POLITICAL PROTECTIONS OF FUNDAMENTAL RIGHTS AS A MEANS OF MITIGATING THE WEAKNESS OF LEGAL PROTECTIONS

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The purpose of this paper is to highlight the important role of political protections of fundamental rights. The paper acknowledges that legal protections as a way of protecting rights against legislative encroachment, have definite strengths – in particular the court provides an determination as to the rights-compatibility of challenged legislation (whatever the consequence of such a determination may be), it offers authoritative interpretations of rights and provides a forum in which victims of (alleged) rights violations can challenge the legislation. However, at the same time, this paper points out that these strengths necessarily bring with them certain weaknesses – the political nature of rights-discourse, the focus on compatibility as a standard of protection and, perhaps most controversially, the non-democratic nature of the courts. This paper will draw on the experiences of various jurisdictions to point out how political protections play an important role in the protection of fundamental rights and, if properly designed, can operate as part of the law-making process where legal protections are least able to engage. If viewed as an inherent part of an overall commitment to the protection of rights – not as merely supplementary mechanisms developed on an ad hoc basis to aid executives and legislatures in avoiding judicial criticism – political protections can be used to retain the strengths of legal protections whilst operating to mitigate the impact (real or perceived) of the weaknesses associated with judicial review models of rights protection.

The protection of fundamental rights is a major concern of most modern legal systems. As a working explanation, 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

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This paper is adapted from the author's PhD thesis entitled 'Legal and Political Protections of Fundamental Rights: Strengths and Weaknesses – a Comparative Study'. While all errors in this paper are her own, the author is grateful to Professor Denise Meyerson for her assistance and comments in developing the original PhD thesis.

law-making power.[1] A distinction must be drawn, however, between the *legitimate* extent of law-making power to limit rights, and the extent of any *legal* limits of those law-makers. The extent (if at all) to which rights will serve as a limit on the legal authority of law-makers depends on the way in which rights are protected within the particular jurisdiction, and it is those forms of rights protections which are of interest here.[2]

The decision to adopt the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (HRPSA) suggests a concern that the Federal Legislature ought not unduly limit fundamental rights. Yet at the same time, the HRPSA falls short of imposing a formalised 'legal' protection which would provide judicial oversight or review legislation as to its rights-compatibility. Instead, the mechanisms introduced are purely 'political protections' – with the legislature and executive tasked with scrutinising and certifying the rights-compatibility of legislation. This paper suggests that there is value in such political protections, but it is suggested that over-emphasising *either* legal or political protections is to leave the job half done.

The common approach to reviewing fundamental rights protections is to focus on the legal protections, and this has left political protections as 'secondary' or 'supplementary'. However, the emphasis on legal protections is only one part of the picture, and while the constitutional, legislative or (in Australia) common law nature of legal protections may indeed form the starting point, each of these forms of legal protection have inherent weaknesses – weaknesses which the strengths of political protections can help mitigate.

When a state decides to adopt a particular form of legal protection, either through the introduction of a new instrument or in the context of review of the efficacy of existing protections, the ultimate decision about which form of rights protection to adopt is not necessarily a reflection of an academic analysis of which instruments would provide the strongest and most robust protection. The form and substance of a 'new' legal protection will be influenced by a range of factors, importantly, but not limited to, the sentiments of the government of the day, existing constitutional structures and the ability of those proposing change to garner sufficient popular and political support for proposed reforms.[3] These factors, along with criticism of the potential weaknesses of

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1 Clearly, rights can extend beyond 'as against the state' and be held as against non-state actors. However, that is a topic for another day.

2 This paper is focused on the instruments and formal protections which regulate the interaction of primary legislation with fundamental rights. It does not extend to other forms of legal protections, such as anti-discrimination statutes which seek to protect against discriminatory conduct or administrative law mechanisms to protect against rights-encroachment by executive measures.

3 For an excellent consideration as to the rejection of a legislative bill of rights in Australia in 2010 see David Erdos, 'The Rudd Government's Rejection of an Australian Bill of Rights: a Stunted Case of Aversive Constitutionalism?' (2012) 65(2) *Parliamentary Affairs* 359. Similarly, the Canadian experience, and the way that political pressures from the provinces influenced the ultimate form of the *Canadian Charter of Rights* is discussed in 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.

legal protections, are hurdles to the introduction of legal protections – hurdles which in Australia have proved to be insurmountable.[4]

Part 1 of this paper begins by defining the relevant terminology – both with regard to bills of rights and the various forms of protection addressed in this paper. Part 2 goes on to acknowledge the potential strengths of legal protection of rights and, more importantly, Part 3 points to the inherent weaknesses that come along with those strengths. Although these weaknesses may be differently realised, depending on the specific form of legal protection, they are weaknesses which are necessarily associated with granting the courts authority to review the rights-compatibility of legislation. Having identified the weaknesses of legal protections, Part 4 of the paper will then turn its focus to political protections. Although 'legislative bills of rights' have engaged with both legal and political protections, there has been a tendency for political protections to be somewhat *ad hoc* responses to the (real or predicted) impact of legal protections. Rarely have they been contemplated as being inherently connected to best achieving the possibilities of the legal protections. This paper suggests that because of the inherent weaknesses in legal protections, political protections ought to be more than merely *ad hoc* and, instead, a coherent approach to the interaction of legal/political protections – discussed in Part 5 – can do the most effective job of maximising the strengths of political protections so as to mitigate the weaknesses of legal protections.

One comment before proceeding: the jurisdictions referred to in this paper have been chosen to demonstrate how political protections interact with legal protections, regardless of their form. They are by no means intended to be definitive of each form, nor do they represent an 'ideal'. A more comprehensive analysis of each (and a wider range of examples) would, of course, be ideal, but in the limits available they each include interesting features within their political and/or legal protections which are helpful in demonstrating the way in which political protections can serve to mitigate the weaknesses of legal protections.

I DEFINITIONS AND TERMINOLOGY

The 'bill' or 'charter' of rights has become the central focus of discussions about how best to protect rights.[5] Erdos has explained a bill of rights as '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.'[6] This definition of the term doesn't specify a particular legal status and thus a bill of rights simply meets the dual criteria of establishing a catalogue of protected rights, and the instrument identifies a special legal status for those protected rights. The HRPSA, for example, falls short of being categorised as a 'bill of rights' as it does not grant rights a legal status.

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4 Although supporters of a national bill of rights for Australia do not think that the *HRPSA* is the end of the story for rights protection initiatives in Australia. See, eg, George Williams, 'The Future of the Australian bill of Rights Debate' (2010) 39 *University of New South Wales Faculty of Law Research Series* <http://www.austlii.edu.au/au/journals/UNSWLRS/2010/39.html>

5 The terminology is often difficult to follow – both 'bill of rights' and 'charter of rights' (as well as other terms like 'Human Rights Act') are used to describe instruments of various legal status and reflecting different forms of rights-protection.

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

The adoption of a bill of rights represents a commitment to a particular form of rights protection within a jurisdiction and provides the touchstone for engagement with rights. Certainly other forms of protections can, and often do, exist within a jurisdiction, notwithstanding the existence (or lack) of a bill of rights.[7] However, the introduction of a bill of rights signals a coherent approach in the protection of rights within a jurisdiction and represents a centralised standard against which the actions of legislatures (and other actors) can be measured.

Legal protections are those which involve a judicial consideration of the rights-compatibility of legislation. Legal protections may be viewed as operating along a spectrum of protection. At one end of the spectrum is what Mark Tushnet has termed 'strong-form' judicial review[8] – where courts are given the 'final word' on the rights-compatibility of legislation, and legislation which does not meet the standard will be invalid. The best known example of this form of protection is associated with the US *Bill of Rights*.[9] This form of protection is also found with regard to those (admittedly few) rights within the *Australian Constitution*.[10]

'Weak-form' judicial review gives the court a role in identifying rights-compatibility but the 'final word' as to the validity of legislation is reserved to the legislature. This paper further distinguishes between the two main types of 'weak-form' judicial review based on the legal status of the relevant instrument – constitutional or legislative.[11] Weak-form judicial review (constitutional) allows for courts to find rights-incompatible legislation invalid but also allows reserves to the legislature to specifically override the judicial decision and re-enact the legislation despite the judicially identified incompatibility. This is the form of protection associated with the *Canadian Charter of Rights and Freedoms* (Canadian Charter)[12] with the s 33 'notwithstanding clause'.

Alternatively, weak-form judicial review (legislative) is the form of protection found, for example, in the UK's *Human Rights Act* (HRA),[13] the Victorian *Charter of Rights and Responsibilities*[14] and New Zealand's *Bill of Rights Act.*[15] A strong interpretative obligation is imposed on the courts to interpret legislation in a rights-compatible

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7 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, 17-9.

8 See, eg, 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>.

9 *United States Constitution*, amend I – X ('*US Bill of Rights*')

10 For discussion of Australia's constitutional rights see, eg, 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.

11 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.

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

13 *Human Rights Act 1998* (UK) c 42 ('*HRA*').

14 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

15 *New Zealand Bill of Rights Act 1990* (NZ)

manner. 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.

At the far end of the spectrum is the fourth form of legal protection – that found in Australia – which are common law rights and the principles of interpretation that consist of rebuttable presumptions regarding the legislature's intent not to enact rights-incompatible legislation. Generally not associated with a bill of rights, these principles are a comparably weak form of judicial review and 'may perhaps not deserve the name of [judicial] review at all.'[16]

On the other hand, what this paper describes as 'political protections' are those that place the obligation for fundamental rights protection on the legislature and/or executive – the political branches of government. The nature of political protections is that they are primarily procedural requirements to 'give consideration to' or 'make statements regarding' rights-quality of proposed legislation. These political protections fall short of an obligation not to breach fundamental rights and, to a large extent, allow legislatures the authority to pass or not to pass rights-infringing legislation (albeit where there is a constitutional bill of rights this falls outside the legislature's authority) and to devote attention only to the potential rights-consequences of proposed legislation.[17] When considered in the absence of formalised legal protections, as is the case in Australia (where legal protections are not associated with a centralised bill of rights), there is greater need to ensure that the potential strengths of political protections are maximised.

There are two main forms of political protections against the legislative encroachment of rights that should be considered in this context: firstly, the requirement that the executive certify a Bill as to its rights-compatibility; and secondly, 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 were to become law.[18]

II STRENGTHS OF LEGAL PROTECTION

Although it is the weaknesses of legal protections that give rise to a role for political protections, it is necessary to acknowledge the strengths associated with legal

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16 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>, 7.

17 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.

18 There are other forms of political protection available. For example, the introduction of commissions tasked with reporting of the effectiveness of rights-protection within a jurisdiction, the development of education programmes or the creation of specialised agencies responsible for advising on rights-based issues. See, eg, 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 - 9.

protections, as it is those strengths which jurisdictions attempt to harness when they adopt a bill of rights. There are three core strengths associated with legal protections:

(i) The availability of a mechanism when a court determines that legislation is incompatible with fundamental rights.

(ii) The empowerment of the court to provide an authoritative interpretation of contested and controversial rights.

(iii) The creation of a forum (the court) to which individuals whose rights have been violated can have recourse.

Invalidity of legislation is the consequence of a judicial determination of incompatibility under both strong-form judicial review and weak-form judicial review (constitutional).[19] It is ostensibly the strongest form of protection against legislative encroachment against rights. While weak-form judicial review (constitutional) does include an 'exception' to this general rule in the event of legislative use of a 'notwithstanding clause' (specifically, the Canadian model), the strong statement that the legislation is *constitutionally* illegitimate creates a bulwark against legislative encroachment.

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.[20] 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 a sympathetic judiciary – something which leans dangerously towards judicial activism rather than the objective judicial analysis that the constitutional protection is intended to offer.[21] 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. Judicial review, therefore, ought to be considered as a 'safety mechanism.' This is explained by Aileen Kavanagh, who states:

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19 The 'exception' to this general rule in the event of legislative use of a 'notwithstanding clause' is found in weak-form judicial review (constitutional) explained below. It should be noted that the utilisation of s 33 of the *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.

20 Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 221.

21 For consideration of how judicial activism (real or perceived) influences the rights debate see eg. James Allan, "Do the Right Thing' Judging? The High Court of Australia in *Al-Kateb*' (2005) 24 *University of Queensland Law Journal* 1; 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.

> 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 people should be treated as responsible moral agents, and still provide safety mechanisms.[22]

Thus the forms of judicial review that constitutional bills of rights create are a safeguard for rights and they step in to invalidate legislation only where the legislature has 'got it wrong'.

In weak-form (legislative) systems, the courts lack the authority to find rights-incompatible legislation invalid. Derived from a legislative instrument rather than a constitutional bill of rights, weak-form (legislative) protections result in courts in these jurisdictions not being able to offer the same 'barrier' against rights-incompatible legislation. Instead, courts may make a 'declaration of incompatibility' (in the language of the UK's HRA), which operates as a more-or-less political pressure on the legislature of the day to amend such rights-incompatible legislation.

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[23] – 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.[24] 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 extent that no rights-compatible interpretation is possible, the legal protection has reached its limit. Where principles of interpretation are the primary legal protection it would be misleading to suggest that the *protection* is of the same standard as under weak-form judicial review. Any comment on its incompatibility is confined to the *obiter dicta*. Additionally, 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

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22 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 - 77.

23 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 detail in this article, but can be considered a form of political protection arising from the legal protection.

24 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 legislation that is consistent with the legislative purpose.

language of the statute restrict the relevance of fundamental rights to the interpretative process and consequently limit the standard of protection offered.

The second 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.[25] While it is appropriate (and desirable) for a legislature to involve itself in debates about rights, the court is more appropriate in offering 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, it is entirely *inappropriate* to expect the 'public' (by way of the legislature) to provide that answer: 'Any plausible theory of rights needs to acknowledge a gap between what rights the public believes we have and what rights we have.'[26]

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 beyond merely immunising decisions regarding the meaning of rights against political pressures. Not only is the legislature limited in its ability to protect rights due to political pressures but '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 often ill informed[27] – opinions about the meaning of rights. This does not imply that the courts will necessarily produce a decision that is uncontroversial.

The third strength associated with bills of rights is that by creating a legal protection, the court is secured as a forum in which individuals may challenge legislative acts as to their compatibility with fundamental rights. Mac Darrow and Philip Alston point to legal protections as empowering disadvantaged groups:

> 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.[28]

In this way, the strength is not merely 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 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.[29]

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25 Michael J Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts' (2003) 38 *Wake Forest Law Review* 635.

26 Alon Harel, 'Rights-Based Judicial Review: A Democratic Justification' (2003) 22(4) *Law and Philosophy* 247, 259.

27 Ibid.

28 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.

29 A. Wayne MacKay, 'The Legislature, the Executive and the Courts: The Delicate Balance of

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.[30] When viewed against this backdrop of an imperfect political system, legal protections may be conceived of 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.

III WEAKNESS OF LEGAL PROTECTIONS

If the above strengths point to a rather rosy picture of legal protections, it must be remembered that with every rose come thorns. Legal protections come with various weaknesses that threaten the legitimacy of the protections and lead to questions as to whether the benefits are worth the costs. The weaknesses can also be divided into three broad categories:

(i) The politicisation of the judiciary;
(ii) The limitations of the judiciary as a mechanism for the *protection* of rights; and
(iii) The undemocratic nature of the courts.

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. Defining rights is an ongoing task and the meaning of particular rights, the appropriate balance between rights and determinations as to whether or not legislative action constitutes an undue limitation of rights are all 'works in progress'.[31] As John D. Whyte has stated: '[W]hat were once political problems have been transformed into legal problems.'[32] While the availability of an authoritative 'legal' answer on these questions may be useful when faced with a particular problem, it is at least controversial to say that the courts are best placed to resolve what are highly political debates. Thus, what was identified in Part 2 as a 'strength' of the legal protections, 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,[33] and whether the

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Power or Who is Running this Country Anyway?' (2001) 24 *Dalhousie Law Journal* 37, 43 – 5.

30 Darrow and Alston, above n 29, 500-501.

31 See eg, the description of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* as a 'living instrument', the rights within it to be interpreted in light of changing conditions of the day. *Tyrer v. United Kingdom*, (Appl No.5856/72) Judgment of 25 April 1978, Series A no. 26, para 31.

32 John D Whyte, 'On Not Standing for Notwithstanding' (1990) 28 *Alberta Law Review* 347, 351.

33 *Rodriguez v. British Columbia (A.G.)* [1993] 3 SCR 519. In this case, a patient with Lou

regulation of abortion is a legitimate limitation of *Canadian Charter* rights.[34] Issues such as these become 'legalised'. 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.[35] 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.[36]

Even where the legislature retains the ability to do so, legislative rejection of judicial decisions is not undertaken lightly.[37] Weak-form judicial review seeks 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. It is important to note, however, that weak-form judicial review jurisdictions ultimately rely on a *political* rather than *legal* protection – the presumption is that the political mechanisms will act to deter legislatures from acting in a manner incompatible with rights and rejection of the judicial decision will be *politically* unpalatable except in extraordinary situations.

The second weakness associated with legal protections, deriving from the shifting of rights discourse from the political to the legal sphere, is the merging of the standards of 'rights-protection' and 'rights-compatibility'. The judicial determination of 'compatibility' grants the aura of legitimacy to legislative programs – potentially shielding them from further political debate or scrutiny – regardless of whether or not alternative programs would *better* protect rights, as opposed to merely not violating rights.[38]

It is certainly not to be suggested that the judiciary *should* be making decisions as to what is the best possible standard of protection. 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 types of protection relating to a standard of compatible/incompatible. This in itself is limiting if the goal of introducing a bill of rights is to better protect rights within the

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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).

34 *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.

35 Lord McCluskey, 'Parliament and the Judges - A Constitutional Challenge' Lecture on 8th July 1996 at the Saddlers Hall. Cited in Michael Zander, *A Bill of Rights* (Sweet and Maxwell, 4th ed, 1997) 104.

36 Jeremy Kirk, 'Rights, Restraint and Reasons for Restraint' (2001) 23 *Sydney Law Review* 19, 25.

37 Francis Bennion, 'Human Rights: A Threat to Law?' (2003) 26(2) *University of New South Wales Law Journal* 418.

38 See for analysis of the Canadian experience, Michael Mandel, *The Charter of Rights and the legalization of politics in Canada* (Wall & Thompson, 1989) 61-3.

jurisdiction. By emphasising the judicial role as 'protector of rights' there is the possibility that a bipolar view of rights (infringed or not infringed) will become the norm. Judicial interpretations of rights therefore have the potential to replace legitimate political debate – as Michael Mandel calls it, the 'depoliticisation' of politics.[39] 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. In this sense, legal protections risk merging 'legal' or 'rights-compatible' with 'good' policy and may in fact stifle legislative consideration of rights beyond the compatibility of legislation.[40]

In addition, the weakness of legal protections can be further evidenced given the judiciary can (generally) only consider questions as to compatibility of legislation with fundamental rights *after* there has been an alleged infringement of rights[41] 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.[42] Again, this is not a suggestion that the judiciary *should* engage in pre-enactment or pre-entry-into-force scrutiny of legislation – that brings its own set of challenges. It is merely a comment that an assessment of the use of the courts to protect rights must recognise the limitations of the institution being given such responsibility.

The final critique of legal protections is based on a traditional understanding of the roles of the legislature and the 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 argument that bills of rights are necessarily undemocratic is hardly revolutionary.[43] The democratic challenge to legal protections

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39 Ibid.

40 Ibid.

41 In some jurisdictions, there is some allowance for the referral of questions to a constitutional (or similar) court prior to the enactment of legislation.

42 Much of the commentary on undue delay and the lengthy process of rights litigation is in regards to the European Court of Human Rights which requires that all local remedies be exhausted before recourse is made to the European Court mechanisms. The problem of the length of time – extending to several years - that it took victims of rights-infringements to navigate domestic human rights remedies became a concern because the increased case load of the European Court (as citizens became more aware of their rights and the availability of European remedies) led to additional delays. Thus while the commentary is focused on reform of the processes of the European Court, it necessarily considers the lengthy processes involved in 'start to finish' rights litigation in domestic jurisdictions. See for discussion and examples Costas Paraskeva, 'Reforming the European Court of Human Rights: An Ongoing Challenge' (2007) 76(2/3) *Nordic Journal of International Law* 185.

43 See eg Jeffrey Goldsworthy, 'Judicial Review, Legislative Override, and Democracy' in Tom

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. The result is 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.'[44]

Courts are limited in their ability to consider the wide range of potential perspectives about rights, and the reasonableness or necessity of the impact of legislation on those rights.[45] Mandel suggests that in practice courts are faced with considering the arguments of whichever interest group brings the constitutional challenge.[46] Even supporters of bills of rights acknowledge that 'constitutional litigation [is] an important tool used by interest groups to advance their political ends.'[47] Mandel suggests that far from facilitating a more effective and inclusive democracy, judicial review accentuates particular interests – interests of '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.[48] Similarly, David Kennedy points to the potential risks of formalising rights as individual legal entitlements to be pursued through the courts which has the potential of '[making] other forms of collective emancipatory politics less available.'[49]

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

44 See, eg, John Moeller, 'Alexander M. Bickel : Toward a Theory of Politics' (1985) 47(1) *Journal of Politics* 113.

45 There have been mechanisms introduced to try to mitigate this effect, and to provide courts with wider perspectives than limiting the considerations in understanding rights issues to the adversarial 'victim'/'government'. For example, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is given authority under s. 40 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) to intervene in proceedings in which a *Charter* issue arises. This type of mechanism is beyond the scope of this paper, but is an interesting way of providing an *additional* and rights-focused point of view within the scope of legal protections. A list of cases in which the VEOHRC has intervened as well as the submissions made to the court can be found at: <http://www.victorianhumanrightscommission.com>. Outside the context of a formalised bill of rights, the Australian Human Rights Commission (formally Human Rights and Equal Opportunities Commission) has a similar intervention mandate. See for discussion 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.

46 Michael Mandel, *The Charter of Rights and the legalization of politics in Canada* (Wall & Thompson, 1989) 61-3.

47 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.

48 Michael Mandel, *The Charter of Rights and the legalization of politics in Canada* (Wall & Thompson, 1989) 61-3.

49 Kennedy's comments should be put in the context of his overall aim to highlight to potential difficulties associated with the human rights movement and to encourage 'a more open conversation' about the future of the rights movement rather than as a criticism of judicial review in the same vein as Mandel. David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) *Harvard Human Rights Journal* 101, 123.

In the same vein, Jeremy Waldron has emphasised 'the importance of democratic participation.'[50] The 'judicial supremacy'[51] created by a bill of rights (whether constitutional or legislative), implies that the legislature (and by implication 'the majority') cannot be trusted with decisions that involve rights. Rather than political power, the right to participate has been diluted from having a say (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.[52]

The potentially limiting nature of the judicial role is perhaps overstated here, but deliberately so. While the introduction of a bill of rights *may* shift political discourse on rights to the courts, it also *may not.*[53] The important point is that balance between legal-decision making on questions of rights and robust, multi-faceted debate in the political arena about what rights mean and how to protect them is not guaranteed by the judicial mechanism alone and is indeed put at risk. Without complementary measures, 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 these concerns about the limits of judicial review as an indication of why the lack of democratic mandate may be considered a weakness of judicial review. This is not merely because of a 'majoritarian' argument but because of the nature of rights discourse.

However, it is a weakness that need not be taken to undermine the potential value of judicial review. That is, 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.

However, while Mandel and Waldron question the overall legitimacy of judicial review as a form of rights-protection within a democratic polity, this is not a universally held position. At the very least, 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 – or at least that the strengths of the protection outweigh the costs. There are, broadly speaking, two broad explanations as to the wide-spread implementation of legal protections and some form of judicial review within modern legal systems which also feature a commitment to democratic governance. The first position concludes that judicial review is undemocratic, but holds both that it is desirable and that these desirable qualities (often) result in popular support. Consequently, judicial review is

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50 Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13(1) *Oxford Journal of Legal Studies* 18, 42.

51 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.

52 Ibid.

53 Ibid.

legitimate *despite* its undemocratic nature. The second position is that judicial review is not undemocratic at all:

> 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].[54]

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.[55]

IV POLITICAL PROTECTIONS

Despite the weaknesses of legal protections, bills of rights of various legal statuses have *in fact* been adopted by most jurisdictions. In effect this is enshrining the access-based view of the right to participate within each jurisdiction. The question then arises: Is it possible to achieve the strengths of legal protections without the costs? The answer – to an extent – lies in political protections. Recognition of this can be seen in the development of legislative bills of rights such as the UK's HRA which includes both weak-form judicial review (legislative) legal protections and associated political protections. However, more broadly speaking, political protections have an important role *regardless* of which form of legal protection is found in a particular jurisdiction and ought to be considered as important in interacting with legal protections so as to mitigate or decrease the potential realisation of the weaknesses.

When viewed in isolation, political protections have weaknesses of their own. Notably, political protections provide no conclusive remedy where rights are breached and they rely on imperfect political processes and politicians lacking in expertise about rights to offer the 'guarantee' of rights. They rely on political processes which, as raised above, do not always prioritise the rights of the minorities and in which individual victims of rights violations may never be able to have their voice heard. Even with the best intentions, politics is subject to pressures and influences to which the courts are not, and thus it does not offer the same independent oversight that judicial review can.[56]

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54 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.

55 There are extensive theoretical discussions as to the relationship between rights and democracy. For a concise discussion see Denise Meyerson, *Jurisprudence* (Oxford University Press, 2010).

56 For a more extensive discussion including practical examples of how political protections in Australia (prior to the *HRPSA)* outside the context of legal protections have faltered in securing rights see Edward Santow, Gilbert + Tobin Centre of Public Law, Submission 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]*, July 2010 available at <http://www.humanrightsconsultation.gov.au/PublicHearings/Documents/Edward_Santow_Submission.pdf> in particular pp 36 – 9.

However, the weaknesses of political protections alone have been extensively discussed by others,[57] particularly in light of the decision in Australia *not* to introduce a bill of rights and to instead focus on political protections in the form of a re-vamped scrutiny committee and the requirement of executive certification of bills. As will be seen, the strengths of political protections roughly align with the weaknesses of legal protections and thus, when appropriately designed, may provide a mechanism by which the weaknesses of legal protections are mitigated. 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[58] – 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.[59]

This explains 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 (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.

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57 See, eg, Fergal Davis, Submission No 26 to Senate Legal and Constitutional Affairs Committee, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions]*, July 2010 available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/human_rights_bills_43/submissions.htm> in particular pp 1-4. See also Andrew Byrnes, 'The protection of human rights in NSW through the Parliamentary process - a review of the recent performance of the NSW Parliament's Legislation Review Committee' (2009) 43 *University of New South Wales Faculty of Law Research Series* available at <http://www.austlii.edu.au/au/journals/UNSWLRS/2009/43.html>; Santow, above n 57; the extensive submissions available at *National Human Rights Consultation* <http://www.humanrightsconsultation.gov.au/>.

58 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, 332-33.

59 Ibid.

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'[60] 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. Political protections specifically allow for 'majority' decision-making (or at least decision-making via representative democratic institutions) to retain primacy.[61]

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 the law-making process. Fundamental rights are inherently controversial and political protections are intended to encourage the consideration of a range of perspectives about rights, the rights-implications of legislation and how competing rights ought to be balanced as well as the line between legitimate and illegitimate limitations on rights.[62]

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 as part of the committee process to the less direct but potentially more important expression of approval/disapproval at the ballot box.[63]

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 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 seek to capitalise on a popular distaste for the violation of fundamental rights as well as

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60 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.

61 Campbell, above n 59, 332-33.

62 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>.

63 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.

relying on politicians having a vested interest – via the ballot box – in the legislation they support.[64]

Executive certification models of rights-protection generally require that Ministers take *personal* responsibility for the rights-compatibility of Bills. 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. Executive statements, therefore, act as a way of introducing rights-based issues into Parliament and, by implication, into the public awareness. Ministers whose statements of compatibility are questionable can face damaging (or embarrassing) questions.[65]

In addition, 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.[66] This is why there were calls for the HRPSA to include a requirement of a thorough explanation of the basis on which the executive statement was made – so as to discourage the executive statement becoming merely a rote statement.[67] Of course, where the legislature is dominated by those with close political alliances with the 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 or for the statement alone being sufficient to generate meaningful debate about rights within the legislature.[68]

By contrast, scrutiny committees within the legislature are comprised of 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. 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 opinions, via its legislative representatives, are genuinely represented in the debate about fundamental rights.

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64 David Kinley, 'Parliamentary Scrutiny: Duty Neglected?' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Clarendon Press, 1999) 158, 160.

65 Michael Ryle, 'Pre-legislative Scrutiny: A Prophylactic Approach to Protection of Human Rights' (1994) (2) *Public Law* 192.

66 Ibid.

67 See especially Julie Debeljak, Submission 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 available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/human_rights_bills_43/submissions.htm>.

68 See, eg, the discussions in the UK Parliament following the executive statements in of the anti-terrorism legislation. Discussed in David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (2002) *Public Law* 323, 341.

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 an evolving and ongoing process which ought to 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 programs – 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.'[69] Rights are, according to Jeremy Webber, 'injected…into the very process of legislative drafting and enactment.'[70] 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.

Some wariness must be expressed at these big claims. Political protections should not be seen as an immediate cure for deficits in the rights-quality of legislation. Formalised political protections cannot *impose* a 'culture of fundamental rights' or force robust assessment and publication of rights implications of Bills.[71] 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.[72]

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69 George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (University of New South Wales Press Ltd, 2004), 84-5.

70 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) 266.

71 As an example, see the technical interpretation of the *HRPSA* which saw the Federal Government responsible for the *HRPSA* decide not to include a statement of compatibility within the legislation for offshore processing of asylum seekers – an issue with undeniable human rights implications – on the basis that the Bill was introduced prior to the entry into force of the *HRPSA* and the August 2012 Bill was merely amending the original Bill rather than introducing a new instrument. See eg, Chris Merrit 'Government accused of skirting own rights legislation' *The Australian* (online) 24 August 2012,<http://www.theaustralian.com.au/business/legal-affairs/government-accused-of-skirting-own-rights-legislation/story-e6frg97x-1226457002654>.

72 Ryle, above n 66, 195.

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.'[73]

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,[74] 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 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 programs.

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.[75] 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.[76] This in turn increases the likelihood that a more rights-aware citizenry will place ballot-box pressure on a rights-infringing legislature.

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.[77] The intended

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73 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.

74 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'.

75 George Williams, *A Bill of Rights for Australia* (UNSW Press, 2000) 46.

76 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) *Statute Law Rev* 91.

77 Michael Ryle, 'Pre-legislative Scrutiny: A Prophylactic Approach to Protection of Human

consequence of political protections is to improve the quality of legislation with respect to fundamental rights. Subjecting legislative proposals to executive scrutiny prior to presentation to the legislature, 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 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. [78]

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.[79] Other jurisdictions have similar 'preventative' measures which include a judicial mechanism within the context of legislative enactment – most notably the *Conseil Constitutionnel* in France.[80]

Rainer Knopff and F L Morton have discussed both the usefulness and dangers of relying on the reference procedure as a means of protecting rights at the stage prior to the enactment of legislation.[81] 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 compatibility or incompatibility. 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.[82]

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

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Rights' (1994) (2) *Public Law* 192.

78 Ibid.

79 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*'), art 218(11).

80 F. L. Morton, 'Judicial Review in France: A Comparative Analysis' (1988) 36(1) *American Journal of Comparative Law* 89.

81 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.

82 Ibid.

judiciary – particularly when judicial decisions seem consistently to favour minority political challenges to majority policies or approaches to rights.[83]

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.[84] 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.[85]

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.

V INTERACTIONS OF LEGAL AND POLITICAL PROTECTIONS

Political protections can, and should, be used to complement legal protections – regardless of what form the legal protections take. The strengths of political protections align well 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 the executive are elected and have a democratic legitimacy that the courts lack. They are therefore better placed to consider a wide range of opinions about rights in the context of scrutinising proposed legislation. 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. 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

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83 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 discrepancy. Morton, above n 81, 98.

84 Knopff and Morton, above n 82, 30-3.

85 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, above n 82, 30-3.

limitations of the legal protections. It is helpful here to point to examples of existing mechanisms so as to demonstrate that it is necessary to give as much consideration to the form and structure of a political protection that exists to complement a legal protection as it is to the legal protection itself.

A *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 invalid legislation). Thirdly, it can provide the impetus for greater legislative debate about rights.

Nevertheless, the experiences of Canada and the UK raise some concerns about relying exclusively or primarily on the executive certification model. In these jurisdictions, the executive statement has been the focus of formalised protections associated with a legislative instrument leading to a formalised procedure. Other, supplementary political protections have 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 *Department of Justice Act* (DJA)[86] political protection requires that the Minister for Justice consider Bills and report any rights-inconsistencies to the Parliament. As a political mechanism to mitigate the potential weaknesses of the weak-form judicial review (constitutional), the DJA has some flaws. Under the DJA, 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.[87] It is limiting the discourse 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.[88] 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. The reason is that the DJA only requires a statement where the Minister of Justice is unable to commit to the rights-compatibility

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

87 For discussion, see the work of Janet Hiebert on this matter. See, eg, 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.

88 Patrick J. Monahan and Marie Finklestein, 'Charter of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501, 510.

of a Bill. While this may allow development of a greater body of knowledge about rights within the Department of Justice itself,[89] 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 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 declaration of incompatibility or where the legislation is found to be invalid) or where fundamental rights concerns are raised after a breach of rights appears to have occurred, there is, in the first instance, a degree of individual accountability, either to parliament or the public, imposed on the individual proposing the law and making the statement. In the second instance, that 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 a centralised process of certification, such as by the Minister of Justice (as in Canada), 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. While this would, in principle, work in (for example) Australia and the UK, which have traditionally had the executive formed from a majority party in the legislature, the formation of coalition governments in both suggests that this form of mechanism relies on an increasingly unreliable status quo rather than prompting political pressure at large.

Finally, the executive focus on a 'compatibility' certification fails to overcome the compatibility/incompatibility dichotomy associated with legal protections. This focus on compatibility rather than protection may in fact be emphasised by an executive approach to certification which decides if 'the Bill would stand up to a [bill of rights]-based challenge' in the courts as the standard for identifying compatibility.[90]

One feature of the UK's HRA political protection which may increase the likelihood of wider consideration than merely 'compatibility' is the need to make a compatibility statement to Parliament with respect to *every* Bill. This may be either in the form of a s 19(1)(a) statement of compatibility, or a s 19(1)(b) statement that the Minister is unable to make such a statement of compatibility. 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 executive). While the language of compatibility

89 Ibid.

90 Michael Mandel, *The Charter of Rights and the legalization of politics in Canada* (Wall & Thompson, 1989) 61-63. This is also the standard used in generating the UK statements of compatibility. See, eg, Home Office, *'The Human Rights Act 1998 Guidance for Departments'* (February 2000) <http://www.nationalarchives.gov.uk/ EORecords/HO/421/2/ hract/ guidance.htm>.

remains, the availability of a challenge to that claim may lead to a more comprehensive consideration of rights-implications.

In addition, where a '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, s 19(1)(b) statements acknowledge the possibility of incompatibility at this early stage, reflecting the diversity of positions and the 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 – whether positive (s 19(1)(a)) or wavering (s 19(1)(b)) – 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 are expected 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.

An interesting development in political protection can be seen in the executive certification model adopted by the European Union (EU). Although there are challenges unique to the EU (especially the lack of electoral pressure on the unelected Commission as the 'executive'), the Commission procedures have sought to overcome other criticisms usually associated with the executive model. For example, the Commission rights-certification procedures include a requirement that where there are specific rights which may be affected by the proposed legislation, the certification (termed 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.[91] Despite recommendations during the consultation process,[92] the HRPSA in Australia did not explicitly include the requirement of reasons or justification for the 'assessment' of rights-compatibility in the executive statement. However, in the Explanatory Memorandum accompanying the Bill, the

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91 European Commission, *Application of the Charter of Fundamental Rights of the European Union* (Communication) SEC(2001) 380/3; European Union Committee (UK), *Human Rights Proofing EU Legislation*, House of Lords Paper No 67, Session 2005-6 (2005).

92 See Debeljak, above n 68.

then Attorney General Robert McClelland said that the statements of compatibility are 'intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights.'[93] The extent of this analysis is yet to be seen.

What is apparent 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 'compatibility' to the 'rights-quality' of legislation. There is no guarantee that it will do so. The development of broader scrutiny within political protections is thus important if the weaknesses of legal protections are to be addressed.

B *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 because, when viewed in this manner, the two forms of political protection interact to offer a more comprehensive political mechanism which operates to mitigate some of the weaknesses associated with the legal protections.

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 on whether rights-infringing legislation is passed. 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 a specific rights instrument.[94] The HRPSA retains this prominent role for legislative scrutiny at ss 4-7.

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93 Explanatory Memoranda, *Human Rights (Parliamentary Scrutiny) Bill 2010*, 4.

94 See, eg, 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; Cheryl Saunders, 'Protecting Rights in Common Law Constitutional Systems;

The HRPSA creates an Australian Joint Committee on Human Rights (Australian JCHR) which includes members of both Houses of Parliament (not only the Senate, as was the case for pre-HRPSA scrutiny). Submissions to and recommendations by the Senate Law and Constitutional Affairs Committee during the scrutiny process of the HRPSA point out that, particularly in light of the absence of comprehensive legal protections, the need for robust political scrutiny is substantially increased to better facilitate review in line with the expected standards.[95] 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 mere 'consideration' of rights, rather than protection.

In Australia, the creation of the Australian JCHR has been a deliberate move as part of the 2011 reforms. Whereas previously the Senate Standing Committee on the Scrutiny of Bills (SSCSB) had responsibility for rights-based scrutiny, the Australian JCHR is specifically tasked with scrutinising bills as to compatibility with rights. Similarly, specialised rights-based committees have been established in the UK and 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 is undertaken.

Another benefit of scrutiny committees is their ability to examine Bills beyond simply the requirement of 'compatibility' and consequently to raise legislative awareness about the rights-implications of Bills.[96] 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.[97] 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.

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a Framework for a Comparative Study' (2002) 33(3/4) *Victoria University of Wellington Law Review* 507.

95 See, eg, Santow, above n 57.

96 The role of the JCHR has been discussed extensively. See, eg, 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.

97 Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29(3) *Melbourne University Law Review* 665.

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[98] keeps the mechanism as a 'secondary' or 'subsidiary' protection rather than genuinely operating to complement and overcome the weaknesses of weak-form judicial review (constitutional) in Canada. Consequently, in order to better achieve those features of political 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.

V CONCLUSIONS

While this has been a brief introduction to the issues relating to the interaction of legal and political protections of rights, it should already be clear why political protections warrant a more robust consideration within the context of the bill of rights debate. Whatever the legal protection adopted by a jurisdiction, the form and nature of the legal protection will contain inherent weaknesses. Whether this is an ostensibly 'weaker' legal protection due to the lack of a bill of rights or a 'strong' barrier against legislative encroachment of rights in strong-form judicial review, the legal protection will have particular features which may be seen as 'weaknesses'. Political protections have the *potential* to mitigate the effects of these weaknesses, when designed appropriately and formulated as a fundamental part of rights-protection, as opposed to an *ad hoc* mechanism designed to facilitate better compliance with (potential) judicial decisions about rights. If the aim of both political and legal protections, beyond simply 'protecting rights against legislative encroachment', is considered to be protection within a framework of democratic discourse – to create a 'culture' of fundamental rights' – it is suggested that the requirements for weakness-mitigating political protection remain similar even though the form of legal protection may differ. The political protection must:

(i) require that rights-certification of *every* Bill is undertaken (for example, via an executive statement) and that certification should include or be accompanied by an explanation as to how the rights-compatibility was determined (*or* highlight any specific rights-incompatibility/rights-based concerns that prevent certification);

(ii) 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;

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98 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.

(iii) encourage scrutiny of legislation beyond 'compatibility' with rights and bring to light the rights-implications of legislation; and

(iv) 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 – political protections ultimately rely on sufficient democratic pressure within the jurisdiction to generate criticism of those politicians who breach rights. Further, since some objections to legal protections stem from deep-seated philosophical and political beliefs about the appropriate roles of the judiciary and the legislature, these weaknesses will never be overcome in the eyes of some observers (short of altogether removing the possibility of rights-based judicial review). On the other hand, 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 protections become apparent and rights-infringing legislation unintentionally makes it through the process – is maintained.

The adoption (or rejection) of a bill of rights – whatever its legal status – is a significant step for any jurisdiction. However, 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. Therefore 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 act as a bulwark against infringements, they push rights into the forefront of political debate where legal protections are 'weak', 'unclear' or otherwise lacking in strength, thereby discouraging (or at least holding law-makers answerable for) legislative encroachments that may otherwise have slipped through the cracks.