Claire Harris, 'United Kingdom: A Significant New Act?' (1999) 24(2) *Alternative Law Journal* 94.

[55] Home Office White Paper, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997), http://www.archive.official-documents.co.uk/document/hoffice/rights/rights.htm.

[56] This was acknowledged in the Home Office White Paper, *Rights Brought Home,* above n 55, [1.11]. See also: Megan Davis and George Williams, 'A Statutory Bill of Rights for Australia - Lessons from the United Kingdom' (2003) 22 *University of Queensland Law Journal* 1, 3- 4. However, Francesca Klug raises a different motive for the lack of implementation into domestic law, at least in the 1950s. She suggests that the enactment of the *ECHR* into domestic law could have lead to embarrassment and political consequences due to the likely conflict between the guarantee of civil and political freedoms within the ECHR and the continued existence of British colonial authority in this era. Klug, above n 48, 121-22.

[57] For example, Satvinder Singh Juss provides a detailed examination of how the common law protections which secured a fair trial were increasingly found to be insufficient as meeting the obligations for securing the Convention right guaranteed in Article 6 *ECHR*. Satvinder Singh Juss, 'Constitutionalising Rights Without a Constitution: The British Experience under Article 6 of the Human Rights Act 1998' (2006) 27(1) *Statute Law Review* 29.

against human rights standards.[58] Consequently, although some rights-based challenges could be heard in the British courts, challenges regarding of Convention rights specifically could only be heard by ECtHR judges at Strasbourg. This had the added (political) consequence of rights being considered and interpreted only at the European level. As Lord Bingham put it: 'the rights, originally developed with major help from the United Kingdom Government, are no longer actually seen as British rights'.[59]

Combined with this politically embarrassing record at the ECtHR in Strasbourg[60] was an increasing awareness of alternatives to a 'constitutionally entrenched' bill of rights which would empower courts to overturn legislation.[61] A bill of rights which allowed legislation to be tested against Convention rights while retaining the authority of Parliament was possible without fundamentally altering the constitutional structure of the UK. The result was, in 1998, the enactment of the *HRA* which gives 'further effect to rights and freedoms guaranteed under the *European Convention on Human Rights*.'[62] The rights protected by the *HRA* are derived from the *ECHR* and are referred to as 'the Convention rights'.[63]

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[58] Article 35 of the *ECHR* requires that all domestic remedies be exhausted prior to an application being made to the ECtHR. Consequently, the high number of cases at the ECtHR was indicative of both the UK statutes being insufficient to protect rights and the limitations of the courts in doing so where they lacked the authority to apply the Convention rights in the absence of specific legislation.

[59] Lord Bingham, 'The European Convention on Human Rights: Time to Incorporate', *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000) cited in Julie Debeljak, 'The Human Rights Act 1998 (UK): the Preservation of Parliamentary Supremacy in the Context of Rights Protection' (2003) 9 *Australian Journal of Human Rights* 183.

[60] Home Office White Paper, *Rights Brought Home,* above n 55, [1.1].

[61] Eg: *New Zealand Bill of Rights Act 1990* (NZ).

[62] The long title of the *HRA* is: *An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purpose.*

[63] Section 1 of the *HRA*:

> (1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—
>
> (a) Articles 2 to 12 and 14 of the Convention,
>
> (b) Articles 1 to 3 of the First Protocol, and
>
> (c) Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the Convention.
>
> (2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

2.2.2 Protection of Rights under the *Human Rights Act*

Legal Status

Before considering the actual form of rights-protection offered by the *HRA*, mention ought to be made about an important consequence of its legislative status. As an ordinary Act of Parliament, the *HRA* may be repealed or amended by any later government.[64] This legislative status has been said by Michael Zander to be 'one of the most vexed issues in the whole bill of rights debate'[65] and has impacted on the form of protection offered by the *HRA*. While political and popular opposition may seem to provide an effective barrier to repeal of the *HRA,* the possibility of repeal remains.[66] Additionally, the *HRA* does not include any provisions imposing special restrictions on amendments (such as the requirement of a two-thirds majority in Parliament).[67] Such measures, which would have placed the *HRA* in a privileged position in the legislative order, were seen as unnecessary. This was addressed in the White Paper on the *HRA* prior to its enactment. The White Paper stated:

> On one view, human rights legislation is so important that it should be given added protection from subsequent amendment or repeal. The Constitution of the United States of America, for example, guarantees rights which can be amended or repealed only by securing qualified majorities in both the House of Representatives and the Senate, and among the States themselves. But an arrangement of this kind could not be reconciled with our own constitutional traditions, which allow any Act of Parliament to be amended or repealed by a subsequent Act of Parliament. We do not believe that it is necessary or would be desirable to attempt to devise such a special arrangement for this Bill.[68]

[64] Zander above n 49, 111 – 113.

[65] Ibid, 111.

[66] Discussion of repeal or amendment of the *Human Rights Act* is a recurring issue in UK politics. Examples can be seen in various news reports, for example 'Human Rights Act: Tories haven't sold out, says May' (2010) *BBC Online* <http://news.bbc.co.uk/2/hi/uk_news/politics/8691330.stm>; Michael White, 'A Retro-fest of Legislative Proposals' (2010) *Guardian Online* <http://www.guardian.co.uk/politics/blog/2010/jul/06/michael-white-presentation-bills>.

[67] *De-facto* entrenchment could be achieved through measures such as the requirement of specified majorities (usually two thirds) in Parliament.

[68] Home Office White Paper, *Rights Brought Home,* above n 55, [2.16].

Yet, despite the absence of formal entrenchment, the *HRA* has been acknowledged by Lord Justice Laws in *Thoburn v Sunderland City Council*[69] as a 'constitutional statute'.[70] Its purpose - the protection of fundamental rights - as well as its influence on the interpretation of all other statutes and its ability to restrict the behaviour of all public authorities makes it possible to consider the *HRA* as something more than simple legislation (although not attaining the same authority as a constitutional bill of rights).[71]

Although the *Thoburn* case did not involve the consideration of human rights principles – it focused instead on the relationship between EC law and UK law – the *HRA* was mentioned among several other 'constitutional' statutes. The case involved three grocers appealing criminal convictions and a fourth appealing refusal of a licence to trade after each of the four had refused to comply with regulations prohibiting the use of Imperial measurements of weight in favour of the metric system. The regulations were made under the authority of the *European Communities Act 1972 (UK)*[72] of which the appellants were claiming that the relevant sections had been impliedly repealed by later incompatible statutes. This would have meant that without a valid authorising statute, the regulations (made in 1994) would not have been upheld. The Court found that those Acts having the character of 'constitutional statutes' – including both the *European Communities Act 1972* and the *HRA* – are exempt from implied repeal:

> [A] constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights…The special status of constitutional statutes follows the special status of constitutional rights…Ordinary statutes may be impliedly repealed. Constitutional statutes may not…
>
> This development of the common law regarding constitutional rights, and as I would say constitutional statutes, is highly beneficial. It gives us most of the benefits of a written constitution, in which fundamental rights are accorded

[69] *Thoburn v Sunderland City Council* [2003] QB 151 (Div Ct).

[70] Helen Fenwick, Roger Masterman and Gavin Phillipson, 'The Human Rights Act in Contemporary Context' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007), 1.

[71] Jonathan L. Black-Branch, 'Parliamentary Supremacy or Political Expediency?: The Constitutional Position of the Human Rights Act under British Law' (2002) 23(1) *Statute Law Review* 39, 60.

[72] *European Communities Act* 1972 (UK) c 68.

> special respect. But it preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes, and now, applying the *HRA*) will pay more or less deference to the legislature.[73]

The court did not suggest that repeal was not possible - quite the opposite. Repeal of the *HRA* (and other 'constitutional statutes') is possible but only where it is done so explicitly. Thus, although not entrenched, the *HRA* does hold a special position within the British legal system.

The legal status of the *HRA* is therefore a result of a range of factors, including the lack of a written constitution into which to insert a bill of rights and the determination to ensure the continued sovereignty of Parliament which is a feature of the UK legal system. This status has influenced the form of rights protection under the *HRA*.

Political Review – section 19 of the *HRA*

Protection of rights under the *HRA* begins prior to the Second Reading of a Bill in Parliament. Section 19 of the *HRA* requires that Ministers consider the rights implications of the Bill and make a statement as to the Bill's compatibility with the *HRA*. While not prohibiting the enactment of legislation incompatible with Convention rights, the protection offered by s 19 forces the executive (and the legislature) to consider how new legislation will potentially impact on the protection of rights. The section states:

> (1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—
>
> > (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or
> >
> > (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

[73] *Thoburn v Sunderland City Council* [2003] QB 151 (Div Ct).

> (2)The statement must be in writing and be published in such manner as the Minister making it considers appropriate.[74]

Like the *DJA* mechanism in Canada (explained above) the s 19 *HRA* requirements places obligations on the executive to engage in rights-based scrutiny of legislation prior to the Bill being formulated. However, s 19 differs from the Canadian model because the while the obligation of an s 19 statement rests with the Executive, the requirement of a statement of compatibility ensures that the Legislature (and conceivably also the public) is informed as to the likely compatibility of every Bill with the Convention rights. This form of political protection will be revisited to in 4.1.1.

<u>The Role of the Judiciary under the *HRA* and the consequences of Judicial 'Declarations of Incompatibility'</u>

The next form of protection offered by the *HRA* is found in s 3 *HRA*. This section places an interpretive obligation on the judiciary by requiring that:

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.[75]

This obligation on the judiciary is to interpret rights (so far is as possible) in a manner which ensures that the Convention rights are protected. This interpretative mandate will be discussed in the following chapter at 3.1.3. However, it is important to recognise the significance of this form of protection.

In exercising the interpretative mandate under s 3 *HRA,* it is clear that the judiciary may go beyond a literal reading of the text and, as Lord Slynn put it in *R v A*, 'the prima facie let alone the literal readings are not the end of the inquiry.'[76] However, the words 'so far as it is possible' suggest that this mandate is not without limit. The courts must not give an interpretation that amounts to legislating rather than 'giving effect'.

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[74] *HRA,* s 19.

[75] *HRA*, s 3(1).

[76] *R v A* [2001] 3 All ER 1 [11], per Lord Slynn.

In *Donoghue v Poplar Housing & Regeneration Community Association Ltd*[77] Lord Woolf explained the importance of s 3:

> It is difficult to overestimate the importance of section 3. It applies to legislation passed both before and after the *HRA* came into force. Subject to the section not requiring the court to go beyond that which is possible, it is mandatory in its terms. In the case of legislation predating the *HRA* where the legislation would otherwise conflict with the Convention, section 3 requires the court to now interpret legislation in a manner which it would not have done before the *HRA* came into force. When the court interprets legislation usually its primary task is to identify the intention of Parliament. Now, when section 3 applies, the courts have to adjust their traditional role in relation to interpretation so as to give effect to the direction contained in section 3. It is as though legislation which predates the *HRA* and conflicts with the Convention has to be treated as being subsequently amended to incorporate the language of section 3.[78]

This tenuous balance between an interpretation which gives effect to rights and judicial amendment of legislation has been an ongoing issue of consideration in both judicial decisions and academic commentary.[79] It is largely accepted that the interpretative obligation provides a broad mandate for the judiciary to interpret legislation in a manner compatible with Convention rights, regardless of factors such as clear meaning and legislative intent.[80]

However, there will be some instances where the courts are unable to interpret legislation in a manner compatible with Convention rights. To this end, s 4 of the *HRA* provides that '[i]f the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility'.[81] As a result of the legislative status of the *HRA*, the validity of legislation is not affected by a judicial

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[77] *Donoghue v Poplar Housing & Regeneration Community Association Ltd & Anor* [2001] EWCA Civ 595 (27 April 2001).

[78] Ibid.

[79] Aileen Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26(1) *Oxford Journal of Legal Studies* 179; Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24(2) *Oxford University Commonwealth Law Journal* 259.

[80] Francis Bennioin, 'What is 'possible' under section 3(1) of the Human Rights 1998' (2000) *Public law* 77.

[81] Section 4(2) *HRA*.

declaration of incompatibility. The legislation remains valid (and is thus applied by the courts) notwithstanding its incompatibility with the *HRA*.

However, reflecting the role of political mechanisms in protecting rights under the *HRA,* a declaration of incompatibility may trigger a 'fast-track' procedure to allow for the incompatibility in the offending legislation to be remedied. Section 10 provides the relevant part:

> (2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.
>
> (3) If, in the case of subordinate legislation, a Minister of the Crown considers—
>
> > (a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and
> >
> > (b) that there are compelling reasons for proceeding under this section, he may by order make such amendments to the primary legislation as he considers necessary.

The 'fast-track' procedures under s 10 are only available in two circumstances. Firstly, a declaration of incompatibility under s 4 may trigger s 10 procedures – an indication of the weight given to the judicial determination that legislation *cannot* be interpreted in a manner compatible with Convention rights. Secondly, s 10 procedures may be used where there has been an adverse finding by the ECtHR – an indication of the *ECHR* roots of the *HRA*.[82]

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[82] Section 10(1) *HRA* states:

> This section applies if—
>
> (a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies—
>
> > (i) all persons who may appeal have stated in writing that they do not intend to do so;
> >
> > (ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or
> >
> > (iii) an appeal brought within that time has been determined or abandoned; or
>
> (b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

Section 10 does not oblige Ministers to take action. Instead, it provides a possible remedy for where an incompatibility is identified. It must be read in conjunction with Schedule 2 of the *HRA,* which specifically requires Parliamentary approval of the Minister's amendments within a specific time period, depending on the urgency of the issue.

The *HRA* involves all branches of government. Fundamental rights have become a necessary consideration at all stages of the legislative process as well as an influence on statutory interpretation undertaken by the judiciary. As the domestic implementation of the *ECHR*, the *HRA* also allows for international human rights obligations to be given effect in domestic law and, under s 2 of the *HRA,* requires the consideration of ECtHR decisions, thus facilitating the improvement of British compliance with European standards while maintaining a large degree of British control over the interpretation and implementation of those rights. The following section of this chapter will highlight how some of these protections are given effect.

2.2.3 Supplementary Sources of Rights Protection

There are two main areas which warrant consideration with regards to supplementing the rights-protection mechanisms within the *HRA*. While they will be considered concurrently with the above protections, when engaging in comparison, they need to be acknowledged as having different sources and impacts. Firstly, within the executive and the legislature, non-*HRA*-mandated procedures have been established so as to facilitate a more effective operation of the *HRA* protections. In particular, the establishment of the Joint Committee on Human Rights (JCHR) will be examined. Secondly, the role of international sources (and the *ECHR* specifically) must be recognised and, in particular, the way in which ECtHR jurisprudence influences the UK Courts.

Legislative and Executive Procedure

The obligations placed on the legislature and the executive by the *HRA* are intended to ensure that a culture of fundamental rights permeates the British legal system at all levels. The focus of the *HRA*'s impact on the political branches of government is not to limit their law-making authority. Instead it is to ensure political review of legislation as

to compatibility with rights. In addition to the prohibitions on public authorities acting contrary to Convention rights, the *HRA* discourages the enactment of laws which would be incompatible with rights and offers a remedy (in the form of amendment procedures) where a breach of rights is apparent.

The *HRA* provides no guidelines as to how Ministers are to determine rights-compatibility in making an s 19 statement, nor does it place specific obligations on the legislature to challenge the accuracy of such a statement. However, the practical and political implications of s 19 have led to extensive pre-legislative consideration of human rights issues, seeking to ensure that s 19 statements are more than merely a 'rubber-stamp'.

Both Cabinet Office Guidelines and the JCHR have been established to ensure that s 19 offers the intended political review of legislation. Although not strictly required by the text of the *HRA*, the Cabinet Office Guidelines suggest that the Minister be prepared to justify or explain his or her statement (while maintaining the confidentiality of any legal advice). Compatibility is considered to encompass an understanding that 'the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the Strasbourg Court'.[83] This is supplemented by the work of the JCHR which conducts additional investigations into the compatibility of legislation with Convention rights and is able to inform Parliament as to potential rights implications of Bills, regardless of the existence of an s 19(a) statement. The mandate of the JCHR goes beyond the Convention rights and can consider human rights not included within the *Convention*. The JCHR can also go beyond the statement of compatibility made by Ministers and offer consideration as to how a Bill may impact on rights in ways which don't constitute and incompatibility but may still limit the enjoyment of particular rights. The investigations of the JCHR into these statements have added an extra layer of protection by making Ministers answerable for the statements made under s 19 and will be examined further at 4.4.2.

[83] Home Office, 'The Human Rights Act 1998 Guidance for Departments' (2nd edn, 2000), [37] available at (24th February 2000) < http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/hract/guidance.htm> **[cited historically].**

International Influences

As has already been mentioned, the *HRA* is intrinsically linked to the *ECHR*. While retaining domestic control over the protection of rights (albeit the availability of applications to the ECtHR remains), the *HRA* has also created a formal relationship between the jurisprudence of the *ECHR* and that of the British courts.

Although the UK is signatory to other international human rights instruments (including the *Universal Declaration of Human Rights*[84], the *International Covenant on Civil and Political Rights*[85] and the *International Covenant on Economic Social and Cultural Rights),*[86] the focus of the impact of international law on the British protection of individual rights must be the *ECHR*. The *HRA* does not reference other human rights instruments, although many of the Convention rights are parallel to those found in other international instruments.

Michael Beloff suggests that even before the enactment of the *HRA*, the *ECHR* was a 'practical instrument in the hands of the English judiciary',[87] being used to assist in the interpretation of legislation and to assist in overcoming uncertainty in the common law.[88] For instance in *R v Miah,*[89] the *ECHR* (and also the *Universal Declaration on Human Rights*) were referenced in the House of Lords to demonstrate the existence of an international law presumption against retrospective laws, from which it was concluded that it was 'hardly credible' that the Government would promote or pass retrospective legislation.[90] The pre-*HRA* role of the *ECHR* was, however, very limited

[84] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

[85] *International Convenant on Civil and Political Rights,* opened for signature 16 December 1966, 993 UNTS 171 (entered into force 23 March 1976) (*'ICCPR')*.

[86] *International Covenant on Economic Social and Cultural Rights* opened for Signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) ('*ICESCR*').

[87] Michael Beloff, 'The Human Rights Act 1998 - A Year On' (2002) *Jersey and Guernsey Law Review* <http://www.jerseylaw.je/Publications/jerseylawreview/feb02/The_Human_Rights_Act_1998.aspx>; Michael Beloff and Helen Mountfield, 'Unconventional Behaviour: Judicial Uses of the Euroepan Convention in England and Wales' (1996) 5 *European Human Rights Law Review* 467.

[88] Beloff, 'The Human Rights Act 1998 – A Year on' above n 87; Beloff & Mountfield 'Unconventional Behaviour' above n 87.

[89] *R v Miah* [1974] 2 All ER 377; 1 WLR 683, 698; cited in Andrew Clapham, 'The European Convention on Human Rights in the British Courts: Problems Associates with the Incorporation of International Human Rights' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (1999) 95.

[90] Ibid.

and courts were under no *obligation* to consider ECtHR jurisprudence. Nor was the presumption of compatibility with international standards absolute. As Andrew Clapham notes, the judiciary recognised the possibility of clashes between *ECHR* obligations and statutes, and consistently concluded that they lacked the authority to remedy the inconsistency.[91]

While the *HRA* obliges the consideration of the ECtHR jurisprudence, the British judiciary is still able to diverge from Strasbourg jurisprudence.[92] This is, however, unsurprising given the fact that the ECtHR does not regard its own decisions as forming 'precedent'[93] and acknowledges that some deviation from its decisions is acceptable. This allowed deviation is related to the 'margin of appreciation' within ECtHR jurisprudence which retains the authority or 'supervision' of the CoE Institutions while allowing for a certain amount of state discretion in determining appropriate limits on Convention rights. [94]

The 'margin of appreciation' was first[95] stated in *Handyside v United Kingdom*[96] which addressed the issue of censorship in the UK, and in particular, the prohibition of 'The Little Red School Book' on the basis of obscenity. This was despite the book's sale and publication in other European states.[97] Under article 10 of the *ECHR,* States may make limitations on the right to freedom of expression for the protection of 'public morals'. The ECtHR determined that '[s]tate authorities are in principle in a better position than

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[91] Clapham, 'The European Convention on Human Rights in the British Courts', above n 89, 100 – 3.

[92] Eg. *Clancy v Caird* [2000] SLT 546 [3] per Lord Sutherland as quoted in Roger Masterman, 'Aspiriation or Foundation? The Status of Strasbourg Jurisprudence and the 'Convention rights' in Domestic Law' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007), 69.

[93] *Goodwin v UK* (2002) 35 EHRR 18 [74], cited in Masterman, above n 92, 57.

[94] Ignacio de la Rasilla del Moral, 'The Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine' (2006) 7 *German Law Review* 611, 613-614.

[95] Michael R. Hutchinson recognises the use of the term in the earlier case of *Lawless v Ireland* (1976) 1 Eur Court HR (ser A), 80. However this case was referring to the determination of the existence of a state of emergency in Ireland which allowed for the derogation from the ordinary standard of rights protection as opposed to the term's later use which allows for divergence between states as to what is an appropriate limitation of the rights. Michael R. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48(3) *International and Comparative Law Quarterly* 638, 639.

[96] *Handyside v United Kingdom* (1976) 24 Eur Court HR (ser A) 5 ('*Handyside*').

[97] The facts are discussed in the beginning of the judgment.

the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them'.[98]

In principle, any of the specified limitations for any of the Convention rights would be subject to consideration as to whether or not the limitation went beyond the 'margin' reserved to state discretion.[99] As discussed by Michael Hutchinson, the 'width' of the margin will be based on a variety of flexible criteria, including consensus between States (ie. can a European standard be identified?), the particular right being limited, the purpose of the limitation and the necessity of the particular action.[100]

In relation to the *HRA*, the margin of appreciation helps to explain why the *HRA* requires courts to 'take into account' Strasbourg Jurisprudence rather obliging them to follow it. The justification for the margin itself suggests that national courts are best positioned to interpret rights and the appropriateness of limitations; the ECtHR only comes into play where the national jurisdiction goes beyond the margin.[101]

At the same time, despite the fact that there is no *obligation* to follow ECtHR judgements, the British Courts have demonstrated a preference for conforming with Strasbourg jurisprudence. Lord Bingham in *Anderson*[102] stated the general rule:

> While the duty of the House under s 2(1) of the Human Rights Act 1998 is to take into account any judgment of the European Court, whose judgments are not strictly binding, the House will not without good reason depart from the principles laid down in a carefully considered judgement of the court sitting as Grand Chamber.[103]

It is thus evident that the *HRA* is legislation which incorporates the *ECHR* into domestic law, but in doing so attempts to ensure the autonomy of the British legal system. The British judiciary has an authoritative body of rights jurisprudence on which to draw, but is ultimately able to retain a 'British flavour' when interpreting those rights in the UK.

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[98] *Handyside*, [48].

[99] Hutchinson above n 95, 640

[100] Ibid.

[101] Ibid.

[102] *R (on the application of) v Secretary of State for the Home Department; Ex parte Anderson* [2002] 4 All ER 1089.

[103] Ibid [48].

2.2.4 Conclusions: United Kingdom

The shift towards a pro-active approach to rights protection in the UK was taken in the context of significant reforms within the constitutional structure of the UK. Although retaining the parliamentary sovereignty which is a fundamental feature of the British legal system, the *HRA* mandates for a rights-consistent interpretation of statutes by the judiciary but stops short of permitting actual invalidation of parliamentary Acts. It legitimises a broad, rights-based approach to interpretation of statutes and encourages incorporation of not merely the rights listed in the *ECHR* but also the jurisprudence of the ECtHR.

2.3 The European Union

Fundamental rights protection is part of the law of the European Union. The position of fundamental rights was solidified with the reference to the *Charter of Fundamental Rights of the European Union (EU Charter)*[104] within the *TEU*[105] in December 2009. However, this overt commitment within 'The Treaties' to the protection of fundamental rights has not always been a feature of Union (previously Community) Law.[106] The

[104] *Charter of Fundamental Rights of the European Union [2000] OJ C 364/01, as adapted in 2007, [2007] OJ C 303/01, as annexed to Treaty on European Union, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) as amended by Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) ('EU Charter').*

[105] *Treaty on European Union, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) as amended by Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) ('TEU').*

[106] Terminology:

Acquis communitare refers to the body of law of the European Communities including the founding Treaties and the ever-growing body of Regulations and Directives. New Member States are obliged to accept the whole *acquis* when acceding to the Union.

Community Law refers to the body of law including the Treaties and the subsidiary law formed by the institutions. The term 'community law' was used up until December 2009 at which time the terminology was altered to reflect the structural changes within the Union. 'Community law', is therefore used in this thesis when discussing the historical developments in rights protection.

European Communities (or Communities) refers to the European Coal and Steel Community, the European Economic Community and Euratom.

The **European Community** (EC) refers to the European Economic Community. The change in terminology occurred in 1961.

Union Law refers to the law of the European Union after December 2009. It is also used when applying pre-2009 law which would previously have been termed 'community law'. Both 'Union law' and 'Community law' are used in this thesis.

post-*Lisbon Treaty* approach to the protection of fundamental rights represents a shift in the primary source of rights protected within the EU. However, the form of protection offered reflects the gradual inclusion of rights via (predominantly) non-Treaty based sources[107] – most notably the European Court of Justice (ECJ). In order to understand the protection of rights within the European Union, it is necessary first to understand how the system reached its current form.

From the early Communities in the 1950s, the appropriate relationship between fundamental rights and 'European' law has been discussed and debated by Member States and the institutions. This has meant that the protection of fundamental rights in the EU cannot adequately be explained by reference to a single defining moment or Treaty provision. Thus, in order to understand how rights are protected, it is necessary to place those protections within the context of their historical developments. What follows is an examination of the development of the protection of rights within the European Union up to and including the *EU Charter (*which seeks to 'strengthen' those protections).[108]

Fundamental rights were initially absent from both the Treaties and judicial consideration within the early European Communities. Therefore, the first issue of consideration, in 2.3.1, will be the reasons for, and the effect of, this early silence. Then, the response to concerns arising from the gap between the standard of protection offered by the Member States and protections in the EU will be addressed. In particular, the role of the ECJ in articulating the protected status of rights within Community law will be considered. Chapter 2.3.2 considers the attention given to fundamental rights by the non-judicial Community institutions, as well as the progression of Treaty-based

[107] 'The Treaties' and 'Treaty Law' refer to the constitutional treaties of the EU.

[108] *EU Charter,* Preamble*:*

> [I]t is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.
>
> This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and
>
> the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

developments which reflect the Member States' common commitment to ensuring that fundamental rights were given protection within Community Law. Finally, in 2.3.3, the development of the *EU Charter* - from its solemn proclamation lacking legal 'bite' to a soft-law instrument utilised by the ECJ and ultimately the impact of the reference to the *EU Charter* within the *Lisbon Treaty* – will be traced.

2.3.1 ECJ Development of Rights Protection in the European Communities

Fundamental Rights during the Early Integration Period: 1949 – 1968

In the founding years of the Communities, fundamental rights were of relatively little significance within the Communities themselves. Despite various domestic and international commitments by each of the six individual Member States - Belgium, France, Germany, Italy, Luxembourg and the Netherlands - the founding Treaties were notably silent on the matter of fundamental rights. The significance of this period, therefore, is not in considering how rights were protected, but in understanding why they were not. Additionally, the initial reluctance of the ECJ to 'read in' rights as informing the interpretation and application of EC laws provides a sharp contrast to developments in later years.

Rights were not included in the *Treaty of Rome*[109] establishing the European Coal and Steel Community (ECSC). Fundamental rights were considered for inclusion in the founding Treaties – in particular there were suggestions from the German delegations to the negotiations that some form of rights guarantees be included in the 1957 *Treaties of Paris* establishing the European Atomic Energy Community (Euratom)[110] and the European Economic Community (EEC).[111] However, in the adopted treaties there was no general protection of rights guaranteed within the Communities.[112] The treaties were

[109] *Treaty Instituting the Coal and Steel Community*, signed 18 April 1951, 261 UNTS 140 (entered into force 23 July 1952). [**cited historically**].

[110] *Treaty Establishing the European Atomic Energy Community*, opened for signature 25 March 1957, 298 UNTS 167 (entered into force 1 January 1958). [**cited historically**].

[111] *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958) (*'EEC Treaty'*). [**cited historically**].

[112] Discussed for example in Andrew Clapham, *Human Rights and the European Community: A Critical Overview* (Nomos, 1991), 92-3; Mats Lindfelt, 'A Bill of Rights for the European Union' (1999) 8 *Research Report for the Institute for Human Rights: Abo Akaemi University* <http://web.abo.fi/instut/imr/norfa/mats_billofrights.pdf>, 8.

largely silent on the matter of rights and freedoms, with the exception of those freedoms considered necessary for the creation of an effective common market - the 'four freedoms' of freedom of movement for goods, persons, services and capital.[113]

The almost exclusive focus on 'economic' issues within the early Communities provides a realistic explanation for the lack of consideration of rights protection as a relevant issue to enshrine within the Communities' law. Rather than implying a lack of commitment to fundamental rights protections amongst the Member States, the silence as to rights protection with the early Communities reflects an assumption that the interests of the Communities were simply unlikely to conflict with fundamental rights.[114] Pierre Pescatore (retrospectively) explained this attitude:

> [O]ne may even wonder how a problem concerning human rights could possibly arise in an organisation whose tasks are mainly of an economic, social and technical nature. Experience shows that it is in a quite different sphere of public life that problems relating to human rights normally arise.[115]

The inclusion of rights protections within the proposed, but ultimately unsuccessful, European Political Community (EPC) further supports the proposition that it was the nature of the interests of the EC that led to the absence of rights protection mechanisms. The EPC was to encourage political integration parallel to the economic integration of the existing Communities.[116] However, the EPC (as well as the proposed European Defence Community (EDC)) failed to garner sufficient support and ultimately did not proceed, and thus the EC remained without Treaty-based rights protections.[117]

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[113] The 'four freedoms' are not set out within the EC Treaty as a clear list, but rather identified through various provisions within the Treaties and supported by Directives and Regulations.

[114] Discussed eg: Lammy Betten and Nicholas Grief, *EU Law and Human Rights* (Longman, 1998).

[115] Pierre Pescatore, 'Fundamental Rights and Freedoms in the System of the European Communities' (1970) 18(2) *American Journal of Comparative Law* 343, 344.

[116] Denys P. Myers, 'Human Rights in Europe' (1954) 48(2) *American Journal of International Law* 299, 300-1.

[117] The EPC was proposed subsequent to the signing (but prior to ratification) of the EDC in order to establish the political mechanisms and unity to allow for the functioning of the EDC. For a concise overview of the EPC and EDC see A. H. Robertson, 'Different Approaches to European Unity' (1954) 3(4) *American Journal of Comparative Law* 502, 510-513. For discussion see Herbert W. Briggs, 'The Proposed European Political Community' (1954) 48(1) *American Journal of International Law* 110, 110 - 111; Michael Burgess, *Federalism and European Union: the Building of Europe, 1950-2000* (Routledge, 2000), 32; John Pinder, 'European Community and Nation-State: A Case for a Neo-Federalism?' (1986) 62(1) *International Affairs* 41, 44-45; Gerhard Bebr, 'The European Defence Community and the Western European Union: An Agonizing Dilemma' (1955) 7(2) *Stanford Law Review* 169.

Michael Burgess has described the process of integration in this era as 'federalism by instalments.'[118] By this he means that the ECSC, EEC and Euratom were regarded as being the first steps in creating an 'ever closer union' amongst the European states.[119] Certainly further integration, including 'political' rather than primarily 'economic' issues, was always predicted, but the enthusiasm for integration was tempered by an understanding of the political reality that it would be neither an immediate nor rapid process.[120] The failure of the EPC and EDC led to a temporary stalling of political integration amongst the Member States of the Communities.[121] Although economic integration continued to evolve and the Communities expanded (both in areas of competence and in the number of Member States), political integration stagnated for the next few decades. Combined with the lack of a perceived pressing need for specific Community-based rights protection, the consequence of this lack of political integration was the continued absence of fundamental rights protection within the Treaties. This silence was a feature not only of the early years of integration but for many years after.

It must be emphasised that despite the lack of formal mechanisms for the protection of rights within Community law, the Member States continued to express commitments to fundamental rights protection outside of the integration process. While there was no formal protection of rights within Community law direct steps towards the protection of individual rights were being taken both by the individual Member States and by European states collectively beyond those involved in the Communities. Although individual Community Member States did have specific protections within their constitutions via domestic legislation, it was the establishment of the Council of Europe (CoE) and the signing of the *ECHR* which proved to be the most important move towards the protection of rights. As will be seen throughout this chapter, the *ECHR* has had far reaching effects on the Communities (and later the European Union).

Although quite distinct from the Communities, and lacking any direct relationship with the institutions of the Communities, the CoE had (and as will be explained later in the

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[118] Burgess, above n 117.

[119] The first paragraph of the preamble of the *EEC Treaty*: 'Determined to establish the foundations of an ever closer union among the peoples of Europe'.

[120] Pinder, above n 117, 44-5.

[121] Robert A. Jones, *The Politics and Economics of the European Union: An Introductory Text* (Edward Elgar, 1996), 9 - 18; Ernest Wistrich, *The United States of Europe* (Routledge, 1994), 29 - 33.

chapter, continues to have) an important impact on the Communities' approach to the protection of fundamental rights. All six EC founding Member States were members of the CoE prior to committing to Community-based integration,[122] and consequently, entered into the Communities with pre-existing European-level commitments regarding the protection of fundamental rights.

Formed in 1949 with an aim 'to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress,'[123] the CoE focused on political co-operation rather than integration. From the beginning, the protection of fundamental rights was to be a major concern of the CoE and in 1950 in Rome, the *ECHR* was signed. All of the Communities' Member States were signatories to the *ECHR.*[124] Thus despite the lack of specific Community measures aimed at the protection of fundamental rights, it is evident that the Member States were not unwilling to commit to European standard of rights protection, albeit one which was separate from the Community integration project. This commitment to rights at the 'European' level went beyond a mere acknowledgement of common standard or a broad international commitment to a core common standard. The *ECHR* standard of protection was, and remains, binding. The *ECHR* led to the establishment of a quasi-judicial institution - European Commission of Human Rights (1951 - 1998)[125] - and an authoritative judicial organ - the ECtHR (est. 1959) - as institutions with the responsibility of hearing

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[122] Belgium, France, Italy, the Netherlands and Luxembourg were founding members of the CoE in 1949, along with Denmark, Ireland, Norway, Sweden and the UK. Germany became a member in 1950 prior to the signing of the *ECHR*.

[123] *Statute of the Council of Europe*, opened for signature 5 May 1949, 8 UNTS 103 (entered into force 3 August 1949) ('*London Treaty*').

[124] However, France did not ratify the ECHR until 1974. Dates of signature and ratification can be found at: Council of Europe, *Table of Signatures and Ratifications for the ECHR* (5 March 2009) <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=5/3/2009&CL=ENG>

[125] In 1998, Protocol 11 to the ECHR amended Article 19 and removed the European Commission during a process of reform which expanded the role of the ECtHR to cover much of what the European Commission on Human Rights had previously undertaken. Original Article 19 (repealed 1998) provided:

> To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:
>
> (1) A European Commission of Human Rights hereinafter referred to as 'the Commission';
>
> (2) A European Court of Human Rights, hereinafter referred to as 'the Court'.

allegations as to Member State violations of the *ECHR* and making decisions regarding CoE Member State compatibility with *ECHR* obligations.[126]

The European Commission of Human Rights and the ECtHR were established under Article 19 of the *ECHR*. Until 1998, the role of the European Commission of Human Rights was to receive petitions from Member States or, where the Member State had recognised the Commission's jurisdiction, from individuals. The Commission would then consider whether the petition was admissible, conduct an investigation as to the merit of the case, and attempt to facilitate an amicable settlement. Where the CoE Member State had accepted the jurisdiction of the ECtHR, the case could be referred to the Court. Even if the Member State had not accepted jurisdiction, a 'minimum standard' of rights protection allowed that the complaint could be referred to the Committee of Ministers of the CoE to take action where it was believed rights had been violated.[127]

In the 1950s, the CoE rights protection mechanisms had little impact on the Communities' approach to rights. At most, the existence of the *ECHR* (and Member State commitment to the rights protection system) provided an alternative to Community political integration, decreasing any perceived urgency to take a distinct Community approach. Not only was it viewed as unlikely that there would be a conflict between rights and the activities of the Communities, but in the event that there *was* an unforeseen conflict, the institutions of the Communities were the product of the Member States which had committed to rights protection and they would be unlikely to continue to direct the Communities to breach those rights.[128]

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[126] The CoE is also responsible for the *European Social Charter* which was signed in 1961 in Turin. Whereas, the focus of the ECHR is on civil and political rights, the *European Social Charter* seeks to protect social and cultural rights. The European Social Charter is not enforced by the ECtHR. *European Social Charter*, opened for signature 18 October 1961, 529 UNTS 89 (entered into force 26 February 1965).

[127] A good explanation of the Commission/Court relationship and the European rights protection system can be found in P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer, 1998).

[128] The possibility of conflicting jurisdiction was merely 'potential' for much of the EC's history. The position that the EC was a 'creature' of the Member States and thus subject to *de facto* ECtHR review was first realised in *Matthews v United Kingdom* [1999] I Eur Court HR 251 ('*Matthews* Case'). In the *Matthews* Case – which involved the voting rights in EU elections of UK Citizens residing in Gibraltar - the ECtHR maintained that while there was no jurisdiction of the ECtHR over the Community institutions, the individual Member States were still bound by the ECHR even when acting under the Treaties. See for discussion Josephine Steiner et. al, *EU Law* (Oxford University Press, 9th ed, 2009),

However, reliance on the Member States and their commitment to alternative rights protection mechanisms did not adequately address the nature of the High Authority[129] as an institution of the Communities and thus independent from any given state. The lack of inclusion of rights protection within the Treaties of the Communities meant that although the states themselves might be required to comply with rights commitments, these protections against encroachment of rights did not apply to the institutions of the Communities. Additionally, if a legislative act of the Communities encroached on fundamental rights, the Member States may be faced with conflicting obligations under Community and *ECHR* commitments. The ECtHR lacked the jurisdiction to review the legislative acts of the Communities. Thus despite the existence of a 'European' standard, the Community remained exempt – and there were at least questions as to EC Member States so far as the areas of competency surrendered to the Communities were concerned. The possibility of conflicting or competing jurisdiction of the two 'European' courts – the ECJ and the ECtHR – did not become an issue of significant debate until the late 1990s/early 2000s.[130] Instead, in the early integration period there was a 'gap' between the apparent 'European' standard of rights protection offered by the *ECHR* and the reality of a lack of identifiable, rights-based standards within the EC. This became evident in *Stork v High Authority*[131] in 1958.

In *Stork*, a German company sought an annulment of a decision of the ECSC High Authority on the basis that it was in conflict with fundamental rights guaranteed by the German Constitution.[132] The ECJ ruled that Article 8 of the ECSC Treaty, establishing the responsibilities of the High Authority, did not require that it consider domestic legal principles including fundamental rights:

123; Trevor C. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Union* (Oxford University Press, 7th ed, 2010), 142.

[129] The High Authority was the governing body of the Communities. Unlike the other institutions, the High Authority was not made up of Ministers representing the Member States. Instead, the High Authority was an independent body consisting of 'technocrats', who, although appointed by the Member States, did not represent any particular Member State. Prior to the *Merger Treaty (1961)* each of the three Communities had individual 'High Authorities'. With the *Merger Treaty*, the Commission served this role for all of the Communities.

[130] See above n 128.

[131] *Stork v High Authority* (C-1/58) [1958] ECR 17 ('*Stork*').

[132] Ibid.

> [T]he High Authority is not empowered to examine a ground of complaint which maintains that…it infringes on principle of German Constitutional Law … [T]he High Authority is only required to apply community law, it is not competent to apply the national law of the Member States.[133]

This position was maintained in the *Geitling*[134] decision, which made an explicit reference to the lack of fundamental rights within the Treaties.

> Community law, such as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights.[135]

The ECJ upheld its decision to refuse to consider domestic legal principles as a limitation on the High Authority in 1964 in the *Sgarlata*[136] decision. In *Sgarlata*, the applicant claimed that a restrictive understanding of Article 173 of the *EEC Treaty*[137] would deprive individuals of the protection of the courts with regard to Community regulations and thus violate fundamental protections guaranteed not merely by *a* Member State, but instead by *all* Member States.[138]

Article 173 *EEC Treaty* stated that '[a]ny natural or legal person may, under the same conditions, appeal against a decision addressed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and specific concern to him'.[139] The regulation concerned was considered to be 'general' as it dealt with Common Agricultural Policy (CAP) and the standardisation of

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[133] Ibid, 26.

[134] *Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community* (C-36/59) [1960] ECR 423.

[135] Ibid.

[136] *Sgarlata and others v Commission of the EEC* (C-40/64) [1965] ECR 215 (*'Sgarlata'*).

[137] Article 173 of the *EEC Treaty:*

> The Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Council and the Commission. For this purpose, it shall be competent to give judgment on appeals by a Member State, the Council or the Commission on grounds of incompetence, of errors of substantial form, of infringement of this Treaty or of any legal provision relating to its application, or of abuse of power.
>
> Any natural or legal person may, under the same conditions, appeal against a decision addressed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and specific concern to him.

[138] *Sgarlata*, (C-40/64) [1965] ECR 215, 227.

[139] *EEC Treaty*, Article 173.

fruit prices. This meant that the regulation could not be considered as directly concerning the applicant and thus he was excluded from recourse to the court. The ECJ stated that its task was to apply the Treaties, and in light of the restrictive wording of the Treaty, it could not be swayed by other considerations, even where the legal principles were offered in all Member States.[140]

The effect of the position taken by the ECJ was that the actions of the Communities were immune from review as to compatibility with human rights standards. Despite the clear statements by the Member States of their individual commitment to the protection of rights, the absence of any specific protections within the Community Treaties left fundamental rights unprotected.

The First Moves towards the Protection of Rights in the Communities – the ECJ in the 1970s

This absence of rights protection could not be maintained if the Communities were to retain legitimacy and encourage further integration. Whereas Community competencies may once have been viewed as rarely interacting with rights, by the late 1960s, this was clearly not the case. The potential of the Communities to encroach on fundamental rights, and the lack of action to remedy this was criticised, with some jurists suggesting that the supremacy of Community law would be at risk should the discrepancy between the standards of rights protection offered by Member States as opposed to the Communities remain.[141] In the late 1960s and the 1970s, there was a decisive shift in the approach taken by the ECJ towards the protection of rights and this 'gap' began to be filled.

In *Stauder v City of Ulm,*[142] the applicant had been entitled to purchase butter at a reduced rate under a Community initiative. The German language version of the Regulation required that the consumer's name be provided on a coupon in order to evidence his entitlement. In other language versions, the coupon did not require a name

[140] *Sgarlata,* (C-40/64) [1965] ECR 215.

[141] In particular the German and Italian Constitutional courts had raised concerns. See for discussion A Glenn Mower Jr, 'The Implementation of Human Rights through European Community Institutions' (1980) 2(2) *Universal Human Rights* 43, 45-47; Werner J Feld, 'The Court of Justice - The Invisible Arm' (1978) 440 *Annals of the American Acaemy of Political and Social Science* 42, 48 - 49; Pescatore, above n 115, 344.

[142] *Stauder v City of Ulm* (C-29/69) [1969] ECR 419.

to be given. This, the applicant claimed, was a violation of his right to privacy under the German Constitution. The case was referred to the ECJ by a domestic German Court.

The ECJ found that the Regulation did not require that names be provided and thus did not violate fundamental rights.[143] The significance of the decision is that, in reaching its decision, the ECJ specifically recognised that fundamental rights *do* form part of Community law, albeit unwritten, as part of the 'general principles of community law':

> The most liberal interpretation must prevail, provided that it is sufficient to achieve the objectives pursued by the decision…Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of community law and protected by the court.[144]

The *Stauder* ruling was not a blanket inclusion of fundamental rights in Community law. Rather, it indicated that the ECJ was willing to recognise that fundamental rights had a role in the Communities. Although the ECJ did not elaborate on the authority for reading in fundamental rights as general principles of law, there are two articles of the *EEC Treaty* which may be taken to imply authority.[145]

Article 164 *EEC Treaty*[146] specified that '[t]he Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty', the implication being that the 'law' of the Communities goes beyond the written rules within the Treaties. Secondly, Article 173 of the *EEC Treaty* makes reference to the ECJ's responsibility to 'review the lawfulness of acts other than recommendations or opinions of the Council and the Commission' and to make decisions regarding the 'infringement

[143] Ibid, 424-425.

[144] Ibid.

[145] Discussed for example in Christian Calliess, 'The Charter of Fundamental Rights of the European Union' in Dirk Ehlers and Ulrich Becker (eds), *European fundamental rights and freedoms* (De Gruyter Recht, 2007), 518; Koen Lenaerts, 'Respect for Fundamental Rights as a Constitutional Principle of the European Union' (2000) 6 *Columbia Journal of European law* 1, 5; Steiner, above n 128, 116-9.

[146] Since amended, now *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1993) ('*TFEU*'), Article 250.

of this Treaty or of any legal provision relating to its application, or of abuse of power'.[147]

By reading fundamental rights into the law of the Communities, the ECJ was departing from its earlier decisions. However, although the ECJ acknowledged the existence of rights as part of the 'general principles' of EC law, the *Stauder* decision did not address either the sources of these fundamental rights or their scope.

Internationale Handelsgesellschaft,[148] decided in 1970, again raised the issue of individual rights being protected within the domestic law but having tenuous status within Community law. In this case, the EC Regulation, which required the forfeiture of deposits by exporters where they failed to comply with particular time frames, was in conflict with the principle of proportionality protected not only by the German Constitution, but also by similar principles found in other Member States.[149] The case was referred to the ECJ by the domestic German court. At the same time, the *Bundesverfassungsgericht* (German Constitutional Court) had made it clear that if there was a conflict between constitutionally protected, fundamental rights and the supremacy of Community law, the German court would not uphold the supremacy of EC law.[150]

The ECJ, in *Internationale Handelsgesellschaft*, specifically addressed the role of both national constitutional rights and fundamental human rights within the context of the European Communities. The ECJ concluded that although the supremacy of Community law must be upheld - to allow deviation from this principle would undermine the operation of the Communities - fundamental rights derived from *common* constitutional traditions would, however, form part of Community law and provide an effective limitation on the ability of the institutions and regulations of the Community to breach rights. The ECJ stated:

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[147] Ibid, Article 263.

[148] *Internationale Handelsgesellschaft v Einfuhr- und Vorratssetelle fur Fetreide und Futtermitte* (C-11/70) [1970] ECR 1125 ('*Internationale Handelsgesellschaft').*

[149] Ibid.

[150] *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* BVerfGE 37, 271 (1974) ('*Solange I*'), English translation available at

http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588.

> Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question…
>
> However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[151]

The constitutional traditions common to the member states were the first, although not the only, source of EC-protected fundamental rights to be acknowledged by the ECJ. The ECJ continued in its development of human rights jurisprudence when, in the 1973 *Nold*[152] decision, it included 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'[153] as a second source of inspiration for the rights which were to be considered as forming part of the 'general principles'. Although the applicant in *Nold* had referred to the *ECHR* in his submission, the ECJ refrained from mentioning specific treaties.

In *Hauer v Land Rheinland-Pfalz,*[154] the ECJ further applied the dual sources of rights: the constitutional traditions of the members states and international treaties. Lisette Hauer claimed that regulations prohibiting the planting of vines on particular lands violated both her property rights as a landowner and the right to pursue a profession. Reiterating the position in *Nold*, the ECJ found that the individual rights were 'guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the First Protocol to the

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[151] *Internationale Handelsgesellschaft*, (C-11/70) [1970] ECR 1125, 1134.

[152] *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* (C-4/73) [1974] ECR 491 ('*Nold*').

[153] Ibid, [13].

[154] *Hauer v Land Rheinland Pfalz* (C-44/79) 1979 ECR 3727.

ECHR'[155] - utilising both commonalities amongst Member States and their common international commitments.

Further, the ECJ indicated that the national courts' concerns as to the incompatibility of Community regulations with fundamental rights must be viewed as a challenge to the validity of the regulation, rather than as a challenge to the supremacy of the Community law, thereby offering an explicit response to the German Court's position in particular. The ECJ stated:

> [T]he doubts evinced by a national court as to the compatibility of the provisions of an act of an institution of the communities with the rules concerning the protection of fundamental rights formulated with reference to national constitutional law must be understood as questioning the validity of that act in the light of community law.[156]

That the *ECHR* had particular significance within Community Law, was already evident through the ECJ's repeated references to it when identifying fundamental rights, making explicit reference to the *Convention* in several cases. For example, in *Johnson v Chief Constable of the Royal Ulster Constabulary,* the ECJ stated that the 'principles on which [the *ECHR*] is based *must* be taken into consideration in Community Law' (emphasis added). [157] *Johnson v Chief Constable* was referred to in later cases such as *Elliniki Radiophonia Tiléorassi AE v Pliroforissis,*[158] where the Court indicated that the *ECHR* had 'special significance' in determining which rights are protected within Community Law.[159]

The result of these developments was that the ECJ came to be viewed as the protector of human rights within the Communities. While neither the constitutional traditions of the Member States, nor the *ECHR*, were *directly* binding on the Community institutions, they came to play an important role both in identifying and in understanding rights within the Communities. In shifting from its earlier position on 'reading in' rights to

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[155] Ibid.

[156] Ibid, 3745.

[157] *Johnson v Chief Constable of the Royal Ulster Constabulary* (C-222/84) [1986] ECR 1651, 1682.

[158] *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia. Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios* (C-260/89) [1991] ECR I-2925 ('*ERT*').

[159] Ibid, 2963.

Community Law, the ECJ was able to secure the protection of rights and thus fill the 'gap' in protection between Community law and Member States' other international commitments.

2.3.2 Non-ECJ Protection of Fundamental Rights – the 1970s to the EU Charter

While the ECJ was undoubtedly the most active of the Community institutions when it came to considering the role of rights within the Communities, the other institutions were not silent. Concurrent with the developments in human rights protections in the ECJ, political debate continued regarding how rights could best be given voice within the Communities. This has taken three main forms: firstly, debate and actions relating to the inclusion of rights within the Treaties or as part of the Community legal order, distinct from relying on the ECJ; secondly, re-consideration of the relationship between the *ECHR* and the Communities; and thirdly, concern with establishment and membership criteria which were of growing significance as the Communities gained both wider competencies and more members. These are each introduced in turn below.

Treaty Amendments

In 1976, the Commission, at the request of the Parliament, produced a report on the action to be undertaken to ensure that fundamental rights were protected within the Communities.[160] The Commission indicated that the Community institutions actively protected the rights guaranteed in the treaties and emphasized the role of the ECJ in ensuring the protection of fundamental rights within the Communities. Although the Commission supported the establishment of a bill or charter of rights for the Communities, it also indicated that such a charter would not be forthcoming in the short term. The Report stated that the ECJ-based protections, supplemented by an awareness of and commitment to the protection of rights by other institutions, offered sufficient protection.[161]

[160] OJ C-26 (1973). Discussed in Reinhard Rack and Stefan Lausegger, 'The Role of the European Parliament; Past and Future' in Philip Alston, Mara R. Bustelo and James Heenan (eds), *The EU and Human Rights* (Oxford University Press, 1999) ; Hartley, above n 128, 140.

[161] European Commission, Report Fundamental Rights, European Communities Bulletin Supplement 5 (1976). Discussed in Hartley, above n 128, 140.

A Joint Declaration was issued in 1977 by the Council, Commission and Parliament stating:

> 1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and The European Convention for the Protection of Human Rights and Fundamental Freedoms.
>
> 2. In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights.[162]

The 1977 Joint Declaration is a political document: it has no legal effect. The various institutions have made a political commitment to adhere to human rights.[163] While the ECJ has made mention of the Joint Declaration, it did so only as an acknowledgement that the other institutions were taking a similar approach to the role of fundamental rights, and particularly those rights included in the *ECHR*, which was within the law of the Community.[164]

Similar political expressions of rights were attempted in the 1970s and 1980s. For example the *Declaration of Fundamental Rights and Freedoms*[165] was a catalogue of rights, heavily influenced by the *ECHR*, which was adopted by the Parliament in 1989 but not endorsed by the other institutions.[166]

The first binding, non-judicial statement that rights were to be considered as an integral part of the law of the Communities is found in the *Single European Act (1986) (SEA),*[167] which was the first major revision of the Treaties since the 1950s. Along with the economic rights or 'four freedoms' from the EEC Treaty, the *SEA* preamble states that

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[162] *Joint Declaration of Fundamental Rights and Freedoms* [1977] OJ C 103/1.

[163] Ralph Beddard, *Human Rights and Europe* (Grotius Publications, 1993), 36; Hartley, above n 128, 140-5.

[164] The ECJ has mentioned the Joint Declaration, in, eg: *Accession by the Community to the Convention for the Protection of Human Rights* (Opinion 2/94) [1996] ECR I-1759 ('*Opinion 2/94*'). See also Lindfelt, above n. 112.

[165] *Declaration of Fundamental Rights and Freedoms* [1989] OJ C 120/51.

[166] Ibid.

[167] *Single European Act,* opened for signature 2 February 1986, [1986] OJ L 169 (entered into force 1 July 1987) (*'SEA'*).

an aim of the Communities is to 'promote democracy on the basis of the fundamental rights.'[168]

It was not until the formation of the European Union with the *Maastricht Treaty (TEU (Maastricht))*[169] in 1992 that human rights were given Treaty status. Although the protection offered in the *TEU (Maastricht)* was largely a confirmation of the existing protections expressed by the ECJ, in each of the subsequent versions of the *Treaty on European Union* – amended by the *Treaty of Amsterdam,*[170] the *Treaty of Nice*[171] and most recently the *Lisbon Treaty* - the protection of fundamental rights has been strengthened.

The *TEU (Maastricht)* in 1992 not only confirmed, in the preamble, the Member States' 'attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law', but went further to give the rights explicit recognition within Article F:

> 1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
>
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The protection in the *TEU (Maastricht)* was largely a re-statement of existing case-law with regard to fundamental rights and was of limited relevance to the 'political pillars' of Justice and Home Affairs and Common and Security Policy. It was, however,

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[168] Ibid, Preamble.

[169] *Treaty on European Union,* opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) ('*TEU (Maastricht)'*).

[170] *Treaty on European Union,* opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) as amended by *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Comminites and Certain Related Acts*, opened for signature 2 October 1997, [1997] OJ C 340/1 (entered into force 1 May 1999) ('*TEU (Amsterdam)'*).

[171] *Treaty on European Union,* opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) as amended by *Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Comminites and Certain Related Acts*, opened for signature 26 February 2001, [2001] OJ C 80/1 (entered into force 1 February 2003) ('*TEU (Nice)'*).

significant because it shifted the source of protection of rights away from the ECJ and expressly embedded fundamental rights within the Treaties. Further, it was a strong statement from the Member States of their acceptance of the approach taken by the ECJ, and of their recognition of the necessity of fundamental rights as a limitation on the power of the Union.[172]

The 1997 *Amsterdam Treaty* made several changes to the protection of human rights within the Union. Most significantly, Article 7 of the *TEU (Amsterdam)* introduced a procedure whereby Member States could face serious consequences (including suspension of voting privileges) if the Council, acting in conjunction with the Parliament and the Commission, determined that there was 'a serious and persistent breach' of fundamental rights.[173]

Finally, the *Treaty of Nice* amended Article 7 to allow that the likelihood of a breach was enough to warrant action by the Community. The *TEU (Nice)* was, however, signed and ratified in the knowledge of an additional development in the Union's approach to the protection of rights – the *EU Charter* - which was drafted in 1999-2000 and was 'solemnly proclaimed' in December 2000.

Like some of the initiatives mentioned above, the *Charter* was initially not a legally binding instrument. Although the drafting Conventions took the approach that the *Charter* ought one day to be given legal status, the decision of the exact nature of legal protection to be offered was left to be considered at a later date. The 'solemn proclamation' therefore had political rather than legal consequences. It was viewed as not only promoting the rights which it catalogues, but also as encouraging citizen identification with the EU and creating the perception of the Union as a rights-focused organisation. Prior to the granting of a formal legal status, the *EU Charter* was utilized more actively in the protection of rights than would be immediately evident given its 'proclamatory' status, but this will be addressed below.

[172] Discussion of the successive amendments to the *TEU* can be found in Steiner, above n 128, 13-16.

[173] *TEU (Amsterdam),* Article 6.

The ECHR and the EU

The *EU Charter* was not the first attempt at specifying in an authoritative catalogue which rights were to be given legal protection within the Union. While the ECJ has tended to give weight to the jurisprudence of the ECtHR, as well as expressing a reluctance to conflict with its jurisprudence, it remained clear that the *Convention* was not binding on the Community institutions.[174] The inclusion of the *ECHR* as part of Community Law had previously been proposed, but ultimately it retains only its 'inspirational' status.[175] These failed proposals for accession to the ECHR provide an important background to the European Union's approach to rights protection and the drafting of the *EU Charter*.

There have been two main proposals throughout the Union's development for accession to the *ECHR* – in 1979 and the 1990s. Although the 1979 proposal – in the form of a memorandum issued by the Commission at the prompting of the Parliament[176] – fell by the wayside, it is worth mentioning for two reasons. Firstly, given the existing ECJ jurisprudence on human rights, including the role of the *ECHR*, it demonstrates an early acceptance of the shifted stance of the Court. Additionally, despite the above-mentioned report of the Commission, which that indicated that rights protection within the Communities was sufficient, the Memorandum showed early support for external supervision of rights within the Union.[177]

The second major attempt to accede to the *ECHR* was likewise unsuccessful, but for significantly different reasons. In Opinion 2/94, issued in 1996, the ECJ was asked by the Council to determine whether accession to the *ECHR* was compatible with the EC Treaty.[178] The ECJ said that it was not. According to the ECJ, nothing in the Treaties

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[174] Steiner, n 128, 124.

[175] Amendments to the *TEU* have allowed that the Union will acceed to the *ECHR*. However, this has not yet occurred. *Treaty on European Union,* opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) as amended by *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) ('*TEU*'), *Protocol No.8 on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.*

[176] See, eg: Vaughne Miller, *Human Rights in the EU: The Charter of Fundamental Rights* (Great Britain, Parliament, House of Commons, Library, 2000), 16; Lindfelt, above n 112.

[177] *Opinion 2/94,* [1996] ECR I-1759.

[178] The proposal was for the Communities to accede as the Union lacked capacity to sign treaties. This would have left the non-Community pillars still outside the jurisdiction of the ECtHR.

granted the Communities competence to accede to the *ECHR*. Furthermore, the ECJ rejected the use of Article 235 to expand the law-making authority of the Communities. Article 235 (since amended) stated:

> If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions.

The ECJ indicated that the judicial recognition of rights provided a comprehensive protection. Not only could Article 235 not be used expansively – that is, it could not be used as a *de facto* amendment to the Treaties - but in any event there was no 'necessity' to do so. The court referred to its earlier decisions, noting that rights were effectively protected as part of the 'general principles', and reiterated its view that the *ECHR* had 'special significance' in identifying and protecting rights.[179]

Regardless of the lack of EC Competency to join the *ECHR*, the ECJ also noted (as did the Council) that the current form and status of the *ECHR* excluded the EC from accession. This was because the *ECHR* can only be signed by those states (and by only those states) that have membership in the CoE – both criteria which the EC was unable to meet.[180]

In determining that there was no competency for the EC to accede to the *ECHR,* the ECJ was maintaining its earlier position, that while the *ECHR* was of relevance to EC Law, it was not binding. At the same time, the Court was making clear that fundamental rights *are* protected within Community Law and thus Article 235 could not be relied on to empower the Community to enter into an international agreement outside the scope of ordinary competencies granted by the Treaties.

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[179] Hartley, above n 128, 123-4l; Steiner, above n 128, 123 – 141.

[180] *ECHR*, Article 59 only allowed for Member States of the CoE to sign the *ECHR*. Article 4 *London Treaty* specifies that only states may join the CoE. The amendments to the *ECHR* with the entry into force of *Protocol 14* have provided that the EU may join the *ECHR* system and negotiations as to how to facilitate such an amendment.

'The Enlargement' and Fundamental Rights

Outside of the Constitutional Treaties and the *ECHR*, there were also other moves to better secure the protection of rights, in particular through requirements that needed to be met prior to the accession of new members. From its original six members, the Communities (and now the Union) have expanded to include 27 Member States.[181] Throughout the enlargement processes, meeting standards of human rights protection within the domestic systems of the applicant states was first an implicit, and later an explicit, requirement of acceptance.

In 1973 the Member States had announced a commitment to retaining a 'European Identity'. In a Joint Declaration of European Identity the Member States stressed that the EC was 'determined to defend the principles of representative democracy, of the rule of law, of social justice…and the respect for human rights.'[182] Although these are rather broad standards, they have been relied on to delay accession. Erik Erikson and J Gower both point to the delays in confirming the membership of Greece (in 1981) and Spain and Portugal (both in 1986). In each of these states, democratic governments needed to be re-instated[183] prior to accession. Further, because of the recent history of authoritarian regimes in these states, the systems in place to protect fundamental rights were untested.

These delays prior to State accession to the Communities reflect the reliance on the ECJ as the primary protector of individual rights – or, more precisely, the ECJ's approach to identifying protected rights through 'common' commitments amongst the Member

[181] As at 2011, the 27 Member States of the EU are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

[182] *'Declaration on European Identity'* (Copenhagen European Summit, 14th December 1973) 12 *Bulletin of the European Communities* 118.

[183] J Gower, 'The Charter of Fundamental Rights and the EU Enlargement: Consolidating Democracy or Imposing New Hurdles?' in Kim Feus and Martyn Bond (eds), *An EU Charter of Fundamental Rights : text and commentaries* (Federal Trust, 2000), 227. Regarding the accessions of Spain, Greece and Portugal see also: Geoffrey Pridham, 'The International Dimension of Democratisation: Theory, Practice and Inter-Regional Comparisons' in Geoffrey Pridham, Eric Herring and George Sanford (eds), *Building democracy? : the international dimension of democratisation in Eastern Europe* (St. Martin's Press, 1994) cited in Helene Sjursen and Karen Smith (eds), *Justifying EU Foreign Policy: The Logics Underpinning EU Enlargement*, ARENA Working Paper Series (ARENA, 2001). Regarding early Community statements regarding human rights as a criterion of membership See, eg: G. C. Rodriguez Iglesias, 'Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities' (1995) 1 *Columbia Journal of European law* 169, 170.

States. There was a recognised need to ensure that, as the Communities expanded, there remained a common standard of protection amongst the Member States. 'Common constitutional traditions' could secure rights protection only where those traditions promoted and protected individual rights.

In the 1993 Copenhagen Criteria, the institutions and Member States made their first explicit statement of membership criteria. State-based rights protection was confirmed as a condition of membership. Applicant states were required to have 'achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.'[184] This was later re-inforced by Article 49 of the *TEU(Amsterdam)* which allowed any European state which respected fundamental rights to apply for membership of the Union.

However, the broad standards set out in the Copenhagen Criteria left applicant states uncertain of the standard to be achieved. Despite its 'special significance' in Community law, accession to and compliance with the *ECHR* was not considered to be a sufficient indication of a commitment to the protection of fundamental rights. For example Slovakia had signed and ratified the *ECHR* in the early 1990s and yet was excluded from the first round of accessions negotiations in 1997/1998. This exclusion was in part because its institutions were considered insufficient to secure democracy and human rights within the domestic legal system.[185]

As the Central and Eastern European Countries (CEECs) formerly under the influence of the Soviet Union came closer to joining the Union, the broad standards of 'respect' for fundamental rights required greater specificity. The *EU Charter*, even without Treaty status, served as a firm indication of the rights to be protected within the Union and thus as a guideline for applicant states. The *EU Charter* served as an expression of what the existing Member States and the non-judicial institutions viewed as a common

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[184] European Council in Copenhagen, Conclusions of the Presidency, (21-22 June 1993, SN 180/1/93) 12 ('*Copenhagen Criteria*'):

> Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

[185] H. Field, 'Awkward states: EU Enlargement and Slovakia, Croatia and Serbia' (2001) 1 *Perspectives on European Politics* 123.

culture of rights protection which was reflected within the law of the Communities that the CEECs sought to join. Such a culture of rights protection was therefore, to be similarly demonstrated in the domestic law of the CEECs if their application for membership was to be accepted. As Enrique Baron (MEP) said of the Charter: '[it] is important for enlargement. Applicant countries must be aware that they are joining a club, which is not just a market, but which is based on shared values'.[186]

Although not formally required to incorporate the *EU Charter* into domestic law, the new Member States are expected to have some reflection of the principles within their domestic system. This is not a requirement imposed on existing Member States, a fact which led to the criticism of a potential double standard from authors such as Andrew Williams.[187] However, it is more appropriate to consider the *EU Charter* as representing (as it states in its preamble) standards already expected within the Member States and thus the expectation of incorporation by new members is to maintain an existing overall standard rather than to allow existing Member States to adhere to a 'lesser' standard of rights protection.

2.3.3 The Legal Status of the EU Charter from Proclamation to the *Lisbon Treaty*

The *EU Charter* was intended to one day have formal legal status – something that was achieved with the entry into force of the *TEU (Lisbon)* – but for the intervening nine years, its status was unclear. The structure of the EU legal system meant that formal legal status needed to be granted via amendment to the Treaties. Despite this delay, or perhaps because of it, the *EU Charter* was not merely symbolic during those nine years. Gradually, the EU Charter moved from being primarily a political tool to having a notable impact on both the ECJ and the other EU institutions, to finally being acknowledged as legally binding within the law of the European Union.

It is necessary to explain how the *EU Charter* influenced Community Law prior to the *Lisbon Treaty* if the significance (or limited significance) of legal status is to be

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[186] Enrique Baron MEP, quoted on the website of the *Commission Website on the Charter of Fundamental Rights of the European Union* (No longer available <http://europa.eu.int/comm/justice_home/unit/charte/en/charter03.html>

[187] Andrew Williams, 'Enlargment of the Union and human rights conditionality: a policy of distinction?' (2000) 25 *European Law Review* 601, 601 - 602; Andrew Williams, *EU Human Rights Policies. A Study in Irony* (Oxford University Press, 2004).

understood. Even in the absence formal legal authority, the *EU Charter* did impact on the protection of fundamental rights within the Communities. As A.J. Menedez observes, 'the *Charter* ha[d] legal bite even if it [was] not legally binding'.[188]

The legal impact of the *EU Charter* in its early years should not be over-estimated. Writing in 2002, Menendez highlighted the use of *EU Charter* in decisions by the Court of First Instance (CFI) and the opinions of the Advocates-General (AG) in the ECJ.[189] In this way, the *EU Charter* was gaining prominence as an influential soft-law source, albeit one source amongst other important sources (such as the *ECHR*). However, while *EU Charter* references occurred as early as 2002 in the CFI, there was initially an apparent reluctance within the ECJ to consider the *EU Charter,* with the ECJ itself silent regarding the *EU Charter* even when it was raised as a source of rights by the AG.[190]

By the time of ratification, the reluctance on the part of the ECJ had waned and following the first reference to the *EU Charter* in an ECJ decision in 2006, *European Parliament v Council*[191] the ECJ showed increasing willingness to reference the *EU Charter*. The case involved the European Parliament challenging a Council Directive relating to family unification. The ECJ referenced the relevant *Charter* provisions, firstly as one of several international rights instruments evidencing a commitment to the rights of the child (including the *ECHR*), and secondly as a specific guiding force for the institutions of the Community institutions. The *EU Charter* was mentioned within the preamble of the challenged directive. The ECJ stated:

> The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that

[188]Agustín José Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' (2002) 40(3) *Journal of Common Market Studies* 471, 476.

[189] Ibid, 474 - 476.

[190] Alicia Hinarejos, 'Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists' (2007) 7(4) *Human Rights Law Review* 793, 796; Michiel Brand, 'Towards the Definitive Status of the Charter of Fundamental Rights of the European Union: Political Document or Legally Binding Text?' (2003) 4(4) *German Law Review*.

[191] *European Parliament v Council of the European Union* (C-540/03) [2006] ECR I-5769.

> the Directive observes the principles recognised not only by Article 8 of the *ECHR* but also in the Charter.[192]

The *EU Charter* was now acknowledged as being something more than a political tool and as having an important role within the legal system. Koen Lenaerts and E. deSmijter had suggested in 2001 that the effect of a proclamation would likely be similar to that of giving the Charter legal status - making it part of the *acquis communitaire.*[193] Reference to the *EU Charter* by the ECJ fell short of Laenerts and deSmijter's bold claims, but it point towards the gradual development of a *de facto* legal status.

In addition to its utilisation by the ECJ to assist in identifying protected rights within Community Law, the pre-*Lisbon EU Charter* had a second impact on fundamental rights within the EU. As was the case in Directive considered in *European Parliament v Council*, the *EU Charter* was referenced by the non-judicial institutions in the drafting of their Regulations and Directives. These references to the *EU Charter* within legislative instruments appeared with increasing frequency throughout the nine years of the *EU Charter's* 'soft law' status.[194]

Unlike the references by the court, the increasing utilisation of the *EU Charter* by the non-judicial institutions of the EU have the potential to represent a shift in the way in which the EU approached the protection of fundamental rights. That is, considering rights at the legislative stage rather than relying on the judicial review offered by the ECJ. It would be an exaggeration, however, to suggest that potential was substantively realised. Although the Commission procedures,[195] which will be discussed in greater detail at 4.4.1, did require a regular consideration of rights, the real impact of early references was linked to the political purposes of the *EU Charter* – increasing the visibility of fundamental rights within the EU – and only tangentially linked to the legal

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[192] Ibid, [38].

[193] K. Lenaerts and E. de Smijter, 'The Charter and the Role of the European Courts' (2001) 8 *Maastricht Journal of European and Comparative Law* 90, 101.

[194] Menendez provided an early indication of institutional reference to the impact of the Charter when he states that there were '[m]ore than 200 acts of the institutions in which reference was made to the Charter. As of 1 April 2002, 10 proposed regulations and 20 proposed directives contain[ed] references to the Charter'. Menéndez, above n 188, 477.

[195] European Commission, *Application of the Charter of Fundamental Rights of the European Union* (Communication) SEC(2001) 380/3.

protection of fundamental rights in that its inclusion in the preamble of the Directive cited above was the impetus for ECJ reference to the *EU Charter* within its judgements.[196]

The first attempt to solidify the status of the *EU Charter* was via inclusion in the *Treaty Establishing a Constitution for Europe (the Constitutional Treaty).* The *EU Charter* would therefore have had 'Treaty' status and thus have been binding both on the institutions and on the Member States (when implementing Community Law).

The proposed approach to human rights under the *Constitutional Treaty* was found in Article I-9 which was supplemented by Protocol on that Article[197]. The *EU Charter*, which was referenced in Article I-9 constituted Part II of the *Constitutional Treaty*. Article I-9 stated:

> 1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.
>
> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.
>
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

However, the *Constitution* failed to secure ratification, thus deferring the entrenchment of the *Charter.*

Unlike the *Constitutional Treaty,* the *TEU* does not include the *Charter* itself. The effect, however, is the same. Article 6(1) of the *TEU* 'recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union …which shall have the same legal value as the Treaties.' This gives the ECJ jurisdiction to utilise the *Charter* as a limit on the authority of both the Member States

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[196] Damien Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (Cambridge University Press, 2nd ed, 2010), 228-266.

[197] *Treaty Establishing a Constitution for Europe,* opened for signature 29 October 2004, [2004] OJ C 310/01 (did not enter into force), *Protocol relating to Article I-9(2) on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms*.

and the institutions (when implementing EC Law). Like the *Constitutional Treaty*, the *TEU* also states that the Union 'shall' accede to the *ECHR*.[198]

Despite the controversies surrounding the amendment of the Treaties,[199] the inclusion of the *EU Charter* was met with little controversy. Even the Protocol (often erroneously referred to as an 'opt-out') relating to the *EU Charter* – from Poland and the UK[200] – relates not to the general applicability of the *EU Charter* itself. Instead, the Protocol merely reiterates that the *EU Charter* may not be used (by courts, domestic or European) to review domestic legislation outside of the implementation of EC Law – a restriction applicable to all EU law not merely the *Charter*. Regardless, the nature of the *EU Charter* as an affirmation of existing protected fundamental rights limits the efficacy of any such Protocol. As Ingolf Pernice has put it:

> [W]hat then could reasonably be the meaning and effect of an opt-out to the Charter? All its provisions are already recognised as binding law. If the Charter, legally speaking, does not add anything further, how can the opt-out have a legal effect?[201]

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[198] *TEU*, Article 6(2).

[199] There was significant debate in several member states, resulting in substantial delays in the ratification of the *Lisbon Treaty*. Probably the most widely publicized delay was associated with the failure of a ratification referendum in Ireland, resulting in a second referendum being held.

[200] *TEU, Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom*:

> Article 1
>
> The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
>
> In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.
>
> Article 2
>
> To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

[201] Ingolf Pernice, 'The Treaty of Lisbon and Fundamental Rights' in Stefan Griller and Jacques Ziller (eds), *EU Law* (Springer, 2008) 235, 245.

The lack of resistance to the shift of the *EU Charter* from proclamation to Treaty law reflects the limited effect that the granting of legal status was to have.[202] Reference to the *EU Charter* within the *Lisbon Treaty* does not fundamentally change the way in which rights are protected within the Communities. Rather, reference to the *EU Charter* within the Treaties acknowledges the *EU Charter* as a predominant source of human rights protected within Community Law.

This lack of a substantive *change* effected by the *Lisbon Treaty* is hardly surprising. Although the *EU Charter* was drafted on the basis that it was intended ultimately to be given legal status, the drafting commission had a mandate to consolidate the existing law rather than to consider reform of the legal protection of fundamental rights.[203] Prior to the *Lisbon Treaty,* the sources of fundamental rights were the constitutional traditions of the Member States (including their common commitment to the *ECHR)* and the 'general principles' of Union law. Both of these sources are cited within the *EU Charter* as informing its content. The result is that the *EU Charter* offers neither a commitment to rights beyond those protected prior to its enactment nor a 'new' approach to the protection of fundamental rights.

One additional development in the EU's approach to the protection of fundamental rights, which occurred parallel to the *EU Charter's* shift in usage was the establishment of a European Union Agency for Fundamental Rights (EUFRA) in 2007.[204] EUFRA, whose efficacy has yet to be tested, is intended to provide Community institutions and Member States with an independent, *Charter*-focused agency (although the establishing Regulation also acknowledges the importance of rights found in the common constitutional traditions and in international treaties) to monitor the standard of rights protection within the Union, raise awareness of human rights issues and assist in the

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[202] Some comments regarding the limited impact of the *EU Charter* on the protection of fundamental rights within the EC Law can be found at: European Union Committee (UK), *The Treaty of Lisbon: An Impact Assessment*, House of Lords Report No 10, Session 2007-8 (2008). While the political benefits of inclusion of the *EU Charter* within the Treaties, the legal impact is presented as minimal.

[203] European Council in Cologne, Conclusions of the Presidency, (3 - 4 June 1999, SN 150/99), Annex IV:

> 'The European Council takes the view that, at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident.'

See also: John Morijn regarding the difficulties with utilizing the *Charter* in isolation from the ECHR and Constitutional traditions due to the 'simplicity' of the language. J. Morijn, in Brand, above n 190.

[204] *Council Regulation 168/2007/EC establishing a European Union Agency for Fundamental Rights* [2007] OJ L 53/2.

realisation of rights protection within the EU.[205] As stated in the *Council Regulation 168/2007/EC establishing a European Union Agency for Fundamental Rights:*

> [The EUFRA is established] to provide the relevant institutions and authorities of the Community and its Member States when implementing Community law with information, assistance and expertise on fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.[206]

The establishment of EUFRA, and the specific reference to the *EU Charter* as a source of rights to be protected within the Union, further suggests the *Charter*'s increasingly important role. Whilst the ECJ has taken a cautious approach to use of the *EU Charter,* it is increasingly utilised by the political institutions as representing the rights which the EU will (or will aspire to) protect.

2.3.4 Conclusions: European Union

The *EU Charter* was drafted against the backdrop of reforms to the structure and competencies of the European Union. As predicted in the 1950s, as political integration became a reality, the absence of fundamental rights in the Treaties was finally addressed. However, by 2009 the 'gap' in the Treaties had been filled via the ECJ's recognition of fundamental rights as part of the general principles of Community Law, and as a consequence of the common constitutional traditions of the Member States.[207] As a result, although the *EU Charter* has had a recognisable influence on the role and protection of individual rights within the European Union, that influence falls within the existing framework of rights protection gradually developed (predominantly by the ECJ) throughout the integration process and offers little in the way of an *increased* legal protection of fundamental rights.

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[205] See for discussion of the aims of EUFRA prior to its establishment: Erica Howard, 'The European Agency for Fundamental Rights' (2006) 4 *European Human Rights Law Review* 445.

[206] *Council Regulation 168/2007/EC establishing a European Union Agency for Fundamental Rights* [2007] OJ L 53/2, [7].

[207] Note, however, that the ECJ has not, as yet, invalidated any Union legislative Acts on the basis of conflict with fundamental rights. Therefore, although available as a remedy for legislative encroachment on fundamental rights, it is rarely used. See for discussion: Chalmers et al, above n 196, 251.

2.4 Australia

Australia is the only one of the four considered jurisdictions without a specific rights protection instrument at the national level which serves as the focus of legal and political protection of rights. Instead, Australia has a range of measures which have been either adopted or developed in order to protect fundamental rights. Most of Australia's history with regard to the protection of fundamental rights has been in the form of *ad hoc* political protections and judicially-expressed principles which develop the common law in a rights-favourable manner or which draw on international rights commitments to inform interpretation of legislation. However, Australia's Human Rights Framework (the Framework), part of which is before the Australian Federal Parliament in the form of the Human Rights (Parliamentary Scrutiny) Bill 2010,[208] proposes substantial changes to the way in which the political process protects rights - short of implementing an Australian bill of rights.[209]

There was a deliberate decision not to include a bill of rights within the *Australian Constitution*[210] at the time of enactment in 1901.[211] This reticence to adopt a single rights instrument has continued with several proposals for a single rights instrument at the national level being rejected (either within Parliament or via referenda).[212] Although this thesis focuses on rights protection at the national level, it is significant to note that only one Australian State – Victoria[213] – and one Territory – the Australian Capital

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[208] Human Rights (Parliamentary Scrutiny) Bill (Cth) 2010.

[209] As at 9th October 2011, the Human Rights (Parliamentary Scrutiny) Bill 2010 has not been passed by the Australian Parliament. It remains before Parliament.

[210] *Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict, c 12* s 9 *('Australian Constitution').*

[211] The reasons and explanations for the absence of a bill of rights in the *Australian Constitution* have been discussed at length by others. See, eg: George Williams, 'The Federal Parliament and the Protection of Human Rights' (Research Paper No 20, Parliamentary Library, Parliament of Australia, 1998-1999).

[212] The *National Human Rights Consultation Report* (2009), suggested the implementation of a statutory bill of rights for Australia. Attorney-General's Dept. National Human Rights Consultation Secretariat, 'National Human Rights Consultation: Report', (2009)

<http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads>; See for discussion, Edward Santow, 'The Act that Dare not Speak its Name: The National Human Rights Consultation Reports Parallel Roads to Human Rights Reform' (2010) 33(1) *University of New South Wales Law Journal* 8. For discussion of several of the past attempts to introduce a bill of rights (either constitutional or statutory) in Australia, See, eg: Hilary Charlesworth, 'The Australian Reluctance About Rights' (1993) 31 *Osgoode Hall Law Journal* 195; Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (Federation Press, 2nd ed, 2004), 88-93.

[213] *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Territory (ACT)[214] – have introduced statutory bills of rights[215] - this will be addressed later in this chapter. The protection of fundamental rights in Australia instead occurs via a mix of legal protections of specific rights within the *Australian Constitution* and via statutes protecting particular rights, as well as judicial development of interpretative principles and a rights-favourable approach to the common law. Additionally, Australia has developed political protections of rights which focus on Parliamentary scrutiny of Bills – protections that the Framework seeks to expand.

In considering Australia's approach to fundamental rights as a basis of later comparison, it must be acknowledged that the Framework represents the first protection (political or legal) intended to protect *fundamental* rights in general. As a result, the various protections that are to be considered in the following overview tend to apply to *specific* rights only, or in the case of the Constitutional protections, apply to an ill-defined collection of rights which may, but will not necessarily, overlap with fundamental rights. Thus while the examples are valuable in understanding the strengths and weaknesses of various approaches to the protection of fundamental rights, their limited applicability also highlights not only the limitations of particular forms of rights-protection, but also the limitations of Australia's overall approach to the protection of fundamental rights. However, despite the limitations of the Australian example, the various forms of rights protection, as well as the Framework, are useful examples to highlight various strengths and weaknesses of both legal and political protections of rights.

2.4.1 Legal Protections in Australia

Legal protections in Australia take three core forms. Firstly, the *Australian Constitution* offers some protection to rights. Certain rights are protected via their constitutional status (either express or implied) which gives rise to judicial review, leading to invalidity of incompatible legislation. The *Australian Constitution* also allows that where Australia has international obligations to protect particular fundamental rights, the Federal Parliament is able to pass legislation which protects such rights. Where a

[214] *Human Rights Act 2004* (ACT).

[215] The ACT *Human Rights Act* and Victorian *Charter of Human Rights and Responsibilities* will not be discussed in substantial detail in this thesis which focuses on the protection of rights at the national level (or the EU level).

conflict between federal and state legislation arises, the federal statute prevails. Therefore the Federal Parliament can indirectly prevent the States from passing contrary legislation. A final constitutional protection derives from the separation of powers preventing the legislature and executive from exercising judicial power (and the judiciary from exercising legislative and executive power).

The second form of legal protection of rights is the common law. The 'principle of legality' is used by courts to presume (albeit rebuttably) intended compatibility between legislation and fundamental common law rights.

The third form of legal protection relates to the influence of the growing body of international human rights law on the development of the common law. Although this form of protection can influence those rights which legislatures will be presumed not to have intended to limit (in the absence of express language), this development of the common law goes beyond statutory interpretation and will consequently be considered separately.

The fourth form of legal protection derives from international human rights law in general, and commitments made by successive Australian Governments to specific international human rights law instruments specifically. As in the other jurisdictions, international human rights law has influenced the approach taken by courts in interpreting legislation and protecting rights within the domestic jurisdiction.

Although each of the four forms of rights protection will be considered in turn, what follows is not an attempt to comprehensively identify all of the specific rights protected by each different 'legal protection' – just as the overviews of Canada, the UK and the EU have not focused on the *particular* rights protected but on the form of protection offered. Instead, the specific rights will be used to evidence the various ways in which Australia offers legal protection to fundamental rights.

Constitutional Protections

Although there is no comprehensive list of protected rights within the *Australian Constitution*, it is not completely silent on the matter of rights. There are several rights given express, if qualified, protection within the *Australian Constitution* as well as others which have been read as implicit in the provisions of the *Australian Constitution.*

The handful of rights included within the *Australian Constitution* does not demonstrate a comprehensive commitment to the protection of fundamental rights. The express constitutional rights are freedom from discrimination on the basis of state of residence (s 117) and freedom of religion (s 116) (which will form the basis of the following discussion), protection against acquisition of property on unjust terms (s 51(xxxi)), the right to a trial by jury (s 80) and rights relating to participation in the democratic process (ss 24 and 41). In addition to these express rights, the High Court of Australia has identified implied constitutional rights associated, for example, with freedom of communication. Although not representative of a wide range of fundamental rights, there are similarities between these constitutional rights and 'fundamental rights' more broadly defined or as identified in international statements of fundamental rights. The right to trial by jury, for example, may be viewed as deriving from the broader right to fair trial.[216]

The significance of these constitutional rights – express or implied – is that they are granted legal protection against encroachment. That is, they give rise to rights-based judicial review in Australia, albeit that judicial review is applicable only to those few rights which can be identified as having constitutional status.[217]

The example of the freedom of religion in s 116 *Australian Constitution* can be used to demonstrate the role of rights-based judicial review in Australia, as well as highlighting how such a protection may be limited via narrow interpretation of the relevant constitutional provision. Section 116 states:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

[216] Jury trials are predominantly found in common law systems such as Australia and the UK. While the right to a fair trial is guaranteed within core international human rights law instruments, such as the *Universal Declaration of Human Rights*, the specific meaning of 'fair trial' is not required to conform to a particular form.

[217] Non-rights based judicial review is also found in Australia although not the focus of this thesis. Judicial review in Australia has primarily focused on the federal division of powers between state and federal institutions. Leighton McDonald, 'Rights, 'Dialogue' and Democratic Objections to Judicial Review' (2004) 32 *Federal Law Review* 1.

Although s 116 offers legal protection of a fundamental right against encroachment by the Federal legislature, it does not limit the authority of the State legislatures. Section. 116 only limits the legislative authority of the Commonwealth. This is not to say that the States have engaged in large-scale or regular legislative programmes which *do* limit the free exercise of religion, only that s 116 gives rise to judicial review only of the actions of the Federal Parliament.[218]

The interpretation of s 116 has been narrow. In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth ('Jehovah's Witness Case'),*[219] in which wartime legislation led to the identification of the Jehovah's Witnesses organisation as 'subversive' in character and thus prohibited,[220] the High Court allowed that the Federal Legislature (and the Executive pursuant to delegated legislation) retained the authority to limit the free exercise of religion in order to secure the 'peace, good government and order' of the Commonwealth.[221] 'Reasonable limitations' clauses are not unusual, an example being s 1 of the *Canadian Charter* (discussed previously in this chapter). However, unlike the *Canadian Charter,* the limitation of s 116 right does not derive from a specific clause within the *Constitution* and instead was identified by the High Court. Additionally, the scope of the potential limitations of s 116 identified by the High Court goes beyond 'reasonable limitation' and has been given such wide interpretation that, as Hilary Charlesworth has commented, 'it is unlikely that s 116 would offer a protection of religious freedom even in peace time.'[222]

Another way in which the protection of the free exercise of religion under s 116 has been narrowed can be seen, for example, in the *Stolen Generations Case.*[223] The *Stolen*

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[218] O'Neill, Rice and Douglas indicate that there is no 'satisfactory' explanation for why freedom of religion was included in Chapter III. O'Neill, Rice and Douglas, above n 212, 67; David Malcolm also mentions this in the context of the failed 1942 referendum which sought to extend the protection of freedom of religion as against the states. The Hon. Mr Justice David Malcolm, 'Does Australia Need a Bill of Rights' (1998) 5(3) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v5n3/malcolm53_text.html>.

[219] *Adelaide Company of Jehovah's Witness Inc v Commonwealth* (1943) 67 CLR 116 ('*Jehovah's Witness Case')*.

[220] *National Security Act 1939-1940* (Cth); *National Security (Subversive Associations) Regulations* 1940 (Cth).

[221] *Jehovah's Witness Case* (1943) 67 CLR 116.

[222] Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (UNSW Press, 2002), 29.

[223] *Kruger v Commonwealth* (1997) 190 CLR 1 ('*Stolen Generations Case'*).

Generations Case challenged the validity of orders under the *Aboriginals Ordinance*[224] which authorised the removal of Aboriginal children from their families during the early-mid 20th Century. The s 116 issue was whether the forced removal of these children from their families and communities, and their placement in homes and institutions which prevented education about their culture and religion, amounted to an infringement of the free exercise of religion. The High Court said that s 116 only limited the Federal Parliament from passing laws with the express purpose of limiting the free exercise of religion, not from passing laws which may merely have the effect of doing so.[225]

Thus it is clear that the protection offered by s 116 cannot be viewed as a broad protection against encroachment on the free exercise of religion by the Federal Parliament. Although rights-based judicial review is available as a legal protection, the standard of protection is limited by the narrow interpretation the provision has been given.

Similarly narrow interpretation featured in much of the High Court's consideration of the s 117 prohibition on discrimination on the basis of State of residence. For much of its history it has largely reflected the federal structure established by the Constitution, rather than offering a guarantee of equality or equal protection of the law (regardless of state of residence).[226] However, in *Street v Queensland Bar Association,*[227] the High Court adopted a broader, rights-focused approach to the non-discrimination clause, allowing that State legislation with the effect of imposing harsher burdens on out-of-state residents would be invalid on the basis of incompatibility with the constitutional right. *Street* overturned previous interpretations which had, similar to the interpretation

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[224] *Aboriginals Ordinance 1918* (NT).

[225] McHugh J explains why the plaintiffs' failed:

> The withdrawal of infants…from the communities in which they would otherwise have been reared, no doubt may have had the effect, as a practical matter, of denying their instruction in the religious beliefs of their community. Nevertheless, there is nothing apparent in the [challenged Orders] which suggests that it aptly is to be characterised as a law made in order to prohibit the free exercise of any such religion, as the objective to be achieved by the implementation of the law.

Stolen Generations Case, (1997) 190 CLR 1, 161.

[226] Clifford L. Pannam, 'Discrimination on the Basis of State of Residence in Australia and the United States' (1967) 6 *Melbourne University Law Review* 105, 107.

[227] *Street v The Bar Association of Queensland and Barristers' Board* (1989) 168 CLR 461.

of s 116, required the discrimination to be fundamental to the purpose of the statute rather than merely the consequence of its application.[228]

Sections 116 & 117 demonstrate how the *Australian Constitution* offers a legal protection of particular rights. These two examples demonstrate how judicial review has a potentially important role to play in the protection of fundamental rights in Australia, but that there are limitations both in the range of express rights within the *Australian Constitution* and the manner in which those rights have been interpreted by the High Court.

In addition to the express constitutional rights, there are also implied rights which the High Court has identified within the *Australian Constitution*. The implied rights recognised within the *Australian Constitution* are not analogous to a comprehensive bill of rights; implied rights giving rise to judicial review are only those rights which are necessary to give real effect to the express provisions within and the structure of the *Australian Constitution*.[229]

The implied rights within the *Australian Constitution* were explained in 1992 in *Australian Capital Television Pty Ltd v Commonwealth (ACTV,)*[230] in which the High Court struck down Commonwealth legislation which restricted political advertising during election campaigns.[231] A limited guarantee of freedom of speech was justified on the basis that '[f]reedom of [political] communication … is so indispensable to the efficacy of the system of representative government for which the Constitution makes

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[228] Discussed in D Rose, 'Discrimination Uniformity and Preference - Some Aspects of the Express Constitutional Provisions' in Leslie Zines (ed), *Commentaries on the Australian constitution : a tribute to Geoffrey Sawer* (Butterworths, 1977), 191, cited in O'Neill, Rice and Douglas, above n 212, 83.

[229] Leslie Zines, 'A Judicially Created Bill of Rights' (1994) 16 *Sydney Law Review* 166, 167; D.A. Smallbones, 'Recent Suggestions of an Implied Bill of Rights in the Constitution, Considered as part of a General Trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254. Also discussed in Paul Kildea, 'The Bill of Rights Debate in Australian Political Culture' (2003) 9(1) *Australian Journal of Human Rights* 7; Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27(1) *Sydney Law Review* 29.

[230] *Australian Capital Television Pty Ltd and New South Wales v Commonwealth* (1992) 177 CLR 106 ('*ACTV*').

[231] The implied freedom of political communication was also discussed in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 *('Nationwide')*. In *Nationwide*, the High Court identified a test of proportionality with regard to the freedom of political communication. That is, legislation which impaired freedom of political communication a consequence of achieving another legitimate, public purpose (rather than being the core purpose of the legislation) would be valid, providing the limitation was not disproportionate to that required to achieve the core purpose of the Statute.

provision that it is necessarily implied in the making of that provision.'[232] The restrictions on political communication in the relevant legislation were viewed as inhibiting the effective operation of the *Australian Constitution* and were thus invalid.[233]

Those implied rights identified within the *Australian Constitution* reflect its status as the foundational document of a modern, liberal democratic legal system, not as a relic of its 19th Century origins. As expressed by Gleeson CJ in *Roach v Electoral Commissioner*[234](regarding the identification of an implied right to vote and an equally implied guarantee of universal suffrage)[235], 'the evolution of representative government,' and progressive developments in legislation which sought to achieve universal suffrage[236] and to secure participation in the electoral process, have led to a stronger protection of the right to vote than was expressly guaranteed by the *Australian Constitution*, or was perhaps imagined by the drafters. He says:

> I see no reason to deny that…the words of [the *Australian Constitution*], because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote.[237]

While not opening the possibility of a potentially expanding list of implied rights, Gleeson CJ in *Roach* is recognising that implied rights are those that are necessary for

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[232] *ACTV Case*, (1992) 177 CLR 106, 140.

[233] The implied freedom of political communication has been further addressed by the High Court in, eg: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'), in which the High Court confirmed that civil rights of action (for example, defamation) may be read down or, potentially, invalidated by the courts if they contravene the implied right to freedom of political communication. *Lange* also highlighted that some limitation of the right would be permitted and that the right of freedom of political communication was only protected to the extent as was required for the effective operation of the Australian legal system of representative government as guaranteed by the *Australian Constitution.* See Sally Walker, '*Lange v ABC*: The High Court Rethinks the "Constitutionalisation" of Defamation Law' (1998) 5(1) *Murdoch University Electronic Journal of Law* <www.murdoch.edu.au/elaw/issues/v5n1/walker51.html>.

[234] *Roach v Electoral Commissioner* (2007) 233 CLR 162.

[235] The *Australian Constitution* does not expressly guarantee the right of Australian citizens to vote. Protection of the Australian democratic process has been implied via reference to two sections. Section 24 states '[t]he House of Representatives shall be composed of members directly chosen by the people of the Commonwealth' and Section 41 states '[n]o adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth'.

[236] *Commonwealth Electoral Act 1918* (Cth).

[237] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [7], per Gleeson CJ.

the *continued,* effective operation of the provisions of the *Australian Constitution*, not merely those that would have been necessary at the time of enactment.

Another indirect way in which the *Australian Constitution* has facilitated the protection of fundamental rights is via s 51(xxix) which authorises the Australian Federal Parliament to make laws with respect to external affairs. While not directly a legal protection of fundamental rights, s 51(xxix) is a constitutional basis for the exercise of federal legislative power so as to protect rights and must therefore be explained.

Section 51, which sets out the 'heads of power' under which the Federal Parliament is authorised to make laws – with all other areas being reserved to the States - grants no power to make laws with respect to individual rights. However, the external affairs power has been used to authorise the Federal Parliament to pass laws facilitating Australia's compliance with international human rights treaties, and with international customary law rules with respect to fundamental rights.[238] Specific examples of statutes which implement Australia's international human rights commitments (primarily anti-discrimination statutes) will be discussed below.

Significantly, the consequence of federal rights-protection legislation enacted under the external affairs power in s 51(xxix), is to effectively limit the States' ability to pass legislation incompatible with those protected rights. This is because, under s 109 of the *Australian Constitution,* in the case of inconsistency between state and federal law, the federal law prevails.

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[238] The seminal cases with regard to the external affairs power are *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dams Case'*) and *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ('*Koowarta'*). In *Koorwata* the High Court identified that the *Racial Discrimination Act 1975* (Cth)was not a legitimate exercise of federal legislative power under the 'race power' (s 51(xxvi) of the *Australian Constitution)* but, as the *Racial Discrimination Act* had been made to give effect to the *Convention on the Elimination of all forms of Racial Discrimination* (1966), it was a valid exercise of Federal legislative power under s 51 (xxix).

In the *Tasmanian Dams Case* the High Court said that the external affairs power was expansive. It allowed the Federal Parliament to pass legislation in relation to the protection of the environment, even though the effect of such legislation would be to extend the federal legislative power into areas otherwise reserved to the legislative authority of the States. Additionally, the High Court indicated that 'external affairs' was deliberately ambiguous and was to be interpreted broadly to empower the Federal Parliament to make laws with respect not only to treaties and international customary law but also to implement advisory opinions or decisions of international organisations, whether or not such a decision was binding at international law.

The *Toonen*[239] case of the late 1990s demonstrates how the external affairs power may be used with regard to the protection of fundamental rights. Toonen complained to the United Nations Human Rights Committee (UNHRC) that the *Tasmanian Criminal Code,*[240]which criminalised homosexual activity, violated his right to privacy guaranteed under the *ICCPR* to which Australia was a signatory. The complaint was heard pursuant to the *First Optional Protocol of the ICCPR* which had come into force in Australia in 1991.

The decision of the UNHRC was that the relevant provisions of the *Tasmanian Criminal Code* were an unreasonable limitation of the right to privacy and thus a breach of Australia's international obligations under the *ICCPR* and that the offending provisions should be repealed.[241] The Federal Parliament did not have the authority to directly repeal the sections of the *Tasmanian Criminal Code* and instead passed the *Human Rights (Sexual Conduct) Act 1994* (Cth)[242], the full title of which is *Human Rights (Sexual Conduct) Act 1994 - An Act to implement Australia's international obligations under Article 17 of the International Covenant on Civil and Political Rights*.[243] Ultimately, the Tasmanian Legislature amended the relevant sections of the Tasmanian Criminal Code, but only after the High Court had recognised the standing of the applicant, Croome, to challenge the legislation as to its compatibility with the Commonwealth Act.[244]

The High Court has given 'external affairs,' an expansive interpretation and while legislation under s 51(xxix) has generally been based on specific treaty obligations, 'external affairs' also encompasses international customary law and issues of general international concern.[245] In this way, international issues, whether or not specific treaty

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[239] Human Rights Committee, *Communication No. 488/1992*, 50th Sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('*Toonen v Australia'*).

[240] *Criminal Code 1924* (Tas)

[241] '[T]he Committee has found a violation of Mr. Toonen's rights under articles 17, paragraph 1, and 2, paragraph 1, of the Covenant requiring the repeal of the offending law', *Toonen v Australia,* UN Doc CCPR/C/50/D/488/1992, [11].

[242] *Human Rights (Sexual Conduct) Act 1994* (Cth).

[243] *Ibid,* s 4(1).

[244] *Croome v Tasmania* 191 CLR 119 ('*Croome*').

[245] This is discussed in various cases including: *R v Burgess; Ex Parte Henry* (1936) 55 CLR 608; *R v Poole; Ex Parte Henry (No. 2)* (1939) 61 CLR 634 both referenced in O'Neill, Rice and Douglas, above n 212, 30.

obligations exist, may be used to authorise the making of laws by the Federal Parliament on matters that would otherwise fall outside of the enumerated powers under s 51 – matters that would otherwise be reserved to the law-making authority of the States.

Despite the broad interpretation of what constitutes 'external affairs' potentially giving wide scope to the rights protected via Parliamentary reliance on s 51 (xxix), it does not constitute a robust or regular protection of rights. While the Federal Parliament is empowered to pass laws on matters of fundamental rights, s 51 (xxix) imposes no obligation to do so. The *Human Rights (Sexual Conduct) Act 1994* was enacted only after a specific, adverse finding by the UNHRC and implemented only specific provisions relevant to that decision. It did not represent implementation of the *ICCPR* rights *en masse* nor is it indicative of Australia's regular practice with regard either to implementing international human rights obligations or responding to UNHRC criticisms. Only a handful of (primarily anti-discrimination) treaties have been implemented via specific statutory enactment.[246] Consequently, the s 51(xxix) power is best understood as *facilitating* the protection of rights rather than as either a direct or indirect protection in its own right.

The main protections enacted by the Federal Parliament in order to give domestic protection to international human rights commitments have focused on anti-discrimination legislation.[247] The key statutes are the *Racial Discrimination Act 1975* (Cth),[248] the *Sex Discrimination Act 1984* (Cth),[249] the *Disability Discrimination Act 1992* (Cth),[250] and the *Age Discrimination Act 2004* (Cth),[251] as well as the *Australian Human Rights Commission Act 1986* (Cth)[252] which established the Human Rights

[246] The Human Rights Commission established under the *Human Rights Commission Act 1986* (Cth) will be discussed below.

[247] Although there have been other rights or categories of rights protected, such as the right to privacy (specifically with regard to sexual matters) in the *Human Rights (Sexual Conduct) Act 1994* (Cth) mentioned above and a more general right to privacy under the *Privacy Act 1998* (Cth).

[248] *Racial Discrimination Act 1975* (Cth).

[249] *Sex Discrimination Act 1984* (Cth).

[250] *Disability Discrimination Act 1992* (Cth).

[251] *Age Discrimination Act 2004* (Cth).

[252] *Human Rights Commission Act 1986* (Cth)

Commission.[253] The Australian Human Rights Commission has the initial responsibility for investigating complaints regarding unlawful discrimination under the various anti-discrimination statutes. Where the Human Rights Commission is unable to resolve the complaint, the complainant may commence proceedings in a federal court.

In addition, the mandate of the Human Rights Commission extends to investigating allegations of 'any act or practice that may be inconsistent with or contrary to any human right.'[254] '[A]ny human right' encompasses a broader range of fundamental rights than those given specific legislative protection in the various anti-discrimination Acts. The Human Rights Commission may investigate allegations that the Commonwealth or its agents (ie. the public service) have breached obligations under international fundamental rights instruments to which Australia has acceded. However, the Human Rights Commission is limited in its powers to take action if its investigations result in a finding that human rights have been violated. The Human Rights Commission can only facilitate conciliation and/or refer the matter to Parliament for consideration (along with its recommendations based on the investigation).

While the recommendations to Parliament could, in principle, be considered to be a 'political protection' to take action where human rights violations have been identified, it would be a protection which lacks any real force. The efficacy of the Human Rights Commission as motivating legislative action to deal with violations of human rights has been limited. Hilary Charlesworth has stated: 'more often than not…[the Human Rights Commission's] recommendations to Parliament to remedy breaches of human rights have been ignored.'[255] Charlesworth suggests that the lack of legislative response to highly publicised, and highly critical, Australian Human Rights Commission inquiries (and in particular she mentions the inquiry into the 'stolen generation' of Aboriginal children taken from their families) demonstrates a general weakness in the protection of fundamental rights in Australia.[256]

A final form of constitutional protection of rights in Australia derives from the separation of judicial power from executive and legislative power, as set out in Chapter

[253] Previously the Human Rights and Equal Opportunities Commission (HREOC).

[254] *Human Rights Commission Act 1986* (Cth), Section 11(f).

[255] Charlesworth, '*Writing in Rights'* above n 222, 34.

[256] Ibid.

III of the *Australian Constitution.* This separation of judicial power serves as a guarantee of due process and, in particular, as a protection against arbitrary detention. It also has implications with regard to the guarantee of a fair trial, although these implications will not be discussed here.[257]

Expressed by the High Court in *Lim v Minister for Immigration,*[258] the separation of judicial power limits the state's power to detain citizens[259] as dependent on a determination of criminal responsibility. Further, the 'adjudgement and punishment of criminal guilt' is exclusively the function of the courts.[260] The consequence being that legislation or executive action which either seeks to arbitrarily detain citizens outside of a judicial determination of criminal responsibility, or which effectively undermines the independence of the judiciary in making such a determination, is incompatible with the *Australian Constitution* and consequently invalid. It should be noted that the principles regarding detention expressed in *Lim* have been somewhat diluted in later cases such as *Al Kateb.*[261]

Initially only a guarantee against Federal Legislative or executive encroachment – the *Australian Constitution* imposing no such separation of judicial power as against the State legislatures – the protection has been extended as a protection against the states. *Kable v Director of Public Prosecutions (Kable)*[262] involved the passage of the *Community Protection Act*[263] which had a stated purpose in s 3(1) of 'protect[ing] the community by providing for the preventative detention (by order of the Supreme Court made on the application of the Director of Public Prosecutions) of Gregory Wayne

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[257] Freedom from arbitrary detention will be used as an example to demonstrate the rights-protection potential of the separation of powers. For discussion of the way in which the separation of judicial power has influenced the guarantee of a right to fair trial in Australia see O'Neill, Rice and Douglas, above n 212, 101-103; Anthony Blackshield and George Williams, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 4th ed, 2010), 701.

[258] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Lim*').

[259] The core issue in *Lim* involved amendments to the *Migration Act 1958* (Cth) which authorised the executive to order the detention of asylum seekers. The High Court determined that the amendments were valid, making clear that the Federal Legislature had the authority to make such laws with regard to non-citizens, who by nature of their immigration status may be subject to non-judicial detention (and ultimately deportation), and citizens who gained full protection of the separation of judicial power.

[260] *Lim*, 27.

[261] *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb'*).

[262] *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 ('*Kable*').

[263] *Community Protection Act 1994* (NSW).

Kable.' Kable, who was nearing the end of a sentence for manslaughter of his wife, had made a series of threats to the safety of his children and their guardian (his wife's sister). The NSW legislature sought to extend his period of detention beyond the sentence imposed by the court, enlisting the NSW Supreme Court to facilitate this.

Although the High Court maintained that no guarantee of separation of judicial power existed at the state level, it nonetheless found the *Community Protection Act* invalid. The High Court (by a 4:2 majority) focused on the ability of state Supreme Courts to exercise federal jurisdiction and concluded that the independence of the judiciary guaranteed by Chapter III of the *Australian Constitution* necessarily extends to State Courts invested with federal jurisdiction. State legislation which had the effect of undermining their judicial independence from political interference would necessarily be in breach of Chapter III and consequently invalid. McHugh J stated:

> Given the central role and the status that Ch III gives to State courts invested with federal jurisdiction, it necessarily follows that those courts must also be, and be perceived to be, independent of the legislature and executive government in the exercise of federal jurisdiction.[264]

This protection of rights deriving from the separation of judicial power should not be overestimated.[265] It does not offer a general guarantee of liberty as against the legislative and executive branches. Australian legislatures (state and federal) may still limit the scope of judicial discretion with regard to detention – for example by the passage of mandatory sentencing laws[266] - so long as the limitation of judicial discretion does not amount to a usurpation of judicial power or undermine judicial independence. Additionally, the due process principle, and in particular its extension to state courts, has been controversial and it remains uncertain how expansively (or how narrowly) this principle will be applied in future cases.[267]

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[264] *Kable* (1996) 189 CLR 51, 116.

[265] Although it has been drawn on in more recent cases, notably: *South Australia v Totani* [2010] HCA 39 (*'Totani'*). See for discussion Mirko Bagaric, Peter Faris and Theo Alexander, *Australian Human Rights Law* (CCH Australia, 2011), 403 - 410.

[266] *Palling v Corfield* (1970) 123 CLR 52, 58.

[267] Blackshield & Williams, above n 257, 640; Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 34 *Federal Law Review* 205.

It is evident that the constitutional protection of rights in Australia is far from straightforward. The eclectic mix of rights found in the *Australian Constitution* hardly constitutes a demonstrable commitment to the protection of rights. The small number of rights which are given 'constitutional status' (whether express or implied) cannot be said to demonstrate a strong commitment to the protection of fundamental rights in Australia. However, while judicial review offers a 'guarantee' against legislative encroachment on fundamental rights, the *Australian Constitution* is not the only means by which rights are given protection in Australia.

Common Law Rights and the Interpretation of Legislation

One of the original, successful arguments against the inclusion of a bill of rights within the *Australian Constitution* was that such guarantees of rights were simply unnecessary: the common law would provide sufficient protection against serious infringements of rights.[268] Faith in representative institutions and the common law as a bulwark against the encroachment of individual liberties still features in arguments against reform of rights protection laws or the introduction of a single rights instrument in Australia.[269] As has previously been discussed in this chapter, in the UK these arguments regarding the efficacy of the common law as means of limiting the legislative encroachment of rights ultimately gave way to the introduction of a single rights instrument with the enactment of the *HRA* in 1998 (albeit there were other factors which influenced the UK's ultimate decision to adopt a single rights instrument which Australia has not needed to consider – for example, the lack of a written constitution as a limit on the authority of the Westminster Parliament and the external pressure derived from adverse ECtHR judgements).

It is well established that the common law recognises particular fundamental rights, and that in interpreting the common law, courts seek to give effect to those rights. The degree to which the identification of common law rights is influenced by modern

[268] Discussed in George Williams, 'The Federal Parliament and the Protection of Human Rights' (Research Paper No 20, Parliamentary Library, Parliament of Australia, 1998-1999); Hilary Charlesworth, 'Writing in Rights', above n 222, 17-27; Geoffrey Kennett, 'Individual Rights, the High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581, 581 - 583; NSW Legislative Council Standing Committee on Law and Justice, 'A Bill of Rights for NSW' Report No 17 (2001), 13.

[269] The Hon. Daryl Williams, 'Recognising Universal Rights In Australia' (2001) 24(3) *University of New South Wales Law Journal* 62; O'Neill, Rice and Douglas, above n 212, 101-103.

'human rights,' and in particular international human rights law, will be discussed below. Less clear, however, is the relationship between statutory interpretation and those rights recognised at common law. Gleeson CJ, in *Plaintiff S157/2002 v Commonwealth,*[270] sought to explain how common law-protected rights influence courts when interpreting legislation. He said:

> [C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakeable and unambiguous language. General words will rarely be sufficient for that purpose.[271]

This reticence to limit rights without clear intention from the legislature derives from the general presumption in favour of liberty which is characteristic of the common law. This presumption that the legislature would not intend to encroach on rights and freedoms has come to be known as the 'principle of legality'. This will be returned to in 3.1.4.[272]

Although the terminology of 'principle of legality' is a relatively recent development in Australia,[273] the presumption that Parliament does not intend to legislate in a manner which encroaches on rights has been present in Australia since at least the early 1900s. Spigelman J references the 1908 case of *Potter v Minahan,*[274] in which the High Court cited with approval *Maxwell on Interpretation of Statutes* (4th ed. 1905) and indicated that it was 'improbable' that Parliament would intentionally violate fundamental rights.[275] Therefore, in the absence of a specific intention, clearly expressed within the legislation, statutes should not be interpreted in a manner which encroaches upon rights.

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[270] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [49].

[271] Ibid.

[272] It should be noted that this principle originated in UK House of Lords. The *HRA* placed a stronger interpretative obligation on the courts as well as introducing a definite catalogue of rights. Although the principle of legality remains present in the UK (in the event, for example, that a common law rights is not protected under the *Convention*-rights protected by the *HRA*) it has largely been replaced by the strong protection offered by the *HRA*.

[273] See, eg: *Al-Kateb* (2004) 219 CLR 562.

[274] *Potter v Minahan* (1908) 7 CLR 277.

[275] James Jacob Spigelman, *The Common Law Bill of Rights* (2008) University of Queensland Press <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman100308.pdf/$file/spigelman100308.pdf>.

It must be highlighted that this presumption is rebuttable. That is, Parliament can validly legislate in a manner which is incompatible with rights, so long as its intention to do so is clear and unambiguous, and the courts will uphold such rights-incompatible legislation.[276] However the presumption acts as a limitation on the actual *effect* of legislation on fundamental rights – unless such an intention to encroach on rights is clear within the statute.

The rights protected by the common law cannot be identified in a clear list. In *Bropho v Western Australia*[277] (which pre-dates the terminology of 'principle of legality' in Australia) the High Court explained the rationale of the presumption of rights-compatibility as well as confirming that the 'rights' would be adaptable to societal changes. The Court said:

> The rationale of [the presumption of rights-compatibility] lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear…If such an assumption be shown to be or to have become ill-founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed. Thus, if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear.[278]

While the above extract suggests that some rights once considered fundamental may no longer fall under the principle of legality, Spigelman J has explained that the list of rights – which he terms the 'common law bill of rights' – may equally be expanded.[279] Thus the list of rights that Spigelman identifies as encompassed by the principle of legality is not exhaustive.[280] This includes (but is not limited to, nor entirely

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[276] Discussed in, eg :Glen Cranwell, 'Treaties and Australian Law - Administrative Discretions, Statutes and the Common Law' (2007) 1 *Queensland University of Technology Law and Justice Journal* 49; Ryszard Piotrowicz, 'Unincorporated Treaties in Australian Law' (1996) *Public law* 190.

[277] *Bropho v Western Australia* (1990) 170 CLR 1.

[278] Ibid, 179.

[279] Spigelman, above n 275.

[280] Spigelman lists 19 rebuttable presumptions identified by the courts as being included in the 'common law bill of rights'. He acknowledges that his list is not exhaustive. These include that the Parliament will be presumed not to have intended: 'To retrospectively change rights and obligations; To infringe personal liberty; To interfere with freedom of movement;To interfere with freedom of speech;To alter criminal law

encompassing of) fundamental rights identified in international human rights law instruments. He says:

> This common law bill of rights overlaps with but is not identical to, the list of human rights specified in international human rights instruments, which have been given legislative force in some jurisdictions. That development will have an influence upon the degree of emphasis to be given to these presumptions. It will also influence the articulation of new presumptions.[281]

Common law principles of interpretation create a hurdle for Parliaments intending to limit rights. While Parliament retains the authority to pass legislation incompatible with rights, it must, as Lord Hoffman said in *Ex parte Simms*[282] (a UK case invoking the 'principle of legality,' which was cited with approval by Gleeson CJ in *Plaintiff S157*[283] and Kirby J in *Al-Kateb*[284]) 'squarely confront what it is doing and accept the political cost'.[285] If Parliament intends that particular legislation is to be interpreted in a manner which potentially limits rights, it must make that intention clear within the legislation, and do so in unambiguous language and specific rather than general terms.

International Human Rights Law as Influencing the Development of the Common Law

It has been explained above that there is some 'overlap' between fundamental rights as recognised by the common law and fundamental rights as expressed in international human rights treaties. This overlap is more than mere coincidence and international human rights law has been used to inform the development of the common law.

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practices based on the principle of a fair trial; To restrict access to the courts; To permit an appeal from an acquittal; To interfere with the course of justice; To abrogate legal professional privilege; To exclude the right to claim self-incrimination; To extend the scope of a penal statute; To deny procedural fairness to persons affected by the exercise of public power; To give executive immunities a wide application; To interfere with vested property rights; To authorise the commission of a tort; To alienate property without compensation; To disregard common law protection of personal reputation; To interfere with equality of religion.' Ibid, 23.

[281] Ibid.

[282] *R v Secretary of State for the Home Department: Ex. Parte Simms* [2000] 2 AC 115 (*'Ex Parte Simms'*).

[283] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [49].

[284] *Al-Kateb* (2004) 219 CLR 562.

[285] *Ex Parte Simms* [2000] 2 AC 115.

The most famous Australian example of judicial use of international and common law principles to protect rights is in *Mabo v Queensland [No. 2]*.[286] Brennan J stated:

> [T]he common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of human rights… It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which…denies [indigenous Australians] a right to occupy their traditional lands.[287]

While *Mabo* recognised that the common law could (and should) develop in a manner consistent with, or at least informed by, international human rights standards,[288] neither common law or international human rights informing the common law serve to limit the authority of the legislature to pass legislation contrary to such rights. Further, the use of international rights standards to inform the development of the common law is, as was acknowledged by Brennan J, limited in itself – the court was not able to read in human rights at the expense of the (undefined) 'skeleton' of the values and principles on which the legal system is based.[289]

Although there has been some support for widespread utilisation of international human rights law to inform the common law and thus protect rights,[290] there has not been a corresponding judicial trend in this direction.[291] While the reason for apparent judicial reluctance is debated, there are substantial concerns with relying on judicial acknowledgement of international human rights law as a means of protecting rights.[292] Most notably, judicial use of international human rights instruments which have not

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[286] *Mabo v Queensland* [No. 2] (1992) 175 CLR 1.

[287] Ibid, 42.

[288] Justice Michael Kirby, 'Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes' (1993) 16(2) *University of New South Wales Law Journal* 363, 386.

[289] Charlesworth, 'The Australian Reluctance about Rights' above n 212, 201.

[290] See, eg: The Hon. Justice Michael Kirby, 'Domestic Implementation of International Human Rights Norms' (1999) 5(2) *Australian Journal of Human Rights* 109; Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion and Use of Unincorporated Conventions* (Presidian, 2009).

[291] See, eg: Hilary Charlesworth, Madeline Chiam, Devika Hovell and George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423.

[292] The Hon. Justice Michael Kirby, 'Deep Lying Rights - A Constitutional Conversation Continues: The Robin Cooke Lecture 2004' (2005) 3(2) *New Zealand Journal of Public and International Law* 195; Stone, above n 229.

been implemented domestically is viewed as encroaching on the role of the legislature – the branch of government constitutionally empowered to take such action.[293]

It is not appropriate to discuss the merits of *Mabo* in this context (and it has been done extensively by others).[294] *Mabo* does, however, demonstrate how international law has been used in developing the Australian common law in a manner which protects fundamental rights. The strength of this protection is, however, limited by the nature of the common law as subject to amendment or repeal by legislative action.

International Human Rights Law as informing the Interpretation of Statutes

In addition to the principle of statutory interpretation that, in the absence of express language, legislatures do not intend to encroach on fundamental rights within the common law, there is a second way in which fundamental rights are protected when courts interpret statutes. That is, where there is ambiguity in the legislation, courts will prefer an interpretation of legislation which complies with international human rights law (in particular, international human rights treaties to which Australia is a party) over an interpretation that does not.

In *Plaintiff S157/2002 v Commonwealth*[295], Gleeson CJ refers to legislation which has been enacted with specific reference to international obligations. He says:

> Where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations.

However, the preference for human-rights-treaty-compatible interpretations of legislation goes beyond statutes enacted with specific reference to such treaties.[296] In *Dietrich v R*[297] the High Court addressed this in terms of general treaty obligations:

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[293] Kennett, above n 268, 583; Julie Taylor, 'Human Rights Protection in Australia: Interpration Provisions and Parliamentary Supremacy' (2004) 32(1) *Federal Law Review* 57. Also discussed in regards to the challenges of bills of rights in general as a limitation on legislative power in Williams, 'Recognising Universal Rights in Australia', above n 269.

[294] The Hon. Justice Michael Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30(2) *Melbourne University Law Review* 576.

[295] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [49].

> There is authority for the proposition that, in the construction of domestic legislation which is ambiguous in that it is capable of being given a meaning which either is consistent with or is in conflict with a treaty obligation, there is a presumption that Parliament intended to legislate in conformity with that obligation.[298]

This treaty-favourable approach to statutory interpretation, in the hands of an activist court, potentially allows for interpretation beyond the 'plain meaning' of the statute so as to secure an interpretation which is compatible with Australia's treaty-obligations. This would be an interpretative process not dissimilar to that found in the UK, post-enactment of the *HRA*. However, the Australian courts have generally acknowledged that in Australia the role of international instruments in interpreting legislation is limited. For example, in *Kartinyeri v Commonwealth,*[299] Gummow and Hayne JJ said:

> It has been accepted that a statute of the Commonwealth or of a State is to be interpreted and applied, *as far as its language permits*, so that it is in conformity and not in conflict with the established rules of international law. On the other hand, the provisions of such a law must be applied and enforced even if they be in contravention of accepted principles of international law. [300]

2.4.2 Political Protection of Rights in Australia

The political protection of rights in Australia is undergoing a process of change; Australia's Human Rights Framework (the Framework) was announced in April 2010[301] and core aspects of the Framework came before Parliament in 2010. While some aspects of this change mirror the political protections in other jurisdictions, the primary

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[296] There have also been statutory developments with regard to legislation enacted with specific reference to international treaties. Section 15AB(2)(d) of the *Acts Interpretation Act 1901* (Cth) permits courts to refer to 'any treaty or other international instrument that is referred to in the Act' when seeking to confirm the meaning of any provision within the Act.

[297] *Dietrich v R* (1992) 177 CLR 292.

[298] Ibid, [24].

[299] *Kartinyeri v Commonwealth* 195 CLR 337 ('*Kartinyeri*').

[300] *Kartinyeri v Commonwealth* 195 CLR 337, 384 (emphasis added).

[301] Australian Government, *Australia's Human Rights Framework* (2010).

way of protecting rights in Australia has been, and under the Framework remains, the scrutiny of legislation via Parliamentary committee.[302]

In Australia, the Senate Standing Committee for the Scrutiny of Bills (SSCSB) was established in 1981. Its purpose and terms of reference are established by Senate Standing Order 24 which (in regards to rights) states:

> a. At the commencement of each parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
>
> i. trespass unduly on personal rights and liberties;
>
> ii. make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
>
> iii. make rights, liberties or obligations unduly dependent upon non-reviewable decisions.[303]

Firstly, it must be noted that the SSCSB is a Senate Committee and thus its primary role is to bring rights-concerns to only one house of the bi-cameral Australian Federal Parliament. The SSCSB Alerts may impact on the decision of the Senate to approve a Bill or to call for rejection/amendment of a Bill. However, whether or not (and how frequently) the Senate is willing to challenge the Bills presented to them is likely to depend on party representation in the Senate. Or, more precisely, the efficacy of the SSCSB as a rights-protection mechanism will likely depend on whether or not the Government of the day has a Senate majority.[304]

The SSCSB also brings its concerns to the attention of the Minister presenting the Bill to Parliament. The Minister may be asked to defend his/her proposed legislation against the SSCSB concerns. Generally, Ministers will respond to correspondence from the

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[302] In addition to the procedural and political requirements which the Human Rights (Parliamentary Scrutiny) Bill (Cth) 2010 (discussed below) introduces, the Framework also includes an education component (increasing public awareness and understanding regarding human rights and the role of human rights in Australia) as well as a 'National Action Plan' aimed at educating the public service about rights. These aspects of the Framework are not of relevance to this thesis.

[303] *Senate Standing Order* 24

[304] Cheryl Saunders, 'Protecting Rights in Common Law Constitutional Systems; a Framework for a Comparative Study' (2002) 33(3/4) *Victoria University of Wellington Law Review* 507.

SSCSB and the Ministerial Comments will be taken into account when the SSCSB's report on proposed legislation is generated.[305]

There are certain weaknesses with the SSCSB system of scrutiny which limit its efficacy as a genuine 'political protection' of fundamental rights. In particular, the lack of guidance to the SSCSB as to which rights to consider, the late stage at which the SSCSB presents its report to the Senate, and the limited influence of the SSCSB's reports on the Senate (and it's even more limited influence on the decision-making of the House of Representatives).[306] Although these weaknesses will be discussed further in Chapter 4, in particular at 4.4.2 which includes analysis of how the SSCSB has operated in practice, it is necessary to mention them in the context of this overview of Australia's approach to the protection of rights, because these weaknesses have provided the impetus for the Framework which develops the Parliamentary scrutiny of Bills as to compatibility with fundamental rights.

The Framework seeks to remedy some of the weaknesses in this SSCSB-dominated political protection. The Human Rights (Parliamentary Scrutiny) Bill 2010[307] seeks to expand the scrutiny of legislation so as to provide a more thorough scrutiny of Bills as to their compatibility with fundamental rights. The *Human Rights (Parliamentary Scrutiny) Bill* introduces three key changes to the pre-existing SSCSB scrutiny system. Firstly, those rights protected, and to which attention should be directed during the drafting and scrutiny process, are given greater specificity. Secondly, parliamentary scrutiny of Bills as to human rights is to be the responsibility of a new specialised Joint Committee on Human Rights (Australian JCHR) as opposed to a general scrutiny committee which has 'personal liberties' amongst its concerns. Thirdly, the *Human Rights (Parliamentary Scrutiny) Bill* requires that a 'statement of compatibility' with human rights be prepared in relation to each Bill and presented to Parliament by the Member of Parliament submitting the Bill.

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[305] NSW Legislative Council Standing Committee on Law and Justice, 'A Bill of Rights for NSW' Report No 17 (2001).

[306] Saunders, above n 304; George Winterton, 'An Australian Rights Council' in Tom Campbell, Jeffrey Denys Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 305; Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29(3) *Melbourne University Law Review* 665.

[307] Human Rights (Parliamentary Scrutiny) Bill (Cth) 2010.

Under s 3 of the Human Rights (Parliamentary Scrutiny) Bill, 'human rights' are defined as the rights and freedoms within seven international human rights treaties to which Australia is a signatory. These conventions are:

a) The International Convention on the Elimination of all Forms of Racial Discrimination;

b) The International Covenant on Economic, Social and Cultural Rights;

c) The International Covenant on Civil and Political Rights;

d) The Convention on the Elimination of All Forms of Discrimination Against Women;

e) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

f) The Convention on the Rights of the Child; and

g) The Convention on the Rights of Persons with Disabilities.

The Human Rights (Parliamentary Scrutiny) Bill is not a 'single rights instrument' of the kind found in Canada, the EU and UK. It does not give the rights within the seven specified treaties a direct legal force. These treaties are to serve as guidance for the Australian JCHR and MPs when seeking to consider how Bills may potentially impact on rights, adding greater clarity to the task of the Australian JCHR than the general 'rights and liberties' mandate of the SSCSB.[308]

Section 7(a) of the Human Rights (Parliamentary Scrutiny) Bill states that it is a function of the Australian JCHR 'to examine Bills or Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue'. This places the scrutiny of legislation at, potentially, an earlier stage in the legislative process than was possible under the SSCSB. Development of a specialised Australian JCHR, with a clear indication of which rights ought to be considered, is intended to increase both the

[308] Santow, above n 212, 24-6.

quality of reports and the influence of such reports on the quality of legislation enacted by the Parliament.[309]

In addition to the Australian JCHR, s 8. of the Human Rights (Parliamentary Scrutiny) Bill introduces the procedural requirement of 'statements of compatibility'. Section 8 states:

> A Member of Parliament who proposes to introduce a Bill for an Act into a House of the Parliament must cause a statement of compatibility to be prepared in respect of that Bill.
>
> A Member of Parliament who introduces a Bill for an Act into a House of the Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be presented to the House.
>
> A statement of compatibility must include an assessment of whether the Bill is compatible with human rights

These statements of compatibility do not appear intended to attach individual political accountability in the manner of similar requirements in the UK's *HRA*. The MP presenting the bill is not making a personal statement about a belief in its rights-compatibility – although such a belief may be implicit, it is not a requirement of the statement that the MP either have or express such a belief. Instead, by requiring that the MP cause a statement of compatibility to 'be prepared' when proposing the introduction of a Bill, the core function of the statements of compatibility appears to be informative – ensuring that the rights-compatibility of Bills has been considered prior to submission to Parliament, and allowing the Australian JCHR to be informed as to that consideration. This was explained in the Framework released by the Attorney-General, Robert McClelland, where the purpose of the statements of compatibility is explained as follows:

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[309] Attorney-General Hon. Robert McCelland MP, 'Enhancing Parliamentary Scrutiny of Human Rights' (Media Release 2 June 2010).

<http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_2June2010-Enhancingparliamentaryscrutinyofhumanrights>.

> Statements of compatibility will aid parliamentary consideration of new laws against human rights principles. Statements of compatibility will provide a valuable assessment to assist the Joint Committee's work.[310]

The Framework does not alter the legal protection of fundamental rights in Australia, nor does it substantially shift the focus of political protections to the executive (as is the case, for example, in Canada). Instead, the Framework is intended to introduce a more effective form of political scrutiny whilst maintaining the focus on Parliament as the institution with primary responsibility for the protection of fundamental rights.

2.4.3 Additional Rights Protections

Finally, some consideration must be given to the initiatives taken by the ACT and Victoria in implementing bills of rights within their own Territory/State jurisdictions. Prior to the enactment of the *Human Rights Act 2004* (ACT) and the *Victorian Charter* the States and Territories, as mentioned above, all adopted an *ad hoc* legislative approach (similar to the Commonwealth) to the protection of rights. In adopting a comprehensive bill of rights, the ACT and Victoria were demonstrating a changed approach to how rights were to be recognised and protected within Australian jurisdictions. They have introduced weak-form judicial review (legislative) model of rights-protection, drawing on the experiences of the UK. As George Williams put it:

> The Victorian Charter of Rights is important not only because it is a significant change to the text of law. It is also significant because it requires a re-evaluation of these and other traditional views about Australian politics and law as they relate to the protection of human rights.[311]

This thesis has not considered the approaches to human rights taken by the Canadian Provinces or within the regions of the UK which have their own legislatures as a result of the process of devolution, nor has attention been given to the individual Member States of the EU (with the exception of the UK). However, each of those three jurisdictions have a clear, nationally applicable (or, in the case the EU, an ECJ-enforced) specific approach to the protection of fundamental rights. In the absence of a

[310] Ibid.

[311] George Williams, 'Victoria's Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 880, 882.

specific rights instrument in Australia at the national level, the enactment of the ACT's *Human Rights Act* and *Victorian Charter* cannot be ignored.

Although there are differences between the two models, the *Victorian Charter* will be used to highlight the shift at the sub-national level. This is partly due to the different implications of state and territory legislation, but also because the drafters of the *Victorian Charter* drew on the experiences of the ACT under the *Human Rights Act* to inform the form of protection offered by the *Victorian Charter.*[312]

The Victorian Charter as an example of a State or Territory Bill of Rights

The *Victorian Charter* focuses on 'ensuring that fundamental principles of human rights are taken into account at the earliest stages of the development of law and policy.'[313] The political protection introduced by the *Victorian Charter* form of rights protection is the requirement that Ministers make statements as to rights-compatibility of Bills[314] supplemented by the Parliamentary Scrutiny of Acts and Regulations Committee[315] which considers and reports on the *Victorian Charter*-compatibility of Bills (in addition to the Ministerial statement of compatibility). Since it is a legislative bill of rights, The *Victorian Charter* does not limit the ability of the Parliament to pass legislation incompatible with human rights, but primarily encourages transparency in law making and the publicity of potential limitations of rights.[316]

[312] Additionally, the ACT *Human Rights Act* was amended in 2008. For discussion of how the ACT *Human Rights Act* influenced the Victorian Charter see; Evans, Simon, 'The Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act: Four Key Differences and their Implications for Victoria', paper presented at the *Australian Bills of Rights: The ACT and Beyond Conference Australian National University*, 21 June 2006, available online at the *Human Rights Law Centre (2011)* <http://www.hrlrc.org.au/files/IQ51KACZFY/Evans.pdf>.

[313] Williams, above n 311.

[314] *Victorian Charter,* s 28.

[315] Ibid, s 30.

[316] According to George Williams, the *Victorian Charter* 'is based on the idea that government should be transparent in its treatment of principles like human rights and also accountable to the people by operating fairly and without adverse discrimination. For example, the requirement for Statements of Compatibility in Parliament whereby key information is brought to public attention about the impact of a Bill will improve deliberation about changes to the law.' Williams, above n 311, 904.

The second form of protection is found in s 32(1) of the *Victorian Charter,* which imposes a requirement that courts interpret legislation in a manner compatible with the rights within the *Victorian Charter*[317]. The section states:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

Additionally, '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to human rights'[318] may be used as aides in interpreting legislation so as to be compatible with rights. This is an expansion of the existing statutory interpretation principles mentioned above because it does not rely on pre-existing ambiguity in the legislation. Section 36(2) allows that in some instances it will not be possible to interpret legislation consistently with human rights, in which case 'the Court may make a declaration to that effect,'[319] after providing notice to the Attorney-General giving him or her the opportunity to intervene. The declaration of inconsistency does not affect the validity of the legislation.

Finally, the *Victorian Charter* also provides a restriction on executive and administrative action incompatible with rights. Section 38 makes such behaviour unlawful. It makes violation of rights grounds for judicial review under the *Administrative Law Act 1978* (Vic).

There have not yet been many cases in which the *Victorian Charter* has been used.[320] Therefore the standard of rights protection is yet to be comprehensively tested. The *Victorian Charter* does, however, raise several issues as to how rights are protected within Australia, or more accurately, in one Australian State.

The *Victorian Charter* seeks to *encourage* the passage of human rights compatible legislation (and discourage incompatible legislation) rather than *prohibiting* the legislature from enacting such laws. This reflects the general wariness against rights-based limits on the authority of legislatures which has been mentioned above. The

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[317] *Victorian Charter*, s 32(1).

[318] Ibid, s 32(2).

[319] Ibid, s 36(2).

[320] Many of the provisions of the *Victorian Charter* did not come into effect until 2008. The Human Rights Law Resource Centre has compiled a regularly updated list of cases with *Victorian Charter* references; http://www.hrlrc.org.au/html/s02_article/default.asp?nav_top_id=63&nav_cat_id=152

strength of this protection relies on both the Minister's statement and the Scrutiny Committee's statement providing sufficient political pressure to prevent incompatible Bills from being passed into law.

The ability of Parliament to pass rights-incompatible legislation is further recognised by s 31. This section allows not only that legislation not stated to be compatible may be passed but that such legislation may be immune from review under the *Victorian Charter*. Section 31 states:

> (1) Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter
>
> (2) …
>
> (3) A member of Parliament who introduces a Bill containing an override declaration, or another member acting on his or her behalf, must make a statement to the Legislative Council or the Legislative Assembly, as the case requires, explaining the exceptional circumstances that justify the inclusion of the override declaration.
>
> (4) It is the intention of Parliament that an override declaration will only be made in exceptional circumstances.
>
> (5) …
>
> (6) If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision.
>
> (7) A provision of an Act containing an override declaration expires on the 5th anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.

While s 31(4) indicates that this 'override' is intended only in exceptional circumstances (and exceptional circumstances that must be explained by the Minister), there is nothing within the *Victorian Charter* which explains how those circumstances are to be determined.

The content of the *Victorian Charter* is heavily influenced by international treaties to which Australia is a signatory. In particular, the *ICCPR* is reflected in the rights

contained within the *Victorian Charter*.[321] Thus, such rights are being given domestic legal effect by State rather than Commonwealth legislation. Further, the express consideration of unimplemented Treaties as well as foreign judgments in interpreting legislation under the *Victorian Charter* expands on the common law interpretative principles (discussed above). This mandate goes substantially further than the common law principles of interpretation. Human rights become an issue to be considered at all stages of law making and application.

The introduction of the interpretative obligation for the court does go beyond the pre-*Victorian Charter* presumptions of rights-favourable interpretations. As Carolyn and Simon Evans put it, 'even well-settled interpretations of statutes may be disrupted by the Charter.'[322] However, this interpretative provision must be exercised within the limits of the purpose of the legislation. This deference to the legislature's purpose was included in the *Victorian Charter* as an attempt to prevent what James Allan has called 'interpretation on steroids' by the judiciary.[323] By this he means the scenario where the realm of possibility, in which rights-compatible interpretations of legislation may be found, is so large that the purpose of the legislation is lost.[324]

The interpretative obligation placed on the judiciary by the *Victorian Charter* seeks to encourage judicial protection of rights while still maintaining both actual and perceived parliamentary control over the content and purpose of legislation. This collaborative relationship between the various branches of government in the protection of rights is furthered by the process that must be followed both in advance of, and in response to, a declaration of inconsistent interpretation made under s 36(2) of the *Victorian Charter*.

Prior to a declaration of inconsistent interpretation being made, the Attorney-General must be notified and given the opportunity to intervene in the proceedings and/or

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[321] Priyanga Hettiarachi goes so far as to suggest that the *Victorian Charter* may be considered to be a state implementation of a Commonwealth international commitment. P. Hettiarachi, 'Some Things Borrowed, Some Things New-An Overview of Judicial Review of Legislation Under the Charter of Human Rights and Responsibilities' (2007) 7(1) *Oxford University Commonwealth Law Journal* 61, 67.

[322] Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian Charter of Rights and Responsibilities' (2006) 17 *Public Law Review* 264, 268.

[323] James Allan, 'The Victorian Charter of Human Rights and Responsibilities: exegesis and criticism' (2006) 30(3) *Melbourne University Law Review* 906, 909.

[324] Ibid.

provide submissions. Further, once the declaration is made, the Minister must, under s 37 provide a response:

> Within 6 months after receiving a declaration of inconsistent interpretation, the Minister administering the statutory provision in respect of which the declaration was made must—
>
> (a) prepare a written response to the declaration; and
>
> (b) cause a copy of the declaration and of his or her response to it to be—
>
> (i) laid before each House of Parliament; and
>
> (ii) published in the Government Gazette.

The intention of the Ministerial response is that it ought to prompt changes in the law.[325] The strength of this protection is, however, limited as it does not force a change in the law but rather allows the retention of the incompatible legislation with a Ministerial explanation.

2.4.4 Conclusions: Australia

Australia has resisted the enactment of a specific rights instrument to facilitate the legal protection of fundamental rights and consequently particular rights are offered differing forms and strengths of protection. While the SSCSB potentially offers a coherent political protection, it is protection derived from scrutiny on the basis of 'rights and liberties' rather than a distinct commitment to the protection of *fundamental* rights. With the introduction of the Human Rights Framework, Australia is in the process of introducing a coherent approach to the protection of fundamental rights short of adopting a single rights instrument. The focus of protection of rights in Australia remains on political protections with the range of legal protections offering an additional layer of protection without (except in relation to those rights which are constitutionally guaranteed) limiting the legislative prerogative to pass legislation inconsistent with fundamental rights.

[325] Williams, above n 311.

CHAPTER 3. Legal Protections

The role of the courts in protecting rights against legislative encroachment has been formalised in three of the four jurisdictions considered. Canada and the EU have granted constitutional status to their bills of rights and the UK's *Human Rights Act (HRA)*[1] grants the rights contained within the *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*[2] the status of a legislative bill of rights. Even in the absence of a formal role for the judiciary specified in legislation or via constitutional arrangement, in Australia fundamental rights act as an influence on the judiciary and serve to promote (although not guarantee) rights-favourable interpretations of existing legislative instruments (as well as particular rights having constitutional protection). Given that legal protections of fundamental rights against legislative encroachment are present in each of the jurisdictions, and indeed legal protection of fundamental rights has become the norm globally, this chapter will explore the strengths and weaknesses of judicial involvement in the protection of rights.

As was highlighted in the Introduction to this thesis (in particular Chapter 1.1.1), the phrase 'legal protections' refers generally to those protections in which the judiciary has a key role in limiting legislative violation of fundamental rights. This is not to suggest that 'legal limitations' against rights-encroachment do not take forms other than those explored here, or that the courts do not have a role in the protection of fundamental rights other than as against legislative encroachment. However, the focus of the thesis is on those ways in which obstacles are placed in the way of the legislative encroachment of fundamental rights or (in certain forms of legal protection) the way in which the legislative encroachment of fundamental rights is prohibited. Consequently the term 'legal protections' is used to refer collectively to the four forms of protection in which the judiciary protects fundamental rights as against violation by the legislature: strong-form judicial review, weak-form judicial review (constitutional), weak-form judicial review (legislative) and principles of interpretation.

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[1] *Human Rights Act 1998* (UK) c 42 (*'HRA'*).

[2] *Convention for the Protection of Human Rights and Fundamental Rights,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (*'ECHR' or 'European Convention'*).

It has been previously noted, but bears repeating at the outset of this chapter, that the purpose of this thesis is not to evaluate the desirability of, or analyse the legitimacy of, the various ways in which legislatures may be limited in their ability to pass rights-encroaching legislation. Instead, this thesis examines the strengths and weaknesses associated with particular forms of protections. Similarly, in considering the strengths and weaknesses of legal protections and the experiences of the various jurisdictions, it is not intended to suggest that any particular legal protection offers a superior (or conversely a less legitimate) form of protection. Instead, the chapter begins by acknowledging that different jurisdictions have adopted differing approaches to the role of the judiciary in the protection of fundamental rights against legislative encroachment, and sets out the four forms of legal protection of rights which are present in the four jurisdictions which are compared in this thesis.

Additionally, it must be noted that this chapter examines legal protections in isolation from any political protections which exist within jurisdictions. The purpose of this is to highlight the strengths and weaknesses of the legal *form* of protection. In particular, this allows for the identification of those weaknesses that are inherent to 'legal protections' and which cannot be mitigated except by going outside of the scope of the legal protection and looking to other (political) factors. This will be returned to in Chapter 5 where the interaction of legal and political protection is discussed.

The first part of this chapter (3.1) elaborates on the four forms of legal protection which were explained in the Introduction to this thesis. Given that discussion of the strengths and weaknesses of various forms of legal protection is often related to arguments regarding the legitimacy of judicial review in general, some discussion of these arguments will occur, in particular those which deal with strong-form judicial review. However, these arguments are not fundamental to the overall discussion in this thesis, so they are introduced only as an acknowledgement of the ongoing theoretical debate as to the legitimacy of legal protections, rather than as an attempt to substantively assess the merits of the various positions. Given that arguments *against* legal protections will be discussed in later parts (in the context of the weaknesses of legal protections), introducing the theoretical justifications of judicial review in this early part also ensures that both sides of the debate are acknowledged.

In 3.2, brief mention is made of judicial activism and the impact of judicial activism on legal protections – or more precisely on the realisation of strengths and weaknesses of legal protection. The inherent subjectivity of determinations of whether a particular judge, or a particular decision, is 'activist' or not, means that judicial activism will have only a very small role in this thesis. However, it is necessary to acknowledge the potential impact of an activist court on the protection of fundamental rights and to recognise the dangers of relying on such a court to ensure the effectiveness of existing mechanisms.

The following two parts of this chapter explore the strengths and weaknesses associated with legal protections of fundamental rights. While not drawing on the specific experiences of the jurisdictions – that comparison is undertaken in the final part of the chapter - 3.3 discusses the strengths associated with particular forms of rights protection and acknowledges the strengths may be realised differently (or to a different extent) depending on the form of legal protection.

Three key areas of 'strength' of legal protections will be addressed in 3.3. First, the consequences of a judicial determination of invalidity will be identified and the strength of each legal protection in responding to legislative violations of fundamental rights will be outlined. Second, the value of legal protections in creating a forum for complaints against legislative encroachment of rights will be addressed. Finally, the judicial role in providing authoritative interpretations of rights will be considered.

In 3.4 the weaknesses associated with legal protections of fundamental rights will be considered. It will become apparent that those who support judicial involvement in the protection of fundamental rights, in particular those who support judicial review in some form, do not necessarily view issues such as the shift away from democratic decision-making as a 'weakness' *per se*. Instead, issues referred to here as 'weaknesses' are perceived by judicial review advocates as acceptable sacrifices necessary to guarantee a stronger protection of fundamental rights. However, the terminology of weakness will be used here for a particular purpose. That is, this thesis does not seek to defend a particular form of rights protection, and instead works within existing forms of rights protection to consider their consequences. Chapter 5 addresses how different forms may be used co-operatively to emphasise the strengths and mitigate the weaknesses of each form of rights protection. In order to do this, it is necessary to

acknowledge that legal protections are imperfect and, while these may be 'acceptable costs' to some, in acknowledging 'weaknesses' that the legal protections cannot *on their own* overcome without impacting on the aforementioned 'strengths', the door is opened to considering how such weaknesses may be mitigated via other (political) forms of protection.

The first key weakness that will be considered is the impoverishment of discourse about the meaning of rights as a result of judicial determinations of 'compatibility' replacing political motivation to identify the *best possible* scheme of rights-protection. Secondly, the retrospective nature of judicial decision-making will be addressed. Thirdly, the democratic challenges to legal protections will be discussed.

The final part of this chapter (3.5) draws on the four jurisdictions to identify core features of legal protections and to highlight how the jurisdictions have experienced both the strengths and the weaknesses of the particular approaches to the protection of fundamental rights. This will include considering how the existence or absence of a single rights instrument may impact on the strengths and weaknesses of the legal protections; assessing the impact of 'exceptions' to the general protection of rights as an attempt to mitigate some of the weaknesses of legal protections without substantially reducing the strengths; and raising concerns about the conflict between the value of the court acting as a forum in which to challenge legislative action with regard to rights and the limits of the judicial forum in giving substantial consideration to a wide range of rights-based arguments in relation to specific complaints.

What becomes apparent is that legal protections can be viewed as comprising as a spectrum. At one end, strong-form judicial review offers a judicial guarantee against legislative violation of fundamental rights. However, the cost of the strengths associated with this form of protection is that the weaknesses are also most pronounced. In the middle, weak-form judicial review (both constitutional and legislative) tends to mitigate the weaknesses found in strong-form judicial review, but is unable to overcome them. At the same time, there is the potential that in mitigating the weaknesses, weak-form judicial review may also be perceived as diminishing potential strengths of 'judicial review'. At the far end of the spectrum, the common law interpretative principles do not suffer from the weaknesses associated with legal protections to the same extent as the various forms of judicial review (or at least the potential for the

weaknesses to be realised is substantially reduced), but at the same time the courts do not offer the same standard of rights protection, and the potential strengths associated with legal protections are least realised in jurisdictions which primarily rely on interpretative principles as a legal protection of fundamental rights.

3.1 Forms of Legal Protection

3.1.1 Strong-form Judicial Review

Strong-form judicial review derives from a (direct or implied) constitutional prohibition on legislation which violates fundamental rights. Unlike other forms of judicial review, the prohibition in strong-form judicial review is more than merely a hurdle against legislative violation of rights. In a strong-form judicial review jurisdiction, the legislature cannot override a finding of invalidity. Of the jurisdictions considered in this thesis, this form of protection is demonstrated primarily by the EU, which (as was explained in Chapter 2.3) has, as of December 2009, granted the *EU Charter* 'Treaty status', but has long featured strong-form judicial review as the primary mechanism by which rights are protected against legislative encroachment (albeit one which has primarily been used against executive rather than legislative measures). Fundamental rights were acknowledged as part of the general principles of Community Law and the common (rights-protecting) constitutional traditions of the Member States, and thus served as a judicially enforced limitation on the law-making institutions and Member States of the EU. Australia also features strong-form judicial review, albeit limited to those few rights given explicit or implied constitutional status. The *Australian Constitution* does not guarantee fundamental rights in general.

The judiciary in a strong-form judicial review jurisdiction is empowered to declare invalid any legislation which is found to be incompatible with fundamental rights. This 'strong' judicial review can be distinguished from 'weak' judicial review (discussed below) because this form of protection does not allow legislature can override the judicial decision via ordinary legislative action, although amendment of a constitution via the specific procedures which facilitate such amendments (for example, via referendum in Australia or via Treaty amendment in the EU). Entrenchment within a constitution positions rights as fundamental values within the legal system. Rights

become a constitutional limitation on the authority of the legislature. Ultimately, one institution must have the 'final say' as to whether legislation complies with the rights-based constitutional limitations and in strong-form judicial review that institution is the court. Rather than rights being treated as a distinct political issue, it is treated as a constitutional limitation and the court is therefore given the task of determining the limits of legislative authority.

Although a feature of many legal systems, empowering courts to determine the constitutionality and consequent validity of legislation is not without controversy. To fully understand the strengths of strong-form judicial review, it is worthwhile to briefly consider some of the theoretical justifications for this form of judicial review.

In the landmark 1803 US case of *Marbury v Madison,*[3] Marshall CJ indicated that judicial review was an indicator of a 'government of laws and not of men.'[4] He stated that *all* branches of government were constrained by the limits prescribed to them within the *US Constitution.* As the branch tasked with interpreting and applying the law, the judiciary (and the Supreme Court in particular) were similarly tasked with interpreting and applying the *US Constitution,* even to the extent of reviewing the actions of other governmental institutions.

Hans Kelsen further developed the argument not only of the legitimacy but the desirability of the existence of a constitutional court with the ability to find legislation invalid. Judicial review, Kelsen suggested, was necessary to ensure the coherency of a constitutional legal system. A constitution is a 'superior law', a law from which all others derive their legitimacy. Kelsen views an expert constitutional court as the most appropriate institution for interpreting and applying the constitution and he views invalidation of unconstitutional statutes as the only solution which would logically reflect the authority of the constitutional document whilst maintaining a unitary legal system.

In order to maintain coherency in the legal system, the consequence of a (judicial) determination of constitutional incompatibility must, in Kelsen's view, be *invalidation* rather than mere non-application. Non-application of a statute only in a *particular* case

[3] *Marbury v. Madison*, 5 US 137 (1803).

[4] Ibid.

would mean that the legislation remains valid and, consequently, could later be challenged again in other courts which might interpret constitutional rules differently.[5] According to Kelsen:

> The disadvantage of this solution consists in the fact that the different law-applying organs may have different opinions with regard to the constitutionality of a statute, and that, therefore, one organ may apply the statute because it regards it as constitutional whereas the other organ will refuse the application on the ground of its alleged unconstitutionality. The lack of a uniform decision of the question as to whether a statute is constitutional, i.e. whether the constitution is violated is a great danger to the authority of the constitution.[6]

Thus, Kelsen's argument demonstrates that if the constitution is to be genuinely entrenched as the 'superior law' from which the (limited) authority of all government institutions derives, it follows that unconstitutional statutes must be *invalid*.

It is interesting to note that Kelsen's defence of the centralisation of judicial review (in particular as it occurred in the *Austrian Constitution* of 1920) was heightened by the previous lack of binding authority of the decisions of higher courts on later cases heard by lower courts.[7] Kelsen sought a legal system where the decisions of the highest court regarding the meaning of the constitution were binding 'not only for the concrete case but generally for all future cases'.[8] While states that are part of the common law tradition - including Australia, Canada and the UK - have a long history of hierarchical courts with the decisions of higher courts forming precedent, this was previously uncommon in continental European systems.

According to Alec Stone Sweet, Kelsen recognised the necessity of judicial review as a means of ensuring a coherent constitutional legal system, while at the same time being mindful of maintaining the balance and division of responsibilities among various branches of government.[9] Kelsen viewed the power to invalidate legislation as a 'law-

[5] Hans Kelsen, 'Judicial Review of Legislation' (1942) 4(2) *Journal of Politics* 183.

[6] Ibid, 185.

[7] Ibid.

[8] Ibid.

[9] Alec Stone Sweet, 'Why Europe Rejected American Style Judicial Review (and why it may not matter)' (2003) 101 *University of Michigan Law Review* 2744, 2768.

making' power, albeit a limited one. The judiciary, he suggests, has a limited 'negative' law-making power (as distinguished from the 'positive' and 'creative' law-making power of the legislature). Kelsen, therefore, suggested that the power to invalidate legislation should be reserved only to a particular constitutional court, staffed by the most learned of legal experts, as opposed to a power granted to the judicial branch at large.[10]

While the Kelsenian constitutional court should have the power to invalidate legislation incompatible with constitutional *rules*, the balance between legislative and judicial roles would be threatened if faced with constitutional *rights*:[11]

> Sometimes constitutions themselves may refer to [natural law] principles, which invoke the ideals of equity, justice, liberty, equality, morality, etc., without in the least defining [precisely] what are meant by these terms.... But with respect to constitutional justice, these principles can play an extremely dangerous role. A court could interpret these constitutional provisions, which invite the legislator to honor the principles of justice, equity, equality.., as positive requirements for the [substantive] content of laws.[12]

Given Kelsen's reluctance about rights as the basis of judicial/constitutional review, it is necessary to look elsewhere to explain the popularity of rights-based judicial review as a legal protection of fundamental rights. Jürgen Habermas provides a useful explanation, which, like Kelsen's, seeks to defend judicial review as a mechanism which seeks to secure the coherence of the constitutional legal system:

> Political will-formulation terminates in resolutions about policies and legal programs that must be formulated in the language of law. This ultimately makes a judicial review necessary in which the new programs are examined for their fit with the existing legal system.

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[10] It should be noted that Kelsen provided substantial detail as to the form and composition of an ideal constitutional court to fulfil this role of 'constitutional review' – which he saw as reserved not to the judiciary at large, but to a specific, expert bench. While undoubtedly this ideal informed his defence of judicial review, for the purposes of this chapter it is sufficient to mention that Kelsen conceived of the constitutional court as comprising of legal experts (including law professors) who are neither members of other branches of government nor elected (and thus with political ambitions) themselves. See for discussion ibid.

[11] Kelsen, 'Judicial Review of Legislation' above n 5, 186; Stone Sweet, above n 9.

[12] Hans Kelsen, 'La Garantie Juridictionelle de la Constitution' (1928) 45 Revue du Droit Public 197, as cited in Alec Stone Sweet, above n. 9, 2768.

> The political legislature may use its lawmaking powers only to justify legal programs that … are compatible with this system and can link up with the corpus of existing laws. From this *legal or juridical* standpoint, all resolutions have to be tested for coherence. The consistency of law must be preserved for the sake of legal certainty.[13]

Unlike Kelsen, however, Habermas sees the positive law/natural law and rules/rights dichotomies as unhelpful.[14] As such, Habermas views rights-based judicial review as part of a broader discourse which encompasses both legal debate and political will.

Habermas presents judicial review as necessary to protect *both* public rights – those rights which guarantee and facilitate individual engagement with the political decision making processes - and private rights – related to individual personal autonomy distinct from the public sphere.[15] Reserving the 'final say' on the meaning of rights (and their appropriate limitations) to the legislature necessarily prioritises public rights by suggesting that the value of democratic participation is more important than those other values which legislative supremacy allows the 'demos' to limit.

Habermas suggests that modern democratic societies are informed by values beyond merely democratic participation – although he certainly acknowledges the importance of democratic participation. Private rights allow individuals to hold and develop ideas and values and to make decisions as to how to live their lives. They are necessary for a meaningful expression of public rights. They are the rights which allow each individual to formulate a perception as to what government *should* do and what it *should not* do and thus the realisation of these private rights influences the way in which individuals participate in democratic processes. Without private rights being secured against 'democratic' encroachment, those democratic rights may be merely procedural.

Yet without public rights, private rights are also insecure. Public rights facilitate the shifting of these values and ideas about appropriate behaviour (of individuals and governments) into concrete standards and allow individuals to engage in debate and discourse about these values and to influence the content of the laws. It is only where

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[13] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press, 1998), 167 - 168.

[14] Ibid, 250-251.

[15] It should be noted that Habermas was wary about formulating a 'list' of private rights.

public participation in government is a core constitutional value that private rights can be protected against governmental interference. William Forbath has distilled Habermas's position to a core claim: 'private rights secure the conditions for deliberative democracy; deliberative democracy alone secures and legitimises private rights.'[16]

Habermas's constitution, is a system of inter-connected and inter-related rights. Judicial review allows for the protection of rights by facilitating a discourse involving both the courts and the legislature. He says:

> The court reopens the package of reasons that legitimated legislative decisions so that it might mobilise them for a coherent ruling…in agreement with existing principles of law; it may not, however, use these reasons in an implicitly legislative manner that directly elaborates and develops the system of rights.[17]

Thus he views each institution of government as limited by the constitution. The courts engage in judicial review, but do so within a pre-existing constitutional framework. Their task is to uphold the coherency of the legal system with the underlying values – including both public and private rights - which inform the constitution. Judicial review does not threaten the role of the legislature as the court is not able to engage in what is effectively a legislative program which develops the rights-based system beyond the scope of the constitutional framework.

Those who support strong-form judicial review face arguments against the legitimacy of protecting rights by allowing the court a 'final say' as to the validity of legislative measures. There are two main strands to the criticism of judicial review as an illegitimate mechanism by which rights are protected. The first - Alexander Bickel's 'counter-majoritarian difficulty' - points to the necessary rejection of majority decision-making on which democratic societies are based.[18] The second – Jeremy Waldron's rights-based argument – goes further and suggests that rights-based judicial review

[16] William E. Forbath, 'Review: Habermas's Constitution: A History, Guide, and Critique' (1998) 23(4) *Law & Social Inquiry* 969, 994.

[17] Habermas, above n 13, 262.

[18] John Moeller, 'Alexander M. Bickel : Toward a Theory of Politics' (1985) 47(1) *Journal of Politics* 113.

undermines the core individual rights to participation in the decision-making process on which liberal democracies are based.[19]

These two arguments will be returned to in the course of discussing the weaknesses of judicial review in Part 3.4 as, having accepted that strong-form judicial review is 'here to stay' as part of various legal systems, these challenges to the legitimacy of judicial review can equally be considered as exposing the weaknesses of the form of protection – which is of greater significance to this thesis.

3.1.2 Weak-form Judicial Review (Constitutional)

Weak-form judicial review (constitutional) provides a general limitation on the power of the legislature to enact rights-encroaching legislation, but, unlike strong-form judicial review, the legislature ultimately retains the ability to reject the judicial determination of invalidity. The Canadian experience is used to demonstrate this weak-form of constitution-based judicial review. In Canada, the retention of the legislature's ability to pass rights-infringing legislation takes the form of a 'shield' under the notwithstanding clause.

In some ways, weak-form judicial review (constitutional) can be viewed as allowing the advantages associated with strong-form judicial review, whilst providing a remedy for a public (or more precisely a legislature) that objects to the judicial determination of invalidity. That is, it relies on the above-mentioned arguments regarding judicial review to justify its legitimacy, yet seeks to accommodate the criticisms associated with the undemocratic nature of the judiciary and the suggestion that judicial review undermines participation in the governance of the jurisdiction.[20] As was discussed in 2.1.3, in Canada, weak-form judicial review (constitutional) additionally seeks to ensure that provincial differences are maintained and that the availability of judicial review as to the reasonableness of any limitation of rights does not result in a homogenisation of policy across the provinces in order to comply with a judicially mandated interpretation

[19] Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13(1) *Oxford Journal of Legal Studies* 18.

[20] Jeffrey Goldsworthy, 'Judicial Review, Legislative Override, and Democracy' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003), 263;Leighton McDonald, 'Rights, 'Dialogue' and Democratic Objections to Judicial Review' (2004) 32 *Federal Law Review* 1.

of rights. This is an acknowledgement of the diverse possible interpretations of rights, or more precisely, of different yet legitimate understandings of whether the limitation of rights to achieve legislative objectives is 'reasonable'.

Weak-form judicial review (constitutional) is often associated with a dialogue model of judicial review. That is, rather than reserving the final say about the meaning of fundamental rights to the courts, judicial review is perceived as motivating discourse about rights rather than replacing democratic decision-making. This has been explained by Peter Hogg and Allison Bushell, who state:

> Where a judicial decision striking down a law on *Charter* grounds can be reversed, modified, or avoided by a new law, any concern about the legitimacy of judicial review is greatly diminished. To be sure, the Court may have forced a topic onto the legislative agenda that the legislative body would have preferred not to have deal with…The legislative body would have been forced to give greater weight to the *Charter* values identified by the Court in devising the means of carrying out objectives…[There] are constraints on the democratic process, no doubt, but the final decision is the democratic one.[21]

The justification, therefore, for weak-form judicial review of this kind is that it gives rise to a dialogue between courts and legislatures (and executives) about the appropriate meaning of rights, and about how rights ought to be protected in the jurisdictions. The invalidity of legislation on the basis of rights-incompatibility, as identified by the courts, gives rise to two potential consequences with regard to the role of the legislature. The potential first consequence is definitive of weak-form judicial review (constitutional). The availability of a 'notwithstanding clause' allows the legislature to re-enact (and shield from further review) legislation which has been determined to be invalid by the court. This may be done due to a political belief that the courts 'got it wrong' or because the legislation is viewed as necessary and appropriate *despite* the incompatibility. The second potential consequence is that the legislature may choose not to re-enact the invalidated legislation. As is the case in strong-form judicial review jurisdictions, the legislature must then re-assess its legislative programmes and seek to

[21] Peter W Hogg and Allison Bushell, 'The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights isn't Such a Bad Thing After all)' (1997) 35 *Osgoode Hall Law Journal* 75, 80.

develop new measures which achieve the legislative objectives without unduly infringing on rights.[22]

However, on the other side of the debate about weak-form judicial review (constitutional) are criticisms stemming from two very different perspectives about judicial review. Cheryl Saunders explains these views as follows:

> [Weak-form judicial review (constitutional)] is vulnerable to criticism by those who favour more effective rights protection as well as by those who prefer the government in Parliament to have essentially untrammeled authority, either because they are sceptical of the effectiveness or bona fides of courts, or for some other reason.[23]

The first school of thought suggests that weak-form judicial review (constitutional) fails to achieve the strong protection offered by strong-form judicial review and consequently fails to offer a genuine bulwark against legislative violations of rights. The 'notwithstanding clause' undermines the 'guarantee' implied by the inclusion of a bill of rights in a constitution and rejects the judiciary as an authoritative decision-making body. The 'majority', whose self-interest the constitutional bill of rights seeks to protect against, retain the ability to encroach on rights and to do so in a way that will be constitutionally permissible.

Dworkin, who supports strong-form judicial review, explains why weak-form 'dialogue' models of constitutional rights protection fail, in his opinion, to recognise the significance of rights as a *limit* on the majority and to place fundamental rights outside of the legislative remit. As explained by Tom Hickman:

> Dworkin argues that individual rights are derived from abstract notions of justice and their development and application is heavily dependent on judicial ideology independent of social consensus. Thus it is not the [judiciary's] function to engage in a 'dialogue between the judges and the nation, in which the [judiciary]

[22] Iacobucci J in *Vriend v. Alberta* [1998] 1 SCR. 493.

[23]Cheryl Saunders, 'Protecting Rights in Common Law Constitutional Systems; a Framework for a Comparative Study' (2002) 33(3/4) *Victoria University of Wellington Law Review* 507.

> is to present and defend its reflective view of what citizen's rights are…in the hope that people will in the end agree.'[24]

This argument suggests that rights *should* be outside of the legislature's power to infringe and thus weak-form judicial review does not create an appropriate 'balance' between democracy and rights, but in seeking to do so, undermines the protection of rights that the judicial review model could potentially achieve.

The second school of thought suggests that weak-form judicial review (constitutional) does not overcome the democracy-based criticisms of strong-form judicial review and remains a threat to democratic decision-making. Despite the *availability* of a legislative override, it is claimed, the dominance of the judicial review protection undermines democratic consideration of rights in a variety of ways. These are discussed below (both in general, as potential weaknesses, and later with specific reference to the Canadian experience). Primarily, the dialogue relies on legislative willingness to challenge judicial decisions and engage in robust debate about rights, an attitude that is potentially undermined by the dominance of the judicial review mechanism as the means of protecting rights and the stigma attached to use of the allowed 'exception' to judicial review.[25] The use of the democratic exception to judicial review becomes not an 'exception' or a means of prompting legislative debate, but a deviation from fundamental rights – albeit one with technical legitimacy.

In Chapter 5, the ways in which the frequency of use of a notwithstanding clause may be minimised will be explored. Later in this chapter, at 3.5.1, the focus will be on how a notwithstanding clause may weaken the overall standard of protection associated with constitution-based judicial review, or, alternatively, may be viewed as mitigating the weaknesses associated with strong-form constitutional protection.

3.1.3 Weak-form Judicial Review (Legislative)

This kind of weak-form judicial review relies not on constitutional mandate but a legislative instrument that obliges the court to consider the fundamental-rights-

[24] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 2000) 146 cited in Tom Hickman, *Public law after the Human Rights Act* (Hart, 2010), 68.

[25] McDonald, above n 20.

compatibility of other legislative instruments. Weak-form judicial review (legislative) generally has two prongs. First, a strong interpretative mandate is imposed on the courts, which requires that they interpret legislation in a rights-compatible manner.[26] Second, where it is not possible to interpret legislation in this manner, the courts may be empowered to make a statement to the effect that they are unable to interpret the legislation in a rights-compatible manner.[27] However, unlike strong-form judicial review and weak-form judicial review (constitutional), the court in a weak-form (legislative) jurisdiction does not have the authority to find rights-incompatible legislation *invalid.* Incompatible legislation must still be applied despite the incompatibility. The declaration of incompatibility, therefore, represents the limits of the legal protection and is a way in which political pressure may be exerted.

Weak-form judicial review (legislative) is viewed by its supporters as a compromise between the desirability of having a 'check' on the tendency of majorities or, more precisely, the legislature, to overlook or infringe on individual rights and the value of legislative supremacy. It achieves this compromise by giving the courts a substantial role but a role short of invalidating incompatible legislation. Anthony Lester has explained the weak-form of judicial review found in the UK's *HRA* as follows:

> The [*HRA*] reconciles formal adherence to the doctrine of Parliamentary sovereignty with the need to enable the courts to provide effective legal remedies for breaches of Convention rights.[28]

Tom Hickman has explained how the combination of interpretative mandate and declarations of incompatibility may be viewed as legitimising the overall weak-form judicial review (legislative) approach to fundamental rights protection. He states:

> This approach hinges on the possibility and desirability of substantive disagreement about the scope and content of …rights being played out through

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[26] The strength of this mandate may vary between jurisdictions, but a legislative bill of rights will generally expand the mandate of the court to interpret legislation in a rights-favourable manner beyond the ordinary common law interpretative principles.

[27] Not all legislative bills of rights include an express power to make declarations of incompatibility. *New Zealand Bill of Rights Act 1990* (NZ), did not originally grant the courts the power to make such a declaration. It has subsequently been amended and the power is now found in ss 92 J & K. Andrew S Butler, 'Strengthening the Bill of Rights' (2000) 31 *Victoria University of Wellington Law Review* 129.

[28] Anthony Lester QC, 'The Magnetism of the Human Rights Act 1998' (2002) 33(3/4) *Victoria University of Wellington Law Review* 477.

> the use of …declarations [of incompatibility], political debate and response. Those who praise the Human Rights Act's dialogic character believe that the role of the courts under the Human Rights Act is to *propose* to the other branches answers to substantive questions of justice.[29]

Although the *HRA* and other legislative bills of rights acknowledge that legislation may be incompatible with fundamental rights, the declaration of incompatibility is only part of the protection offered. Unlike judicial review associated with constitutional protection of rights, weak-form judicial review (legislative) does not view the judicial role as primarily involving a compatible/incompatible determination. Instead, the court is granted a strong interpretative mandate – even where there is no ambiguity in the statute – to interpret legislation in a rights-favourable manner. A determination of incompatibility occurs only in those instances where it is not possible to read a statute in a rights-compatible manner.[30]

The broad interpretative mandate has the potential to offer a judicial protection of rights which is stronger than that which is offered by judicial review leading to invalidation of legislation. Whereas invalidity of legislation prevents rights-incompatible legislation from remaining in force, the courts may, by virtue of the interpretative mandate, give the legislation a rights-favourable interpretation even where it has been read to have meaning beyond legislative intent. Alternatively, a narrow reading of legislation in order to determine a rights-favourable meaning, may result in the legislation not fulfilling the full scope of (rights-incompatible) functions it was intended to produce. However, as Julie Debeljak has pointed out, weak-form judicial review (legislative) can place the court in the precarious position of seeking to use the interpretative mandate without substantively engaging in law-making. She says:

> The judiciary may find themselves in an unenviable position. The success of the rights project rests largely on the perceived legitimacy of the judges' performance. If the judiciary is perceived to take too active an approach to rights, parliamentary sovereignists will claim illegitimate judicial activism and lawmaking in favour of rights. If the judiciary is perceived to be too deferential

[29] Hickman above n 24, 60.

[30] See, for example, Lord Steyn in *R v A* [2001] 3 All ER 1, [44].

> to parliament, rights advocates will equally claim illegitimate judicial activism and lawmaking in favour of majoritarianism and parliamentary rule.[31]

Significantly, weak-form judicial review (legislative) supplements judicial review with other protections, including political protections (although this chapter does not explore these political protections). The protection of rights by the courts intentionally falls short of overtly departing from formal parliamentary sovereignty. Consequently the legal protection, when viewed in isolation from the political protections, may initially be perceived as 'weaker' than the invalidation of legislation. However, much of the protection of rights under a legislative bill of rights is a result not of identifying *incompatibilities* between legislation and fundamental rights, but from identifying rights-*compatible* interpretations of legislation.

There is some debate about the effectiveness of weak-form judicial review in achieving an appropriate balance between legal protection of rights and retention of legislative authority. This relates to whether the 'declaration of incompatibility' is perceived to be an ordinary part of the judicial review process or whether it is seen as an exceptional circumstance and the interpretative mandate is taken as encouraging expansive judicial creativity.[32] The UK experience will be used in the final part of this chapter to highlight how the UK has sought to achieve this balance.

3.1.4 Principles of Interpretation

The final form of legal protection considered is the general principles of interpretation which guide courts when interpreting ambiguous legislation. This is the primary form of legal protection against legislative violation of rights in Australia. This form of legal protection needs only brief comment as it offers both a weaker overall protection of rights and suggests that other forms of protection, considered in the following chapter, are the dominant way in which rights play a role in the Australian legal system. Stated another way, the legislature in Australia retains primary responsibility for the protection

[31] Julie Debeljak, 'The Human Rights Act 1998 (UK): the Preservation of Parliamentary Supremacy in the Context of Rights Protection' (2003) 9 *Australian Journal of Human Rights* 183.

[32] See: Tom Campbell, 'Incorporation through Interpretation' in Tom Campbell, Kieth Ewing and Adam Tomkins (eds), *Sceptical essays on human rights* (Oxford University Press, 2001) ; Hickman above n 24.

of rights and, with the exception of the constitutionally guaranteed rights, has the ability to violate those rights through clear legislative intent expressed in statutory provisions.

There is a (rebuttable) presumption in jurisdictions which utilise these interpretative principles[33] that the legislature does not intend to violate fundamental rights. On this basis, where there is ambiguity in a statute, the court will seek to interpret the statute in a manner compatible with fundamental rights. In Australia, in the absence of a specific rights instrument identifying which rights the state views as 'fundamental', this involves an appeal to the common law and to international rights treaties to which Australia has committed through ratification.

That is not, however, to suggest that the protection offered by these presumptions is without value. Instead, it is important to recognise how the protection operates so as to recognise both the way in which it can effectively protect rights and the limitations of relying on the presumptions to limit legislative encroachment on fundamental rights. The protection is more than a vague and easily rebuttable direction to the court. As Gleeson CJ has said:

> The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.[34]

In *Evans v State of New South Wales*[35] the Court described the presumption as requiring that 'Acts be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms.'[36] In *Evans,* the Court found that despite the

[33] It should be noted that while Australia relies on these principles of interpretation as the primary legal protection of fundamental rights, courts in other jurisdictions also consider rights as informing the interpretation of ambiguous statutes. These are not considered in this thesis as in other jurisdictions such principles are merely a subsidiary protection with the core legal protection being based on the specific rights instrument.

[34] *Electrolux Home Products Pty Ltd v Australian Workers' Union* 221 CLR 309 [21].

[35] *Evans v State of New South Wales* (2008) 168 FCR 576 ('*Evans*').

[36] In *Evans,* the court found that despite the wide mandate given to the executive to pass regulations under the *World Youth Day Act 2006 (NSW)*, the legislation must be narrowly construed so as to not arbitrarily infringe on fundamental rights. Consequently, the *World Youth Day Regulations 2008 (NSW)* which regulated conduct which 'annoyed' WYD participants were found to exceed the authority granted by the legislation. *Evans v State of New South Wales* (2008) 168 FCR 576 ('*Evans*').

wide mandate given to the executive to pass regulations under the *World Youth Day Act 2006 (NSW)*, the legislation had to be narrowly construed so as to not to arbitrarily infringe on fundamental rights. Consequently, the *World Youth Day Regulations 2008 (NSW),* which regulated conduct which 'annoyed' WYD participants, were found to arbitrarily limit the freedom of expression and consequently to exceed the authority granted by the legislation as construed by the court.

The protection of rights by the principle of legality is, however, limited. In *S v Boulton,*[37] in which the court determined that the common law privilege against incrimination of a spouse was abrogated by the *Australian Crime Commission Act 2002* (*ACC Act*),[38] Jacobson J set out how the principle operates in practice. He stated:

> First, a statue is not to be construed as abrogating important common law rights and privileges except by clear words or necessary implication;
>
> Second, an intention to exclude a common law privilege may be gleaned from a statute even though express words of exclusion are not used;
>
> Third, the question of whether the statute impliedly abrogates a privilege is to be determined upon the proper construction of the statute, considered as a whole, and from its character and purpose;
>
> Fourth, important common law privileges are not to be lightly abrogated and the oft cited phrase 'necessary implication' requires that there be a high degree of certainty as to the intention of the legislature; the intention must be manifested by unmistakable and unambiguous language;
>
> Fifth, what is required is that there be a manifestation or indication that the legislature has directed its intention to the question of abrogation and has consciously determined that the privilege is to be excluded;
>
> Sixth, general words will not be sufficient to disclose the requisite intention unless it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification;
>
> Seventh, the presumption that the legislature does not intend to abrogate entrenched common law rights may be displaced by implication if it is necessary

[37] *S v Boulton & Anor.* (2006) 151 FCR 364.

[38] *Australian Crime Commission Act 2002 (*Cth) ('*ACC Act*').

> to prevent the statute from being rendered inoperative or meaningless or from frustrating the evident statutory purpose.[39]

The core issue in *S v Boulton* was whether the common law protection against incrimination of a spouse extended to *de facto* spouses. The court found that it did not and thus the appellant would not have been covered by the common law privilege. While Jacobson J indicated that it was not strictly necessary to consider whether the privilege had been abrogated, he still offered substantive consideration of the issue. He concluded that although there was no express intention within the *ACC Act* to remove the common law right, the 'character and purpose of the legislation' necessarily implied that such an intention must be read in to the Act. Further, he indicated that the purpose of the Act would be frustrated if the court was to interpret the legislation so as to allow spousal privilege to be claimed. Jacobson J drew heavily on the earlier case of *A v Boulton*[40] in which the court found that the common law protection against self-incrimination had similarly been removed (in certain circumstances) by the *ACC Act*.[41]

Consequently, it can be seen that the presumption against a legislative intent to encroach upon rights can be effective in limiting how legislation operates in practice, and its function is to narrow the scope of potential rights-limitations allowed under legislation. However, it does not limit legislative authority to encroach on rights, nor does it require an express statement of intent to do so. It does not promote rights-favourable interpretations to the same extent as promoted by weak-form judicial review, and it retains more scope for legislatures to limit rights.

This form of protection reflects a commitment to representative democracy as the appropriate way to resolve disputes about the meaning of rights and the most appropriate way to secure rights. The parliament retains the ability to override the court's rights-favourable interpretation of legislation if such an interpretation fails to appropriately reflect its intention for the statute or has the effect of undermining the policy objective intended to be achieved by the legislation.

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[39] *S v Boulton & Anor* (2006) 232 ALR 92 [121 – 127].

[40] *A v Boulton* (2004) 207 ALR 342.

[41] *A v Boulton* (2004) 207 ALR 342 [15] and [58] , cited in *S v Boulton & Anor* (2006) 232 ALR 92 [58] and [121].

3.2 Judicial Activism

In considering the strengths and weaknesses of various forms of legal protection of fundamental rights, one issue that should be mentioned is the impact that judicial temperament may have in emphasising or mitigating in practice the strengths and weaknesses that potentially result from the form of legal protection offered. This section addresses how, in particular, judicial activism (or conversely, judicial deference to the legislature) may impact on legal protections. Additionally, this section also explains why such an impact will not affect the overall consideration of the strengths and weaknesses of legal protections in this thesis.

Judicial activism refers to situations in which the court appears to imbue decisions with a particular political agenda. Tom Campbell explains this as follows:

> [A] judicial activist is essentially (1) a judge who does not apply all and only relevant clear positive law and (2) does so because of his or her views [as] to what the content of the law should be.[42]

Within the context of fundamental rights protection, judicial activism includes judges adopting a particular, often controversial, approach to the meaning of, and appropriate application of, fundamental rights. While judicial activism can reflect a conservative political agenda,[43] it is generally associated with judicial creativity resulting in decisions informed by a progressive 'rights' agenda. James Allan, in his discussion of *Al-Kateb,*[44] calls this the 'do the right thing' approach to judging, whereby judges will 'do everything [they] can to read into otherwise clear statutory words a limitation in favour of an outcome [the judge] consider[s] morally superior' even where this has the

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[42] Tom Campbell, 'Judicial Activism - Justice or Treason' (2003) 10 *Otago Law Review* 307, 312.

[43] Kmiec cites Van Graafeiland. J (dissenting) in the US Case of *Turpin v. Mailet* 579 F.2d 152 (2d Cir. 1978). Van Graafeiland provides a concise statement as to how judicial activism cannot be confined to those judges promoting a liberal political agenda. He states:

> 'One need only skim through the all too numerous Supreme Court dissents to recognize that on occasion judicial activism has been checked with a very loose rein. Sometimes this has pleased the so-called conservatives; at other times it has gratified the so-called liberals…today's staunchest supporters of judicial activism were the most vocal critics of the Supreme Court's "usurpation" of congressional powers.'

Keenan D. Kmiec, 'The Origin and Current Meanings of "Judicial Activism"' (2004) 92(5) *California Law Review* 1441, 1460 - 1462.

[44] *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*').

consequence of judicial imposition of particular policy choices which differ from those preferred by the legislature.[45]

Determining whether the court has relied on distinctly non-legal considerations to produce the judges' preferred outcome is not straightforward. The line between legitimate judicial creativity, for example, in the presence of legislative ambiguity, and activism is by no means clear.[46] While there is a general acceptance that a degree of judicial creativity is an essential part of legal protections of fundamental rights protection, and that judges need not simply be 'passive, mechanical creatures',[47] activism tends to be associated with judges stepping beyond their legitimate mandate.

The difficulty with engaging in debate regarding the role of activism (or deference) – in courts generally or with regard to fundamental rights specifically – is that identifying a decision as an example of activism or deference is a matter of subjective judgement. Leaving aside disagreement as to the meaning of the term, even where there is a broad agreement as to what 'judicial activism' is, debate remains as to whether particular judgments demonstrate legitimate judicial creativity or undue activism.

Identification of activism or deference may be outcomes-based, depending on whether the commentator approves of the court's interpretation of the rights in question and/or the challenged legislation.[48] Alternatively, whether a decision is identified as 'activist' or unduly deferential may be the result of opinions as to the breadth of the court's interpretative mandate or the legitimacy of the tools used when engaging in interpretation.[49]

An allowed expansion of judicial creativity - for example via a broad interpretative mandate as under s 3 of the UK's *HRA* - or an increase in the power of the judiciary to

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[45] James Allan, "Do the Right Thing' Judging? The High Court of Australia in *Al-Kateb*' (2005) 24 *University of Queensland Law Journal* 1, 1.

[46] Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line between Judicial Interpretation and Judicial Law-making' (2007) 33(1) *Monash University Law Review* 9.

[47] Campbell, above n 42.

[48] Christopher P. Manfredi, 'Judicial Power and the Charter: Reflections on the Activism Debate' (2004) 53 *University of New Brunswick Law Journal* 185, 188.

[49] See, for example, the discussion by Paul Roberts regarding the *HRA*. Paul Roberts, 'Criminal Procedure and Judicial Reasoning', in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds.), *Judicial Reasoning under the UK Human Rights Act*, (Cambridge 2007). 414-6.

allow for invalidation of incompatible legislation - as occurred when Canadian rights protection shifted from a legislative bill of rights to weak-form judicial review (constitutional) under the *Canadian Charter* - does not necessarily lead to a rise in 'judicial activism'. However, these particular forms of legal protection may result in greater scope for accusations of activism. This is discussed, for example, by Campbell, who suggests that a constitutional bill of rights 'almost requires judges to be judicial activists,' due to the wide array of potential interpretations available to the court resulting from the broad statements of rights within such instruments.[50] Similarly, Julie Debeljak, in relation to Victoria's legislative bill of rights, says: '[a]ttempts (legitimate or otherwise) at judicial interpretation under the *Charter* are bound to generate criticism of improper judicial activism.'[51]

Certainly, the introduction of a specific rights instrument both formalises the judiciary's role in protecting rights and encourages more frequent judicial involvement in questions of fundamental rights. It is likely that the courts will be required to make controversial decisions which open them to criticism that they have gone beyond legitimate interpretation. Whether such activism has in fact occurred (and the extent of any occurrence) will, of course, remain a matter of debate.

The significance of activism, in the context of this thesis, is that activism (and judicial deference) have the potential to exaggerate both the potential strengths and potential weaknesses of the various legal protections. Most significantly, if legal protections become substantially dependent on the temperament of the judges hearing the particular case, then the undemocratic nature of the process is emphasised, as the judges' moral or political leanings are translated into law.[52] While a pro-rights, activist court may produce decisions which ostensibly offer a high standard of protection of individual rights against legislative encroachment, these decisions are at a high cost both to democratic decision-making and to the independence of the judiciary.[53] An

[50] Campbell, above n 42.

[51] Debeljak, above n 46.

[52] Michael Mandel, *The Charter of Rights and the legalization of politics in Canada* (Wall & Thompson, 1989).

[53] Andrew Heard, in his analysis of the decisions of the individual justices of the Supreme Court of Canada, also points to consequences such as the politicisation of appointments and inconsistency between cases. It should be noted that Heard does not attribute differences between the judges as necessarily reflecting a high degree of 'activism' on the understanding used here. For example he points differences in particular judges approach to interpretation as a factor which influences the differences between

overtly activist court limits legitimate discourse about rights in favour of the imposition of the judges' personal preferences. Further, if a 'pro-rights' court is required in order for the legal protection to be considered effective, then the legal protection itself is flawed and those who criticise legal protections would appear to be justified in their wariness of a central judicial role in the protection of fundamental rights.[54]

Conversely, the minimisation of judicial creativity, in favour of deference to the legislature, undermines the potential strengths of the legal protections and fails to impose an effective limit on the ease with which the legislature may violate fundamental rights. Thus whilst particular weaknesses may be avoided, potential strengths are similarly absent.

Therefore, while some degree of activism (or at least some amount of criticism that individual judges have behaved in an activist manner) is likely unavoidable in any jurisdiction faced with judicial involvement in the protection of fundamental rights, in the context of this thesis such activism is only of tangential relevance. This is because judicial activism (or judicial deference) does not alter the core strengths and weaknesses under consideration in this chapter. These are associated with the various legal protections *regardless* of whether, or to what extent, the court in a particular case is influenced by non-legal factors. Because activism tends to exaggerate the strengths and weaknesses, cases which commentators may have highlighted as demonstrating 'activism' are often useful to demonstrate the realisation of potential strengths and weaknesses in particular jurisdictions. However, the strengths and weaknesses are present regardless of whether or not one believes activism has a substantial presence within a particular jurisdiction.

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justices. Andrew D. Heard, 'The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal' (1991) 24(02) *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 289.

[54] Mark Tushnet addresses judicial activism within the context of an argument against judicial review. He points out that if judicial review is dependent on the attitudes of the judges in order to be effective, then the legal protection is fundamentally flawed. Further, he points to the inherent subjectivity of any assessment of the efficacy of judicial review which relies on agreement between the judge and the commentator as to the appropriate standard of protection.Mark V. Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press, 1999).

3.3 Strengths of Legal Protections

3.3.1 Consequences of a Judicial Determination of Incompatibility

The first issue to consider, with regard to the strengths of legal protections, is the consequence of a court's decision to find that legislation is incompatible with fundamental rights. There are two potential consequences deriving from a judicial determination of incompatibility. The first consequence is that the legislation will not be valid. This is the legal protection associated with constitutional judicial review (strong and weak-form). The second potential consequence is associated with weak-form judicial review (legislative): the legislation remains valid despite the inconsistency and must be upheld and applied.

Invalidity of Legislation

Invalidity of legislation is the consequence of a judicial determination of incompatibility under both strong-form judicial review and weak-form judicial review (constitutional).[55] Due to the 'constitutional' status of fundamental rights, invalidity is the necessary consequence of such a judicial determination in order to maintain consistency with the constitution from which the rights derive. The strength of protection is clear – the courts, on the basis of the constitution, provide a barrier against legislative violation of fundamental rights. Albeit, weak-form judicial review (constitutional) does include an 'exception' to this general rule in the event of legislative use of a 'notwithstanding clause'. The Canadian experiences with the s 33 'notwithstanding' clause under the *Canadian Charter* will be discussed later in the chapter at 3.5.3. This exception operates both in response to a judicial determination of incompatibility and as a 'shield' which pre-empts judicial review of legislation and prevents the relevant legislation from being considered by the court with regard to fundamental rights compatibility.

The strength of the constitutional judicial review protection derives from the non-elected status of the judiciary. Whereas the political institutions are influenced either by

[55] The 'exception' to this general rule in the event of legislative use of a 'notwitstanding clause' in weak-form judicial review (constitutional) will be discussed later in the chapter. It should be noted that the utilisation of s 33 of *Canadian Charter* prevents the relevant legislation from being considered by the court with regard to fundamental rights compatibility. That is, there is no consequence to a judicial determination of rights-incompatibility because the court lacks the jurisdiction to make such a determination.

external factors or a perception of the majority's interest, the judiciary is able to make decisions without such pressures, thus giving priority to fundamental rights rather than to particular political interests. The protection of rights may be viewed as in the long-term interest of the community as a whole, as demonstrated by the inclusion of rights in the 'basic law' of the land. In interpreting and applying these fundamental rights, the court is, in effect, ensuring that the transient issues of the day do not unduly displace the fundamental values which inform the legal system as a whole.

Invalidity of legislation is designed to protect against the 'tyranny of the majority', that is, to secure particular fundamental rights from encroachment regardless of the majority will. There is a tendency to imply from the phrase 'tyranny of the majority' that the 'self-interested majority' will *intentionally* marginalise rights of minority groups where it is perceived to be in its own interest to do so.[56] This perception is not particularly helpful when considering the strengths of judicial review as it suggests that democracies (via representative legislatures) simply cannot be trusted to protect rights. The suggestion is that legislatures are inherently untrustworthy and must be subject to review from the more enlightened judiciary. One of the dangers of this argument is that it tends towards relying on judicial activism to achieve substantive protection (the problems with which were discussed in 3.2 above).

A more useful conception of how judicial review offers strong protection is if the legislature is perceived as being *unable* to guarantee rights – whether due to lack of information, expertise or political will. That is, in the course of determining what is perceived to be the 'common good', it is possible that the majority may overlook or fail to secure the rights of minorities who are unable to make their voices heard in the political process. Judicial review, therefore, ought to be considered as a 'safety mechanism.' This is explained by Aileen Kavanagh, who states:

> Even if we accept people's capacity to make the right decisions when they act politically, we are still faced with the prospect that they might not always do so. They may make the wrong decision, either because they give preference to their own self-interest over the common good, or because they fail to consider the long-term effects of their decision or the effect it might possibly have on others…We can believe that

[56] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999), 221.

people should be treated as responsible moral agents, and still provide safety mechanisms.[57]

Legislation remains valid

In the absence of strong-form or weak-form (constitutional) judicial review the courts lack the authority to find rights-incompatible legislation invalid. A distinction, however, must be drawn between weak-form judicial review (legislative) and a reliance on interpretative principles in the absence of a specific rights instrument.

While legislation does remain valid under weak-form judicial review (legislative), unlike strong-form judicial review and weak-form judicial review (constitutional), the protection does not rely on identification of incompatibility as the core way of preventing legislation from violating fundamental rights. As will be discussed later in this chapter, the core protection under a legislative bill of rights is the interpretative mandate given to the courts which requires them first to seek to interpret the legislation in a manner which is compatible with fundamental rights. While this mandate is not unlimited – the availability of a 'declaration of incompatibility' is an acknowledgement that some legislation will not be able to be interpreted in a rights-favourable manner[58] – the judiciary is potentially able to go beyond both the words of the statute and consideration of legislative intent in determining a rights-compatible interpretation of the legislation.[59] Additionally, unlike those jurisdictions where the courts' involvement in rights protection is primarily via the principles of interpretation, weak-form judicial review (legislative) confers the interpretative obligation even in the absence of ambiguity as to the meaning of the statutory provisions.

The legal protection offered by weak-form judicial review (legislative) is, nevertheless, limited. In those cases where legislation *is* incompatible with fundamental rights to the

[57] Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24(2) *Oxford University Commonwealth Law Journal* 259, 476 - 477.

[58] The political, or intended political, consequences of a declaration of incompatibility or similar judicial statement that it is not possible to interpret the legislation in a rights compatible manner are not considered in this chapter which focuses on the legal protection itself. This will be discussed in the following chapters as a 'political' protection arising from a legal mechanism.

[59] The scope of the interpretative mandate will vary between jurisdictions. In the ACT and Victoria, for example, the mandate is not as broad as in the UK and the courts seek a rights-favourable interpretation of the legislations that is consistent with the legislative purpose.

extent that no rights-compatible interpretation is possible, the legal protection has reached its limit.

While the limitation of the legal protection is similar under weak-form judicial review (legislative) and in jurisdictions which rely on principles of interpretation as the primary legal protection – the rights-incompatible legislation remains valid – it would be misleading to suggest that the *protection* is of the same standard. This is firstly because, in the absence of a specific rights instrument, the court does not make a formal 'declaration' of incompatibility, it merely applies the legislation, with any comment on its incompatibility confined to the *obiter dicta*. Secondly, in the absence of an interpretative *mandate,* the court may only rely on rebuttable presumptions of interpretation. Thus, clear intention of the legislature or the lack of ambiguity in the language of the statute restrict the relevance of fundamental rights to the interpretative process and consequently limit the standard of protection offered.

3.3.2 Creation of a Forum

The role of the court as a forum in which individuals may challenge legislative acts as to their compatibility with fundamental rights is the second strength associated with legal protections. Judicial involvement in the protection of rights creates a forum in which all individuals – even those who would otherwise have limited access to decision-making institutions – may have their grievances heard regarding legislative encroachment on rights. Such a forum facilitates protection of fundamental rights regardless of what specific role (judicial review or interpretative mandate) the courts have.

Mac Darrow and Philip Alston (in the context of a comparative analysis of various approaches to bills of rights) discuss this strength. In the context of a consideration of constitutional bills of rights, they conclude that legal protections go beyond passive protection of rights. They point to judicial review as empowering disadvantaged groups to ensure that their concerns are heard. They state:

> Entrenchment of bills of rights can contribute significantly to the empowerment of disadvantaged groups, providing a judicial forum in which they can be heard and seek

> redress, in circumstances where the political process could not have been successfully mobilised to assist them.[60]

In this way, the strength of judicial review (regardless of the form it takes) is found not merely in the *outcome* of a case which may identify the presence of incompatibilities between legislation and protected rights. The strength of judicial review is also in the *process*. The availability of a forum, accessible to all, ensures that such important concerns as fundamental rights are able to be voiced. The court has the task of specifically considering whether any limitation of rights is reasonable in response to a specific complaint from someone who alleges their rights have been violated.[61]

This strength is further emphasised if the issue of unequal access to the political system is considered. Most individuals have only limited access to the political process outside of periodic elections. Between these elections, legislatures are influenced by various interest groups seeking to present particular views of the common good. Alternatively, they may refrain from action due to a perceived lack of political interest in a particular issue. When viewed against this backdrop of an imperfect political system, judicial review may be conceived not only as a general protection of fundamental rights of minorities, but as actually *enhancing* the democratic credentials of a jurisdiction – securing the rights of ordinary people against the interests of those with influence.

While the importance of representative institutions is acknowledged as a fundamental part of democratic governance, the introduction of judicial mechanisms for the protection of rights may be viewed as mitigating the effects of power and access disparities within a representative democratic system. Even individuals who find themselves as part of the potentially diverse group perceived as the 'majority' may find their rights infringed upon or, more precisely, may find the legislature unmotivated to hear their concerns regarding alleged infringements of their rights. In contrast, the court 'cannot say that the time is unripe for a decision on the issue, or that it is politically awkward to alter existing rules or policy.'[62] Thus, the court is not only able to, but also

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[60] Philip Alston and Mac Darrow, 'Bills of Rights in Comparative Perspective' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Clarendon Press, 1999), 493.

[61] A. Wayne MacKay, 'The Legislature, the Executive and the Courts: The Delicate Balance of Power or Who is Running this Country Anyway?' (2001) 24 *Dalhousie Law Journal* 37, 43 – 45.

[62] Michael Zander, *A Bill of Rights* (Sweet and Maxwell, 4th ed, 1997), 65.

required to, respond to rights concerns, whereas the legislature only does so when there is sufficient political impetus.

3.3.3 Authoritative Interpretations

The third strength of legal protections derives from the judiciary being the most appropriate branch of government to make authoritative statements as to the meaning of fundamental rights within a particular jurisdiction, regardless of whether such a determination is popular.[63] The legislature – with its authority ostensibly derived from popular mandate – lacks either the expertise or political neutrality to make such an authoritative statement. Consequently, rights are offered stronger protection via the involvement of the appropriate institution for determining the meaning of rights (and their legitimate limitations).

This argument regarding the strength of judicial review suggests that while it is appropriate (and desirable) for a legislature to involve itself in debates about rights, the court is the most appropriate institution to offer an authoritative statement as to the meaning of those rights – regardless of whether the rights serve as a constitutional limitation on the power of the legislature or as an interpretative tool of the courts. More than this, as Alon Harel explains, despite the inherent indeterminacy as to the meaning of rights, when an answer about rights is needed, it is entirely *inappropriate* to expect the 'public' by way of the legislature to provide that answer:

> It would of course be absurd to argue that we have rights to what we believe we have rights to. If the majority believes that they have a right to hold slaves, it does not entail that slavery is morally permissible. Any plausible theory of rights needs to acknowledge a gap between what rights the public believes we have and what rights we have.[64]

The availability of an authoritative judicial statement about rights allows for the resolution of disputes about rights, by those with expertise, in circumstance where such a dispute has an immediate impact on individual rights. The introduction of legal protections secures rights as *legal* rather than exclusively *political* issues. This goes

[63] Michael J Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts' (2003) 38 *Wake Forest Law Review* 635.

[64] Alon Harel, 'Rights-Based Judicial Review: A Democratic Justification' (2003) 22(4) *Law and Philosophy* 247, 259.

beyond merely immunising decisions regarding the meaning of rights against political pressures. It suggests that not only is the legislature limited in its ability to protect rights due to political pressures (as discussed above) but that 'the public' (and by implication, the legislature) is incapable of offering an authoritative interpretation of rights. This is not the result of political pressures *per se* but the result of the diverse – and, according to Harel, potentially ill informed[65] – opinions about the meaning of rights, the legislature being ill qualified to make decisions about the meaning of rights.

This does not imply that the courts will necessarily produce a decision that is uncontroversial. It would be a mistake to conclude that the involvement of the judiciary in the protection of rights ought to replace discourse about fundamental rights in the political arena. Political debate about rights continues and the relationship between legal and political interpretations will be discussed in Chapter 5. What is significant to acknowledge at this point is that in granting rights legal status within a jurisdiction, the judiciary is empowered to make such authoritative interpretation.

3.4 Weaknesses of Legal Protections

While the issues addressed above point to the strengths associated with legal protections of fundamental rights, this part explores the weaknesses associated with the role of the judiciary in each of the four forms of legal protection. As alluded to in the introduction to this chapter, some of the weaknesses addressed are considered by some to be a cost of such significance that the legitimacy of legal protections is undermined. Generally, this criticism is directed at the various forms of judicial review. However, while the following discussion raises issues of legitimacy, they are not the focus of this thesis. Instead, given that the jurisdictions *have* (with the exception of Australia) introduced judicial review in some form, and the purpose of this section is to consider where there are weaknesses in the existing protections (including in Australia), this part will use these criticisms to draw attention to areas which jurisdictions must acknowledge as weaknesses associated with their form of legal protection of fundamental rights.

Chapter 3.4.1 will address politicisation of the judiciary as a weakness associated with legal protections. As was discussed above, the granting of legal protection to

[65] Ibid.

fundamental rights shifts what would otherwise be politically controversial topics into the field of the courts. Judges are required to make essentially political decisions, which then gain the status of the 'legal answer' to the question about rights. Quite apart from the aforementioned dangers of 'activism', this potentially poses challenges to the neutrality of the judiciary.

In 3.4.2, the dominance of the judiciary as the branch of government with primary responsibility for the protection of fundamental rights will be examined as a weakness of legal protections. Later chapters will discuss how the co-existence of strong legal and political protections may mitigate the focus on the courts as having *primary* as opposed to *complementary* responsibility. Chapter 3.4.2, however, sets out two associated weaknesses associated with legal protections viewed in isolation from any mechanisms which place rights-protecting obligations on the legislature or executive. These are:

1) The merging of 'protection' and 'compatibility'. That is, the availability of a judicial interpretation of rights, and the determination that legislation is compatible (ie. in those cases where judicial review does not result in a determination of incompatibility) replace substantive legislative consideration of the *best possible* standard of rights protection. The consequence is that, rather than being a 'check' on the legislature or a 'safeguard' against legislative encroachment of rights, judicial decisions become the primary form of rights protection in the jurisdiction; and
2) The nature of judicial decision-making. In particular, rather than *protecting* rights in a proactive manner (as other institutions may do), the courts cannot initiate an inquiry (only respond to an application) and can only respond to those cases brought before them – generally where a breach has already been alleged.

In 3.4.3 the weakness considered is that of the challenge posed to democratic governance as a result of a strong judicial role in the protection of fundamental rights. This argument suggests that empowering the judiciary to protect rights, whether through invalidation of legislation or via a broad mandate to interpret legislative instruments in a rights-favourable manner, undermines the democratic right to participation in the law-making process. That is, in protecting fundamental rights in general against majoritarian pressures – an acknowledged consequence of judicial review which many

view as a strength (as discussed above) - the fundamental right to participation is marginalised, and, in some cases, may be entirely subverted by judicial invalidation of legislation passed by democratically elected representatives or by interpreting legislation in a way which effectively alters the meaning of the statute beyond the intention of the legislature.

3.4.1 Politicisation of the Judiciary

The inclusion of fundamental rights within the purview of the courts shifts the consideration of highly controversial issues, once the subject of enthusiastic public and political debate, out of the legislative sphere and into the judicial. As John D. Whyte has stated: '[W]hat were once political problems have been transformed into legal problems.'[66] While the availability of an authoritative 'legal' answer on these questions is a strength of legal protections – providing, as discussed above, a safeguard and allowing for continued political debate within the framework of rights authoritatively interpreted by the courts – it is at least controversial that the courts are required to resolve what are highly contested debates about the meaning of, and conflict between, rights.

This need not suggest a complete rejection of the value of legal protections. Instead, it is better viewed as recognition of the weakness of legal protections. The 'strength' of the legal protections – judicially reviewable limits on the legislature's ability to violate rights - comes at the cost of shifting debate about controversial topics into the courts.

In Canada, for example, the Supreme Court has been faced with highly controversial political and social issues, including whether prohibitions on assisted suicide of a terminally ill person violate *Canadian Charter* provisions,[67] and whether the regulation of abortion is a legitimate limitation of *Canadian Charter* rights.[68] Issues such as these

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[66] John D Whyte, 'On Not Standing for Notwithstanding' (1990) 28 *Alberta Law Review* 347, 351.

[67] *Rodriguez v. British Columbia (A.G.)* [1993] 3 SCR 519. In this case, a patient with Lou Gherig's disease unsuccessfully challenged the *Criminal Code of Canada* on the basis of violating the right to life, liberty and security of person (s 7), Freedom from cruel and unusual treatment (s 12) and equality of treatment under the law (s 15).

[68] *R v Morgentaler* [1988] 1 SCR 30. In this case, the prohibition of regulation of abortion under the *Criminal Code of Canada* was found to be an unconstitutional violation of the s 7 right to security of the person. Although the regulation of abortion was potentially a legitimate limitation of the right, the majority of the Court found that it was disproportionate to the policy objectives and therefore not covered by s 1.

become 'legalised' – the constitutional bill of rights facilitating a shift away from political debate by authorising (and indeed requiring) the court to make decisions which effectively provide a final answer. It is not a matter of 'activist' courts (although, admittedly, a court which appears to be activist may make this issue more pronounced and/or more controversial as the judiciary is *perceived* as interfering beyond what is appropriate). The court, faced with rights-based questions, is obliged to provide answers to the questions before it, but given the political nature of these issues the question arises whether the court is the appropriate institution to be deciding some of these matters which have such inherently political implications. Jeremy Kirk explains this point as follows:

> Some matters covered by rights are not in areas of judicial expertise. The justifiability of laws infringing constitutional rights may depend on the existence, causes, nature and effects of social, economic, scientific or other phenomena.[69]

The consequence is that judges are necessarily faced with highly controversial and political issues. Judges are thus forced into a position which expands their traditional, neutral role – yet it remains couched in the language of constitutional neutrality. Lord McCluskey in 1996 expressed this view:

> Lawmaking should be left to lawmakers, policymaking to responsible policy-makers. And that's just the problem with a constitutional Bill of Rights…it turns judges into legislators…it makes the mistake of dressing up policy choices as if they were legal choices.[70]

Because the judiciary is not subject to scrutiny, nor answerable for its decisions, the lawmaking role of the court is potentially expanded without any regulation or review of its decisions. Under strong-form judicial review, despite the potentially political nature of the decision, there is no recourse for the legislature to challenge the final judicial decision. However, weak-form judicial review (both constitutional and legislative) can be seen as an attempt to mitigate the impact of this weakness associated with judicial usurpation of political decision-making.

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[69] Jeremy Kirk, 'Rights, Restraint and Reasons for Restraint' (2001) 23 *Sydney Law Review* 19, 25.

[70] Lord McCluskey, 'Parliament and the Judges - A Constitutional Challenge' Lecture on 8th July 1996 at the Saddlers Hall. Cited in Zander, Michael, A Bill of rights (Sweet and Maxwell, 4th ed, 1997), 104.

Both weak-forms of judicial review retain the ability for the legislature to reject the decision of the court and to re-assert legislative supremacy. There are three ways in which this may occur. Firstly, weak-form judicial review (constitutional) jurisdictions may re-enact the rights-infringing legislation by use of an override clause (such as s 33 of the *Canadian Charter*). Secondly, in a weak-form judicial review (legislative) jurisdiction, where a court has made a declaration of incompatibility, the legislature may simply not take any action to remedy the incompatibility. This has the consequence of leaving the rights-inconsistent legislation unchanged. Thirdly, where the court adopts a rights-favourable interpretation of legislation which departs from the legislature's intended meaning of the Act, a legislature may reject the interpretation of the court and enact new legislation which has the effect of rejecting the court's decision. This is particularly relevant with regard to weak-form judicial review (legislative) where the court's strong interpretative obligation facilitates a greater likelihood of an interpretation which diverges from the legislative intent. However, the express legislative rejection of rights-favourable judicial interpretations of legislation may also occur in weak-form judicial review (constitutional) jurisdictions (and, for that matter, also in those jurisdictions which rely primarily on presumptions of interpretation to protect rights, rather than on judicial review).

However, where the role of the judiciary is formalised in the specific rights instrument of a particular jurisdiction, legislative rejection of judicial-decisions is not undertaken lightly. Whilst the legislature retains the authority to override judicial decisions, this exercise of legislative supremacy is presented as the 'exception' rather than the 'rule'. Consequently, weak-form judicial review can be viewed as seeking to retain the strengths associated with judicial decision-making as a legal protection of fundamental rights, whilst avoiding some of the criticisms levelled at strong-form judicial review by recognising that some issues may be better addressed via political (legislative) debate.

However weak-form judicial review jurisdictions ultimately rely on a *political* rather than *legal* protection to ensure that the exercise of the legislative override of the judiciary does, in practice, remain the 'exception'. Chapter 3.5.3 will explore how the jurisdictions which have retained legislative supremacy and adopted weak-form judicial review protection of fundamental rights have sought to balance the retention of legislative supremacy with the strength of protection offered by the courts.

At the far end of the spectrum of legal protections, in a jurisdiction which relies only on presumptions of interpretation as the legal protection of rights, a judicial decision which diverges from legislative intent may, with relative ease (subject to political will), be rejected and 'overturned'. Thus, in this non-specific-rights-instrument situation, the effect of politicisation of judiciary is minimal. In the absence of a specific rights instrument, judicial engagement with complex political considerations is both less likely to occur and, if it does, may easily be reversed.

3.4.2 Protection becomes Equal to 'Compatible'

The second weakness of legal protections, deriving from the shifting of rights discourse from the political to the legal sphere, is the merging of 'rights-protection' and 'rights-compatibility'. The dominance of the legal protection in jurisdictions that have adopted (in particular) constitution-based judicial review leads to the perception of the court as the 'protector' of fundamental rights, and this can serve to discourage legitimate debate within the political branches as to how best to protect rights. The judicial determination of 'compatibility' grants the aura of legitimacy to legislative programmes – shielding them from further political debate or scrutiny - regardless of whether or not alternative programmes would *better* protect rights, as opposed to merely not violating rights.

It is certainly not to be suggested that the judiciary *should* be making decisions as to what the best possible standard of protection is. There would be a plethora of objections to any legal protection which attempted to judge 'best possible' outcomes. Instead, this 'weakness' is an acknowledgement of the limited role of the judiciary within a legal system and a suggestion that legal protections *on their own* can offer only particular forms of protection – that is invalidation of legislation, interpretation of legislation in a rights-favourable manner, and/or drawing to the attention of the legislature any rights-incompatible legislation.

Where the judiciary has the authority to make 'final' decisions (albeit with the availability of 'exceptions' to this under some forms of legal protection), there is the possibility that the bipolar view of rights (infringed or not infringed) will be encouraged, as opposed to the intended creation of a framework in which rights-discourse may be situated. Judicial interpretations of rights therefore have the potential

to replace legitimate political debate – as Michael Mandel calls it, the 'depoliticisation' of politics.[71]

Constitution-based judicial review, both strong and weak-form, is most likely to realise this weakness. That is, legislation having been judicially identified as 'compatible' has the potential to decrease the pressure for legislation to be reformed to *better* protect rights. The court is faced with two options; either the challenged legislation is compatible and thus valid or incompatible and thus invalid. The result of this 'compatible'/'incompatible' (or valid/invalid) dichotomy created by judicial review is that there is a perceived 'correct' answer to policy questions. Rather than merely one choice among a range of possible (rights-compatible) policies, the successfully upheld legislation becomes shielded from political challenges due to a *de facto* 'seal of approval' as to its rights-credentials from the court. Judicial review risks merging 'legal' or 'rights-compatible' with 'good policy' and thus, while offering a guarantee against legislative violation of rights, may in fact stifle legislative consideration of rights beyond the compatibility of legislation.[72]

Weak-form judicial review (legislative) has sought to mitigate this potential weakness of judicial review via the shift in focus of legal protection to a broad interpretative mandate. Although the legal protection has a definite 'limit' – in the form of the declaration of incompatibility which is an indication that the court is unable to offer a *legal* protection[73] – the interpretative mandate as the core of the legal protection has the effect of making the compatible/incompatible dichotomy secondary to the overall protection of rights offered. While strong-form judicial review and weak-form judicial review (constitutional) do allow for courts to adopt a rights-favourable interpretation, the core of the protection offered by these forms of legal protection relates to the ability of the court to find rights-incompatible legislation invalid.

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[71] Mandel, above n 52, 61-3.

[72] Ibid.

[73] In addition, the weak-form judicial review (legislative) jurisdictions also tend to include specific political protections as part of the overall approach to the protection of rights. These are intended to work in conjunction with legal protections and encourage the political branches to develop more overtly rights-compatible legislation (thus minimising the need for the interpretative mandate to be used expansively) and to respond to declarations of incompatibility. However, these are political protection and thus will be discussed in the following chapter.

Thus the 'strengths' discussed in Chapter 3.3.1 – the judicial determination of incompatibility (or compatibility) and the consequence of invalidation of rights-incompatible legislation in strong-form and weak-form (constitutional) judicial review – and in 3.3.3- the ability of the courts to make authoritative interpretations of rights - are limited by the (quite appropriate) inability of the judiciary to substantively engage in questions of 'the best' or 'most' rights-protecting interpretation of legislation. Once given the judicial 'stamp of approval' as compatible with fundamental rights (or at least not incompatible with fundamental rights), legislative programmes which could perhaps *better* protect rights are potentially shielded (at least politically) from substantive rights-based reform.

Alternatively, in the absence of a specific rights instrument - in jurisdictions where the legal protection is predominantly the interpretative presumptions - the relatively narrow role for the courts means that they are unable to make authoritative determinations of compatibility/incompatibility. As a result the 'weakness' of the merging of 'rights-protection' and 'rights-compatible' is not realised. However, although the weakness associated with specific-rights-instrument-based legal protections is not realised, its avoidance is at the cost of potential strengths.

One final issue must be addressed when considering the consequences of relying on the judiciary as the 'protector' of fundamental rights, especially if that focus is at the expense of substantial political discourse about how best to protect rights. This issue is a consequence of the fact that the judiciary can generally only consider questions as to compatibility of legislation with fundamental rights *after* there has been an alleged infringement of rights[74] and in response to a complaint from an alleged victim. Thus judicial-based protection models are limited in their ability to *prevent* rights-violation and instead respond to past violations. This responsive rather than proactive approach to the protection of rights may additionally be exaggerated by the processes of appeals leading to the final decision, meaning the time-delay between violation and remedy may be lengthy. Again, this is not a suggestion that the judiciary *should* engage in pre-enactment or pre-entry-into-force scrutiny of legislation (the difficulties associated with this possibility will be considered when comparing jurisdictions). It is merely a

[74] In some jurisdictions, there is some allowance for the referral of questions to a constitutional (or similar) court prior to the enactment of legislation.

comment that an assessment of the use of the courts to protect rights must recognise the limitations of the institution being given such responsibility.

3.4.3 Legal Protections as Undemocratic

The final critique of legal protections is based on a traditional understanding of the roles of the legislature and judiciary. Arguments have been presented above which suggest one of the strengths of judicial review is that it enhances participation by creating a forum to give voice to those excluded from the political process (either due to membership in a minority or the lack of influence with those in power). It is somewhat ironic that democratic arguments also lie at the heart of judicial review's greatest weakness – the elevation of the judiciary above the elected legislature. This democratic weakness of legal protections – the price of the 'guarantee' legal protections seek to provide – may be exacerbated where the previously mentioned weaknesses are realised.

The democratic challenge to legal protections suggests that in requiring the judiciary to make political decisions (as has been discussed above), the neutrality of the court is undermined. This is not 'activism' in the ordinary sense. The suggestion is that courts under judicial review are both empowered and required to go beyond the ordinary, limited authority of the judiciary in order to make rights-based decisions. This necessarily results in a marginalisation of the democratic rights of the electorate in favour of those other rights protected as fundamental by the specific rights instrument. This is what Alexander Bickel called the 'counter-majoritarian difficulty.'

Commentators such as Michael Mandel point to the limited ability of courts to consider the wide range of potential perspectives about rights, and the reasonableness or necessity of the impact of legislation on those rights. He suggests that in practice courts are faced with considering the arguments of whichever interest group brings the constitutional challenge. Even supporters of rights charters acknowledge that 'constitutional litigation [is] an important tool used by interest groups to advance their political ends.'[75] Mandel suggests that far from facilitating a more effective and inclusive democracy, judicial review accentuates particular interests – interests of

[75] Robert J Sharpe, 'The Impact of a Bill of Rights on the Role of the Judiciary: A Canadian Perspective' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Clarendon Press, 1999) 431, 431.

'minorities' with a particular perspective about rights - on issues which are more appropriately debated in public and parliament than judicially determined under the guise of rights protection. He says:

> [T]he [constitutional] Charter is admittedly a revolt against majoritarianism. But it does not substitute a new kind of democracy for it. In allowing individuals to short-circuit representative institutions and groups, and to advance claims which "trump" more representative claims on the basic of consistency with abstract rights embedded in the status quo, it is a perversion of democracy.[76]

Mandel's position is perhaps overstated but it does provide insight into one of the weaknesses of judicial review. The balance between rights and democratic decision-making that various forms of judicial review seek to attain is not guaranteed by the judicial mechanism alone. Without complementary measures (for example, the provision of funding and representation) judicial review risks being merely a tool for interest groups with the resources to access and effectively argue their case. Combined with the limitations of the court to take into account all of the competing interests and factors in deciding whether a limitation constitutes a breach of protected fundamental rights, the ability of judicial review to protect rights in a manner which can be said to reflect the values of the society in which it is located, is limited.

It is useful to consider that these concerns about the un-representative nature of judicial review as an indication of why the lack of democratic mandate may be considered a weakness of judicial review. However, it is a weakness that need not be taken to undermine the potential value of judicial review. That is, while the final chapter of this thesis will consider how it may be mitigated, those jurisdictions that have opted for a specific rights instrument giving rise to judicial review have acknowledged that this shifting of rights protection out of the legislative sphere is a cost they are willing to tolerate (to an extent) because of the benefits associated with legal protections.

Another argument regarding the undemocratic nature of judicial review has been put forward by Jeremy Waldron. He argues:

> [T]his arrogation of judicial authority, this disabling of representative institutions, and above all this quite striking political inequality, should be frowned upon by any right-

[76] Mandel, above n 52, 60.

> based theory that stresses the importance of democratic participation on matters of principle by ordinary men and women.[77]

Waldron cites William Cobbet when he calls the right to participation in the decision-making process 'the right of rights':

> The great right of every man…the right of rights, is the right of having a share in the making of the laws, to which the good of the whole makes it his duty to submit.[78]

Waldron and others place special importance on the right to participate in the law-making process even (and especially) with regard to the meaning of rights and their potential limitation. The 'judicial supremacy'[79] created by a constitutional charter, and which may also arise where the legislative bill of rights grants a broad interpretative mandate to the courts to go beyond legislative intent, implies that politicians (and by implication 'the majority' which they represent) cannot be trusted with decisions that involve rights. Rather than political power, the right to participate has been diluted from having a say in the decisions (via elections) to merely having a voice in the process (through appeal to the courts). While elections and the political process remain in place, they are subject to oversight by the courts.

However, while Mandel and Waldron question the overall legitimacy of judicial review as a form of rights-protection within a democratic polity, not all commentators are convinced that the non-representative nature of judicial-decision making necessarily makes it illegitimate. Certainly the predominance of constitutional bills of rights within legal systems suggests that there is substantial *practical* recognition that judicial review is a legitimate mechanism by which rights can be protected.

There are, broadly speaking, two broad explanations as to the wide-spread implementation of legal protections and some form of judicial review within modern

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[77] Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13(1) *Oxford Journal of Legal Studies* 18, 42.

[78] William Cobbett, from 'Advice to Young Men and Women, Advice to a Citizen' (1829), quoted in LJ. MacFarlane, The Theory and Practice of Human Rights (London: Maurice Temple Smith, 1985), p. 142, cited in Jeremy Waldron, 'The Right of Rights ' (1998) 98 *Proceedings of the Aristotelian Society, New Series* 307, 307.

[79] This term is used frequently in the literature, See, eg: The Hon. Joseph L. Call, 'Judicial Review vs Judicial Supremacy' (1958) 62 *Dickinson Law Review* 71; James B. Kelly and Michael Murphy, 'Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence' (2001) 16 *Canadian Journal of Law and Society* 3.

legal systems which also feature a commitment to democratic governance. The first position concludes that judicial review is undemocratic, but holds that it is both desirable and that these desirable qualities (often) result in popular support. Consequently, judicial review is legitimate *despite* its undemocratic nature. The second position is that judicial review is not undemocratic at all.

William Haltom and Mark Silverstein express the first position as follows:

> If judicial decision [can] be shown to be based on desirable qualities normally absent from democratic politics, then judicial review [is] defensible despite its undemocratic character. Furthermore, adherence to certain techniques, be they of avoidance or neutrality would facilitate public acceptance of judicial actions. In short, principle and technique, properly employed, would result in a powerful and politically acceptable [constitutional court]'.[80]

This position acknowledges that judicial review – the decision-making of the court – is undemocratic. However, there are various factors that make it a superior (or at the very least, an attractive) way of protecting individual rights when compared to democratic politics alone.

On the other hand, some theorists view democracy as having a broader meaning than 'majority decision-making'. They concede that judicial review does limit the decision-making authority of the 'majority', but they argue that this does not mean that it is undemocratic.

Dworkin, for example, conceives of democracy as a 'partnership'. Consequently, he views majority decision-making as conditional on the protection of the fundamental rights that protect all citizens' basic interests and their status as full 'partners' in the political process.[81] Judicial invalidation of legislation on the basis of rights-incompatibility is therefore not undemocratic as it is holding the 'democratic' institutions to the conditions of their law-making authority.

Another conception of democracy which rejects the claim that judicial review is undemocratic is put forward by John Ely. Ely focuses on the process of democracy and

[80] William Haltom and Mark Silverstein, 'The Scholarly Tradition Revisited: Alexander Bickel, Herbet Weschler and the Legitimacy of Judicial Review' (1987) 4 *Constitutional Commentary* 25, 40.

[81] Denise Meyerson, *Jurisprudence* (Oxford University Press, 2010), 64.

points to certain (limited) rights as constitutive of democracy. It is important to note that Ely does not suggest that this is a justification for judicial review to protect fundamental rights in general and he is referring to a narrow range of process rights, in particular those relating to the processes of democracy, such as the right to vote and to be fairly represented. He suggests that if legislatures were to violate these rights, democracy would be undermined.[82] Consequently, the judiciary engaging in judicial review is *upholding* democracy by ensuring that the rights constitutive of democracy are protected, rather than threatening it.

Although Dworkin and Ely provide interesting arguments to combat the general position that judicial review undermines democracy, their arguments cannot overcome the undemocratic nature of the courts. That is, even if one accepts that judicial review is a legitimate and valuable part of democratic governance, it is a weakness of the form of protection that it necessarily prioritises the perspective of unelected, unrepresentative judges with regard to the 'legal' meaning of rights and their appropriate limitation. When the various forms of legal protection are considered, it is apparent that the pattern alluded to in earlier parts holds true. That is, the weakness is most realised in strong-form judicial review, which allows for no way in which the majority can demonstrate an 'acceptance' of the judicial position. Both weak-form judicial review (constitutional) and weak-form judicial review (legislative) provide an opportunity for a more overt expression of majority acceptance – although the presumption is that this will usually be expressed via the legislature *not* taking action in response to a judicial invalidation of legislation or an interpretation of legislation beyond the original intent of the legislature. While the 'acceptance' of a judicial decision does not suggest majority agreement that it is the best decision, the decision *not* to reject the judicial decision allows for a democratic (majority) acknowledgement of the value of judicial involvement in the protection of fundamental rights.

Once it is accepted that jurisdictions have *in fact* entrenched charters of rights, in effect enshrining the access-based view of the right to participate within a jurisdiction, these concerns about distribution of decision-making power may still inform an assessment of the strengths and weaknesses of judicial review. That is, when seeking to learn from the experiences of the four jurisdictions – three of which have implemented some form of

[82] Ibid.

judicial review, and one of which has rejected the idea of granting a significant rights-protecting role to the courts – what is interesting is how the jurisdictions have sought to maintain the maximum level of democratic participation concurrent with the availability of judicial protections.

3.5 Lessons from Comparison

The previous parts in this chapter have considered the strengths and weaknesses associated with various legal protections. The following discussion will draw on the experiences of the particular jurisdictions – the EU, Canada, the UK and Australia.

In comparing the experiences of the jurisdictions, there are three main issues which must be considered. The first issue is the value of having a 'bill of rights' to ensure that the legal protection is a 'legal protection of fundamental rights' rather than only applying to a few particular rights. Second, it is necessary to consider the way in which using the court as a 'forum' has impacted on both the strengths and the weaknesses of the jurisdictions and how the design of specific rights instruments has sought to address this. Finally, the possibility of 'exceptions' to general protections will be addressed and whether the jurisdictions which offer a general protection but allow that the legislature may violate rights in some circumstances (and override a judicial decision), genuinely mitigate the weaknesses while retaining the strengths.

3.5.1 Value of a Specific Rights Instrument

It becomes apparent through the consideration of the experiences of the jurisdictions that there is significant value in offering clarity as to which rights are to be considered to be protected by a particular judicial mechanism. Beyond the often made claim that a formalised 'bill of rights' (of either legislative or constitutional status) nowadays constitutes the 'norm' amongst democratic societies,[83] there are particular benefits associated with the 'chartering' of rights. In three of the four considered jurisdictions, there has been a formalisation of the judicial role with regard to the protection of rights

[83] See for examples of this now uncontroversial claim - Gareth Griffith, 'The Protection of Human Rights: A Review of Selected Jurisdictions' (Briefing Paper No. 3/2000, Parliament of New South Wales, 2000); George Williams, 'Victoria's Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 880; Albert P. Blaustein and Carol Tenney, 'Understanding "Rights" and Bills of Rights' (1991) 25 *University of Richmond Law Review* 411.

with the adoption of a bill of rights (the *EU Charter*, the *Canadian Charter* and, in granting legal status to the *ECHR,* the *HRA* in the UK). In identifying those rights within a charter, the jurisdiction is making a statement about which rights it identifies as fundamental and, consequently, which rights are to be specifically protected within the jurisdiction. Additionally, in adopting a specific rights instrument, the jurisdiction is offering a uniform form and standard of protection to the whole catalogue of fundamental rights included in the instrument.

A specific rights instrument not only sets out the form of rights protection within the jurisdiction, but also identifies which rights are to be protected as 'fundamental rights' within the jurisdiction. The initial hurdle of: '*should* those rights be protected?' is no longer the core question – that is resolved by the enactment or entrenchment of the bill of rights (albeit amendment of the bill of rights is still a possibility). Instead, a specific rights instrument creates a body of rights which both legislatures and courts then seek to secure. There are several benefits to having a specific rights instrument which both clearly sets out which rights are to be given constitutional or legislative status within in the jurisdiction, and which grants that status to a wide range of fundamental rights.

The Australian experience provides the clearest example of a jurisdiction in which strong-form judicial review protects only specific rights, and consequently cannot be said to demonstrate a general legal protection against legislative violation of fundamental rights. There are very few rights enshrined within the *Australian Constitution* and consequently judicial review leading to invalidation of rights-infringing legislation is the exception rather than the norm.[84] Although there has been some scope for a more expansive protection via implied rights, such as the implied right to freedom of political communication mentioned in the previous chapter, this cannot be said to place strong-form judicial review at the forefront of Australia's approach to the protection of *fundamental* rights. Australian courts have specifically rejected utilising judicial review as a general protection for fundamental rights via an 'implied bill of rights' and the range of potential implied rights is limited to those considered necessary

[84] See eg, Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (UNSW Press, 2002), 17 - 19 and discussion in Chapter 2.4.1.

for the effective realisation of the non-rights-based provisions in the *Australian Constitution*.[85]

The Australian experience highlights that if judicial review is to be used as a mechanism for the protection of rights, there must be some parallel between fundamental rights and constitutional or legislative rights. The entrenchment of only a few, select constitutional rights creates a hierarchy of rights whereby the rights are protected not because they are considered *fundamental* but because they reflect or secure the structure of the legal system established and maintained by the Constitution. The absence of a centralised, comprehensive catalogue of rights in a judicial review jurisdiction limits the ability of the mechanism to realise its potential strength.

Although all of the other jurisdictions have adopted a comprehensive catalogue of fundamental rights in order to create a coherent approach to the protection of rights, the pre-*EU Charter* experiences of the EU shed some light on an alternative to a rights charter, albeit one with its own dangers. Whereas Australian courts have taken a narrow approach to the identification of non-specified fundamental rights to be given constitutional protection, the ECJ identified 'fundamental rights' *in general* as protected by the 'general principles of Community Law'. Further, while the ECJ drew inspiration from the *ECHR* and the constitutional traditions of the member states when identifying which rights were to be categorised as 'fundamental rights' and thus protected by Community Law, it was equally clear that it was not *confined* to those sources and sought inspiration from a wide range of European and global sources.[86]

Rather than the creation of a 'bill of rights', prior to the *Lisbon Treaty,* successive treaty amendments reflected the ECJ approach and fundamental rights were not confined to those within a specific rights instrument. The non-judicial references to the protection of fundamental rights, first in the preamble to the *Single European Act (1986)(SEA)*[87], and in successive versions of the *Treaty on European Union* (Article F of the *TEU*

[85] *Australian Capital Television Pty Ltd and New South Wales v Commonwealth* (1992) 177 CLR 106 (*'ACTV'*), [33].

[86] See eg *Hauer v Land Rheinland Pfalz* (C-44/79) 1979 ECR 3727 as discussed in Chapter 2.3.1.

[87] *Single European Act,* opened for signature 2 February 1986, [1986] OJ L 169 (entered into force 1 July 1987) (*'SEA'*).

(Maastricht)[88], Article 7 after the *TEU (Amsterdam)*[89] and the amended Article 7 after the *TEU (Nice))* [90] all expressed a commitment to fundamental rights in general rather than identifying specific constitutional rights. It was left to the ECJ to identify, in the context of each particular case, which rights were protected.

However, while the judicial-focused approach to identification of rights potentially facilitates the protection of a more comprehensive range of fundamental rights than would be possible with a finite catalogue of constitutional rights, there are certain potential drawbacks. Admittedly, creation of a bill of rights necessarily reflects the perception of which rights are fundamental at the time of drafting and requires the use of often complex procedures to make potentially politically controversial additions (or, in principle, to remove a right from the bill of rights). However, the cost of leaving to the judiciary the determination of which rights are protected is that the protection of rights becomes overly dependent on judicial decisions. There is a general lack of lack of certainty as to what rights are guaranteed protection in the jurisdiction: this is effectively determined on a case-by-case basis in the event of a direct application to the court and only in the event of an allegation of undue encroachment on that particular right.

While the ECJ did offer some clarification by identifying the sources from which it drew inspiration in identifying protected fundamental rights – including Member State Constitutions and Member State treaty commitments (especially the *ECHR*) - it was equally made clear that the identified sources were neither binding in entirety nor were they exhaustive. Thus, prior to a specific judicial decision on a particular right, there was no authoritative guarantee that the right was to be protected.

It ought to be recalled that judicial review which leads to the invalidity of rights-incompatible legislation operates as a 'safeguard' against encroachment of rights –

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[88] *Treaty on European Union,* opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) ('*TEU (Maastricht)'*).

[89] *Treaty on European Union,* opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) as amended by *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Comminites and Certain Related Acts*, opened for signature 2 October 1997, [1997] OJ C 340/1 (entered into force 1 May 1999) ('*TEU (Amsterdam)'*).

[90] *Treaty on European Union,* opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) as amended by *Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Comminites and Certain Related Acts*, opened for signature 26 February 2001, [2001] OJ C 80/1 (entered into force 1 February 2003) ('*TEU (Nice)'*).

offering an authoritative interpretation of protected fundamental rights and determining whether action by the legislature or executive unduly limits those rights and thus exceeds the legislature's constitutionally assigned authority. In the absence of a comprehensive list of protected fundamental rights, the judiciary is relied upon to both protect and identify protected rights. This means that the political branches of government are hindered in their ability to comply with constitutional limits on their authority because they are unaware of which rights will give rise to judicial review. The consequence is that the task of the judiciary is expanded and recourse to the courts may, out of the necessity for clarification, become the norm.

While this broad identification of fundamental rights as equal to constitutional rights meant that the ECJ was not limited to a small selection of protected rights as is the case in Australia, it also meant that the ECJ, and indeed the other institutions and the Member States, were offered little guidance as to which rights ought to be considered as fundamental and consequently constitutional. Protected rights were identified only in their breach. Certainly, informed assumptions could be made by the law-making institutions and the Member State Governments about which rights were protected – drawing on the above-mentioned sources previously referred to by the court. However, the ECJ was not restricted by those sources. This meant that the institutions were each operating on a different set of standards. Although this was not necessarily a problem in practice in the EU, the potential for unintentional encroachment of rights is increased due to the lack of clarity as to which rights ought to be considered.

To a large extent, the *EU Charter* was designed to remedy this lack of clarity.[91] The drafting process of the *EU Charter* sought to be as inclusive as possible, so as to ensure that the rights included were representative of those considered fundamental within the jurisdiction. Effort was made to maximise the parallels between 'fundamental rights' and 'constitutional rights.' These benefits of clarity and certainty associated with codification of rights are apparent whether fundamental rights are 'constitutional rights' or protected via weak-form judicial review (legislative).

The interpretative mandate given to the courts in the UK presumes that the legislature and the executive intend to act within a set of clearly identified, known standards –

[91] See eg Agustín José Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' (2002) 40(3) *Journal of Common Market Studies* 471.

fundamental rights within the *ECHR* as set out in the *HRA*. A broad commitment to unspecified 'fundamental rights' which left to the courts the authority to determine which rights are 'fundamental' would undermine the presumption on which the protection is based as the legislature would be presumed to have intended to legislate according to standards about which they are ill-informed.

It becomes evident that a specific rights instrument serves several purposes in seeking a legal protection which balances the potential strengths and weaknesses associated with various forms of legal protection. Although specific rights instruments will necessarily limit the application of a legal protection to those included within the 'bill of rights', where such an instrument is included in a legal system, and it seeks to be representative of a wide range of fundamental rights, there are certain benefits. Firstly, the Australian example demonstrates that the absence of a specific rights instrument within the Constitution leads to the potential for a substantial divide between protected rights and 'fundamental rights'. Secondly, a specific rights instrument provides a clear framework of rights applicable to all branches of government. Consequently, the legal protection allows courts to hold the other branches to a pre-identified set of standards rather than a diffuse body of rights which are identified only when breached.

As a final note on the 'chartering' of rights, there remains some scope for rights not included within the catalogue to be offered protection, albeit perhaps at a different standard when compared to those included in the specific rights instrument. To this end, the EU and Canada have taken different approaches as to how to deal with these rights which are not included in the specific rights instrument. Their approaches have different consequences with regard to the standard of protection offered to rights not included within the respective charters of the jurisdictions. However, both approaches have the same rationale – that there were pre-existing protections of rights (via the general principles of Community law and the common law respectively) and introducing a formalised constitutional protection should, at least, not *reduce* the range of rights offered protection.

Granting *EU Charter*-rights the status of constitutional rights via the *Lisbon Treaty* could potentially have limited the authority of the ECJ to self-identify the rights it protects. Because the ECJ had previously refrained from identifying a judicially-created list of rights (and despite the involvement of judicial representatives in the *EU*

Charter drafting process), the possibility remained that a right potentially protected prior to the *EU Charter* no longer would gain judicial protection due to lack of inclusion. Previously the list of potentially protected rights was ever-evolving and was adaptable to, for example, changes in the recognition by States of international human rights standards, or could reflect the expanding membership and the identification of commonalities among the 'constitutional traditions' of the Member States. The consequence of codification is that it reflects the perception of fundamental rights by the drafters at the time of drafting.

However, the risk of the *EU Charter* narrowing the scope of protected rights was mitigated by Article 6(3) *TEU* (as amended by the *Lisbon Treaty*), which maintains the pre-*EU Charter* general protection of fundamental rights in addition to the specified *Charter*-rights. Article 6(3) states:

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

This hybrid approach places primacy on the catalogue of rights available in the *EU Charter*, itself heavily informed by the Article 6(3) sources, while allowing the ECJ limited leeway to look beyond the *EU Charter* (albeit to specified sources).

The Canadian approach is to retain the common law protections which pre-dated the *Canadian Charter*. Section 26 of the *Canadian Charter* states:

> The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Whilst the intent of the *Canadian Charter* was to create a parallel between fundamental and constitutional rights, the s 26 statement acts as a recognition that the two categories are not necessarily (or will not necessarily be) exactly the same. While such a statement potentially creates a hierarchy of constitutional/non-constitutional fundamental rights, the section seeks to minimise the *Canadian Charter* being used to stifle pre-existing protection of non-included fundamental rights, albeit a protection which is of a

substantially lesser strength than the judicial review guaranteed by the *Canadian Charter*.[92]

The value of having a clearly defined list or 'bill of rights' of fundamental rights is evident. If there is a substantial divergence between those rights viewed as 'fundamental' and those given special legal protection – that is, the special legal protection applies only to very few, select rights - then regardless of the strengths associated with the form of legal protection, it cannot genuinely be said to protect against legislative violation of fundamental rights.

In summary, while the identification of particular rights in a bill of rights limits the rights to which the particular legal protection is offered (albeit this is not the case in the EU where the strong-form judicial review pre-dated the introduction of the *EU Charter* and thus the *EU Charter* specifies that it is not an exhaustive list) the alternative – a broad mandate for the courts to identify the protected rights– has substantial costs which emphasise the potential weaknesses associated with all forms of legal protection. In particular, the lack of a clear statement as to the rights protected under the mechanism means that legislatures and executives are limited by standards of which they are not aware and it is likely that the 'after the fact' nature of legal protection will be emphasised. It is unclear which rights are protected until a violation has occurred. At the same time, the power of the unelected judiciary is necessarily increased and the protection may be limited or applied expansively, depending on which rights are identified as protected by the courts.

A bill of rights which sets out the rights protected by a particular form of legal protection seeks to maintain a balance between the roles of the various institutions. In a strong-form judicial review or weak-form judicial review (constitutional) jurisdiction, this provides a known framework as to the limits and extent of the authority of legislature and executive. In a weak-form judicial review (legislative) jurisdiction, the

[92] Interestingly, the *Canadian Charter* also makes reference to a specific category of rights – those pertaining to the indigenous populations of Canada - which are protected via non-*Charter* mechanisms. Specifically s 25 states:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.

clear identification of protected fundamental rights provides an important limitation on the broad mandate given to the courts.

3.5.2 The Court as a Forum

The second of the strengths of involving the judiciary in the protection of fundamental rights is that doing so creates an accessible forum in which rights discourse may be facilitated in a manner which is not guaranteed by the normal democratic processes. The court as a forum allows those most affected by legislative action to have their views about rights, and how legislation has limited those rights, heard. However, this strength of legal protections must be weighed against the weakness associated with the limitations of the court in acting as an inclusive forum. The court is being asked to decide often highly controversial issues based on limited information as presented by the parties. Further, the availability of the court as a forum to challenge the political decisions of the legislature risks the court being used to put forward particular political agendas – agendas which seek to prioritise particular understandings of individual rights – and to undermine the ordinary legislative processes.

Consideration of the jurisdictions raises some interesting issues regarding the way that the rights-protection mechanisms may maximise the benefits associated with utilising the judicial forum as a means of broadening discourse about rights. Conversely, comparison of the experiences of the jurisdictions also highlights the limitations of the judicial forum. Through these comparisons, it becomes apparent that there are features which must be present if the 'strengths' associated with the creation of a forum are to be maximised, whilst the 'weaknesses' are minimised.

It was argued in Chapter 3.3.2 that the strength of a judicial forum lies not in the imposition of a formalised *outcome* (either invalidation or declaration of incompatibility) but in the *process* of judicial involvement in discourse about rights. However, this ought to be examined further.

As unelected experts on the law, the judiciary is able to adjudicate disputes about rights without external (political) pressures and without fear of the consequences of offending popular sentiment. However, the judiciary is a limited forum – the consequences of which are highlighted when dealing with issues which have substantial political

implications. A particular limitation is that access to the forum in any particular case is restricted, leading to the range of potential arguments about the meaning of rights and what constitutes a 'reasonable' limitation of those rights being similarly limited. How various jurisdictions have sought to expand access to the forum in human rights cases will be addressed in the following comparison.

Comparison of the approaches and experiences of Australia, Canada, the EU and the UK suggests that regardless of the legal status of rights, the operation of the judicial forum must seek to balance the independence of the judiciary as against the limitations of the forum if it is to maximise the potential strengths and minimise the impact of potential weaknesses. It becomes apparent that two important issues need addressing. The first is the value in having a formalised protection mechanism, for example, as set out in a specific rights instrument. Secondly, there is substantial value on expanding access to the proceedings beyond the parties (but not in an unlimited way so as to re-hear the political debate), so as to ensure that the court is a true forum for discourse, not a tool to prioritise particular agendas.

Once again, the value of a formalised charter of rights – legislative or constitutional – becomes apparent as a means of securing the strengths associated with the judicial forum. It offers consistency to the way in which rights are protected within the jurisdiction and allows those who believe their rights have been violated a mechanism by which they may challenge the offending legislation. It also makes clear what the consequence for the challenged legislation is, in the event of an adverse judicial decision. Whether the judicial decision identifies an incompatibility or not, and whether the legislatures in weak-form judicial review jurisdictions take advantage of the ability to reject or not, in allowing individuals to raise their rights-based concerns in response to alleged violations, the judicial forum serves a purpose beyond the the legal protection itself. Jeremy Waldron (albeit in a slightly different context) expresses this:

> It may not always be easy for legislators to see what issues of rights are embedded in the legislative proposals brought before them; courts can help them see this, particularly if courts are not distracted by the issues …about the legitimacy of their own decision-making.[93]

[55] Laurence H Tribe, Jeremy Waldron and Mark Tushnet, 'On Judicial Review' (2005) 52(3) *Dissent* 81, 83.

Even where the legislature in a weak-form (constitutional) jurisdiction decided to exercise its override of a judicial decision, or in a weak-form (legislative) jurisdiction retains legislation identified as incompatible, the discourse that arises subsequent to the decision is not so much whether the judiciary has the authority to make a decision, but whether or not the legislature feels the incompatible measures should be retained despite their incompatibility. In Australia, where there is no formalised legal protection within a specific rights instrument, when the court operates as a forum for discourse about rights the debate (both in the court and subsequent to the decision) is not necessarily centred on the rights themselves, but on whether the court has the authority to make decisions with respect to rights which have not been given constitutional or legislative status.

An example may be seen with regard to *Minister for Immigration v Teoh.*[94] In *Teoh,* the court expanded the pre-existing common law 'legitimate expectations' doctrine to include international treaties. The court stated:

> [R]atification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention, and treat the best interests of the children as 'a primary consideration'.[95]

While *Teoh* relates to executive rather than legislative action, and subsequent decisions have made less certain the protection set out in the *Teoh* judgment,[96] the case is interesting here not for the protection it identified, but for the reaction to it.[97] The way in which the executive responded to the decision demonstrates the importance of a clear judicial role if the strengths associated with legal protections are to be realised.

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[94] *Minister for Immigration v Teoh* (1995) 183 CLR 273 (*'Teoh')*.

[95] Ibid, [34].

[96] Matthew Groves, 'Is Teoh's Case Still Good Law?' (2007) 14 *Australian Journal of Administrative Law* 126; Glen Cranwell, 'Treaties and Australian Law - Administrative Discretions, Statutes and the Common Law' (2007) 1 *Queensland University of Technology Law and Justice Journal* 49.

[97] Cranwell, above n 96; Wendy Lacey, 'In the Wake of *Teoh*: Finding an Appropriate Government Response' (2001) 29(2) *Federal Law Review* 219.

In the absence of a formalised legislative or constitutional commitment to fundamental rights, the courts drew on existing, common law rules, albeit not ones which had previously been used in the context of the protection of rights expressed in international treaties.[98] This was a decision which drew sharp criticism from the Government at the time, which questioned (and at times outright rejected) the authority of the court to expand the doctrine of legitimate expectation to require administrative decision makers to take into account Australia's international human rights commitments.[99] The Government went so far as to introduce (although it was withdrawn) the Administrative Decisions (Effect of International Instruments) Bill 1995,[100] known as the Teoh Bill, which sought to specifically exclude international treaties from 'legitimate expectation'.[101] Rather than drawing executive attention to the rights-implications of the challenged actions, the focus of the Government response was on the legitimacy (or lack thereof) of the judicial use of fundamental rights as a limit on executive action.

Australia's experiences with, for example, the *Teoh* case, demonstrate that while courts may be involved in discourse about rights, where they do so outside of a formalised protection mechanism, their decisions face controversy on more than one front. In addition to the debate as to whether a court has behaved in an 'activist' manner in relation to the rights themselves, the court is faced with criticism about its very authority with regard to the form of protection. The strength of the forum is undermined because debate and discourse becomes about the court and not about the rights.

The strength may be realised in spite of the lack of formal identification of the court's role, but it relies on the court's incorporation of non-formalised rights being relatively uncontroversial and not open to override by the political branches. That is, the success or failure of the mechanism in acting as a forum to further discourse and protect rights relies on political sentiment. For example, the shift in the ECJ's approach to fundamental rights (from outside the realm of EC Law, to part of the general principles of EC Law) was made against the backdrop of substantial concerns about the apparent

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[98] Lacey, above n 97.

[99] Ibid.

[100] Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth).

[101] Bills Digest No. 100 1999-2000, Administrative Decisions (Effect of International Instruments) Bill 1999, http://www.aph.gov.au/library/pubs/bd/1999-2000/2000bd100.htm.

lack of rights-protection in the EC. In particular, the German Constitutional Court in *Solange I*[102] had rejected the supremacy of EC Law (and consequently indicated it would refuse to apply relevant Regulations and Directives) if it failed to offer adequate protection to fundamental rights. In *Solange I*, the German Constitutional Court had explicitly indicated that in the absence of a formalised catalogue of rights in EC Law, it would continue to determine the applicability of EC Law within the German jurisdiction.[103] When the ECJ began to identify protected rights in the absence of a formalised, written mandate, but as part of the 'general principles' it was, therefore, relatively uncontroversial and thus the ECJ increasingly became used as a forum to bring to light concerns about the rights-implications of EC legislation.

Interestingly, just over a decade after *Solange I*, well before the introduction of the *EU Charter,* the German Constitutional Courts were convinced that despite the lack of formalisation, the ECJ was offering sufficient protection of rights so as to withdraw its ongoing scrutiny. In *Solange II* The German Court said:

> [S]o long as the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights. The Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation… and will no longer review such legislation by the standard of fundamental rights contained in the Constitution.[104]

Similarly, in Australia the lack of formalisation has allowed for a degree of accepted protection within the judicial forum. The judiciary's reference to fundamental rights as informing the interpretation of legislation has been generally accepted. The presumption of intent to legislate in a manner compatible with human rights is rebuttable – and, is in many ways a weak protection – but reliance on presumptions of

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[102] *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* BVerfGE 37, 271 (1974) ('*Solange I*'), English translation available at

http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588.

[103] Ibid.

[104] *Re the Application of Wünsche Handelsgesellschaft* BVerfGE 73, 339 (1986) ('*Solange II*') English Translation available at

http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=572.

intended compatibility is relatively uncontroversial. However, this further demonstrates the unreliable and unpredictable nature of an unlegislated role for the courts.

Access to the courts is the second key issue which impacts on whether a particular legal protection realises the potential strengths or emphasises the potential weaknesses associated with the court's role as a forum for discourse about human rights issues. Here it is important to reiterate that the 'strength' associated with the involvement of the judicial forum does not imply that the legislature *must* comply with the judicial interpretation of rights (except, of course, where strong-form judicial review means that the legislation is invalid with no available legislative override). Rather, the forum-argument is that the involvement of the judiciary results in legislative consideration, or re-consideration, of the rights-consequences and rights-compatibility of legislative or executive programmes. By requiring the government to argue their position against claims that the legislation unduly infringes on rights, and by having an authoritative decision from the courts, the forum devotes greater attention to perspectives about rights and in particular the perspectives of those whose rights are most immediately affected. This is said to occur *whether or not* the court identifies legislative programmes as incompatible with protected rights. Thus while Canada and the EU's judicial review create forums in which broader rights considerations may be heard, the UK's *HRA* may equally be said to facilitate broader discourse on fundamental rights.

Just as the strength of legal protections associated with viewing the court as a forum are associated with processes, so are the ways in which jurisdictions have sought to mitigate the potential weaknesses associated with the limited access to the judicial forum. In the absence of specific procedures which facilitate the inclusion of wider arguments about rights, the 'strength' cannot be fully realised and, rather than encouraging a greater discourse about rights, judicial protections risk limiting access to such discourse at the same time as shifting the decision-making away from the (admittedly imperfect) legislative forums. That is, while challenges to the rights-compatibility of legislation may allow previously unheard or marginalised opinions to be brought before the court, it may equally prioritise particular arguments (of complainants) over other legitimate concerns. In this way the judicial forum actually risks stifling discourse. Various jurisdictions have sought to address this.

The *HRA's* mechanisms expressly facilitate the involvement of the executive in cases where fundamental rights are an issue of concern – regardless of whether the case is one of private or public parties. In recognition that fundamental rights issues can arise and that the rights-compatibility of legislation may be questioned even in cases where the state is not a party, s 5 of the *HRA* requires that relevant Ministers be notified and guarantees their right to be joined as parties, where the court is giving consideration to making a declaration of incompatibility. Ministers are not required to exercise this right. In Australia, similar provisions appear at s 34 of the *Victorian Charter*.

However, whilst the right of the state to be adjoined to the litigation and consequently to defend the rights-compatibility of legislation is guaranteed in these legislative bills of rights, such measures only partially address the limited views presented to the court. Where the state is already a party to the litigation, the parties are generally confined to the state and the aggrieved person.

Traditionally, the inclusion of alternative positions has been at the discretion of the court via *amicus curiae* briefs. However, among the jurisdictions there are increasing moves to expand the scope of interested parties with the option to present rights-based arguments to the courts. These developments seek to address two potential weaknesses associated with judicial involvement in the protection of fundamental rights. In particular, the jurisdictions have sought to minimise the likelihood that restricting rights cases to the parties will result in the court prioritising the particular interests of the parties and they have done so aware of the undesirability of the courts engaging in a re-hearing of all the political arguments which influenced the legislation.

In the EU, Article 40 of the *Statute of the ECJ* allows for intervention of member states and institutions (beyond the parties to the conflict).[105] Non-state third-parties also have a limited ability to make submissions. Although not restricted to rights-based cases, the right of non-parties to present submissions seeks to broaden access and ensure that

[105] *Treaty on European Union,* opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) as amended by *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) ('*TEU*'), *Protocol 6 on the Statute of the European Court of Justice,* Article 40:

> Member States and institutions of the Communities may intervene in cases before the Court. The same right shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Communities or between Member States and institutions of the Communities.

judicial involvement in the protection of rights does not limit discourse. Further, it recognises that judicial decisions – especially those involving the potential invalidation of legislation – have an impact beyond the parties to the case.

Allowing an expansion of discourse beyond the parties is particularly important in the context of a multi-level governance system such as the EU. Invalidation of Regulations, or the determination that member-state measures to implement EU Law are incompatible with rights, have implications beyond the parties to the case, requiring action by other Member States to reform their own measures to comply with the ECJ-identified standard. The Article 40 intervention mechanism recognises that a polarised discourse within the judicial forum is unlikely to facilitate the court making a fully informed determination.

However, while the effect of Article 40 is to widen the scope of rights-based arguments raised within the judicial forum, it would be difficult to argue that this was its intent. Instead, Article 40 is a reflection of the unique tensions between integration and state-sovereignty found within the EU. It is applicable to all treaty-based challenges to EC Law and Member State implementation and applies to fundamental rights by virtue of their 'constitutional' status. Measures taken in other jurisdictions, in particular in Australia (both at the federal level and in Victoria), are more directly targeted at a limited expansion of the rights discourse within the judicial forum.

Despite the earlier criticisms concerning the ability of Australia's legal framework (in the absence of a specific rights instrument) to facilitate discourse about rights (as opposed to a discourse about the role of the court), the Australian experience does offer some valuable lessons. This is particularly evident in those areas which have been addressed by specific legislation – mainly in relation to legislation which prevents discrimination in certain areas of life.

The Australian approach has been to create an expert human rights body: the Australian Human Rights Commission. Although the Australian Human Rights Commission has a range of functions with regard to fundamental rights, the *Human Rights Commission Act*[106] gives it specific functions in relation to human rights matters before the courts.

[106] *Human Rights Commission Act 1986* (Cth).

Firstly, the Commissioner(s) are recognised as expert and are given the function of 'assisting the …Court as *amicus curiae*'[107] in cases where discrimination is alleged and the Commissioner views it as having particular significance, either in terms of the impact of potential orders on the rights of others (non-parties) or on the administration of the anti-discrimination legislation. The Australian Human Rights Commission has the additional function, under s 11 *Human Rights Commission Act,* to intervene on the basis of a broad range of human rights (defined in relation to a range of international human rights treaties) and discrimination issues. While not an unlimited mandate to intervene on the basis of human rights, the *amicus* and intervention functions reflect the recognition that there is scope for expert rights-based input into cases which involve issues of fundamental rights.

It should be noted that Australian Human Rights Commissioners do not have the *right* to have their *amicus* briefs accepted or to intervene. Assistance or intervention is dependent on leave being granted by the court. However, the specific granting of the *amicus curiae* function to the Commissioners is an acknowledgement that there may be value in third party perspectives being put before the court on matters of rights. The Australian Human Rights Commission does not represent the Government position, nor will it represent the position of the aggrieved person. Instead, the Australian Human Rights Commission is tasked with putting forward a 'human rights' perspective.

Interestingly, Victoria has taken further this approach of an independent, expert human rights body with the function to intervene in cases which may affect fundamental rights. Section 35 of the *Victorian Charter of Rights and Responsibilities* requires that the Victorian Equal Opportunities and Human Rights Commission (VEOHRC) be notified of cases involving questions which may impact on fundamental rights. Section 40 takes the national approach of *amicus curiae* briefs but does not require that VEOHRC first obtain leave from the court to submit such a brief. The Victorian approach consequently acknowledges that there may be non-party-based arguments which are relevant to the case and specifically empowers an expert body to present a (potentially)

[107] Ibid, s 46PV (along with the relevant sections in the discrimination Acts mentioned in the previous sections of this chapter).

third perspective on the issue to the court, where the arguments of the parties would likely limit the scope of relevant arguments presented to the court.[108]

In each of these Australian examples, the Commission is viewed as an 'expert' party seeking to ensure that the polarised arguments of the parties (whether individual or governmental) do not undermine the function of the court as providing a forum for discourse. It aims to put the court in a *better* position to make a decision regarding fundamental rights because it is better informed about the relevant arguments. At the same time, the creation of a particular body of expertise to fill this role allows for the inclusion of a non-self-interested argument. Additionally, the focus on an independent expert body seeks to limit the considerations in front of the court and discourage the use of the court as a replacement for the wider debate about rights occurring in the ordinary political process.

What becomes apparent is that if the creation of a forum for the continued discourse about rights is to be realised as a 'strength' of particular legal protections of rights, it is not one which is guaranteed simply by the availability of a judicial remedy. When the mechanisms put in place by the jurisdictions are considered, reliance purely on the existence of the judicial process to secure such a forum offers merely the *potential* rather than the *guarantee* of a true forum and risks discourse about rights being undermined by the presentation of polarised arguments in particular cases. However, the introduction of processes and procedures that recognise the potential for third-party input allow for interested parties to present arguments without using the judiciary as a replacement for robust political debate in the law-making process.

3.5.3 Retention of Legislative Supremacy

The final lessons that can be drawn from the experiences of the jurisdictions relate to the way in jurisdictions – specifically Canada and the UK where the legal protections are different types of weak-form judicial review - have sought to retain legislative supremacy by creating an 'exception' to the general protection of fundamental rights offered under a specific rights instrument. The term 'exception' is used here to describe the three main ways in which a jurisdiction may return the ultimate decision regarding

[108] Williams, above n 83.

fundamental rights, or their violation, to the legislature – either pre-emptively or as a specific rejection of the decision of a court regarding the protection of rights. These were alluded to in 3.4.1 and are:

1) A provision within a specific rights instrument which allows a legislature to expressly exempt particular legislation from the legal protection, or to re-enact legislation which has been found to be rights-incompatible and thus invalid. That is, the s 33 notwithstanding clause within the *Canadian Charter*. These should be distinguished from express derogations from the ordinary legal protection, justified, for example, by a state of emergency. These are best viewed as 'exceptional' rather than a generally allowed exception and will be briefly explained below.

2) Judicial declarations of incompatibility, such as those made under s 4 *HRA,* which are unenforceable and which do not require that action be taken to remedy the incompatibility. The legislature may continue to violate fundamental rights by refusing to take action to amend legislation so as to remedy the judicially-identified rights-infringement.

3) Where a judicial decision has resulted in a rights-compatible interpretation of legislation which diverges from legislative intent, the legislature may pass new legislation which has the effect of re-asserting the original intent and which cannot be interpreted in a rights-favourable way. This form of exception is particularly relevant when considering weak-form judicial review (legislative) as found in the UK as a means of rejecting the ordinary legal protection found in s 3 *HRA*.

One small aside regarding derogations before continuing: These 'exceptions' which allow the legislature to pass rights-violating legislation should be distinguished from allowable derogations. Derogations allow that in certain, exceptional circumstances a legislature may limit rights beyond what would ordinarily be considered 'reasonable.' The UK, for example, has a derogations provision under s 14 of the *HRA,* which derives from the *ECHR*. Article 15(1) of the *ECHR* states:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under

> this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Derogations are allowable, temporary, deviations from the ordinary legal protection, justified by necessity in a time of crisis or public emergency. However, unlike the 'exceptions' which retain legislative supremacy, the use of derogations to diverge from the ordinary standard of rights protection is subject to judicial review. In the UK this allows the court to determine whether the particular measures justified as a derogation are only that which are 'strictly required by the exigencies of the situation'.

Another way of looking at derogations is that the legal protection remains but the standard against which limitations are judged is altered. For example, in the *Belmarsh Case*[109] the court addressed whether the indefinite detention of foreign-national terror suspects was legitimate.[110] At the first appeal, Lord Bingham stated:

> Assuming, as one must, that there is a public emergency threatening the life of the nation, measures which derogate from article 5 [of the *ECHR* dealing with liberty of the person] are permissible only to the extent strictly required by the exigencies of the situation, and it is for the derogating state to prove that that is so.[111]

Although a greater than normal limitation of rights was potentially allowable, on appeal, the House of Lords made clear that the existence of a 'public emergency' did not allow the legislature *carte blanche* to ignore the *HRA*. The court has maintained that it retains its role in protecting rights. In this case, the measures were not strictly required by the situation and the purported derogation was invalid and the relevant legislation was incompatible with the *HRA*-protected rights.[112]

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[109] *A v Secretary of State for the Home Department* [2004] QB 335.

[110] The measures only applied to foreign nationals, not to UK citizens similarly suspected. This was a point that would ultimately influence the court's decision on the facts. Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart, 2008), 209; Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32(2) *Melbourne University Law Review* 422.

[111] *A v Secretary of State for the Home Department* [2004] QB 335, [44].

[112] *Case of A* [2005] 2 AC 68. For discussion, see also Leigh and Masterman above n 110, 209; Debeljak 'Balancing Rights in a Democracy' above n 110, 462.

On the other hand, when considering with 'exceptions' rather than derogations, the legislative decision to reject a judicial decision or to bypass the legal protection (for example in Canada by inclusion of an s 33 clause in the original legislation so as to shield it from rights-based judicial review). These exceptions are not dependent on the existence of a particular emergency circumstance. While *political* circumstances may serve to limit the actual frequency which legislatures rely on available exceptions under a specific rights instrument, unlike derogations exceptions do not place *legal* limits on the legislature's ability to pass legislation which violates otherwise protected rights.[113] That is, the nature of an exception, is to return 'the last word' to the legislature. Legislatures are not required to provide reasons for their decision to utilise an exception and courts have no authority to scrutinise the reasons for which a legislature has made use of that exception. This will be discussed below.

Legal protections which involve retention (or return) of the legislature's ability to pass rights-encroaching legislation are designed to mitigate key weaknesses associated with judicial mechanisms. In particular, exceptions provisions are designed to return decision-making authority about rights to the democratic institutions. Additionally, given the inherently political nature of many of the rights-based questions which come before courts, and the concerns expressed at 3.4.1 that the judiciary may become unduly politicised – at the extreme, engaging in a policy task for which it is inherently unsuitable - exceptions provisions are intended to be a 'prudent fail-safe device,'[114] which ultimately secure policy- and law-making to the institutions best suited to that task.

In the EU there is no 'exceptions' provision and, at least in relation to fundamental rights, the judiciary retains the 'final word'. There is an ongoing criticism levelled at the EU that there exists a 'democratic deficit'. By this it is suggested that the limited role of the European Parliament (EP) in EC-law making (albeit its role has increased substantially in successive amendments to the *TEU* as was explained at 2.3.2), the strong role of the unelected Commission, and the low turn-out numbers at EP

[113] Certain rights may not be able to be encroached by use of an s 33 clause in Canada. This will be explained below.

[114] Peter Russell, *Canadian Constraints on Judicialisation from Without,* The Global Expansion of Judicial Power (New York University Press, 1995), 138 cited in Julie Debeljak, 'Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights' (2002) 26(2) *Melbourne University Law Review* 285.

elections[115] combine to diminish the role of the individual in participating in decision-making at the European level.[116] The absence of an 'exception' to the *EU Charter* protections offered by the ECJ may at first seem to exacerbate this by reserving rights to an unquestionably unelected court. However, when the structure of the EU legal system is considered – a system in which there has never been parliamentary sovereignty and in which the legislative process involves an 'executive' (the Commission) which is not an elected body – it appears that although an exception which secures legislative supremacy may play a role in mitigating the weaknesses of judicial mechanisms, it will not be appropriate in all circumstances.

Exceptions may also have purposes distinct from redressing the weaknesses of judicial decision-making with regard to rights. These are generally unique to the specific jurisdiction, such as securing provincial support for the *Canadian Charter* in Canada, as was discussed in 2.1.3. While these purposes may explain the design of the exception provision, they are of limited use in assessing how the provision seeks to mitigate the weaknesses of judicial mechanisms whilst not undermining the strengths.

Of the jurisdictions under consideration, it is Canada and the UK which demonstrate different forms of 'exception' which allow the legislature to exert its authority in spite of the existence of legal protections which would usually apply. As noted above, the EU's legal system is not conducive to an exception in this sense. In Australia, at the federal level, the lack of a formalised approach to rights protection means that parliamentary sovereignty with regard to fundamental rights has necessarily been retained, subject only to those constitutional provisions protecting rights.

The Canadian exception mechanism is found in s 33 of the *Canadian Charter* – the 'notwithstanding' clause. Section 33 of the *Canadian Charter* implements two potential exceptions to the general legal protection of invalidation of rights-incompatible legislation. The first is where judicial review results in the invalidation of legislation but the legislature decides to override the judicial decision by re-enacting the

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[115] European Parliament, *'Turnout at the European elections (1979-2009)'* (2009) <http://www.europarl.europa.eu/parliament/archive/staticDisplay.do?language=EN&id=211>

[116] For discussion of the 'democratic deficit' in the EU See, eg: Giandomenico Majone, 'Europe's 'Democratic Deficit': The Question of Standards' (1998) 4(1) *European Law Journal* 5; Andreas Follesdal and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44(3) *JCMS: Journal of Common Market Studies* 533.

legislation with the inclusion of an s 33 notwithstanding clause. The second is where the legislature institutes a pre-emptive shield against rights-based judicial scrutiny of particular legislation.

The main concern with the exception to judicial review under s 33 is that, on the text of the *Canadian Charter,* the federal Parliament and Provincial legislatures are almost unlimited in how they choose to utilise s 33 declarations. Legislatures are not able to use s 33 to violate particular rights (guaranteed by ss 3 – 6 of the *Canadian Charter,)* as well as language rights (guaranteed in ss 16 - 24). However, apart from the limitation as to which rights s 33 may be applied, the only specified limit on the use of s 33 is the five-year 'sunset clause' in s 33(3) which states:

> A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

This sunset clause does have an important role in limiting the operation of s 33. The sunset clause reflects the position that judicial review protection is the 'default' under the *Charter.* By having a built-in expiry date of the declarations made under s 33, the *Canadian Charter* reduces the likelihood of ongoing shielding of legislation. This legal limitation on the exercise of the notwithstanding clause may ultimately interact with a political protection (as will be discussed in Chapter 5 generally) or may lead to the development of a political pressure (as will be discussed at 5.1) which discourage an excessive use of s 33. Additionally, requiring that legislatures review the use of s 33 on a five-year basis ensures that rights are not violated merely by *inaction* of successive governments. Legislatures can, of course, re-enact the s 33 clause, but in doing so will (presumably) once again face political pressures associated with its use.[117]

Even with the temporal limitation on s 33, the question remains: does the availability of s 33 undermine the constitutional protection of rights offered by weak-form judicial review? The answer, clearly, is 'yes'. Despite its relatively rare use in practice, and the existence of a sunset clause, the *availability* of an 'exception' mechanism effectively shields legislation from the legal protection which the *Charter* is intended to provide. While residual protections (eg. common law principles of interpretation) remain, the

[117] Kent Roach, *The Supreme Court on Trial* (Irwin, 2001), 264 - 265.

availability of s 33 which can (and has) been used to re-enact legislation after the judiciary has identified incompatibility with the *Canadian Charter,* means that the protection offered by the *Canadian Charter* is reliant on popular support – on *political* rather than *legal* protections - for its ability to effectively protect rights. Viewed in another way, the legal protection is reliant on *lack* of popular support for measures which may attract the use of an s 33 mechanism.

Ideally, and to a large extent in practice, the use (or proposed use) of s 33 has not been to overtly and deliberately violate protected rights. As was discussed at 2.1.3, the 'shield' has instead been used to secure a particular interpretation of 'rights', or to secure a particular approach to what constitutes a reasonable limitation in one province where that approach differs from the approach adopted at the national level or in the other provinces. In particular, where there are differing approaches taken by the provinces, s 33 has been used to shield a particular provincial approach to the relationship between certain policy objectives and individuals rights against 'federal' judicial scrutiny.[118]

B. Slattery has suggested that the notwithstanding clause is limited by more than merely the s 33(3) temporal limitation and is not entirely reliant on political pressures to limit its abuse. He says:

> [T]he effect of a valid notwithstanding clause is to curtail or eliminate judicial review, not to release a legislature from its constitutional responsibilities under the Charter…they have a duty to ensure in their judgement the bill does not unjustifiably infringe any Charter rights.[119]

However, while the limited use of s 33 would largely seem to support Slattery's understanding of the notwithstanding clause, the text itself does not place such limits on use of the legislative override. Unlike the above-mentioned derogations, the decision to utilise s 33 is not subject to any form of formal review. At best, the determination as to when use its is 'appropriate' is left to the legislatures – shifting the mechanism to a *political* rather than *judicial* protection.

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[118] Brian Slattery, 'A Theory of the Charter' (1987) 25 *Osgoode Hall Law Journal* 701.

[119] Ibid, 730-742.

Additionally, the effect of s 33 is to provide an *absolute* shield against rights-based judicial scrutiny of legislation to which an s 33 declaration is attached. In providing this shield the judiciary cannot scrutinise the legislation as to *Charter* compatibility. Here the two types of s 33 'exception' have different implications. Whereas the legislative override after a judicial decision may undermine the strength of protection associated with invalidation of legislation, several strengths associated with the judicial forum are retained because the court has had the opportunity to review the legislation in the first instance. The legislature's decision to reject that decision is indicative of the 'dialogue' between institutions.[120] However, where the exception is used as a pre-emptive shield, the anti-majoritarian weaknesses may be overcome but so are the strengths associated with the involvement in the courts in rights-protection. For example, in preventing rights-based judicial scrutiny, the 'forum' that the courts provide is similarly removed. The only recourse for those whose rights are affected by legislative violation of rights (and who wish to challenge the 'reasonableness' of that limitation) is to find voice within the political process and to seek to garner sufficient support amongst the legislature (and the population as a whole) so as to effect change to the shielded legislation.

In the UK, the preservation of parliamentary sovereignty was a key concern in the design of the *HRA*.[121] The legislative status of the *HRA* is specifically intended to give the judiciary a formalised (and important) role in the protection of rights but a role short of allowing the courts to infringe on the principle of parliamentary sovereignty and find rights-incompatible legislation invalid. Unlike in Canada, the 'exception' leading to the retention of the legislative will is not dependent on a specific act by the Parliament. Instead the 'exception' occurs because the legal protection reaches its limit. That is, once the court has identified legislation as incompatible with fundamental rights, the legislature does not take steps to remedy that inconsistency.

The *HRA* exception is perhaps narrower than the Canadian s 33. This is because it must be viewed in conjunction with s 3 which provides no specific direction to the court as to the limits of the interpretative mandate of the *HRA* – apart from the rather vague 'so far as is possible'. Under ordinary circumstances (that is, where there is no state of

[120] Hogg and Bushell, above n 21, 80.

[121] Home Office White Paper, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997), http://www.archive.official-documents.co.uk/document/hoffice/rights/rights.htm.

emergency) there is no shield against judicial scrutiny of legislation and, because the interpretative mandate is so broad, while the courts may well accept legislative and executive interpretations of protected Convention rights, they are in no way required to do so. Short of enacting legislation with language so unambiguously incompatible with fundamental rights that the judiciary has little choice but to issue a declaration of incompatibility rather than adopting a creative interpretation, the parliament is limited in its ability to secure its preferred interpretation. However, ultimately the effect of the exceptions is the same as in Canada: the legal protection may be overridden.

As will be discussed in the final chapter, political protections which operate in conjunction with legal protections are able to discourage legislatures from utilising the exceptions, allowing the legal protections to operate as the 'norm' within the jurisdiction. However, in the context of considering how exceptions impact on the strengths and weaknesses of *legal* protections (notwithstanding the existence, in practice, of complementary *political* protections) certain conclusions can be drawn.

In a legal system which features specific rights-instrument-based legal protections of fundamental rights, the availability of an exception which secures legislative supremacy is clearly an attempt to address concerns about the weaknesses of legal protections. The Canadian s 33 creates so heavy a shield that its use undermines any form of protection offered by the judiciary (with regard to affected legislation). While it undoubtedly returns decision-making authority to the democratic institutions, it does so at the cost of several strengths which legal protections have the potential to secure. Alternatively, while the *HRA* does not result in the invalidity of rights-incompatible legislation, it arguably provides a more balanced approach to the availability of exceptions to the general protection, retaining a judicial role even if that role is short of the legal protection usually offered via the interpretation of legislation so as to be compatible with rights.

3.6 Conclusion

It is immediately clear from the comparisons that there are benefits to basing legal protections on a comprehensive catalogue or bill of rights – in particular those protections which involve some form of judicial review. A specific rights instrument which encompasses a broad selection of fundamental rights provides a framework in

which the legal protection operates. It brings certainty and clarity to the protection, as opposed to the *ad hoc* basis of the Australian approach or the wider but still unspecified commitment to fundamental rights of the pre-*EU Charter* European Union. Where rights are included in a specific rights instrument, there is little doubt as to which rights are considered protected rights within the jurisdiction. Further, such a specified list acts as a limit on the authority of judiciary when exercising its rights-protecting role, and ensures that all institutions are aware of the limitations that the instrument places on the legislative violation of fundamental rights. Whilst the experiences of the EU demonstrate that a general statement that fundamental rights form part of the law of the jurisdiction *may* result in a cohesive approach to rights-protection by the judiciary, the Australian experience has demonstrated that the absence of such a specific rights instrument may equally limit the scope for the judiciary to adopt such an approach. Regardless, given that a persistent criticism of judicial mechanisms is that they shift increasing amounts of power to the judiciary, lack of a comprehensive charter expands this power from interpreting and applying rights to additionally identifying which rights are protected in the first place.

Additionally, the use of the courts as a forum for further discourse about rights is potentially a strength of judicial mechanisms. This strength derives from the *process* rather than the *outcome* of judicial review. However, as the mechanisms in the UK and Canada demonstrate, this forum has the potential to be limited as to the perspectives that are presented and consequently has the potential to emphasise the weaknesses of judicial protection of rights by politicising the judiciary, which may effectively be re-hearing limited aspects of a policy debate already heard in the political sphere and decided by the legislature. In order to expand the range of arguments presented to the court, the EU has extended the scope of interested parties to include the institutions and any or all 27 Member States. This is, however, a result of existing Treaty arrangements, not a specific measure to improve the forum strength of the ECJ as a rights-protecting institution. Australia, however, has developed specialised agencies with a specified function to present arguments to the court. Although still limited at the federal level to acting with leave of the court, the Australian Human Rights Commission as an expert human rights organisation is able to present arguments which are not reflective of either governmental policy or dependent on 'victim' status. In Victoria, this has been taken further and the Victorian Commission has a right to intervene and to present arguments

in cases in which fundamental rights are affected. By expanding the scope of arguments presented to the court, whilst not opening the proceedings up to unlimited *amicus curiae* briefs from 'interested' parties, the judicial mechanism can be strengthened. The risks are minimised that the judicial forum will be dominated by particular interests/interested groups, exacerbating the weakness associated with an apolitical institution being faced with the task of deciding political issues for which it is ill-informed and ill-suited.

However, whilst a more inclusive forum would certainly improve the realisation of the forum strength of judicial review, it can only diminish the effects of the weaknesses, not altogether overcome them. Regardless of how well designed the 'forum' is, and how inclusive the debate, the weaknesses of the judicial mechanisms remain.

The final area of consideration relates to the weaknesses of judicial mechanisms associated with the non-democratic nature of the judicial branch. It is clear that this is a weakness that all jurisdictions are faced with and have approached differently. Whereas the EU has refrained from undermining the protection offered by judicial review – arguments about democratic deficits focus on the unelected Commission, while the judicial protection of fundamental rights is generally perceived as *enhancing* democratic governance by protecting basic *rights* as against majority *interests* – the other jurisdictions have taken steps to rein in judicial power.

The Canadian 'notwithstanding' clause re-establishes parliamentary sovereignty and in doing so seeks to establish a balance between legislative and judicial-decision making with regard to the protection of fundamental rights, as opposed to the prioritisation of the courts in the EU. This weak-form judicial review seeks to realise the strengths associated with legal protections whilst similarly seeking to overcome, in particular, the criticism that judicial-decision is undemocratic.

Further along the spectrum of legal protections, the weak-form judicial review (legislative) of the UK's *HRA* has sought to mitigate the democratic weaknesses associated with constitutional judicial review, whilst maintaining many of the strengths of legal protections. However, the cost has been that the overall strength of the legal protection does not extend to the invalidation of laws which violate rights. Further, while the broad interpretative mandate may indeed be rights-favourable, it may have the

effect of limiting the ability of the legislature ability to secure its will – which is something that the weak-form judicial review (legislative) model, ostensibly protects.

What is clear is that although some of the weaknesses of legal protections may be mitigated by careful design of the judicial role and process of judicial review, 'gaps' remain. Regardless of the careful design of legal protections, they are unable, on their own, to realise the potential strengths at the same time as entirely mitigating or avoiding the occurrence of weaknesses associated with the form of protection. This opens the door for suggesting that political mechanisms, discussed in the following chapter, ought to be viewed as not only desirable as a means of protecting fundamental rights in a jurisdiction, but necessary to mitigate the weaknesses of legal protections without substantially affecting the potential strengths which such legal protections may bring.

CHAPTER 4. Political Protections

Political protections – those mechanisms that are designed to encourage political debate about rights, and pressure law-makers into adopting rights-compatible legislative programmes – fulfil an important role in a legal system's overall commitment to the protection of fundamental rights. Political protections make rights a regular consideration of the law-making process. They ensure that legislatures are aware of the potential implications for individual rights before passing new legislative programmes into law. Alternatively, they may be designed to trigger a re-assessment of legislative programmes with greater attention given to fundamental rights implications. Based on arguments about democratic legitimacy and the value of discourse and debate about the meaning of rights, political protections may supplement legal protections – the interaction of legal and political protections being the focus of Chapter 5 – or may be seen as a the primary way of protecting fundamental rights. Strong political protections place the political branches of government at the heart of rights protection within a jurisdiction. This shifts the focus of rights protection from responding to and remedying breaches of rights-standards, to a pro-active prevention of those rights standards being breached in the first place.

However, these political protections are not without weaknesses. Because political protections rely on popular pressure against rights-encroachment, the standard of protection offered falls short of a 'guarantee'. Although seeking to create a 'culture of fundamental rights' both within the legislative process and the community at large, the mechanisms equally rely on such a 'culture' being already in existence if they are to be a success.

Although, in practice, political protections tend to form only part of a general commitment to fundamental rights in a jurisdiction which offers both legal and political protections, this chapter considers the strengths and weaknesses of political protections *in their own right*. That is, it will consider the efficacy of political protections in protecting rights regardless of the presence (or lack thereof) of legal protections against rights-infringing legislation in the jurisdiction.

In 4.1, an overview of the three forms of political protection which seek to prevent the passage of, or at least limit the occurrence of, rights-infringing legislation will be addressed. Executive statements, legislative scrutiny and the political mechanisms which respond to a judicial finding of rights-incompatibility within existing legislation (judicial declarations and fast-track remedial legislation) will each be briefly explained.

Next, in 4.2 and 4.3, this chapter will consider the strengths and weaknesses of protecting fundamental rights via the political process. Although this necessarily involves mention of legal protections (which are often presented as an alternative to political protections in the literature) the interaction of legal and political protections will not be the focus of this chapter. Instead, the pros and cons of political protections will be considered in their own right. In 4.2, the strengths of political protections will be divided into three main themes, focusing on the democratic arguments for the dominance of the legislature in the protection of fundamental rights, the role of political protections in facilitating an increased discourse about and increased 'culture' of rights and the importance of rights-protection mechanisms in the legislative process as a pro-active approach to rights-protection. In 4.3, the weaknesses of political protections will also be considered under three broad headings. First, there will be a challenge presented to the strength of the protection offered by a mechanism which relies on the population disapproving of rights-encroachment and engaging in the political process. The second weakness suggests that the political processes are incapable of fully realising the purported strengths of the mechanism. Thirdly, there is a weakness that flows from the lack of expertise about rights within a representative body asked to make complex decisions about where to draw the line between disagreement about the meaning of rights and an undue limitation of those rights.

The chapter will then go on to draw lessons from the four jurisdictions' experiences (or lack of experience) with political protections in Chapter 4.4. In engaging in comparison of these experiences, the chapter will highlight features of various mechanisms which have emphasised or undermined the potential strengths and weaknesses of the political protections. Two themes emerge from the comparison – the fundamental role often given to an executive 'rights certification' of legislative proposals and the form and importance of legislative scrutiny within jurisdictions as a means of ensuring that 'rights certification' is effective.

4.1 Forms of Political Protection

Political protections operate in three main ways. Firstly, they may be pre-legislative scrutiny of proposed legislation, where the protections take the form of executive statements of compatibility in relation to proposed legislation or legislative scrutiny which is committee-based examination of the rights-implications of bills. It is these types of political protections which are of concern in this chapter and they will be explained in greater detail in 4.1.1 and 4.1.2 respectively. Secondly, political protections may relate to rights-infringing legislation which is already in force are designed to generate pressure on the legislature (and executive) to change the law so as to remedy the rights-encroachment. For example, s 10 *HRA* includes 'fast-track' measures which encourage changes to legislation that the courts have identified as incompatible with fundamental rights. These post-enactment protections will only warrant brief mention, in 4.1.3, as they are strongly connected to legal protections and thus feature in the following chapter. Finally, there are protections offered via the creation of political institutions with human rights responsibility – such as the Australian Human Rights Commission. These are not of substantial relevance to the ways in which political protections may generate pressure on the legislature against passing rights-infringing legislation and as such will not be considered further.

Pre- and post-enactment protections have the same function – to pressure those involved in the law-making process to give consideration to the fundamental-rights-implications of legislation. Political protections do not, on their own, prevent the passage of rights-infringing legislation. Instead, political protections can be viewed as pushing discourse about rights into the political arena and creating political consequences for those who – knowingly or carelessly – propose or support legislation which has adverse consequences with respect to fundamental rights. Thus they seek to minimise the occurrence of rights-infringing legislation.

4.1.1 Executive Statements

The first form of political protection is an executive statement of compatibility. This involves a requirement that those with responsibility for proposing legislation certify that they believe the proposal to be compatible with fundamental rights. The details of

how the four jurisdictions have approached executive statements will be considered and compared in 4.4.1.

The requirement that the executive certify each Bill as to its compatibility with fundamental rights is a procedural requirement but it serves an important purpose: it ensures that the impact that each Bill may have on fundamental rights is considered.

Political protections of this form do not, however, preclude the executive from proposing rights-incompatible legislation, or from proposing legislation about which there is uncertainty as to how it may interact with fundamental rights. K. D Ewing (in relation to the UK *HRA*) explains this as follows:

> There may of course be cases where it is not possible for the minister to make a declaration of compatibility, because for example the government feels the need to proceed with legislation without being fully aware of its implications for Convention rights. There may also be very rare cases where the government feels the need to legislate regardless of whether there is any violation of Convention rights.[1]

Executive statements need not explicitly make a claim as to compatibility. An alternative statement may be made, such as those made under s 19 (1)(b) *HRA* or the *DJA* in Canada. These statements require that the executive official make a statement to the effect that, although unwilling or unable to 'certify' the rights-compatibility of the legislation, he or she believes the legislation should still be passed. While the inclusion of an alternative statement may indeed reflect the executive's intention that an explicitly rights-incompatible law be passed despite the incompatibility, such a statement may instead reflect an acknowledgement on the part of the executive that there is some controversy or debate about the rights-implications of the legislation, and, despite that controversy, the executive still views the legislation as necessary.

A constitutional prohibition under strong-form judicial review may have the effect of putting such legislation outside the scope of legislative power (as explained in 3.1.1). Thus an alternative statement may not be available in those jurisdictions. Alternatively, where the legislature retains the availability to exempt certain legislation from ordinary

[1] K. D. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62(1) *Modern Law Review* 79.

rights-protection standards – for instance by using the s 33 notwithstanding clause in Canada or the s 31 clause in the *Victorian Charter* – the use of such a mechanism may require a statement by the executive explaining or at least declaring their use of such a mechanism.

The requirement of some form of rights-statement has, in the first instance, the function of ensuring that the rights-consequences of all, or virtually all, Bills[2] are considered by the executive. This may be due to the requirement of a statement in relation to each bill (whether compatible or not), or because the executive must scrutinise each Bill to determine whether an alternative statement is necessary. Regardless of which form of statement is utilised, the requirement of some form of executive certification is intended to encourage debate and discussion about rights in Parliament (the institution to which the executive statement is delivered).[3] The efficacy of the various models of executive statement in achieving this will be considered in 4.4.1.

Moreover, executive statements – particularly those in which a Minister makes a positive statement as to his or her belief that the Bill is rights-compatible - are intended to hold Ministers to account. Where their legislative initiatives are subsequently shown to encroach on rights, they must face the political consequences of that claim.[4] While a statement which acknowledges rights-incompatibility (or raises the possibility that the legislation *may* conflict with rights) potentially lessens the individual accountability of Ministers 'after the fact', it creates a more immediate form of political pressure. In particular, because such statements specifically acknowledge the weaknesses of the legislation with regard to fundamental rights *before* the legislation is passed into law, the political pressure relates more to Parliament (and the public) questioning whether the legislation is necessary.

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[2] Although it will not be discussed here, there are some Bills which potentially are not covered by a general requirement of an executive statement. These are Bills which fall outside the ordinary legislative procedure where a member of the Executive is responsible for proposing the Bill. For example, Anthony Lester QC has pointed out that in the UK, the requirement that the proposing Minister make a statement does not cover Private Members Bills. Anthony Lester QC, 'Parliamentary Scrutiny of Legislation under the Human Rights Act 1998' (2002) *Victoria University of Wellington Law Review* 1, 5.

[3] See for discussion, Lester, 'Parliamentary Scrutiny of Legislation under the Human Rights Act' above n 2; Anthony Lester QC, 'The Magnetism of the Human Rights Act 1998' (2002) 33(3/4) *Victoria University of Wellington Law Review* 477, 500.

[4] This may be particularly emphasised where there are legal protections which allow the legislation to be reviewed by the courts as to its rights-compatibility. The interaction of these political and legal protections will be discussed in the following chapter.

4.1.2 Legislative Scrutiny

Legislative scrutiny of Bills is the second form of political protection to be examined in this chapter. In particular, formalised scrutiny committees tasked with examining the potential impact of legislation on fundamental rights provide an opportunity for debate – whether as a supplement to an executive statement (that is, providing the opportunity to investigate and challenge an executive claim to compatibility) or in the absence of such a statement. The approaches to legislative scrutiny of the various jurisdictions are compared in 4.4.2.

Carolyn Evans and Simon Evans have explained the important role of the legislature in relation to fundamental rights:

> In established democratic States, legislatures perform several distinct functions. They are representative bodies providing a mechanism by which citizens participate in public affairs and government; they are forums in which governments can be held accountable for their conduct; and they are (more or less) deliberatively law-making bodies. In discharging each of these functions they can affect the enjoyment of human rights.[5]

The political pressures generated by scrutiny committees are two-fold. Firstly, committees challenge the executive – whether individual Ministers or the executive as a whole. Thus, the legislature is not only offered the executive view about rights. Regardless of whether the executive has been required to make a statement, legislative scrutiny committees seek to hold the executive to account for the rights-consequences of their Bills. Secondly, as part of the legislative process, scrutiny committees provide opportunities for interested or affected parties to participate, via submissions to the committee, in the legislative process. The extent or strength of this participation may be limited by a range of factors (as will be discussed in 4.3.3). However, the legislative committees, in general, provide some opportunity for interested or expert parties to contribute to the debate.

Whereas executive statements do not necessarily include a full explanation as to the basis on which rights-compatibility has been declared, legislative scrutiny committees

[5] Simon Evans and Carolyn Evans, 'Evaluating the Human Rights Performance of Legislatures' (2006) 6(3) *Human Rights Law Review* 545, 547.

provide the opportunity to challenge or investigate the statement in a more in-depth manner than parliamentary debate alone is likely to achieve. The role of the legislative scrutiny committee is to inform the legislature about the rights-implications of legislation and, given this role, such committees may offer a more thorough consideration of the rights-implications of legislation than can be explained via an executive statement which expresses only compatibility/incompatibility. This may involve suggesting that the Bill is not, in fact, compatible with fundamental rights despite the claims of the executive. Alternatively, a committee may devote attention to ways in which the legislation limits rights and, even if such a limitation is not a violation of rights, the committee may offer consideration as to whether such limitation is necessary.

4.1.3 Post-enactment Measures – Pressure Arising from Judicial Declarations and the 'fast-track' Procedures

The final types of political protection, which has been alluded to in the previous chapter and will be returned to again in Chapter 5, are those which generate political pressure to repeal or amend legislation which is identified as incompatible with rights. These pressures generally arise from the exercise of legal protections, particularly judicial declarations of incompatibility whereby the legislation remains valid despite the incompatibility. Political pressure arises to encourage legislatures to amend the rights-incompatible legislation. These pressures may be emphasised by the existence of formal mechanisms, such as the 'fast-track' procedures in the UK, which facilitate amendment to the rights-infringing legislation without the (potentially) lengthy processes ordinarily required.

However, these forms of post-enactment protection are mentioned at this point because, in the context of political protections, they do have a role. That is, judicial declarations and fast-track procedures are a way of responding to the weaknesses of political protections in the pre-legislative and legislative processes. These post-enactment protections allow a legislature to respond to judicial declarations of incompatibility and to remedy the rights-infringement identified. These types of protection re-ignite debate about rights and place pressure on the executive and the legislature to remedy the flaws in the legislation which meant that the courts were unable to protect rights via rights-

favourable interpretation of the legislation. They operate as a political pressure in much the same way that other political protections do – by bringing attention to the rights-implications of legislation and encouraging both institutional (legislative and executive) and popular dialogue about the rights and the particular legislation. However, unlike the executive statements which leave room for ambiguity (that is, the rights-compatibility of legislation is uncertain rather than confirmed as incompatible), the declaration of incompatibility is a clear statement from an expert source (see 3.3.3) which indicates that the legislation *is* incompatible. The debate, therefore, is whether and how to remedy that incompatibility.

4.2 Strengths of Political Protections

The strengths associated with the use of political mechanisms for the protection of fundamental rights revolve around the benefits of considering fundamental rights within the democratic law-making process. There are several ways in which political protections may contribute to the protection of fundamental rights. Tom Campbell, who argues for what he calls a 'democratic bill of rights' – a political mechanism designed to protect fundamental rights but without allowing for judicial enforcement[6] – explains this. He states:

> The aim [of a democratic bill of rights] would be to retain responsibility for the detailed formulation of human rights with elected governments, but put pressure on these governments to resist their inherent tendency to negate the very norms that justify democracy as a system of government…It is desirable to adopt democratic bills of rights as a basis for the stimulation and assessment of legislative and policy proposals that promote human rights. [7]

Campbell's explanation highlights the two core strengths associated with political protections: the appropriateness of involving elected representatives in the inherently political debates about the meaning of rights within a jurisdiction and the development of a 'culture of fundamental rights,' which increasingly encourages an institutional

[6] Campbell acknowledges that there may be judicial enforcement of a democratic bill of rights on procedural matters. Tom Campbell, 'Human Rights Strategies: An Australian Alternative' in Tom Campbell, Jeffrey Denys Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 319, 332-333.

[7] Ibid.

(legislative and executive) tendency towards rights-compatible legislative and policy options. By ensuring that the human rights deliberations of the executive and (particularly) the legislative committees are publicised, the political protections have the added strength of encouraging the participation of the population in the decision-making process. An additional strength, and an intended effect of the improved quality of legislation derived from greater executive and legislative consideration, is that rights-protection under political protections is preventive rather than reactive.

4.2.1 Democratic Legitimacy

The central strength of political protections of rights is that they rely on democratic processes as a means of promoting and protecting fundamental rights. Mechanisms which put in place procedures which rely on the elected (political) branches of government recognise the highly controversial nature of questions of fundamental rights and the likelihood that legislative initiatives will involve questions not of the 'compatible/incompatible' kind but rather competing interpretations of fundamental rights. Because of the inherently political nature of debates about fundamental rights, it follows that the political institutions are well placed to engage in the task of balancing these rights. Political protections develop 'opportunities and obligations for political rights review'[8] that ensure that members of the executive and the legislature engage in this task.

The most basic arguments regarding the democratic strength of political protections must be the association of decision-making and law-making with the representative (democratic) legislature. If there are no legal protections which operate concurrently within the jurisdiction, political protections overcome the 'counter-majoritarian difficulty' associated with legal protections (discussed at 3.4.3). Political protections specifically seek to allow for 'majority' decision-making (or at least decision-making via representative democratic institutions) to retain primacy in the law-making process.[9]

> However, the 'democratic' strength of political protections is not merely a product of ensuring that rights are considered by law-makers as a regular part of

[8] Janet L. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' (2006) 4(1) *International Journal of Constitutional Law* 1, 3.

[9] Campbell, 'Human Rights Strategies' above n 6, 332-333.

> the law-making process. As was discussed in 3.2 and 3.4.1, fundamental rights are inherently controversial and while a court may engage in determining whether legislation is rights-compatible/incompatible, political protections are intended to encourage a range of perspectives about rights, the rights-implications of legislation and how competing rights ought to be balanced.[10] Compatible/incompatible claims are merely one aspect of political debates about rights.

George Winterton provides a clear explanation of the value of democratic involvement (via representative institutions) in the protection of fundamental rights. He says:

> The balancing of these rights and freedoms can rarely adequately be achieved merely by neutral, principled reasoning…It requires the input of community values, policy and public opinion…The political process subject, ultimately, to the ballot box is a more appropriate mechanism for resolving such dilemmas than the blunt neutrality and consistency of …courts, essentially because it is more 'democratic' in the sense that ultimate decision-making rests with the people…or their elected representatives.[11]

Whereas legal protections face criticism of *limiting* the range of perspectives with which those making the decisions are presented, political protections allow for greater participation and, consequently, the expression of a wider range of perspectives. This may range from encouraging direct submissions to a committee process to the less direct (if more significant) expression of approval/disapproval at the ballot box.

Views about the meaning of rights, the balancing of competing rights and what constitutes a reasonable limitation of rights are hardly 'neutral': even within a single jurisdiction there is the potential for greatly divergent opinions about whether and how particular rights should be realised within the legal system. The task of the political branches (with regard to the protection of fundamental rights) should be viewed as protecting rights within the society which they represent and govern. Because political

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[10] For extensive debate and discussion of the role of political protections, see: Senate of the Parliament of Australia, *Submissions received by the Legal and Constitutional Affairs Committee for the Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions]* (10 February 2011) <http://www.aph.gov.au/senate/committee/legcon_ctte/human_rights_bills_43/submissions.htm>.

[11] George Winterton, 'An Australian Rights Council' in Tom Campbell, Jeffrey Denys Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 305, 306.

protections tend to require explicit statements about the rights-compatibility of proposals prior to legislative assent/rejection, and because the legislature is ultimately answerable to the electorate, political protections encourage the legislature to make every effort to ensure that its approach to fundamental rights reflects the values of the community it represents.

Political protections within a democratic framework introduce a degree of accountability for decisions about rights. The legislature must ultimately answer to the society it claims to represent. This can be contrasted with the judicial alternative discussed in the previous chapter, which draws strength from the independence of the judiciary but lacks any accountability for controversial final decisions. Political protections seek to capitalise on a popular distaste for the violation of fundamental rights as well as relying on politicians having a vested interest – via the ballot box - in the legislation they support. As David Kinley explains:

> [T]here exists at least the potential for and effective preventive influence over Parliament by way of electoral pressure in respect of unacceptable legislation, where the electorate is aware of such legislation and cognizant of its impact on human rights.[12]

Executive certification models of rights-protection generally require that Ministers take *personal* responsibility for the rights-compatibility of Bills. The certification models in Australia (including in Victoria) and the UK, and to a lesser extent in Canada (where the obligation is on the Minister for Justice rather than the proposing Minister), require that an individual member of the executive make the statement regarding rights-compatibility to Parliament. The protection encourages the executive to engage in meaningful pre-legislative scrutiny of proposals so as to avoid the political consequences of ill-informed or incorrect claims about the rights-compatibility of Bills. There are two related elements to this personal responsibility associated with executive certification (and it should be acknowledged that this is not the case in the EU where the executive – the Commission – is not elected). The first is the short term political pressure from the legislature to which the certifying statement is made. The second is the longer-term consequence deriving from the fact that the Minister will, ultimately,

[12] David Kinley, 'Parliamentary Scrutiny: Duty Neglected?' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Clarendon Press, 1999) 158, 160.

face the electorate presuming they seek re-election. Executive statements, therefore, act as way of introducing rights-based issues into Parliament and, by implication, into the public awareness. Minister whose statements of compatibility are questionable can face potentially damaging (or embarrassing) questions.[13]

Further, because executive proposals ultimately require legislative support, there is another way in which political protections may influence the behaviour of the executive.[14] In addition to facing questions about rights-compatibility, or risking political embarrassment, an executive that does not adequately justify their legislative proposals within a framework of fundamental rights compatibility may face a legislature unwilling to enact those Bills into law. Of course, where the legislature is dominated by those with close political alliances with executive (as is often the case in Westminster systems) this may inhibit the efficacy of executive certification as a means of preventing rights-incompatible legislation from being passed.

By contrast, scrutiny committees within the legislature are comprised of several elected representatives with potentially diverse political views. Therefore, there is little or no *individual* political responsibility and greater attention is devoted to the scrutiny of the legislation generally. The impact of unpopular interpretations of rights, or of support for rights-infringing legislation, is less direct and less clear. Instead, the democratic strength of scrutiny committees tends to be associated with the ability of the committee to ensure that Bills are not accepted at face value and – regardless of whether there exists an executive statement – that those proposing legislation *are* held to account and to ensure that the executive is not given *carte blanche* to impose a particular approach to fundamental rights.

Legislative committee-based scrutiny seeks to increase the likelihood that legislation *will be* compatible with fundamental rights, not merely that it will be *perceived* as compatible, based, for example, on an executive statement to that effect. Committee-based scrutiny additionally ensures that the considerations which influenced the 'balancing' of rights and led to an executive declaration of rights-compatibility are not 'hidden' – that they are able to be questioned and challenged and that the community's

[13] Michael Ryle, 'Pre-legislative Scrutiny: A Prophylactic Approach to Protection of Human Rights' (1994) (2) *Public law* 192.

[14] Ibid.

opinions, via its legislative representatives, are genuinely represented in the debate about fundamental rights.

4.2.2 Discourse and a 'Culture of Fundamental Rights'

The second strength associated with protecting rights via the political branches of government is that it encourages greater discourse about fundamental rights within the political processes generally and as part of the law-making process specifically. This strength relates to the perception of the protection of rights as evolving and ongoing process and that, in order to protect rights, they should be discussed more openly and frequently. Rights are controversial and the requirement that the executive and legislature engage with rights as part of the ordinary law-making process encourages both increased awareness about rights and greater debate about their meaning and the extent of 'reasonable' limitations. Further, by making the debates about rights within the political branches accessible (for example, via publication of executive statements and allowing for submissions to the legislative committees) political protections facilitate a 'culture' of fundamental rights in the broader sense amongst the population at large.

Firstly, political protections should be seen as having a function of raising awareness about rights – and the rights-implications of legislative programmes – within the political institutions. Regularising political scrutiny has the effect, as George Williams observes, of 'build[ing] Parliamentarians into the rights protection process, contributing to a greater understanding of rights issues by politicians.'[15] Rights are, according to Jeremy Webber, 'injected…into the very process of legislative drafting and enactment.'[16] The 'culture of fundamental rights' is facilitated as representatives become increasingly aware of fundamental rights concerns and are confident in voicing these concerns and challenging claims of compatibility.

This suggests that political protections should not be seen as an immediate cure for deficits in the quality of legislation in respect of fundamental rights. Formalised

[15] George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (University of New South Wales Press Ltd, 2004), 84-85.

[16] Jeremy Webber, 'A Modest (but robust) Defence of Statutory Bills of Rights' in Tom Campbell, Jeffrey Denys Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 2006, 266.

political protections cannot *impose* a 'culture of fundamental rights' on the political branches. Instead, political protections form part of a long-term commitment to the protection of fundamental rights. They merely put in place the framework for regularised consideration of fundamental rights by the legislature and encourage increasingly robust rights-based scrutiny of proposals put forward by the executive. As Michael Ryle explains:

> Over the years such processes would lead to the establishment of a better understanding of what [human rights standards require] in respect of legislation affecting human rights. This in its turn should result in better legislation.[17]

Similarly, Janet Hiebert suggests that systematic scrutiny of Bills by the legislature both promotes and is a product of a developing 'culture' of fundamental rights within the legal system. She points out that this culture is facilitated by the dividing of responsibility among various institutions of government. Further, she says that political protections which recognise responsibility for rights on the part of both the legislature and the executive 'anticipate discussion, debate, and reflection on the merits of these institutional perspectives.'[18]

The second way in which political protections are able to facilitate a 'culture of fundamental rights' refers to the increasing awareness of individuals as to their rights and their ability (and willingness) to place pressure on their representatives with regard to these rights. That is, they seek to enhance the fundamental rights culture of the community at large (not merely within the law-making institutions) and to encourage greater awareness amongst citizens about their rights and the importance of rights within the jurisdiction. A centralised bill or charter of rights, regardless of legal status, has been said to go some way to achieving this function,[19] by providing a clear centralised statement of the rights and freedoms considered fundamental within the jurisdiction. However, while the creation of a charter of rights may inform citizens of their rights, it is merely a starting point. By requiring that publicised debates or

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[17] Ryle, above n 13, 195.

[18] It should be noted that Hiebert is discussing political protections which exist concurrent with legal protections. Janet Hiebert, 'Resisting Judicial Dominance in Interpreting Rights' (2004) 82 *Texas Law Review* 1963, 1977.

[19] See, eg: The preamble to the *EU Charter* which refers to the *Charter* as 'contributing to a strengthening of the culture of rights and responsibilities to be enjoyed by the present and future citizens of the European Union'.

statements about rights are a *regular* part of the law-making process, political protections seek continually to inform individuals about the role rights have within the jurisdiction generally, and how those rights have informed specific legislative programmes. It should be noted, and it will be raised again in more detail in 4.3.2 and again in 4.4, that the efficacy of political protections in actually achieving this outcome varies greatly between jurisdictions.

Beyond merely expressing approval or disapproval of the approach of parliamentary members to fundamental rights at the ballot box, political protections facilitate the involvement of citizens in the law-making process. In the context of the Australian debates regarding the appropriate form of rights protection, George Williams, for example, points to the way in which an inclusive scrutiny process – one that allows public submissions to a scrutiny committee and ensures its deliberations are accessible and publicised – may increase the understanding of fundamental rights among the Australian people at large.[20] Genuine improvement in public awareness about fundamental rights issues derives, as David Feldman points out, from the increased transparency of the legislative process in general, and increased transparency about the consideration of rights in relation to that process specifically. [21]

4.2.3 Protecting Rights Rather than Remedying Breaches

It seems logical to suggest that the protection of rights is best achieved by *preventing* the legislative encroachment of fundamental rights in the first instance. The intended consequence of political protections is to improve the quality of legislation with respect to fundamental rights. Subjecting legislative proposals to executive scrutiny, and Bills to committee-based legislative scrutiny, is intended to reduce the likelihood that the legislation that is passed will encroach on protected rights.

This strength of political protections is further emphasised when contrasted with the nature of the protection offered by the courts, which focuses on remedying breaches and

[20] George Williams, *A Bill of Rights for Australia* (UNSW Press, 2000), 46.

[21] David Feldman, 'Parliamentary scrutiny of legislation and human rights' (2002) *Public Law* 323; David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25(2) (February 1, 2004) *Statute Law Rev* 91.

may take many years of applications and appeals before decisions are made. According to Ryle:

> [F]rom the point of view of the citizens whose human rights are threatened, it is much better to prevent any infringement of those rights being included in legislation in the first place, rather than their having to wait for redress from the courts, perhaps many years later.

There is an alternative to political protections as a preventative mechanism for the protection of fundamental rights. This is the availability of referral of bills to a judicial body for a determination as to constitutional (rights) compatibility. Both Canada and the EU allow for governments (or, in the case of the EU, the non-judicial institutions) to ask the court questions relating to the interpretation of legal provisions or to the constitutionality of particular proposals.[22] Other jurisdictions have similar 'preventative' measures which include a judicial mechanism within the context of legislative enactment - most notably the *Conseil Constitutionnel* in France.[23]

Rainer Knopff and FL Morton have discussed both the usefulness and dangers of relying on the reference procedure as a means of protecting rights at the prior to the enactment of legislation. [24] In particular, reference to the courts may be used to avoid responsibility for politically controversial decisions. Despite the availability of a wide range of potential legislative measures, a court is limited to a decision of compatible or incompatible. As discussed in the previous chapter, a decision by the court that a proposal is compatible with fundamental rights does not necessarily imply that the proposal is necessarily the most appropriate action to take. Yet judicial approval can, and has, been used to justify particular policy choices and to stifle further debate. [25]

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[22] This is not available in relation to every legislative proposal. In the EU, for example, the ECJ can be asked for an opinion as to whether an international agreement is compatible with the Treaties. *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1993) ('*TFEU*'), Article 218(11).

[23] F. L. Morton, 'Judicial Review in France: A Comparative Analysis' (1988) 36(1) *American Journal of Comparative Law* 89.

[24] Rainer Knopff and F. L. Morton, *Charter Politics* (Nelson Canada, 1992), 186-188. See also F. L. Morton, 'The Political Impact of the Canadian Charter of Rights and Freedoms' (1987) 20(01) *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 31, 47.

[25] Ibid.

Further, judicial review which occurs prior to the enactment of legislation effectively involves challenges to Bills by political opponents (rather than victims of alleged rights-breaches, as is ordinarily the case for judicial review of enacted legislation). As Morton, in relation to the French experience with the *Conseil Constitutionnel* points out, this can serve to emphasise the unaccountable, unrepresentative nature of the judiciary – particularly when judicial decisions seem consistently to favour minority political challenges to majority policies or approaches to rights.[26]

Additionally, delays necessarily associated with referring an issue to the courts make frequent use of the procedure impractical and a hindrance to the effective governance of the jurisdiction.[27] Political protections seek to utilise existing procedures without imposing significant delays on the decision-making processes. That is, they are intended to be a part of the law-making process, as opposed to restricting the ability of the executive/legislative branches to undertake the task of governing. While delays associated with the pre-emptive involvement of the judiciary necessarily delay the entry into force of challenged legislation, there is perhaps also a greater concern. These delays may be strategically used by political opponents to avoid debate on politically controversial issues, thus utilising the judicial process for political purposes.[28]

While reference procedures potentially have a role to play in the protection of fundamental rights in some jurisdictions, they cannot be seen as a replacement for robust political scrutiny of legislation. Political protections seek to protect fundamental rights within the context of the ordinary governmental functions – they are intended to enhance the political process and to ensure that the discussion of rights is not limited to a discussion only about the rights compatibility (or incompatibility) of legislation.

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[26] Morton, however, tempers this criticism by acknowledging that such divides between political and judicial positions about rights is generally a temporary matter in France. While there may indeed have been significant divides between majority (as represented by the government) positions and those of the *Conseil Constitutionnel* in particular periods of history, this should not be taken to suggest that there is *always* such discrepency. Morton, 'Judicial Review in France' above n 23, 98.

[27] Knopff and Morton, *Charter Politics*, above n 24, 30-33.

[28] Knopff and Morton provide a good overview of the use of the reference procedure and the potential pitfalls of relying on such a mechanism. Knopff and Morton, *Charter Politics,* above n 24, 30-33.

4.3 Weaknesses of Political Protections

Political protections are not without their weaknesses. Political protections are primarily procedural checks, which rely on public sentiment and mobilisation in favour of rights and engagement in discourse about the meaning of those rights, to offer protection of real value. As will be discussed in 4.3.1, where that involvement is lacking, political protections struggle to offer meaningful protection of rights. Additionally, the political processes which purport to offer equal participation in the democratic decision-making processes are, in practice, hindered in achieving this by issues of access and the dominance of particular interest groups influencing political decision-makers between elections. This is considered in 4.3.2 and then 4.3.3 addresses the value of expertise over popular opinion. Political protections offer a democratic legitimacy within their decision-making processes, but the question remains whether elected officials, without necessarily any background in fundamental rights, are qualified to make decisions about rights which go beyond merely popular sentiment.

4.3.1 Lack of Remedy for Breaches of Rights

One of the key weaknesses of political protections is that, on their own, in the absence of legal protections, political protections do not offer recourse or remedy for those whose rights have been violated. They make no provision for when the executive and the legislature 'get it wrong'. At best, political protections allow the mobilisation of the electorate to pressure politicians to make changes to rights-limiting laws.[29] Additionally, this form of protection relies on encroachment of fundamental rights being politically problematic within the jurisdiction. Political protections are designed to create a situation where, if rights-encroaching laws are permitted by the constitution, that such laws are the 'exception' rather than the rule. However, there many considerations which may make it politically acceptable to encroach on fundamental rights.

[29] As has been raised previously and will be explained in the following chapter, it is possible for a political protection, or at least a political pressure, to arise out of a legal mechanism – such as the pressure to make use of the 'fast-track' procedures after a declaration of incompatibility under the *HRA* or the pressure *not* to re-enact legislation after a judicial determination of incompatibility under the *Canadian Charter*.

Firstly, as has been stated above, a 'culture' of political rights is not *imposed* but *facilitated* by political protections. This means that there is still the possibility – particularly in the years immediately following the implementation of scrutiny provisions – that there will be general ignorance or apathy about fundamental rights (or the fundamental rights of particular groups).[30] Political pressure against rights-encroachment may therefore not be present and thus the 'strength' of political protections will be substantially undermined.

Because politicians may equally be swayed by public sentiment which supports encroachment of rights in particular situations, democratic participation cannot be relied on to guarantee rights within a jurisdiction. The unelected status of judges may mean that legal protections are 'anti-majoritarian', but at least such a status means that judges are able to put rights first. Political protections cannot guarantee this. As Michael Zander puts it, 'the politician who is concerned about what the electorate may think will often trim on principle whereas the judge who does not have to worry about being elected can act on principle without having to concern himself with the political consequences.'[31]

Anti-terror legislation[32] provides an oft-cited and current example of legislative programmes which have the potential to infringe fundamental rights, but which have been passed despite substantial questions regarding the rights-compatibility of that legislation.[33] This is not to suggest that anti-terror legislation is *necessarily* incompatible with fundamental rights – that debate can be left to others[34] - but only that

[30] Philip Alston and Mac Darrow, 'Bills of Rights in Comparative Perspective' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Clarendon Press, 1999), 500. This article also specifically points to the work of Barbara Gamble which pointed out that popular-led initiatives in the US frequently proposed legislation which was in conflict with fundamental rights. See Barbara S. Gamble, 'Putting Civil Rights to a Popular Vote' (1997) 41(1) *American Journal of Political Science* 245.

[31] Michael Zander, *A Bill of Rights* (Sweet and Maxwell, 4th ed, 1997), 81.

[32] Relevant anti-terror legislation includes; in *Australia Border Security Legislation Amendment Act 2002* (Cth), *Telecommunications Interception Legislation Amendment Act 2002* (Cth), *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth); in the UK, *Prevention of Terrorism Act 2005* (UK), *Terrorism Act 2006* (Cth) and the *Counter-Terrorism Act 2008* (Cth) ; in Canada *Anti-terrorism Act* SC 2001 c 41.

[33] See, eg Human Rights Commission (Australia), *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008) <http://www.hreoc.gov.au/legal/publications/counter_terrorism_laws.html>.

[34] See, eg John von Doussa, 'Reconciling Human Rights and Counter-terrorism - A Crucial Challenge' (2007) 13 *James Cook University Law Review* 104; Joo-Cheong Tham and Keith D. Ewing, 'Limitations

the existence of political protections has not prevented legislation with such questionable rights-compatibility from being passed.

Even within communities which claim to have a pre-existing culture of fundamental rights, suggesting that the introduction of political mechanisms is merely the formalisation of existing commitments to the protection of rights, political protections may provide only the most tenuous of protections. This is because political protections rely not only on a general public sentiment in favour of fundamental rights – something that is hardly uncommon in a modern, liberal democratic society – but also on a willingness to express displeasure at the ballot box for rights encroachment even when it is not the rights of the majority that are affected. That is, they require altruism on the part of the electorate at large – hardly a guarantee.

4.3.2 The Political Process

Following on from the preceding discussion about how popular pressure may fail to provide an effective protection against rights-encroaching legislation, or may limit the efficacy of political protections in achieving their strengths, it is necessary to recognise that flaws in the political process may additionally weaken the efficacy of political protections. The previous section demonstrated that political protections have an inherent weakness associated with the potential of the majority will being prioritised over minority rights. However, there is an even more serious criticism of political protections, which suggests that, in practice, it is not the 'majority' whose will is being prioritised, but instead only a small part of the population who actively engage in the processes.

Michael Zander raises an argument about flawed political processes undermining several of the perceived strengths of political protections. The suggestion that political protections are 'democratic' on the basis that the members of the institutions are representative in a way that judges are not is, he suggests, flawed. The mere presence of democratic elections, he says, has little to do with the actual governing of the state:

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of a Charter of Rights in the Age of Counter-Terrorism' (2007) 31(2) *Melbourne University Law Review* 462.

> There is little reality in the notion that all adult persons participate in the system of government. All adults do not even participate in the sense of voting once every five or so years…The process of government is in the hands of ministers and civil servants. Even M.P.s of the party in government only have a marginal role in the process of government, opposition M.P.s have none.[35]

Specific political protections (as opposed to reliance on the political process generally) seek, in part, to overcome some of these criticisms of Zander's. A well designed scrutiny committee, for example, encourages the involvement of individuals and groups in the scrutiny process, via the acceptance of submissions and the publication of deliberations. Zander's criticisms do, however, raise legitimate concerns about how 'democratic' the political protections can be said to be and suggest that at the very least there is the *potential* for political protections become dominated by a narrow range of interests and perspectives on rights, rather than reflecting the genuine participation in the rights discourse that political protections are ostensibly designed to facilitate.

This lack of participation and involvement is emphasised where jurisdictions have low turn-out rates for elections. While not a concern in Australia, where voting is compulsory, in the EU, the turn-out in the last three elections has been less than 50% and is declining.[36] With such a small proportion of the population engaged in even the most basic of the political processes, political protections are unable to truly reflect the democratic legitimacy discussed in 4.2.1.

General apathy for the political processes can be extended to general apathy about how rights are considered within the legislative processes. Similarly, lack of participation further leads to the exaggerated role that powerful minority interests may play in influencing legislative decision-making, being those most likely to involve themselves in the process.

In addition, the infrequency of electoral pressure can have the effect of narrowing the scope of opinions given consideration at the pre-enactment stage. As was mentioned above, one way in which political protections work is to generate on popular and

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[35] Zander, above n 31, 79.

[36] 2009 elections saw a 49.51% turnout, 45.46% in 2004 and 43% in 2001 with turnout in individual countries being as low as 19.64% (Slovakia). http://www.europarl.europa.eu/parliament/archive/elections2009/en/turnout_en.html

political pressure against the encroachment of rights in order to dissuade the executive from proposing Bills which are likely to unduly limit rights. Between elections, however, the 'political pressure' from the public is limited and relates primarily to those who have access. This risks *narrowing* the scope of opinions considered or given attention at this pre-enactment stage – rather than encouraging discourse of a wide range of perspectives as was suggested in 4.2.1 and 4.2.2. Access to those engaged in the law-making process is not necessarily secured by those whose rights are most at risk. Mac Darrow and Philip Alston, for example, suggest that the 'reality [is] that access to government and the legislative processes…is more open to the rich and powerful than the oppressed and downtrodden.'[37]

While not suggesting that elected representatives deliberately overlook relevant points of view, Darrow and Alston rightly point out that the nature of representative decision-making will result in some groups being in a stronger position to influence decision-makers. With regard to fundamental rights, this can mean that those most affected are in the weakest position to put forward (or to have heard) their concerns.

Thus, despite the ostensible strengths of political mechanisms associated with the democratic involvements and the generation of political pressure, there are substantial weaknesses with realising those potential strengths. While political protections may be presented as having high ideals, in practice, they will struggle to overcome the flaws in the operation of the political system.

4.3.3 Lack of Expertise about Rights

Finally, a brief comment must be made about the appropriateness of relying on politicians to answer questions about rights. Mentioned above was the ability of politicians to be swayed by particular interest groups or the party-developed opinion as to the 'best interests' of the country. However, there is a further criticism of politicians to be addressed with regard to their ability to effectively protect rights. This criticism questions whether, in light of expanding international commitments as to the importance of protecting fundamental rights, and the development of extensive jurisprudence – in international fora and in the domestic courts of all four jurisdictions

[37] Darrow and Alston, above n 30, 500-501.

under consideration – it is reasonable to expect that untrained, inexpert politicians are appropriately qualified to make decisions about the line between differing opinions about rights and legislative incompatibility with fundamental rights.

Further, in particular where the legislatures (and in particular the legislative committees) have the task of scrutinising legislation as to compatibility with fundamental rights, these politicians are required to engage in complex considerations about rights within a minimal time-frame set out by legislative procedures. While the executive has fewer time constraints (it need not put the Bill before the legislature until it has thoroughly scrutinised it as to compatibility with rights), scrutiny committees are faced with choices – they may limit public access and engagement with the process or alternatively they may confine their scrutiny to only a small number of select Bills – those most likely to have an impact on individual rights. In light of the limitations of scrutiny committees, there remains concern as to how effective such protections can be as a political protection.

4.4 Comparisons

4.4.1 Certification of Legislation

One of the key features of political protections is some certification on the part of the government (or the Commission in the EU) that it is confident that the legislation it proposes is compatible with fundamental rights. When considering the four jurisdictions under comparison, it appears that these statements have a role in emphasising the strengths associated with political protections. That is, they encourage greater awareness and discourse about the rights-implications of Bills. However, consideration of the approaches to rights-certification by the four jurisdictions suggests that it is not simply the presence of the statement as a procedural requirement that will give rise to a genuine political protection. There are certain features of these statements which ought to be present if the potential strengths of this form of political protection are to be maximised and similarly if the potential weaknesses are to be minimised. Specifically, if such statements are made openly and regularly, are able to be challenged in the legislative forum and if there is individual responsibility for the statement, political protections are most likely to operate effectively.

Of the jurisdictions considered, the UK provides the clearest example of the use of a rights charter to build in of political protection mechanisms at the pre-enactment stage. Specifically, the requirement of a declaration of compatibility with Convention rights found in s 19 of the *HRA* offers a solid example of how a charter-based political mechanism offers a protection of fundamental rights by encouraging improved rights-compatibility of legislation.

Section 19 *HRA* provides that the statement is 'in [the Minister's] view'. The Ministers are not viewed as infallible nor are they expected to be experts in fundamental rights law. Instead, the s 19 statement is intended to encourage Ministers to give consideration to fundamental rights and to make every effort to propose Bills that are compatible with the fundamental rights standards expressed in the *HRA*. Section 19 makes consideration of the rights implications of Bills mandatory. The requirement of an s 19 statement for every Bill ensures that fundamental rights become a regular consideration of Ministers when translating policy objectives into law. Section. 19 additionally requires the statement as to the rights compatibility of the new Bill be made as part of the presentation of the Bill to Parliament: it must be made openly. This is intended to encourage debate and make Ministers immediately answerable to Parliament for their claim of compatibility (or, in the event of an s 19(1)(b) statement, to justify the Bill's necessity despite the uncertainty of its rights-compatibility). Ultimately, the requirement that the Minister make the statement in Parliament is intended to ensure, should their statement later be shown to be erroneous, that the Minister is able to be held responsible to the electorate.

The requirement of a public statement of compatibility discourages Ministers from proposing (and Parliament from enacting) legislation that is incompatible with the Convention rights. The routine nature of the s 19 statements (and the overwhelming dominance of s 19(1)(a) statements) suggests that there is, according to Feldman, 'a presumption that there is something questionable' about legislating in a manner incompatible with Convention rights.[38] The *HRA* creates a process which presumes that Bills *ought* to be compatible with fundamental rights standards and that the occasions where this is not the case (or where compatibility is unclear) are a deviation from the norm and therefore are more likely to garner greater attention and require greater justification from the Minister – justification both to Parliament and the electorate.

[38] Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' above n 21, 324.

The standard of protection offered by s 19 is, however, limited. Ministers are given great discretion to determine 'their opinion' as to the compatibility of the Bill with Convention rights. Further, the *HRA* does not prohibit the passage of incompatible legislation. Instead, as David Feldman has stated, the *HRA* creates 'a heavy responsibility to ensure that [Parliament] does not do so lightly, or for inadequate reasons, or inadvertently.'[39]

Despite the establishment of s 19(1)(a) statements as 'the norm,' and a procedural requirement of the legislative process, s 19 statements should not be considered as merely 'rubber-stamps' – that is, they should not be accepted without question. The intention of this section is to ensure that bills are subjected to a form of political review – although not an authoritative, legal statement of the compatibility of legislation with fundamental rights standards, the s 19 declaration requires that consideration be given to the rights implications of legislation and further enables the claim of compatibility to be reviewed, challenged and questioned by the legislature (and consequently the public).

Although the direct responsibility for the determination (and subsequent declaration under s 19 *HRA*) of the compatibility of a Bill with *HRA* standards lies with the Minister, Parliament is ultimately responsible for the passage of legislation. The public nature of the statement of compatibility discourages mere acceptance of the Ministerial statement and encourages broader Parliamentary debate on the issue. Thus the political protection impacts on both the executive (responsible for proposing the legislation) and the legislature (responsible for passing the legislation) and both face the consequences of the 'questionable' action of passing rights-incompatible legislation. It is unsurprising, therefore, that in the absence of guidelines within the *HRA* as to how compatibility should be determined, there has developed consideration of human rights issues both by the executive (at the pre-legislative stage) and amongst members of the legislature (and in particular within the Joint Committee on Human Rights (JCHR)).[40]

The Cabinet Office Guidelines[41] offer a clear statement not only of the standards to be considered by Ministers in determining the 'compatibility' of their Bills with the *HRA*,

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[39] Ibid.

[40] The impact of s 19 on the drafting process has had a greater impact than predicted prior to enactment of the *HRA*. See Lester, above n 2; Hiebert, 'Parliamentary Scrutiny of Legislation under the Human Rights Act', above n 8, 12.

[41] Cabinet Office "The Human Rights Act 1998 Guidance for Departments" (February 2000), cited in Lester, 'Parliamentary Scrutiny of Legislation under the Human Rights Act', above n 2.

but also of the nature of pre-legislative and legislative political protections in general. The Ministers are required to give consideration as to the interpretation of rights and the standards of the protection offered by both domestic and European Courts – the aim being that every effort should be made to ensure that legislation will meet those standards should a challenge arise. Such consideration, and the attempt to ensure legislation will successfully face any challenges on the grounds of fundamental rights, is not an attempt to 'immunise' the legislation against judicial challenges. Instead, it represents an attempt to ensure that the Bill *is* compatible with the Convention rights.

Canada is an interesting jurisdiction with regard to political protections designed to encourage the protection of fundamental rights. Canada's 'political protections' have their origins not in the *Canadian Charter* but in its predecessor, the *Canadian Bill of Rights* (1960)[42]. Despite the significant changes to the role of the judiciary in the protection of fundamental rights, the political protections have seen very few changes since the 1960s.

The *Canadian Bill of Rights* placed certain obligations on the Minister of Justice. Section 3 *Canadian Bill of Rights* stated:

> [T]he Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation …and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

In requiring that all proposed regulations and Bills were to be examined by the Minister of Justice, the *Canadian Bill of Rights* centralised executive scrutiny as to rights compatibility. By placing obligations only on the Minister of Justice, the *Canadian Bill of Rights* allowed for a form of executive self-scrutiny of proposals. Additionally, by requiring that the Minister of Justice notify the Parliament of any identified incompatibilities, the political mechanism was intended to allow for a supervision of the executive by the Parliament. The efficacy of this form of mechanism will be discussed below.

[42] *Canadian Bill of Rights* SC 1960, c. 44.

The requirement that the Minister of Justice take responsibility for the scrutinisation of proposals has been maintained almost exactly under the *Canadian Charter*. Although the *Canadian Charter* does not itself provide for any political protections, the current form of this requirement is found in s 4.1 of the *Department of Justice Act (DJA)*[43], which provides that the Minister of Justice must consider Charter compliance prior to a Bill being put before the Federal Parliament . Section 4.1 of the *DJA* states:

> …[T]he Minister shall…examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the Statutory Instruments Act and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity

Importantly, the *DJA*, like the *Canadian Bill of Rights* before it, is applicable only to the Federal Parliament. The Provincial legislatures are left to develop their own mechanisms.

One must be wary of overemphasising the efficacy of the *DJA* mechanism. Although it does require the Minister of Justice to regularly scrutinise legislation, it falls short of imposing genuine and identifiable political pressures on the government.

An interesting feature of the Canadian pre-legislative mechanism is that it only requires the identification of incompatibility. Compatibility with *Canadian Charter*-rights is implied through the Minister's silence. The identification of incompatibility would necessarily either prevent the passage of legislation or require the inclusion of an s 33 'notwithstanding clause' to immunise the incompatible legislation from judicial review and invalidation. While still requiring that the Minister of Justice engage in the same level of scrutiny, the requirement only to report where there is lack of certainty or clear compatibility places the protection 'behind the closed doors' of the executive policy process – rather than shifting the regular debate about rights into the legislature.

There are several concerns with the *DJA* approach to executive certification. Writing in 1981, with the *Canadian Charter* already proposed, Walter S. Tarnopolsky commented

[43] *Department of Justice Act,* RSC 1985, c.J-2 (as amended 12 December 2006).

on the efficacy of the Minister of Justice as the key figure in the political-protection mechanism:

> [T]he safeguard created by the supervision of the Department of Justice over Bills introduced by the Government appears illusory. Except in the most extreme circumstances…the Minister of Justice is likely to find a Bill presented by his Government to be consistent with the Bill of Rights. Therefore, the requirements …represent only minimal protection against the restriction of civil liberties by the legislative process.[44]

The 'illusion' of supervision suggested by Tarnopolsky has several possible implications with regard to the manner in which fundamental rights are considered in Canada. That a Minister will generally find a Bill of his own Government 'not inconsistent' with the *Canadian Charter* may indeed be the result of considered scrutiny of the Bill. However, within a Government there is the likelihood of a relatively homogeneous approach to the interpretation of the *Canadian Charter*. The scope of issues and interests taken into account when considering what constitutes a 'reasonable limitation' in particular circumstances is unknown. As a result, it is difficult to determine how effective the *DJA* mechanism is. At the very least, by keeping the process of justifying compliance 'behind closed doors', the Minister's acceptance of the Bill is shielded from scrutiny.

F.L Morton has suggested that the *DJA* requirements potentially provide a significant protection of fundamental rights.[45] He acknowledges, however, that the nature of that supervision makes the actual impact difficult to confirm. Similarly, Patrick J Monahan and Marie Finklestein suggest that the *DJA* requirements have encouraged the creation of processes within the executive branches generally, and the Department of Justice specifically, to ensure that rights are considered at the very earliest stages of policy development.[46] They point to the creation of a *Canadian Charter/*human rights focused committee within the Department of Justice as well as the expanded availability of rights-based legal advice at the policy stage.

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[44] Walter S. Tarnopolsky, 'The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms' (1981) 44(3) *Law and Contemporary Problems* 169, 174.

[45] F. L. Morton, 'The Charter Revolution and the Court Party' (1992) 30(3) *Osgoode Hall Law Journal* 627, 638 - 640.

[46] Patrick J. Monahan and Marie Finklestein, 'Charter of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501, 510-513.

On the other hand, Janet Hiebert has criticised the 'behind closed doors' nature of the *DJA* mechanism.[47] She focuses on the lack of evidence as to how often proposals are rejected or amended, how rigorous the review conducted by the Department of Justice is and what issues have been raised in the determination that any limitation on rights is a 'reasonable' one. The implication is that the lack of answerability for the Minister of Justice's position undermines the potential value of the protection.

The exact nature and scope of rights-considerations at this pre-legislative stage (and in some cases, as early as the policy formation stage) is undoubtedly difficult to pinpoint. However, there can be little doubt that the presence of the *DJA* has, at the very least, influenced the procedures adopted by the executive when formulating its legislative agenda. The involvement of a human-rights-focused body of expertise within the Department of Justice, and the fact that body of expertise is accessible to other Departments and Ministers, suggest that the *DJA* has had some influence on the rights-considerations of the executive.

An associated concern with the *DJA* requirements arises from the presumption of compatibility where no incompatibility is specifically identified. The assumption that Bills have already been scrutinised and found rights-compatible may hinder the development of rights-based debates within the Parliament – one of the major aims of a political mechanism. Certainly, Hiebert suggests that the *DJA* requirement as well as the availability of judicial review, limited the occurrence of rights-based debate within the Canadian Parliament.[48] This minimises the political pressure placed on the government and can potentially lead to a pre-enactment mechanism falling short of offering genuine 'political scrutiny' of Bills.

The fact that the responsibility for identification of incompatibilities lies with a single Minister is another issue, distinguishing the Canadian model from that of the UK and Australia with regard to executive statements. This form of Department of Justice scrutiny of Bills and proposed regulation does have certain benefits. By giving a single Minister final responsibility for the identification of incompatibilities, the *DJA* centralises the expertise regarding fundamental rights issues. Unlike other jurisdictions in which individual Ministers (and later parliamentarians) are asked to engage in review

[47] Janet Hiebert, *Charter Conflicts What is Parliament's Role?* (McGill-Queen's University Press, 2002), 8.

[48] Ibid, 8-10.

on an issue about which they may have limited expertise, the Canadian approach has been to delegate responsibility to the executive agency/Minister which has the highest level of engagement with the legal perspective on rights. To this end, the Department of Justice has established a section committed to human rights.

Political protections work because they impose pressure on those involved in the law-making process – imposing a responsibility for legislative initiatives and creating an expectation that legislation ought to be compatible with rights. Legislation which is later found to be incompatible may result in political consequences for the Minister who originally proposed the Bill and (incorrectly) certified its compatibility. A side-effect of centralising executive scrutiny is that it devolves responsibility away from the individual Ministers. While the Minister of Justice may be held responsible for failing to identify an incompatibility with the *Canadian Charter*, the Minister responsible for the proposal is potentially removed from immediate accountability.

Like Canada, the EU has a centralised approach to executive rights-certification of legislation. However, the process of certification is quite different from all of the other jurisdictions. The institution responsible for proposing legislation in the EU – the Commission – is an unelected body. Although the certification of legislative proposals lacks many of the features generally associated with political protections, it does fulfil some similar functions. The experiences of the EU, therefore, provide some insight into how an executive statement may be used to achieve some of the strengths of political protections generally, even where those making the statement do not face any substantive political pressures.

Since 2001, the Commission has included what is termed a 'recital' in every legislative proposal which has a specific link to fundamental rights. Made after scrutiny of the proposal as to potential links and compatibility with the rights contained in the *EU Charter,* the recital takes a standardised form which reads as follows:

> This act respects the fundamental rights and observes the principles which are recognised in particular by the Charter of the Fundamental Rights of the European Union.[49]

[49] European Commission, *Application of the Charter of Fundamental Rights of the European Union* (Communication) SEC(2001) 380/3.

An additional statement may be included where there are specific rights which have direct relevance to the proposed legislation.[50] The recital and the commitment to rights protection was adopted by the Commission prior to the *EU Charter* gaining formal legal status.

An interesting feature of the Commission procedure is that, by contrast with the UK and Canadian certification procedures, the basis on which the Commission makes its recital is made public and the public are encouraged to make submissions on which the Commission can base the determinations which inform its final recital. In this way, the role played by the EU recital is similar to the role of scrutiny committees in other jurisdictions. Further, where there are specific links between legislation and particular rights, the Commission's explanation of the compatibility of the proposal with those rights is included in an explanatory memorandum presented to the other institutions involved in the law-making process.[51]

This unique feature of EU rights-certification of proposals is specifically designed to maximise the 'culture of fundamental rights' within the jurisdiction. In the 2005 Commission Communication, *Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals: methodology for systematic and rigorous monitoring,*[52] the Commission set out the purposes of its rights-based scrutiny:

> to allow Commission departments to check systematically and thoroughly that all the fundamental rights concerned have been respected in all draft proposals;
>
> to enable Members of the Commission, and the Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities in particular, to follow the results of the scrutiny and to promote a 'fundamental rights culture';
>
> to make the results of the Commission's monitoring of fundamental rights more visible to other institutions and to the general public. The Commission should be seen to set an example, which will also give it credibility and authority in

[50] This secondary recital is formulated: 'In particular, this [act] seeks to ensure full respect for [right XX] and/or to promote the application of [principle YY] / [Article XX and/or Article YY of the Charter of Fundamental Rights of the European Union]'.

[51] European Commission, *Compliance with the Charter of Fundamental Rights of the European Union in Commission Legislative Proposals: Methodology for Systematic and Rigorous Monitoring,* (Communication) COM(2005) 172/final.

[52] Ibid.

> monitoring respect for fundamental rights in the activities of the two branches of the legislature.[53]

A 2006 Report by the UK House of Lords European Union Committee, titled 'Human Rights Proofing EU Legislation,' responded to the procedures set out in the Memorandum. While several witnesses raised concerns about the ability of a mechanism such as the Commission procedure genuinely to engage in the protection of fundamental rights, both because of the lack of democratic pressure on the Commission's conclusions and because of the overly proceduralised nature of its investigations,[54] the conclusions of the Report were generally positive. The publication of the considerations which inform the 'recital' were viewed as a 'positive step that should increase awareness of the Commission's procedures and encourage interested parties to raise fundamental rights concerns when the Commission is developing policy and legislative proposals,'[55] thus engaging the EU citizenry in a law-making procedure which otherwise generally lacks significant democratic involvement.

As part of the proposed changes to Australia's approach to the protection of fundamental rights, statements of compatibility in relation to all new Bills are included in the Human Rights (Parliamentary Scrutiny) Bill 2010.[56] Section 8 of the Human Rights (Parliamentary Scrutiny) Bill states:

> (1) A member of Parliament who proposes to introduce a Bill for an Act into a House of the Parliament must cause a statement of compatibility to be prepared in respect of that Bill.
>
> (2) A member of Parliament who introduces a Bill for an Act into a House of the Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be presented to the House.
>
> (3) A statement of compatibility must include an assessment of whether the Bill is compatible with human rights.

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[53] European Union Committee (UK), *Human Rights Proofing EU Legislation*, House of Lords Paper No 67, Session 2005-6 (2005).

[54] See Evidence to House of Lords European Union Committee, Parliament of the United Kingdom, Westminster (13 July 2005) 27 (Elsbeth Guild), European Union Committee (UK), *Human Rights Proofing EU Legislation*, House of Lords Paper No 67, Session 2005-6 (2005).

[55] European Union Committee (UK), *Human Rights Proofing EU Legislation*, House of Lords Paper No 67, Session 2005-6 (2005), 5.

[56] Human Rights (Parliamentary Scrutiny) Bill (Cth) 2010.

The Attorney General has indicated that it is expected that a statement of compatibility will 'assist in explaining the purpose and intent of legislation, to contextualise human rights considerations, and *where appropriate*, justify restrictions or limitations on rights in the interests of other individuals or society more generally.'[57] Like the s 19 *HRA* statements in the UK and the requirements under the Canadian *DJA*, the 'assessment' under Section 8(3) of the Human Rights (Parliamentary Scrutiny) Bill does not oblige the Minister (or MP) to disclose the reasons for their final assessment. This is something that the Senate Legal and Constitutional Affairs Committee (SLCAC) commented on and recommended that reasons for an executive statement should be required (at least with respect to apparent incompatibilities with rights). The Report states:

> The committee recommends that clauses 8 and 9 of the Human Rights (Parliamentary Scrutiny) Bill 2010 be amended to provide that statements of compatibility must clearly explain the nature and extent of, and provide reasons for, any incompatibility of a bill or legislative instrument with relevant human rights standards.[58]

This recommendation is intended to improve transparency of the executive process. In the SLCAC's Report on the Human Rights (Parliamentary Scrutiny) Bill,[59] and in the submissions considered in the SLCAC's investigations,[60] comparisons were drawn between the s 8 requirements of the Human Rights (Parliamentary Scrutiny) Bill and s 28(3) of the *Victorian Charter* which states:

> A statement of compatibility must state-
>
> (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and
>
> (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

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[57] Attorney-General Hon. Robert McClelland MP, 'Enhancing Parliamentary Scrutiny of Human Rights' (Media Release 2 June 2010)

<http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_2June2010-Enhancingparliamentaryscrutinyofhumanrights>.

[58] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions]* (2011), 49.

[59] Ibid.

[60] Ibid.

Section 28(3) of the *Victorian Charter* therefore imposes an obligation on the proposing Minister or MP to explain how they have reached the conclusion as to compatibility or incompatibility. As in the EU, where the Commission publishes the reasons for its conclusion that the proposal is compatible with rights, the requirements of the *Victorian Charter* are designed to provide the legislature with a more thorough understanding of the rights-implications of Bills.

A requirement that the executive *must* justify a statement of compatibility creates a clear link between the pre-legislative and legislative protections of fundamental rights. Moreover, a requirement that these reasons be published minimizes the likelihood that those making the statement have not undertaken a thorough investigation into the impact of legislation on rights

Another difference between the Human Rights (Parliamentary Scrutiny) Bill *and* the *Victorian Charter* is that the 'statement of compatibility' is a general obligation, requiring the Member of Parliament to state their assessment as to whether the Bill is rights-compatible. Under the Human Rights (Parliamentary Scrutiny) Bill there is no statutory distinction made between statements of compatibility and statements of incompatibility. However, while the lack of a statutory distinction between the behavior of Ministers with respect to rights-compatible and rights-incompatible legislation may have some impact on how the legislature (and the population) respond to such statements, unlike the *DJA* reporting requirements in Canada, s.8 of the Human Rights (Parliamentary Scrutiny) Bill does require that some form of executive certification is made to Parliament in relation to *every* bill – not merely those that are incompatible.[61]

It is interesting in comparing the approaches of the jurisdictions that each has taken a different approach (albeit there are substantial similarities between the Australian and UK approaches). While certainly the EU has the most open and publically accountable approach – the UK and Canadian certification statements being subject to the

[61] Julie Debeljak in her submission to the SLCAC inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 recommends that the Bill be amended so as to make such a distinction. Specifically, she suggests that s 28 of the *Victorian Charter* ought to be used as a model for the federal legislation. Julie Debeljak, Sumbission No 25 to Senate Legal and Constitutional Affairs Committee, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions],* 9 July 2010.

willingness of Parliament to question them – the EU is equally the jurisdiction which lacks political accountability for the claims made within its 'recitals.'

It is clear that a positive statement as to the rights-compatibility of legislation (as opposed to the presumption in the absence of a negative statement as is found under the Canadian *DJA*) is a form of rights-protection which emphasises several of the potential strengths of this form of mechanism. That is, it creates a focal point for debate in the legislature as to the appropriateness of legislative initiatives and additionally places the proposing Minister in the position of personally associating him or herself with an explicit statement with regard to fundamental rights.

4.4.2 Legislative Scrutiny

The second area in which comparison of the experiences of the jurisdictions can lend insight into the realisation of the strengths and weaknesses of political protections relates to how the jurisdictions have involved the legislature in the scrutiny of executive proposals. Here Australia's scrutiny procedures (not including those included as part of the Australian Human Rights Framework (AHRF)) will be particularly addressed. This is because they demonstrate the role of scrutiny procedures as an isolated measure – they operated as a political protection in the absence of any obligation for the Minister to make a formalised statement regarding rights-compatibility (and additionally, in the absence of any formal legal protection in the form of judicial review – although this will not change should the AHRF come into force). Consequently, both its strengths and flaws will be discussed to demonstrate the extent to which the committee alone can achieve (or fail to achieve) the potential strengths associated with political protections.

In the UK and Canada, however, the scrutiny committees are supplementary measures which are outside of the formalised protections within the *HRA* and *Canadian Charter* (or *DJA)*. Both the JCHR in the UK and Standing Senate Committee on Human Rights (SSCHR) in Canada are political protections which have developed in order to better realise the respective statute-based protections.

It should be noted that the EP does have a role in the protection of fundamental rights during the legislative process and can challenge the accuracy of the Commission's

'recital'.[62] However, the Commission's consultation procedures during the formulation of the proposal, explained above at in 4.4.1, and the requirement of a detailed explanatory memorandum in cases where there is clear or particular impact on rights, fulfil many of the features of the scrutiny committees of the other jurisdictions which are discussed in this section. In particular, the public nature of Commission consultations allowing for public and expert input into the policy formation process[63] encourages consideration of wider perspectives than the Commission alone would be likely to achieve. What distinguishes the EU scrutiny process is that it occurs within the unelected Commission as part of the 'certification' process, rather than within the elected EP.

In Australia the Senate Standing Committee for the Scrutiny of Bills (SSCSB) was established in 1981. Its purpose and terms of reference are established by Senate Standing Order 24 which (in regards to rights) states:

> At the commencement of each parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
>
> i. trespass unduly on personal rights and liberties;
>
> ii. make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
>
> iii. make rights, liberties or obligations unduly dependent upon non-reviewable decisions;[64]

Notably, and consistent with the approach to rights taken in Australia generally (prior to the changes proposed as part of the AHRF), the SSCSB terms of reference do not specify which rights are to be the subject of the Committee's scrutiny. The SSCSB has not specifically extended the protection to encompass 'fundamental rights' analogous to

[62] See, eg European Parliament, *Situation of Fundamental Rights in the European Union (2009) - Effective implementation after the entry into force of the Treaty of Lisbon* (Procedure File) INI(2009) 2161.

[63] For a list of current and ongoing consultations see: European Commission, *Your Voice in Europe: Open Consultations* (2011) <http://ec.europa.eu/yourvoice/consultations/index_en.htm>.

[64] Senate Standing Order 24.

those found in core international rights treaties,[65] but has identified where proposed legislation has impacted on common law rights.[66]

It must be noted that the SSCSB is a Senate Committee and thus its primary role is to bring rights-concerns to only one house of the bi-cameral Australian Federal Parliament. Although the SSCSB's report in relation to human rights *may* impact on the decision of the Senate, it is no guarantee. However, there are factors unrelated to fundamental rights concerns which are likely to play a strong role in the decision of the Senators (individually or collectively) – notably strength of party loyalty – which may influence whether the SSCSB's scrutiny is able to raise a sufficient level of concern to block a rights-infringing Bill.[67]

Another function of the SSCSB is to bring its concerns to the attention of the Minister presenting the Bill to Parliament or to the attention of other relevant Ministers (such as the Attorney-General). The Minister may be asked to defend his or her proposed legislation in light of the SSCSB concerns. Generally, Ministers will respond to

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[65] Carolyn Evans and Simon Evans, 'Scrutiny Committees and Parliamentary Conceptions of Human Rights' (2006) *Public law* 785, 794 – 795.

[66] According to the SSCSB:

> 'Under Standing Order 24(1)(a)(i), the Committee is required to report on whether legislation trespasses unduly on personal rights and liberties. Legislation may trespass **unduly** on personal rights and liberties in a number of ways. For example, it might:
>
> - have a retrospective and adverse effect on those to whom it applies;
> - not only operate retrospectively, but its proposer (invariably the Government)
> - might treat it as law before it is enacted – usually from the date the intention
> - to legislate is made public; this is often referred to as **legislation by press release**;
> - abrogate the common law right people have to avoid incriminating themselves and to remain silent when questioned about an offence in which they were allegedly involved;
> - reverse the common law onus of proof and require people to prove their innocence when criminal proceedings are taken against them;
> - impose strict liability on people when making a particular act or omission an offence;
> - give authorities the power of search and seizure without requiring them to obtain a judicial warrant prior to exercising that power; or
> - abrogate legal professional privilege.
>
> Standing Order 24(1)(a)(i) may also apply in other circumstances, for example, where legislation directly affects fundamental entitlements such as the right to vote.'

Senate Standing Committee for the Scrutiny of Bill, Parliament of Australia, *The Work of the Committee during the 41st Parliament* (2008), 2.1-2.2.

[67] Cheryl Saunders, 'Protecting Rights in Common Law Constitutional Systems; a Framework for a Comparative Study' (2002) 33(3/4) *Victoria University of Wellington Law Review* 507.

correspondence from the SSCSB and the ministerial comments will be taken into account when the SSCSB's report on proposed legislation is generated.[68] In justifying the rights-compatibility of legislation, the Minister may assuage the concerns of the Committee.

An example of this is the SSCSB's investigation into the Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 2004,[69] where the SSCSB raised concerns regarding the retrospective application of the Bill as a trespass on individual rights and freedoms. The Bill (which was ultimately passed) retrospectively validated the decisions of the Classification Board (CB) and the Classification Review Board (CRB) with the intention of ensuring that prosecutions relating to possession of pornographic material (in particular, child pornography) were not hampered by technical errors. However, the broad wording of the Bill had, according to the SSCSB, the possibility of validating all decisions of the CB and the CRB 'whatever the reason – whether technical or substantive.'[70] Further, the SSCSB noted the brevity of the Attorney-General's consideration of the potentially rights-infringing nature of the legislation in both his explanatory memorandum and second reading speech.[71] Given the opportunity to respond, the Attorney-General addressed the rights-concerns of the SSCSB, thus demonstrating that the function of the Committee should not be seen as one-dimensional – that is, merely seeking to prevent the passage of rights-infringing legislations. The Committee also serves to raise issues regarding the interaction of Bills with fundamental rights and, consequently, to generate pressure on Ministers to justify the rights-compatibility of their Bills.[72]

Of course, the response of the Minister will not always assuage the concerns of the SSCSB. However, in those instances the extent of its scrutiny is limited by the relatively weak language used. The SSCSB refrains from strong criticisms of proposed legislation, instead preferring to phrase its conclusions in terms of 'possible' trespass on

[68] NSW Legislative Council Standing Committee on Law and Justice, 'A Bill of Rights for NSW' Report No 17 (2001).

[69] Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 2004 (Cth).

[70] Senate Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest 11 of 2004*, 12

[71] Ibid, 11-12.

[72] Senate Committee for the Scrutiny of Bills, Parliament of Australia, *Report 12 of 2004*.

rights, or merely raising issues of potential interaction between a Bill and rights.[73] It may reject the Minister's explanations or answers to its queries, but this falls short of offering a strong statement that the legislation conflicts with fundamental rights. Consistent with this role of identifying rights-concerns (as opposed to identifying incompatibilities), the expression of concern of the SSCSB falls short of a clear statement that, in the Committee's opinion, the proposed legislation *does* infringe on fundamental rights. Instead, the SSCSB has adopted a practice of identifying where there is a 'trespass' on fundamental rights but 'mak[ing] no final determination ... [and the Committee] leaves for the Senate as a whole the question of whether [the relevant] provision unduly trespasses upon personal rights and liberties.'[74] While the Senate makes no direct statement on the matter of undue trespass on fundamental rights, the implication is that the Senate is unlikely to pass legislation which is perceived as being unduly restrictive of fundamental rights.

Additionally, there are limitations to the quality of scrutiny that can be provided by the SSCSB within the context of the legislative process. Winterton writes:

> [S]uch committees suffer from considerable constraints: time pressure; lack of expertise, only partly ameliorated by the employment of external experts; the difficulty of building up a coherent body of jurisprudence over time; and the ultimate subjection of its work to the vicissitudes of politics.[75]

While this is a general comment on the ability of scrutiny committees to act as an effective bulwark against an executive or legislature seeking to pass legislation with questionable rights credentials, the lack of a bill of rights or clear indication of the rights to which the SSCSB ought to refer makes the Committee's task that much more difficult. Cheryl Saunders rightly points to the 'generality of the reference to "rights and liberties" in the committees 'terms of reference' as a limitation on the efficacy of the SSCSB.[76] In the absence of a clear statement of which rights are protected, the SSCSB (within the limited time frame and expertise highlighted by Winterton)[77] has

[73] Saunders, above n 67.

[74] See, eg. Senate Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest 1 of 2006*,

[75] Winterton, above n 11.

[76] Saunders, above n 67.

[77] Winterton, above n 11.

been faced with either a very general consideration of fundamental rights or, alternatively, are limited as to the rights given attention in the scrutiny process.

It must be acknowledged that some of these criticisms regarding the limitations of the SSCSB as a committee with responsibility for scrutinising the rights-implications of Bills, have been addressed within the new AHRF. Firstly, s 7 of the Human Rights (Parliamentary Scrutiny) Bill establishes a scrutiny committee with a specific human rights mandate (the Australian JCHR). Secondly, while there is no specific indication within the Human Rights (Parliamentary Scrutiny) Bill as to when the Australian JCHR's involvement in the scrutiny of Bills begins, unlike the SSCSB, the Australian JCHR involves both the House of Representatives and the Senate and s 7 Human Rights (Parliamentary Scrutiny) Bill specifically requires the JCHR to report to both Houses. Thirdly, the AHRF clarifies with which rights the Australian JCHR is to engage,[78] via reference in s 3 of the Human Rights (Parliamentary Scrutiny) Bill to various international conventions to which Australia is signatory.[79]

What the Australian pre-AHRF experience and the changes proposed in the Human Rights (Parliamentary Scrutiny) Bill show is both that legislative committees can have a valuable role to play in the protection of fundamental rights, but that in order to

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[78] Although offering greater clarity than the SSBC, there remains some debate as to whether reference to the seven conventions provides sufficient clarity with regard to which rights are protected as 'fundamental' in Australia. Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions]* (2011). ('SLACALC Report').

[79] The SLCALC Report on the *Human Rights (Parliamentary Scrutiny) Bill* noted the absence of the traditional sources of rights in Australia from the mandate of the proposed Australian JCHR. It recommended that this be reviewed:

> 'In acknowledging the significant level of discussion throughout the inquiry in relation to the definition of 'human rights' in clause 3 of the Human Rights Bill and its relevance to the role and functions of the proposed joint committee, the committee recommends that the joint committee undertake a comprehensive review of the definition at the end of the joint committee's first 12 months of operation. The purpose of the review should be to ensure that the seven core UN conventions provide an appropriate basis for the definition, and the review should include specific consideration of whether the following sources of law should be articulated in the definition:
>
> - the Australian Constitution;
> - the common law as applied in Australia; and
> - statutes of the Commonwealth or state or territory parliaments.
>
> The joint committee's review should also consider harmonising the definitions of 'human rights' for the purposes of the new joint committee and for the purposes of the Australian Human Rights Commission's mandate'.
>
> Ibid, 47.

maximise the potential strengths of political protections there needs to be attention to how that committee protection operates. In the absence of a coherent approach to the protection of fundamental rights, the SSCSB has been the only mechanism which both calls the government to account for the rights-implications of its proposals and can challenge any (voluntary) claims to rights-compatibility of Bills. Additionally, in Australia the SSCSB has been a political protection which operated without any other formalised legal or political protections of rights *en masse* (except for constitutional protection of particular rights and common law protections). With the AHRF it is acknowledged that legislative scrutiny can be viewed as a complementary protection to executive certification and, in doing so, the efficacy of both forms is improved.

As an interesting aside, the AHRF approach of including both executive statements and legislative scrutiny follows the example of the *Victorian Charter*. The *Victorian Charter* differs from the Human Rights (Parliamentary Scrutiny) Bill because it includes legislative scrutiny as part of the legislative charter of rights. In including the scrutiny committee as a part of the *Victorian Charter,* Victoria must be distinguished also from other charter of rights jurisdictions with scrutiny committees because the Victorian Scrutiny of Acts and Regulations Committee (VSARC) is not merely measure that has developed to facilitate the better operation of core protections. It is a core protection itself, included within s 30 of the *Victorian Charter* which states:

> The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

This is not, on the surface of it, substantially different from the SSCSB role. However, the *Victorian Charter* benefits from a clear catalogue of rights on which VSARC can base its decisions.[80] Additionally, unlike the SSCSB (but like the proposed Australian JCHR) VSARC has a specific obligation to comment on the compatibility of the Bill.

In Australia legislative scrutiny has had an important role – albeit this may be attributed to the lack of other (executive) mechanisms which scrutinised legislation prior to its enactment. This central position is to be maintained, with the AHRF giving equal

[80] The differences between the *Victorian Charter* definition of 'human rights' and that of the *Human Rights (Parliamentary Scrutiny) Bill 2010* are discussed in Senate Legal and Constitutional Affairs Committee Report, ibid.

attention both main forms of political protection by including *both* a human rights scrutiny committee and executive statements within the *Human Rights (Parliamentary Scrutiny) Bill*.

In the UK, Cabinet Office Guidelines (which were addressed above at 4.4.1) and the JCHR have been established to ensure that s 19 offers the intended political review of legislation.[81] Although not strictly required by the text of the *HRA*, the Cabinet Office Guidelines suggest that the Minister be prepared to justify or explain his s 19 statement (acknowledging that legal advice may be kept confidential).[82] Compatibility is considered to encompass an understanding that 'the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the Strasbourg Court'.[83] To this end, Ministers are encouraged to seek legal advice to better inform their understanding of the legal protections offered by the judiciary both at the domestic and European level.[84]

As mentioned above, and as with the SSCSB in Australia, the Minister's s 19 statement is not taken at face-value. The JCHR provides an additional level of scrutiny of legislation and is able to conduct investigations into the compatibility of legislation with Convention rights. The JCHR is able to challenge the accuracy of the Ministerial claim of compatibility and is able to inform Parliament as to the potential rights implications of Bills – as well as proposed amendments to Bills - regardless of the existence of an s19(1)(a) statement.[85] The mandate of the JCHR goes beyond the consideration of the Convention rights secured in the *HRA* and the statement of compatibility made by Ministers. The Committee is also able to consider the compatibility of the Bill with other fundamental rights commitments (eg. commitments under the various UN Conventions). The investigations of the JCHR in response to Ministerial statements of compatibility have added an extra layer of protection by making Ministers immediately

[81] The JCHR mandate goes beyond merely consideration of Convention rights compliance.

[82] Cabinet Office "The Human Rights Act 1998 Guidance for Departments" (February 2000), cited in Lester, 'Parliamentary Scrutiny of Legislation under the Human Rights Act', above n 3.

[83] Ibid.

[84] Ibid.

[85] The role of the JCHR has been discussed extensively. For example: Lester, 'Parliamentary Scrutiny of Legislation under the Human Rights Act', above n 2; Lester, 'The Magnetism of the Human Rights Act', above n 3; Hiebert, 'Parliament and the Human Rights Act', above n 8; Feldman, 'The Impact of the Human Rights', above n 21.

and publically answerable for their claims of compatibility in s 19 statements. Additionally, the JCHR attempts to overcome the criticism of lack of expertise via the appointment of a legal advisor.

The JCHR has also sought to work within the limited time and resource constraints which were raised above and 'aims to address the issues raised by a Bill at as early a stage as possible.'[86] Anthony Lester points to the 'Third Special Report of Session 2000-01'[87] in which, in the absence of sufficient time to devote substantive enquiry into several Bills which potentially had rights-implications, the JCHR focused their enquiries and published their comments on particular Bills and authorised the publication of their enquiries and correspondence without offering any conclusions. The intention of this was 'to inform consideration of these Bills in this or a subsequent session of parliament'.[88] In 2006 the JCHR announced its intention 'maintain its predecessors' undertaking to scrutinise all Government and private bills introduced into Parliament for their human rights implications ...[but] to focus its scrutiny on the most significant human rights issues raised by bills in order to enhance its ability to alert both Houses to them in a timely way.'[89]

A distinction must be made between the various potential functions of the JCHR. There is substantial debate as to the efficacy of the JCHR and much of the debate appears to rest on the perceived function of the Committee. If the criterion for efficacy is the extent to which the JCHR reports give rise to discussion of human rights issues in Parliament, then studies (most notably those of Francesca Klug) that seek to quantify the frequency of reference to the JCHR reports, suggest that the JCHR is having an impact on raising the awareness of law-makers as to the rights-implications of Bills.[90] Drawing on these studies, Michael Tolley claims that '[b]oth Houses of Parliament in the post-HRA era have shown greater awareness of the human rights issues at stake in

[86] Lester, 'Parliamentary Scrutiny of Legislation' above n. 2.

[87] Joint Committee on Human Rights (UK), *Third Special Report of Session 2000-01, Scrutiny of Bills* (10 May 2001).

[88] Ibid.

[89] Joint Committee on Human Rights (UK), *Legislative Scrutiny: Thirteenth Progress Report*, Report No. 25 (2006).

[90] Francesca Klug, *Report on the Working Practices of the JCHR*, Twenty-third Report of Session 2005–06 (2006) <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/239/23907.htm>.

proposed legislation than any time before.'[91] However, the number of references to JCHR reports is only part of the picture.

Whether or not the JCHR actually influences the rights-quality of legislation is more difficult to ascertain, although there is at least some agreement that its efficacy in this regard is rather limited.[92] Determining whether and to what extent the JCHR has led to amendments to legislation has presented challenges to those seeking to quantify the success of the Committee.[93] In addition to the difficulties in ascertaining whether it was the JCHR or some other factor/s that influenced the amendments, there are influences which fall outside the debates of Parliament. As Feldman has suggested, the early involvement of the JCHR (including considering draft Bills before they are introduced to Parliament) has an impact on the quality of legislation, but one that does not require a formal amendment to a Bill.[94]

The JCHR has had both successes and failures in prompting legislative change. An example in which both occur is the Anti-Terrorism, Crime and Security Bill (UK) (2001) (ATCSB).[95] The ATCSB included, at Part 4, the authority for the Secretary of State to detain without charge foreign individuals suspected of being international terrorists of a threat to society. Where these individuals could not, for whatever reason, be deported (for example because they face serious threats to their life or safety if returned to their home country) the consequence could be indefinite detention. Further, the broad mandate given to the Secretary of State to identify these persons had a limited scope for appeal.

The JCHR raised several concerns as to the rights-compatibility of the ATCSB, specifically the potential conflict with the right to liberty (Article 5, *ECHR*) and

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[91] Michael Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44(1) *Australian Journal of Political Science* 41, 48.

[92] Ibid, 47 – 49.

[93] In the 2006 report by Klug, mentioned above n 90, the figure of 20 out of 500 Bills (including Private Members Bills, and Draft Bills) was given. However, Klug is wary about relying on these figures as true indication of the success of the JCHR given the difficulties in ascertaining the extent to which it is the JCHR, as opposed to other factors, which has influenced amendments to the Bill. She states: 'It is quite possible that this is an underestimate as there are no reliable records of this process. Conversely this might be an overestimate in that in 6 cases it is not clear whether the JCHR was a primary source of the amendment/s, or not'. Klug, above n.90, 57. For discussion see Tolley, above n 91.

[94] Feldman, 'The Impact of the Human Rights', above n 2121, 107 – 9.

[95] Anti-Terrorism, Crime and Security Bill (UK) (2001)

exclusion of procedural guarantees such as *habeus corpus* and judicial review of executive decisions as a consequence of the very limited rights of appeal allowed under the ACSTB.[96]

The JCHR addressed the ACSTB in its Second Report of 2001 – 2002 and was unconvinced by the Home Secretary's assurances that the measures would not, in practice, result in an arbitrary infringement on rights.[97] Like the Australian SSCSB, the JCHR does not expressly identify a rights-incompatibility within the Bill, but instead refers its concerns to the Parliament, and did so in this instance.

As a direct result of the JCHR inquiry, the ACSTB was amended to require that the Secretary of State have 'reasonable' grounds to suspect the individual of being an international terrorist before issuing a certificate for their detention.[98] In addition, the Bill was amended to require that a Committee review the certificate of detention on a regular basis.[99] However, despite these amendments, the JCHR was unconvinced that the changes were sufficient and remained unconvinced by the Home Secretary's arguments that the legislation sufficiently guarded against arbitrary deprivation of liberty. Consequently, the concerns of the JCHR were again referred to the Parliament.[100]

While the JCHR Report did impact on the content of the legislation, and prompted amendments designed to decrease the likelihood that individuals would be subject to arbitrary, un-reviewable and indefinite deprivation of liberty, the efficacy of those changes as to the overall standard of rights protection is, at best, muted. The *Anti-Terrorism, Crime and Security Act (UK) (2001)*[101] was passed into law despite JCHR concerns over the possibility of indefinite detention without charge and the insufficiencies of the available processes of review and appeal. Feldman suggests that

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[96] Joint Committee on Human Rights (UK), *Report: Anti-Terrorism, Crime and Security Bill*, Report No. 2 (2001-2002), [20].

[97] Ibid, [78]; Lester, 'Parliamentary Scrutiny under the Human Rights Act', above n

[98] Joint Committee on Human Rights (UK), *Report: Anti-Terrorism, Crime and Security Bill*, Report No. 5 (2001-2002), [8]; David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25(2) *Statute Law Review* 91, 111; Lester, 'Parliamentary Scrutiny under the Human Rights Act', above n

[99] Ibid.

[100] Joint Committee on Human Rights (UK), *Report: Anti-Terrorism, Crime and Security Bill*, Report No. 5 (2001-2002), [15] – [17]; Feldman, above n

[101] *Anti-Terrorism, Crime and Security Act* (UK) c 24.

there is a key distinction between the changes which were effected as a result of JCHR concerns, and those provisions which the Government was unwilling to amend within the Bill. The former retained the core policy aim of the ATCSB but allowed it to be achieved in a rights-compatible manner. The latter required that liberties be limited in order for the policy aim to be achieved.[102] Thus the JCHR was able to influence legislation where is did not involve a change to the underlying policy.

It has been repeated several times that the perception of Ministers being 'answerable' for their statements is an important part of the s 19 protection. The suggestion is that citizens, via their representatives in Parliament, are likely to resist undue or unreasonable restriction of fundamental rights. Realistically, and particularly in the early years of a political mechanism, the onus falls on the Parliament rather on the citizens directly to scrutinise the statements of Ministers. The existence of elections separated by several years, the presence of majority interests operating in conflict with minority rights, and the existence of strong majorities within the Parliament all act as barriers to the effective protection of fundamental rights via citizen-based scrutiny. Thus although in principle a political protection can be said to seek to give citizens a voice with regard to the protection of their rights, this voice is substantially filtered through their representatives. As such, the development of procedures and committees *within* the institutions are an important way in which political protections can shift from a formal mechanism within the law-making process to facilitating an open and increasingly informed debate regarding fundamental rights.

In Canada, as a response to the inability of the *DJA* mechanisms to adequately bring to light rights-based concerns, the Canadian Parliament has developed supplementary protections. These supplementary protections are designed to 'fill the gap' between the potential of political protections and the reality of the reliance on Ministerial scrutiny. That is, they are aimed at encouraging open debate in Parliament and requiring Ministers to justify their belief in the compatibility of their proposals with the *Canadian Charter.*

Political scrutiny of Bills by the Canadian SSCHR has been introduced as a subsidiary form of political protection of rights. Rather than accepting the position of the Minister

[102] Feldman, above n , 111.

of Justice, the SSCHR has a mandate to scrutinise particular Bills for compatibility with human rights. Much like the UK's JCHR, the SSCHR is responsible for the consideration of the potential rights-implications (not only *Charter* compatibility but also as to Canada's obligations under, for example, the *ICCPR*). This measure places the debate about fundamental rights within the legislature – encouraging a more robust consideration of fundamental rights at the pre-enactment stage.

Janet Hiebert, who was cited above as criticising the lack of effective political scrutiny in Canada prior to the establishment of the SSCHR, has subsequently considered how effective the SSCHR has been. She mentions the continued reliance on the *DJA* mechanism – that is, the perception that the protection of rights is a matter for the executive to consider rather than the legislature – as a major hindrance to the efficacy of the SSCHR. Additionally, the scrutiny of Bills already approved by the Minister of Justice is just one of the SSCHR's several mandated tasks and it is limited to scrutinising only a small number of Bills put before Parliament. Further, it is hindered by a lack of expertise and its influence is limited.[103] The SSCHR's introduction is a response to the inability of the *DJA* mechanism alone to generate a thorough debate about fundamental rights. In particular, the SSCHR is intended to facilitate a debate about the impact of legislation on rights. Whereas utilisation of the *DJA* mechanism (or indeed s 33) is likely to put rights at the forefront of the discussion – or at least prompt discussion as to the necessity of the legislation in light of the apparent or predicted conflict of rights – the SSCHR expands that discussion beyond the small number of rights in which s 33 is utilised.

From the consideration of the experiences of the three jurisdictions with parliamentary committees, it becomes clear that such committees can play an important role in the protection of fundamental rights as part of the democratic law-making processes. However, they should not be seen as providing sufficient protection in the absence of additional political protections. Scrutiny committees alone risk offering merely nominal protection – lacking the influence and political will to challenge legislative proposals in a meaningful way.[104] Additionally, lacking a clear statement from the Minister about the

[103] Janet Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review' (2005) 35(2) *British Journal of Political Science* 235.

[104] See for discussion Winterton, above n 11, 794 – 795.

rights implications of a Bill, the experience of the SSCSB in Australia is that scrutiny tends to 'raise concerns' rather than effectively challenge executive proposals.

Additionally, scrutiny committees become involved in the legislative process at a relatively late stage. Simon Evans explains:

> Perhaps the greatest weakness of parliamentary scrutiny committees (and other parliamentary processes) is …the late stage in the legislative process at which scrutiny committees become involved in considering proposed legislation. At the scrutiny stage, the executive has already decided on its policy objectives, the need for legislation to achieve those objectives, the legislative model and the concrete terms of proposed legislation. Perhaps most importantly, the executive has in most cases also publicly committed itself to all of these things, often making it difficult for it to accept changes without losing political face.[105]

In particular where the committee is comprised only of members of a single house of a bi-cameral parliament – as is the currently the case in both Australia and Canada (albeit the AHRF seeks to create a joint committee in Australia) - scrutiny comes after substantial commitment to the Bill has already been expressed and justifications for the programme have been presented both to the House and to the public at large.

Although this certainly decreases the potential strength of the mechanism, it does not suggest that parliamentary scrutiny has no role to play in protecting rights as part of the political process. Despite executive commitment to a legislative programme, political scrutiny within the legislature can challenge the executive to respond to claims of rights-encroachment and, where relevant, place pressure on members of the parliament as a whole, or the house to which the committee is attached, to block the passage of such legislation until such concerns are adequately resolved.

By viewing scrutiny committees as a way of enhancing the rights-awareness of the institutions of law-making – both the executive and the legislature –this form of rights-protection can be viewed as emphasising the strengths of political protections. In particular, scrutiny committees improve the 'culture of fundamental rights' in the law-making process, ensuring that rights are a genuine consideration and encouraging a

[105] Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29(3) *Melbourne University Law Review* 665, 669 - 670.

broader awareness of the implications of government policies for fundamental rights. Additionally, the location of scrutiny committees within the legislative branch ensures that rights protection is not confined to the executive, thus enhancing the democratic legitimacy of political protections as a means of rights protection.

4.5 Conclusion

This chapter has argued that political protections are valuable tools which have strengths which jurisdictions may seek to utilise to protect fundamental rights. However, despite the benefits associated with political protections, they do have weaknesses which they cannot, on their own, overcome. Additionally, because the realisation of the strengths of political protections is limited both by the design of the mechanism and also the structure of the institutions and law-making processes, care must be taken if a political mechanism is to achieve its potential strengths in practice.

Firstly, political protections can offer a democratic basis for the consideration of fundamental rights. However, this 'strength' should not be over-emphasised. The actual democratic basis is limited by a plethora of institutional (structural) and political (participation) factors. Political protections for the protection of rights cannot overcome a 'democratic deficit', such as that found in the EU. However, by ensuring that Parliament and not merely the executive is involved in the debate about rights, scrutiny committees can play an important role in injecting popular concerns as well as general rights-considerations into the law-making process.

Secondly, political protections can go a long way towards creating (or improving) a culture of fundamental rights within the law-making process and institutions. By regularising the consideration of rights and stigmatising the passage of rights-incompatible legislation, rights-compatibility begins to be seen as the 'norm' rather than as an exceptional consideration.

The weaknesses devolve to one central criticism. Whilst political protections seek to improve the protection of fundamental rights by preventing their encroachment and improving the rights-quality of legislation, they fail to offer a guarantee. This is due to lack of expertise about rights within the political process, the inability of the democratic process to guarantee that there will be political consequences for the infringement of

rights, or apathy amongst the electorate undermining the likelihood that the 'system' will be mobilised to support those whose rights are threatened.

The experiences of the jurisdictions point to the inescapable conclusion that political protections are not enough to guarantee rights. Their success or failure depends not on the mechanisms – no matter how well designed – but on the willingness of the electorate to impose political consequences on elected representatives.

CHAPTER 5. Conclusion: The Interaction of Legal and Political Protections

This thesis began by setting out the different forms of legal and political protection of fundamental rights which have developed in the four jurisdictions of concern – Australia, Canada, the EU and the UK. It was acknowledged that the reasons for the approach adopted by any particular jurisdiction may include factors extraneous to the strengths and weaknesses of the form of protection itself. Factors including a lack of popular motivation to change existing mechanisms, the structure of the particular legal system and the need to gain support from federal units (provinces) may have substantial impact on the forms of protection adopted (or not adopted) in any of the jurisdictions. Consequently, the thesis has not sought to pass judgement on whether one or other form of protection is superior. Instead, Chapters 3 and 4 have examined what the respective strengths and weaknesses of legal protections and political protections are, and how the various forms of legal protections and political protections affect whether or not, or the extent to which, those strengths and weaknesses are apparent.

Having considered legal and political protections separately this chapter seeks to demonstrate that although these forms of protection take different forms, they are ultimately aimed at a similar core aim – the minimisation of the advent of legislation which, overtly or inadvertently, violates fundamental rights. Therefore, rather than being viewed as alternative mechanisms of protection, or with one form of protection being implemented merely as a subsidiary form of protection, legal and political protection ought to be viewed as having complementary roles in achieving the common aim.

An additional aim associated with reform of either legal or political protections is the development of a 'culture of fundamental rights', along with the intended consequences of a closer relationship between individuals and rights protection mechanisms. The differences are in the way in which the different forms of protections seek to achieve that aim. While political protections alone struggle to effectively prevent, or respond to, rights-violating legislation, legal protections alone risk isolating rights-protection from democratic involvement and limiting the 'culture' which they seek to facilitate. However, if viewed as complementary rather than as alternative, the two forms of

protection may be used to diminish the effect of the weaknesses of the other without substantially affecting the realisation of the potential strengths.

This Chapter focuses on the weaknesses which have been identified as associated with legal protections – legal protections are limited in their ability to encourage democratic involvement in the protection of rights, they give rise to the potential politicisation of the judiciary and they can encourage the merging of standards of 'protection' and 'compatibility - and it shows how political protections, when designed to take advantage of the potential strengths of that style of protection, can 'fill the gaps' and reduce the impact or diminish the likelihood that the weaknesses of legal protections will eventuate.

This dual approach has been adopted by jurisdictions which have implemented weak-form judicial review (legislative) via specific rights instruments. These legislative bills of rights intentionally create an interaction of legal and political protections. The intentional and complementary relationship between political and legal protections may be a reflection of the inability of the judiciary in these jurisdictions to find rights-incompatible legislation invalid, or the perception that weak-form judicial review is a weaker legal protection than other forms of judicial review. Regardless, the effect is that the political protections emphasise democratic, participatory strengths which the legal protection is limited in its ability to achieve. Given that the UK already has such a complementary approach, throughout this chapter the UK's system will be used to demonstrate, first, how political protections can interact with legal protections, and secondly to discuss how consideration must be given to the design of the political protection if it is go beyond being a mere procedural requirement and is to mitigate the weaknesses generally associated with legal protections.

In the constitutional judicial review jurisdictions of the EU and Canada, political protections have developed separately and the form of political protection adopted is less comprehensive and thus more limited in its ability to respond to the weaknesses inherent in the legal protection in those jurisdictions. While both jurisdictions have sought to improve the interaction of legal and political protections, it is clear that the legal protection dominates the jurisdictions' particular approaches to rights protection. The perceived strengths of strong-form judicial review and weak-form judicial review (constitutional) respectively are prioritised in these jurisdictions and, while various

mechanisms have been developed in the EU and in Canada in order to engage the non-judicial branches in the protection of rights, such political protections (or, what are primarily procedural protections in the EU) leave many of the weaknesses of legal protections unchecked. This chapter will highlight the weaknesses of the particular political protections which have been adopted in the two constitutional judicial review jurisdictions being considered. It will be shown that robust political protections which operate as complementary rather than subsidiary protections have the potential to reduce the weaknesses of constitution-based legal protection, or at least minimise the likelihood that such weaknesses will be realised.

At the other end of the spectrum, the Australian example demonstrates that political protections can, potentially, serve as a rights protection mechanism with its own particular strengths that are maximised through careful design. However, even taking into account the Australian Human Rights Framework (AHRF) reforms of the political protections, there are still inherent weaknesses of political protections that careful design alone cannot overcome. Political protections are not a panacea. They cannot achieve the strengths associated with judicial review (weak or strong), nor are they intended to. The absence of legal protections creates 'gaps' in the overall protection of rights which political protections alone cannot fill.

The first issue, addressed in 5.1, is the potential of legal protections to generate a form of political pressure. These political pressures take three main forms. The most obvious is related to weak-form judicial review jurisdictions (constitutional or legislative), where the legislature retains the ability to pass or maintain rights-incompatible legislation despite the courts identifying it as such – Canada and the UK. 5.1.1 will address the Canadian experience with s 33 of the *Canadian Charter*[1] and the way in which the 'notwithstanding clause' has, and has not, been used to re-enact legislation after the courts have found the original legislation to be *Charter*-incompatible and thus invalid. Then, in 5.1.2, the more direct approach of the UK in generating a direct approach of generating a political response to judicially declared rights-incompatible legislation will be considered.

[1] *Canada Act* 1982 (UK) c11, sch B pt I, *Canadian Charter of Rights and Freedoms* ('*Canadian Charter')*.

Where a legal protection exists, legislatures (and executives) are reluctant to pass (or propose) legislation which is later found to be rights-incompatible – or less cynically, the presence of a legal protection clearly identifies the rights-standards to which the political branches will be held, and, consequently these branches seek ways to better meet their legal obligations under the specific rights instrument. 5.1.3 will therefore use the experiences of the jurisdictions – in particular the experiences of the EU - to demonstrate how the presence of legal protections can lead to the development of formalised mechanisms as part of the law-making process in order to facilitate better rights-compliance.

In 5.2 the focus will be on the ability of political mechanisms to mitigate the weaknesses associated with legal protections. In particular, this part will demonstrate both the ability and limitations of using particular forms of political protections as a means of mitigating those weaknesses. 5.2.1 will examine how executive certification can interact with legal protections but does not, on its own effectively mitigate the weaknesses of the legal protection. 5.2.2 focuses on legislative scrutiny and how, if used in conjunction with executive certification and given importance as part of the ordinary political protection rather than as an occasional or alternative protection, it can assist in preventing the potential weaknesses of legal protections from materialising.

Finally, the conclusions in 5.3 highlight what features of political protections are necessary in order to address the weaknesses of legal protection. This final section draws conclusions from the preceding discussions about the nature of political protections as a way of expanding participation in the rights-protection process and operating as a genuine pressure, as opposed to being merely a procedural requirement of the law making process. In this way, the objections to legal protections, although not necessarily overcome completely, are at least minimised as to their likely impact and occurrence.

5.1 Legal Protections as Generating Political Pressure or Encouraging Political Protections

Before proceeding to address how formalised political protections serve to respond to the specific weaknesses necessarily associated with legal protections, this section focuses on the way that these two forms of protection do, in fact, interact. Legal

protections can, by virtue of the power of courts to identify legislation as rights-infringing, give rise to political pressure. This can be an incidental pressure arising out of popular and political wariness about the passage of rights-infringing legislation, as is the case in Canada. It may be through design, such as the declarations of incompatibility and supplementary fast-track procedures in the *Human Rights Act (HRA)*[2] in the UK. Political (or procedural) protections may also be introduced as a deliberate move on the part of the non-judicial institutions, as an acknowledgement that a specific rights instrument creates obligations not only on the courts, but on all branches of government. This aims to pre-empt findings of incompatibility by the courts and is the case in the EU, where the Commission procedures were implemented *prior* to the *EU Charter*[3] being given legal status.

The first two types of political pressure are a reflection of the nature of weak-form judicial review, where the legislature retains the ability to re-enact judicially identified rights-incompatible legislation (weak-form constitutional) or where the legislation remains valid despite the incompatibility (weak-form legislative). Political pressure arises where executives and legislatures voice continued support for legislation which has been identified as in violation of the general standard of fundamental rights ordinarily protected within the jurisdiction. Unlike pre-legislative protections, some of the ordinary weaknesses of political protections are not at issue. In particular, after a legal protection has been exercised and/or exhausted, it is difficult to attribute the continued support of rights-infringing legislation to the lack of expertise about rights. The expert body – the court – has voiced its opinion regarding the rights-compatibility of the legislation and if the legislature decides either to re-enact the legislation (in Canada) or not take advantage of fast-track amendment procedures and therefore retain the rights-infringing legislation (in the UK), some compelling argument must be presented to justify this continued infringement.

Chapter 5.1.3 considers the value of having a clear statement of the legal protection – for example in a bill of rights, although this need not be the case – in promoting greater

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[2] *Human Rights Act 1998* (UK) c 42 (*'HRA'*).

[3] *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/01, as adapted in 2007, [2007] OJ C 303/01, as annexed to *Treaty on European Union,* opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) as amended by *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) ('*EU Charter*').

recognition and understanding of the rights-obligations of the executive and/or the legislature. This can then encourage the greater consideration of the rights implications of legislative proposals in the pre-legislative stage. This section focuses on the way that political pressures have arisen within jurisdictions as a result of the legal protections. This will involve consideration of the formalised mechanisms which were introduced into the Commission of the EU.[4] It will also involve the way in which parliamentary scrutiny committees have been introduced in the UK and Canada. These protections are not part of the core legal or political protections included in constitutional or legislative instruments and instead reflect the pressures that such legal protections may put on the non-judicial branches. That is, although the legal protections focus on the judicial branch, the existence of legal protections and the likelihood of judicial review (strong or weak) can create a political pressure on the non-judicial branches to devote greater attention to fundamental rights, and the compatibility of legislation with fundamental rights. Law-making and law-proposing institutions are reluctant to face the political consequences of the courts identifying their legislative initiatives as incompatible with rights (or given rights-favourable interpretation which is beyond the original intent of the legislature) and as a result have introduce mechanisms in addition to the specific rights instrument in order to better respond to (or avoid) the political pressures arising out of the legal protections.

5.1.1 Political Pressures Not to Override a Finding of Invalidity

In Canada, when a court has identified legislation as *Charter*-incompatible and thus invalid, the political branches of government are faced with an indirect political pressure not to override the court's decision. At the time of drafting the *Canadian Charter,* s 33 was perceived as a tool which would be used only in limited circumstances and that political pressures against its use would arise.[5]

[4] European Commission, *Compliance with the Charter of Fundamental Rights of the European Union in Commission Legislative Proposals: Methodology for Systematic and Rigorous Monitoring,* (Communication) COM(2005) 172/final; European Commission, *The legal nature of the Charter of Fundamental Rights of the European Union* (Communication) COM(2000) 0644/Final.

[5] Discussion of the drafting of the Charter has been undertaken extensively in Chapter 2.1. See also: R McMurtry, 'The Search for a Constitutional Accord - a Personal Memoir' (1983) 8(1/2) *Queen's Law Journal* 28; James B. Kelly, 'Toward the Charter: Canadians and the Demand for a National Bill of Rights' (2005) 38(03) *Canadian Journal of Political Science/Revue Canadienne de Science Politique*

An example of how attempts to re-enact legislation, after it had been found invalid on the basis of *Charter*-incompatibility, led to increased political discourse and thus pressure can be seen in the response to the attempt to re-enact legislation after the Supreme Court decision in *Vriend v. Alberta.*[6] After the Court had 'read in' sexual orientation as a characteristic protected from discrimination under s 15(1) of the *Charter,*[7] there was heated debate as to whether the notwithstanding clause should be added to the offending legislation.[8] Although the Alberta legislature ultimately did not utilise s 33, the wealth of debate and argument at the time ensured that the issue remained in the public spotlight and that the legislature would be answerable for its decision.

On the other hand, the Saskatchewan legislature faced comparatively little pressure when it utilised s 33 in response to a judicial decision that the *Saskatchewan Government Employees Union Dispute Settlement Act*[9] was rights-incompatible. Arguing that it was securing a particular interpretation of what constituted a reasonable limitation (and, admittedly, this argument prevailed at the concurrent Supreme Court appeal), the use of s 33 was undertaken with relative ease.[10]

Public pressure alone is hardly a complete explanation for the lack of use of s 33. As Howard Leeson says, 'no single explanation seems powerful enough to fit each case'.[11]

771;Walter S. Tarnopolsky, 'The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms' (1981) 44(3) *Law and Contemporary Problems* 169.

[6] *Vriend v. Alberta* [1998] 1 SCR. 493.

[7] 'The denial of the equal benefit and protection of the law on the basis of sexual orientation, a personal characteristic *which is analogous* to those enumerated in s 15(1). This, in itself, is sufficient to conclude that discrimination is present and that there is a violation of s 15' [emphasis added] ibid per Lamer CJ.

[8] Peter W Hogg and Allison A. Thornton, 'The Charter Dialogue between Courts and Legislatures' (1999) April *Policy Options* 19, 22.

It is interesting to note that Major J. in his dissenting judgement in '*Vriend'* went so far as to suggest that 'given the legislature's persistent refusal to protect against discrimination on the basis of sexual orientation, it may be that it would choose to override the *Charter* breach by invoking the notwithstanding clause in s 33… In any event it should lie with the elected legislature to determine this issue.' Major's dissent was on the issue as to whether sexual orientation should be read into the Alberta Legislation as opposed to being a protected category in the *Charter*. *Vriend v. Alberta* [1998] 1 SCR. 493.

[9] *Saskatchewan Government Employees Union Dispute Settlement Act*, SS 1984-85-86, c. 111 s 9.

[10] Tsvi Kahana, 'Understanding the Notwithstanding Mechanism' (2002) 52(2) *University of Toronto Law Journal* 221, 235; Howard Leeson, 'Section 33, the Notwithstanding Clause: A Paper Tiger?' (2000) 33(4) *Choices* 1.

[11] Leeson, above n 10.

Where s 33 could *potentially* have been used to re-enact legislation, but ultimately the relevant legislature demurred from doing so, such as post-*Vriend*, political pressures have certainly played a role, but it is at least questionable how extensive that role is. There is a wide range of possible explanations for the general lack of enthusiasm for the use of s 33. These explanations include: legislative deference to the courts; the perception that use of s 33 is an extreme measure; and the short-term (5 year) nature of the 'solution' of s 33.[12] Whatever has led to its infrequent utilisation by legislatures, the gap in the legal protection which could possibly have resulted in a more frequent legislative rejection of constitutional protections, has not, in practice, eventuated.

The absence of special requirements imposed on legislatures (state or federal) which wish to re-enact legislation which is found to be rights-incompatible means that the *Canadian Charter* imposes no additional or special hurdle for legislatures that wish to re-enact rights-incompatible legislation. Although the political protections which apply to all new legislation - the ordinary *DJA* and scrutiny committee protections - would apply, weak-form judicial review (constitutional) specifically allows for the legislature to reject the judicial determination of incompatibility and popular wariness regarding the use of s 33 is relied upon to limit its use. This wariness increases pressure: first, pressure that the executive justify its use of the mechanism as an override and second, pressure on the legislature to reject (or at least thoroughly question) the executive proposal. Unlike s 1 of the *Canadian Charter*, which requires demonstrable reasons and justifications for legislative limitation of rights, there is no legal requirement that s 33's use be explained or justified. Regardless, the nature of s 33 as a 'shield' against judicial review prevents the court from enquiring into those reasons.

The 5-year sunset clause, which effectively requires that the legislature re-new the s 33 shield, could be argued to be a form of self-regulation[13] and the decision not to re-instate the Quebecois 'blanket' statutes after a change in government in that province might suggest the potential efficacy of such self review. There is, however, no guarantee that genuine or thorough review as to the appropriateness of s 33 use would be undertaken prior to its re-use.

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[12] Ibid.

[13] See, eg: Kent Roach, *The Supreme Court on Trial* (Irwin, 2001), 264 - 265.

5.1.2 Declarations of Incompatibility and Pressure to Amend

Unlike the Canadian model, the legislative bill of rights approach adopted in the UK has created a deliberate form of political pressure arising out of legal protections which is distinct from the ordinary pre-enactment mechanisms. Rather than relying on an indirect political pressure, the *HRA* creates a mechanism which facilitates amendment of rights-infringing legislation.

As David Feldman has stated, the *HRA* allows for rights-infringing legislation to be passed but creates 'a heavy responsibility to ensure that [Parliament] does not do so lightly, or for inadequate reasons, or inadvertently.'[14] The possibility of inadvertently rights-incompatible legislation is, perhaps, a greater risk under the *HRA* than legislative measures which deliberately encroach on fundamental rights. However, as such legislation remains valid despite identified rights- incompatibility, the fast-track procedures under s 10 *HRA* have been introduced specifically to remedy unintended incompatibilities. According to Francis Bennion, 'practically every case' of unintended breach of rights ought to warrant the use of fast-track procedures.[15]

The fast-track procedures are initiated by a declaration of incompatibility by the courts. Thus they are necessarily linked to the exhaustion of the legal protection. In effect, the fast-track procedures re-ignite the political pressures to ensure that violations of fundamental rights are not only addressed at the legislative stage, but, where such a violation has been overlooked (or pre-dated the *HRA* and consequently was not subject to the requirement of executive certification),[16] to ensure that it may be addressed once identified. Whereas legislation which is inadvertently rights-infringing may be attributed to weaknesses in politicians' expertise in rights-matters, refusal (or failure) to utilise procedures available to amend an authoritatively identified rights-incompatibility has no such defence. A declaration of incompatibility has the potential effect of encouraging greater justification of the legislation - either on the basis of necessity despite the incompatibility, or with regard to specific controversy and debate about the

[14] David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (2002) *Public law* 323.

[15] Francis Bennion, 'Human Rights: A Threat to Law?' (2003) 26(2) *University of New South Wales Law Journal* 418.

[16] Section 3(2)(a) *'HRA'* states that the *HRA* 'applies to primary legislation and subordinate legislation whenever enacted'. Thus legislation enacted prior to the entry into force of the *HRA* will equally be subject to rights-based interpretation.

meaning of rights or legislative compatibility with rights which has led politicians to a different conclusion than has been expressed by the court. Declarations of incompatibility have no legal effect and 'fast-track' procedures are optional, but their combined effect is likely to lead to political pressure to justify the retention of judicially-identified rights-infringing legislation.

5.1.3 Legal Protections Giving Rise to the Formalisation of Political Protections

An interesting point to raise, which supports the suggestion that legal and political protections ought to be viewed as complementary rather than as alternatives, or with one as merely a subsidiary protection to the other, core protection, is that political protections *have* been developed in jurisdictions which have prioritised legal mechanisms. The development of parliamentary scrutiny committees in both Canada and the UK is an acknowledgement that the availability of a legal protection does, in fact, impose obligations on all branches of government – even where that obligation is not specified within the specific rights instrument. The UK Joint Committee on Human Rights (JCHR) was created in the context of the coming into force of the *HRA*, with the intention of ensuring that *Convention*-rights-based scrutiny would lead the legislature to more thoroughly consider rights on the presumption that, except in limited circumstances, the legislature does not intend to pass rights-incompatible legislation. Thus the JCHR, in addition to holding the executive to account for its proposals, as discussed in Part 5.2, assists the Parliament in fulfilling its indirect obligations under the *HRA*. Likewise, in Canada, although the *DJA* mechanism pre-dates the *Canadian Charter,* the introduction of a scrutiny mechanism in the form of the Senate Standing Committee on Human Rights (SSCHR) has developed so as to better ensure that executive proposals meet the standard of rights protection introduced by the *Canadian Charter*. The Canadian SSCHR offers a more general human rights approach to scrutiny than the UK's scrutiny committee (including, for example, considering the compatibility of Bills with international instruments such as the International Covenant on Civil and Political Rights) and is very much a supplementary protection, rather being part of the specific rights instrument.[17]

[17] It must be noted that Australia's proposed Scrutiny Committee under the AHRF is not intended to complement a legal protection but to operate in lieu of, or instead of, a comprehensive legal protection.

The most interesting example of pre-enactment, political-type mechanisms developing in response to the existence of, or in contemplation of a development in, legal protections, is found in the EU. Although, as was explained in Part 2.3.4 the *EU Charter* did not gain legal force until December 2009, the Commission developed procedures to scrutinise legislation for *EU Charter*-compatibility as early as 2001 – when the *EU Charter* was still merely a 'solemn proclamation' of the three non-judicial institutions, including the Commission.[18] While the *EU Charter* was not in itself a legal protection, the Commission's procedures were clearly created in contemplation of the *EU Charter* becoming law. While the essential characteristic of the legal protection (strong-form judicial review) had been part of EU law long before the *EU Charter,* it was the *EU Charter* that gave clarity and visibility to the rights which the Commission had an obligation to protect. The relative scarcity of ECJ decisions invalidating EC legal instruments[19] suggests that the Commission's procedures have motivations apart from merely avoiding the invalidation of legislation. Instead, the creation of the *EU Charter* itself and the swift introduction of Commission procedures to scrutinise proposals and to include a 'recital' as to compatibility reflect the changing nature of the European Union as a whole. A greater awareness of the way in which European law – as opposed to the domestic law of the Member States – may impact on individual rights prompted a change in the way the Commission viewed the interaction of its proposed legislation with fundamental rights.[20] The procedures are an acknowledgement that legal protections ought not to be the sole protection within a jurisdiction and that the presence of a constitutional-like protection is not merely a concern of the courts.

The *EU Charter,* therefore, while not a legal protection itself, gave clarity to the pre-existing legal protection (albeit the ECJ was not, and is not, limited to the protection of *Charter*-rights). This suggests that while the presence of a legal protection gives rise to an obligation that executives ought not to propose, and legislatures ought not to pass,

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[18] European Commission, *Application of the Charter of Fundamental Rights of the European Union* (Communication) SEC(2001) 380/3.

[19] Damien Chalmers, Gareth Davies and Giorgio Monti have pointed out that although the ECJ has the authority to find EU legislative acts invalid, they have not done so. The vast majority of judicial review in the ECJ has referred to administrative acts of the Commission rather than Legislative acts. This also perhaps goes towards explaining why the Commission has been the institution which has introduced procedures analogous to the political protections in the other considered jurisdictions. Damien Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (Cambridge University Press, 2nd ed, 2010), 251.

[20] European Commission, *Application of the Charter* above n 18.

legislation which violates fundamental rights, where there is clarity as to the nature and content of that obligation– for example in a specific rights instrument – the obligations on the non-judicial institutions are similarly given greater clarity.

At the same time, despite the introduction of such mechanisms, the ECJ is overwhelmingly viewed as the institution with responsibility for the protection of rights and thus the political protections are secondary to the legal protections.[21] Commentators have questioned the efficacy of the Commission's procedures in actually furthering the protection of fundamental rights.[22] At the very least, the lack of political pressure and, consequently, democratic accountability of the Commission, means that the Commission recital is primarily a procedural requirement rather than a mechanism which generates political pressure on the institution itself. Regardless of the effectiveness, or lack thereof of the Commission's procedures – this thesis has certainly not suggested that any of the political protections are perfect, and the general weaknesses of the EU mechanism have been discussed previously, in Part 2.4.3 – what is significant is that such mechanisms were viewed as necessary at all in a strong-form judicial review jurisdiction. The introduction of protections which *require* that non-judicial institutions of government devote attention to the protection of rights in the pre-enactment stage suggests that the legal protection is inefficient in providing a comprehensive protection of rights within the jurisdiction.

5.2 Political Protections as a way of Combating the Weaknesses of Legal Protections

There are three core weaknesses and one supplementary weakness of legal protections which were set out in Chapter 3. They are:

1) The dominance of the judiciary as the institution with responsibility for the protection of rights places highly controversial political disputes before the

[21] A brief perusal of textbooks on EU Law, demonstrates a substantial focus on the ECJ's role in the protection of fundamental rights in the EU, both historically and under the *EU Charter* (albeit, the effect of the *EU Charter* having legal status is as yet unknown). See, eg.: Chalmers et al. above n 19, 228-266; Trevor C. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Union* (Oxford University Press, 7th ed, 2010), 141 – 172; Josephine Steiner et. al, *EU Law* (Oxford University Press, 9th ed, 2009), 122 – 128.

[22] Gráinne de Búrca and Jo Beatrix Aschenbrenner, 'European Constitutionalism and the EU Charter of Fundamental Rights' (2003) 9 *Columbia Journal of European law* 355; Chalmers et al. above n 19, 251.

courts, leading to the politicisation, or the perceived politicisation, of the judiciary (Chapter 3.4.1);

2) The nature of legal protections focuses on a determination of 'compatible' or 'incompatible' leading to 'protection' becoming equal to 'compatible' (Chapter 3.4.2); and

3) Legal protections shift discourse about rights out of the political and democratic institutions and into the hands of an unelected judiciary. Thus, far from creating a 'culture' of fundamental rights, legal protections are inherently undemocratic (3.4.3).

4) While there are certain benefits to having the court available as a forum where victims of rights-violations can seek a remedy, there are equally limitations both in terms of the 'after-the fact' nature of the judicial protection and with regard to the limited scope of arguments on often controversial issues that may be raised (Chapter 3.5.2).

These weaknesses undermine the frequently made claim that legal protections – in the form, usually, of a specific rights instrument – facilitate a 'culture of fundamental rights'. As was made clear in Chapter 3, as the strengths of legal protections are maximised – in particular relating to the invalidation of legislation or a wide mandate for judges to adopt a rights-favourable interpretation and the authority of the judges as having rights-expertise - so the likelihood that potential weaknesses will be realised is also increased. At the same time, the weaknesses of legal protections are less overt when the strengths are achieved to a lesser degree. Thus, if legal protections are considered in isolation from other forms of political protection, the cost of mitigating these weaknesses is, necessarily, that the strengths that a legal protection could potentially achieve will be diminished.

Political protections can, and should, be used to fill this gap. The strengths of political protections outlined in Chapter 4 appear to align with the weaknesses of legal protections. Political institutions are the appropriate place for complex debates as to how to balance competing rights, and to make decisions as to how to protect rights, rather than merely to decide whether legislation is compatible with rights. The members of the legislature and (in all but the EU) the executive are elected and have a

democratic legitimacy that the courts lack and they are therefore better placed to consider a wide range of opinions about rights in the context of scrutinising proposed legislation. Even in the EU the Commission's proposals must pass through the democratically elected Parliament prior to a law being adopted. Finally, the requirement of executive certification places rights at the very beginning of the legislative process, encouraging a pro-active approach to the protection of rights, or at the very least minimising the likelihood that rights-infringing legislation will accidentally be passed. However, at the same time, political protections do not offer the 'guarantee' associated with legal protections and the lack of expertise amongst the politicians (and general public) suggests that a judicial safeguard serves an important purpose.

Whilst political protections have the potential to respond to the weaknesses of legal protections, it is not merely the presence of *a* political mechanism that will promote the regular occurrence of such discourse. There are certain features of the political mechanisms considered that can be drawn on to maximise the potential of the political mechanism to mitigate the limitations of the legal protections.

5.2.1 Executive Certification Model of Political Protection

The executive certification model of political protection has several benefits in terms of interacting with legal protections so as to mitigate the weaknesses of legal protections. Firstly, it places the protection of rights at the very beginning of the legislative process, thus seeking to *prevent* the passage of rights-infringing legislation, as opposed to merely responding to it. Secondly, it has the potential to generate personal, political accountability of the proposing Minister, in particular where the judiciary has the authority to make a clear statement of incompatibility (whether or not that results in invalidity of legislation). Thirdly, it can provide the impetus for greater legislative debate about rights.

Nevertheless, the experiences of Canada, the UK and the EU raise some concerns about relying exclusively or primarily on the executive certification model. In all three jurisdictions, the executive statement has been the focus of formalised protections associated with either a legislative instrument or, in the case of the EU Commission, a formalised procedure. Other, supplementary political protections have, in the UK and

Canada at least, arisen in order to respond to the inability of executive certification alone to generate genuine discourse about rights. In particular, executive statements alone lack the ability to shift the discourse from 'compatible/incompatible' to a broader consideration of 'right-protection'.

In Canada, the *DJA* mechanism has, as has previously been raised, several flaws. The scrutiny of the proposal prior to the Bill being submitted is conducted 'behind closed doors' and there is no requirement to state how the conclusions were reached. This separates the primary rights-consideration of rights from public, and even legislative, discourse. It is limiting in a different way from the narrow range of perspectives heard in the judicial forum – there may or may not be a wide range of perspectives considered but the extent to which different perspectives are considered is simply not known except to those involved in the process.[23] This can hardly be said to overcome or even mitigate the weaknesses of the legal protections mentioned above.

In addition, the political pressure is general in nature, the Minister of Justice has sole responsibility for certification, and, in most cases, his or her certification of compatibility is assumed through silence, since the *DJA* only requires a statement where the Minister of Justice is unable to commit to the rights-compatibility of a Bill. While this may allow development of a greater body of knowledge about rights within the Department of Justice itself,[24] thus increasing the rights-expertise of those involved in the drafting process, the centralisation of certification serves to undermine some of the benefits ordinarily associated with political protections. This is because there is a lesser degree of political pressure on individual members of the executive. One of the key ways in which pressure is generated via the interaction of legal and political mechanisms is, as was raised in part 5.1, that those responsible for rights-infringing legislation are answerable to the electorate. Where an individual makes a statement that is later found to be incorrect (for example via a judicial decision (UK)) or where fundamental rights concerns are raised via non-legal mechanisms (as will be the case in Australia if the AHRF enters into force) there is, in the first instance, a degree of individual accountability, whether to parliament or the public, imposed on the individual proposing the law and making the statement. In the second instance, that

[23] Patrick J. Monahan and Marie Finklestein, 'Charter of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501, 510.

[24] Ibid.

accountability is attributed to the executive as a whole. By contrast, where the responsibility for the proposal and the 'statement of compatibility' is divided between the original Minister and the Minister of Justice, it is unclear on whom political responsibility for the later-identified incompatibility would lie. The protection would seem to rely on a coherent, party-based executive to which collective accountability could be attributed. The occurrence of weak or informal coalitions to form a government, and appoint a Minister of Justice who may be a member of a different political group or party from the Minister proposing a particular law, could potentially lessen the degree of accountability by raising questions as to where the responsibility for the rights-incompatibility remaining undetected or unaddressed lies – the Minister for Justice or the proposing Minister.

Finally, the executive focus on a 'compatibility' certification fails to overcome the compatibility/incompatibility dichotomy associated with legal protections. As was discussed in Chapter 3.4.2, this focus on compatibility rather than protection may in fact be emphasised by an executive approach to certification which chooses 'would the Bill would stand up to a *Canadian-Charter*-based challenge' as the standard for identifying compatibility under the *DJA*.[25] This is an issue with executive certification in general, not merely the Canadian *DJA* model and will, as a consequence, be discussed below in relation to how other jurisdictions have sought to overcome this limitation.

There is one element of the *HRA* political mechanism which may increase to the likelihood of wider consideration than merely 'compatibility'. This is the need to make a compatibility statement to Parliament with respect to *every* Bill. This may be either in the form of an s 19(1)(a) statement of compatibility, or an s 19(1)(b) statement that the Minister is unable to make such a statement. This requirement ensures that the issue of fundamental rights is specifically raised within the legislative branch with respect to *every* Bill. This regular acknowledgement of rights issues increases the likelihood that the legislature will challenge – or at least question – the executive's claim to rights-compatibility. This has the potential to broaden the scope of human rights issues raised within the legislature and to encourage greater legislative consideration of the ways in which the Bill may interact with rights (perhaps even beyond those considered by the

[25] Michael Mandel, *The Charter of Rights and the legalization of politics in Canada* (Wall & Thompson, 1989), 61-63.

executive). While the language of compatibility remains, the availability of a challenge to that claim may lead to a more comprehensive consideration of rights-implications.

In addition, where an s 19(1)(b) statement is used, there is the potential that political pressure may be (and is intended to be) generated against the passage of rights-questionable legislation. While this still retains the dichotomy of 'compatible/incompatible', rather than relying on an *ex post facto* determination of incompatibility by a court (as discussed in Chapter 4.2.2), s 19(1)(b) statements acknowledge the possibility of incompatibility at this early stage, reflecting the diversity of positions and controversial nature of discussions about rights. Rather than facing political consequences for failing to adequately identify the incompatibility, the Minister may face pressure – whether criticism or question - for his or her intention to pass legislation which potentially (or in some cases, deliberately) encroaches on individual rights.

Thus the requirement that every Bill has a relevant s 19 statement under the *HRA* encourages Ministers to formulate Bills which have the lowest political 'cost'. The intention is that Ministers will be more likely to formulate Bills which are compatible with Convention rights and, within the scope of the 'compatibility' standard used by the *HRA*, to extend the discourse about the meaning of rights and their appropriate limitations. Additionally, given that rights-incompatible legislation is permissible under this legislative bill of rights, Ministers are discouraged from taking advantage of that and to propose such legislation only where a strong argument can be made that the encroachment is legitimate. The presentation of s 19 statements as part of the legislative process is designed to ensure that the claim as to compatibility is more openly made, with the intention that it may be thoroughly questioned in Parliament. This, in turn, increases the potential for rights-implications to be raised in the context of questioning how the determination of compatibility has been made.

The EU's executive certification model faces some of the same criticisms as the Canadian model. The limitations of the *DJA* requirements in generating political accountability are, however, minor when compared to the complete lack of political accountability in the EU, a consequence of the unelected status of the Commission. However, this is something associated with the structure of the EU rather than the mechanism itself, as discussed in Chapter 4.4, and this criticism will not be repeated

here. Unlike the procedures under either the *DJA* or the *HRA,* the Commission procedures have sought to overcome other criticisms usually associated with the executive model. For example, the Commission procedures include a requirement that where there are specific rights which may be affected by the proposed legislation, the 'recital' must be extended to specifically acknowledge that those rights have been given consideration. Further, the explanatory memorandum attached to the proposal is required to provide, as a matter of procedure, the considerations taken into account when drafting the recital. The intention of the publications is specifically to improve awareness and to ensure that the Commission's conclusions are open to both public and legislative scrutiny.[26]

The Australian political protections do not currently require that the Minister or proposing Member of Parliament make a statement of compatibility. Proposed changes to the political protection of rights in Australia as part of the Australian Human Rights Framework (AHRF) seek to make a statement of compatibility by the Minister a regular part of the rights-protection process. Much like the Canadian and UK models, the Australian Human Rights (Parliamentary Scrutiny) Bill does not include a requirement that the Minister or MP making the statement provide reasons. This change was recommended by the Senate Legal and Constitutional Affairs Committee (SLCAC), but it is yet to be seen whether the change will be included. However, unlike the other jurisdictions, the focus of the proposed changes associated with the AHRF is not on the executive (see Chapter 2.4**)** but on the legislature and thus the AHRF is discussed in the following section of this chapter.

What is apparent from the experiences of the jurisdictions is that the executive scrutiny model alone is limited in its ability to mitigate the weaknesses of legal protections and, in some instances, risks emphasising them by relying on the same standards of 'compatible/incompatible' as the courts. At best, an executive statement of compatibility is an indirect way of shifting considerations from 'compatible' to one of the 'rights-quality' of legislation. There is no guarantee that it will do so. Thus while the executive procedures can serve valuable functions by encouraging (or requiring) rights-based considerations at the earliest stages of the law-making process, and by

[26] European Commission, *Application of the Charter* above n 18; European Union Committee (UK), *Human Rights Proofing EU Legislation*, House of Lords Paper No 67, Session 2005-6 (2005).

creating political accountability for executive officials, jurisdictions aiming to mitigate the weaknesses of legal protections ought additionally to ensure that the broader considerations on which the executive-certification statements are based are made available and open to political scrutiny so as to ensure that the certification is not merely procedural but a genuinely 'political' protection.

5.2.2 Legislative Scrutiny Processes

Increasingly, political protections have included legislative scrutiny procedures which have particular benefits in terms of addressing the weaknesses of legal protections. Viewed autonomously, political scrutiny processes within the legislature are relatively weak protections. However, legislative scrutiny processes ought to be seen as supplementing the executive certification model as, when viewed in this manner, the two forms of political protection interact to offer a more comprehensive political mechanism.

Whereas an executive statement, in particular when viewed in conjunction with the possibility of a judicial safeguard, acts as a deterrent for the executive to propose legislation which is incompatible with rights, scrutiny processes may raise concerns about the accuracy of that statement and bring to attention any rights-concerns. It is only with the support of the legislature as a whole (or at least a majority within the legislature) that the scrutiny committee's findings can have a direct impact as to whether rights-infringing legislation is passed – and, particularly in the Westminster systems of the UK, Canada and Australia, the likelihood of that occurring depends on the extent of the control that the executive exercises over the legislature. However, legislative scrutiny committees play a very important role in the overall mitigation of the weaknesses of legal protections. This is because, if the committee is given a sufficient mandate (via its authorising instrument), it is able to facilitate a degree of both direct and indirect (via representatives) democratic participation and the consideration of a range of identifiable rights-issues (as opposed only to rights-compatibility).

In Australia, legislative scrutiny of Bills as to their compatibility with rights has been the primary form of political protection, in the absence of specific rights instrument. The proposed AHRF retains this prominent role for legislative scrutiny. The strengths and weakness of this political protection model were discussed in Chapter 4. The

AHRF model creates an Australian Joint Committee on Human Rights (Australian JCHR) which includes members of both Houses of Parliament (not only the Senate, as is the case in the pre-AHRF model, and in Canada). Submissions to and recommendations by the SLCAC point out that, particularly in light of the absence of comprehensive legal protections, the need for robust political scrutiny is substantially increased. Edward Santow and George Williams, for example, have raised the need for 'clear rules to provide a framework for human rights assessment by the Australian JCHR and others,'[27] to better facilitate a scrutiny in line with the expected standards. In the absence of a complementary legal protection, it is unclear what standard of 'compatibility' or even 'protection' a scrutiny committee will or can use. There is a risk that when scrutiny committees become the dominant form of protection, the lack of clear guidance as to the expected standards will lead to merely 'consideration' of rights, rather than protection.

It is interesting to note that, unlike other jurisdictions in which there is a bill of rights, the *Victorian Charter* includes reference to the scrutiny committee within the bill of rights itself – in s 30 *Victorian Charter.* Thus, unlike in the UK, where the JCHR is clearly a subsidiary protection designed to supplement the executive statement (ie. it exists to create some of the political pressure that the executive statement alone is limited in its ability to generate), in Victoria the scrutiny committee is considered part of the overall approach to rights protection. However, in Victoria, fundamental rights are merely one concern of the Scrutiny of Acts and Regulations Committee rather than the responsibility of a dedicated rights-based scrutiny committee.

In Canada and the UK, as well as under the AHRF, the committee with responsibility for rights-based scrutiny is a dedicated human rights committee. At the national level in Australia, this has been a deliberate move as part of the AHRF reforms. Whereas previously the Senate Standing Committee on the Scrutiny of Bills (SSCSB) had responsibility for rights-based scrutiny, with the Human Rights (Parliamentary Scrutiny) Bill (2010) a specific Australian JCHR will be created. This Australian JCHR will be specifically tasked with scrutinising bills as to compatibility with rights. Similarly, specialised rights-based committees have been established in the UK and

[27] Gilbert + Tobin Centre of Public Law, Sumbission No 20 to Senate Legal and Constitutional Affairs Committee, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions],* 8 July 2010.

Canada. This specialisation has certain benefits including allowing for greater focus on the rights-issues within the limited time frames in which the scrutiny process in undertaken.

Another benefit of scrutiny committees is their ability to examine Bills beyond the requirement simply of 'compatibility' and consequently to raise legislative awareness about the rights-implications of Bills.[28] This increases the likelihood that the rights-quality of legislation rather than only its rights-compatibility will be considered and potentially improved. Although the 'compatibility' standard derived from the legal protection remains a guiding factor, scrutiny committees are not limited to that standard.

One feature of political protections that focus on the legislature is that they are able to facilitate a greater scope of participation via calls for submissions from interested or expert parties.[29] While there are limitations to this associated with cost and efficiency, access to such committees, even in a limited manner, opens to the door to greater access and participation beyond what legal protections can facilitate. The EU Commission has incorporated this into its executive processes by allowing access at the consultation stage. This is specifically designed to better facilitate citizen access to decisions about rights and to ensure that the impact-assessment of legislative proposals takes into account a wide range of potential rights-implications.

The necessity of supplementing executive certification with committee scrutiny can be seen in the experiences of Canada and the increasing role of the SSCHR. In Canada, the lack of openness and answerability of the executive under the *DJA* mechanism[30] fails to adequately address the weaknesses of weak-form judicial review (constitutional) in Canada. Consequently, in order to better achieve those features of political

[28] The role of the JCHR has been discussed extensively. For example: Anthony Lester QC, 'The Magnetism of the Human Rights Act 1998' (2002) 33(3/4) *Victoria University of Wellington Law Review* 477; Anthony Lester, 'Parliamentary Scrutiny of Legislation under the Human Rights Act 1998' (2002) 33(1) *Victoria University of Wellington Law Review* 1; Janet L. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' (2006) 4(1) *International Journal of Constitutional Law* 1; David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25(2) *Statute Law Review* 91.

[29] Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29(3) *Melbourne University Law Review* 665.

[30] See, eg: Janet Hiebert, 'Resisting Judicial Dominance in Interpreting Rights' (2004) 82 *Texas Law Review* 1963; Janet Hiebert, 'A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny' (1998) 26(1) *Federal Law Review* 1.

protections which facilitate a 'culture of fundamental rights' by promoting democratic participation and expanding consideration beyond that of compatibility – and indeed in Canada's SSCHR, extending to consideration of rights not contained within the *Canadian Charter* – it became necessary to develop additional, committee protections distinct from the formalised procedures in the *DJA*.

5.3 Conclusion

While political protections have the potential to mitigate the effects of the weaknesses associated with legal protections, political protections must be appropriately designed so as to take advantage of their own potential strengths. The preceding discussion has highlighted what features political protections must have in order to serve this purpose. If the aim of both political and legal protections, beyond simply 'protecting rights against legislative encroachment', is considered to be to achieve this protection within a framework of democratic discourse – to create a 'culture' of fundamental rights' – the experiences of the jurisdictions with the interaction of legal and political protections suggests that while the form of legal protection may differ, the requirements for weakness-mitigating political protection remains similar. The political protection must:

1) Require that rights-certification of *every* Bill is undertaken (for example, via an executive statement). That certification should include or be accompanied by an explanation as to how the rights-compatibility was determined *or* must highlight any specific rights-incompatibility/rights-based concerns which prevent certification.

2) Ensure that the legislature and, wherever possible, the public, can participate in the scrutiny of legislation so as to ensure that the widest possible range of perspectives is considered prior to the passage of legislation.

3) Encourage scrutiny of legislation beyond 'compatibility' with rights and bring to light the rights-implications of legislation.

4) Be capable of generating political pressure to discourage those proposing and passing legislation from infringing on rights.

These characteristics of political protections can never entirely overcome the weaknesses of legal protections. Indeed, given that some of the objections to various forms of legal protections (or even to the idea of legal protections) stem from deep-seated philosophical and political beliefs about the appropriate roles of the judiciary and the legislature, for some commentators these weaknesses will never be overcome short of altogether removing the possibility of judicial review of legislation for conformity with fundamental rights standards. However, by facilitating engagement with rights at the earliest stages, and continuing throughout the law-making process, the dominance of the judiciary as the 'protector of rights' can be reduced, while its role as a 'guardian of rights' – a last resort for when the weakness of the political mechanism becomes apparent and rights-infringing legislation does, unintentionally, make it through the process – is maintained.

This is not a thesis that suggests that any particular form of legal protection is 'better' or 'worse', or which promotes a particular form of judicial review over another. Instead, this thesis has sought to acknowledge that there are fundamental political, structural and philosophical differences which may influence, or even dictate, the form that legal protections take in any particular jurisdiction. In acknowledging this, the thesis has demonstrated that regardless of the form of legal protection present in a legal system, political protections ought to play a substantial role. Where legal protections are of ostensibly the 'strong' kind, the weaknesses of the legal mechanism are similarly emphasised and thus robust political protections are necessary to fulfil a role relating to expanding the breadth of rights-discourse, improving the quality of legislation and minimising the potential for political issues to be shifted from the political to the legal arena. While political protections alone cannot achieve the strengths of legal protections, where legal protections are 'weak', 'unclear' or otherwise lacking in strength, political protections push rights into the forefront of political debate and discourage (or at least hold law-makers answerable for) legislative encroachment which may otherwise have slipped through the cracks.

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