# Beyond the Courts:
# Rethinking Charter Review to Foster Effective and Sustainable Rights Protection in Federal Lawmaking

Stéphanie Pepin
Doctor of Civil Law

Faculty of Law

McGill University
Montréal, Québec

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# Abstract

Four decades after adopting the Canadian Charter of Rights and Freedoms (the "Charter"), its effectiveness in improving the living conditions of marginalized and vulnerable communities has fallen short. This thesis explores how the institutional frameworks surrounding the Charter can facilitate the effective and sustainable protection of Charter rights. More precisely, it examines how pre-enactment review – that is, the rights review done during lawmaking to assess the Charter compatibility of bills – could assist in limiting the enactment of legislation infringing on the rights of marginalized groups.

Departing from the prevailing court-centric approach to rights protection, the author emphasizes the need for a more active role for lawmakers in rights review. This role requires the presence of institutional mechanisms that compel lawmakers to thoroughly assess the Charter compatibility of bills and encourage them to rectify infringements before they are enacted into law. Principles of good governance can guide in designing such mechanisms of rights review, creating an institutional framework for pre-enactment review that fosters effective and sustainable rights protection in federal lawmaking.

In this context, the author undertakes a critical analysis of the current federal mechanisms of rights review, shedding light on deficiencies and limitations that could impede the protection of Charter rights, particularly for marginalized groups. To address these concerns, she introduces two institutions of rights review with the potential to strengthen federal lawmakers' ability to carry out robust Charter review: a human rights institution advising the government on the broader societal implications of legislative proposals and a joint parliamentary committee of rights review scrutinizing the bills introduced for adoption by the government.

# Résumé

Quatre décennies après son adoption, la Charte canadienne des droits et libertés (la « Charte canadienne ») continue de se révéler insuffisante pour améliorer les conditions de vie des communautés marginalisées et vulnérables. Cette thèse examine comment le contrôle constitutionnel législatif – c'est-à-dire, l'examen effectué par le législateur lors de l'élaboration des projets de lois pour évaluer leur compatibilité avec la Charte canadienne – pourrait limiter l'adoption de lois portant atteinte aux droits des groupes marginalisés.

Cette thèse s'éloigne de l'approche légaliste qui prévaut en matière de protection des droits et qui attribue aux tribunaux la principale responsabilité de donner effet aux droits garantis par la Charte canadienne. L'auteure soutient plutôt que la protection de ces droits requiert que le gouvernement et le Parlement participent activement au contrôle constitutionnel des lois dans le cadre de leurs fonctions législatives. Ce rôle nécessite la présence de mécanismes institutionnels qui contraignent les législateurs à examiner la compatibilité des projets de loi à la Charte canadienne et les encouragent à corriger les atteintes aux droits avant leur entrée en vigueur. Les principes de bonne gouvernance peuvent guider la conception de tels mécanismes de contrôle constitutionnel et permettre la mise en place d'un cadre institutionnel propice à une protection efficace et durable des droits garantis par la Charte canadienne.

Dans ce contexte, l'auteure procède à une analyse critique des mécanismes fédéraux de contrôle constitutionnel législatif. Elle met en évidence leurs lacunes et limitations pour assurer la protection des droits garantis par la Charte canadienne, en particulier auprès des communautés marginalisées. Pour répondre à ces préoccupations, elle introduit deux institutions de contrôle constitutionnel pouvant permettre aux législateurs fédéraux de conduire un examen complet des implications des projets de loi sur la Charte canadienne: une institution nationale des droits humains conseillant le gouvernement sur les impacts socio-économiques des propositions législatives et un comité parlementaire mixte spécialisé en contrôle constitutionnel chargé de procéder à un examen minutieux des projets de loi introduits par le gouvernement.

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# List of Abbreviations

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| CAG: | Community Advisory Group |
| CDPDJ: | Commission des droits de la personne et des droits de la jeunesse (Québec) |
| CHRC: | Canadian Human Rights Commission |
| CNCDH: | Commission nationale consultative sur les droits humains (France) |
| CPC: | Conservative Party of Canada |
| ECHR: | European Convention on Human Rights |
| EHRC: | Equality and Human Rights Commission (UK) |
| GANHRI: | Global Alliance of National Human Rights Institutions |
| GBA: | Gender-based Analysis |
| GBA+: | Gender-based Analysis Plus |
| HRA: | Human Rights Act (UK) |
| HRLS: | Human Rights Law Sections |
| ICESCR: | International Covenant on Economic, Social and Cultural Rights |
| JCHR: | Joint Committee on Human Rights (UK) |
| LSUs: | Legal Services Units |
| NHRI: | National Human Rights Institutions |
| NPD: | New Democratic Party |
| OHCHR: | Office of the United Nations High Commissioner for Human Rights |
| OHRC: | Ontario Human Rights Commission |
| PJCHR: | Parliamentary Joint Committee on Human Rights (Australia) |
| SAHRC: | South Africa Human Rights Commission |

# Introduction

The recent 40th anniversary of the *Canadian Charter of Rights and Freedoms*[1] (the "Charter") brought much attention to this constitutional instrument's progress in reaching its promises of making Canada an equal and just society. Despite being at the root of several constitutional protections – including the recognition of same-sex marriage[2] and medical aid in dying[3], and the prohibition of discrimination based on sexual orientation[4] – constitutionalists and human rights scholars largely agree that the Charter has fallen short of its promises.[5]

Behind the Charter's perceived shortcomings is a failure to foster effective and sustainable protection of the rights it guarantees. Effective and sustainable protection of human rights, by definition, should provide short- and long-term benefits equally to all members of civil society. Yet, the Charter did not improve the living situation of the most marginalized and vulnerable, including low-income individuals, racial and gender minorities, Indigenous peoples, immigrants and people with disabilities.

Extensive scholarship focuses on the enduring socio-economic deprivations caused by systemic exclusions and discrimination despite the Charter.[6] The Charter's inability to achieve

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[1] *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c. 11.
[2] *Reference re Same-Sex Marriage*, [2004] 3 SCR 698 [*Reference re Same-Sex Marriage*].
[3] *Carter v Canada (Attorney General)*, [2015] 1 SCR 331 [*Carter*].
[4] *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*].
[5] See e.g., Brian Bird, "The Charter at Forty: The future of Canada's Charter", (25 May 2022), online: *The Hub* <https://thehub.ca/2022-05-25/brian-bird-the-charter-at-forty-the-future-of-canadas-charter/>; "Dean Mark Walters on the Charter at 40 | Queen's Law", online: <https://law.queensu.ca/news/Dean-Mark-Walters-on-the-Charter-at-40>; Mirja Trilsch, "The Charter at 40 – Who's still afraid of social rights?", (22 June 2022), online: *Centre for Human Rights & Legal Pluralism* <https://www.mcgill.ca/humanrights/article/charter-40-whos-still-afraid-social-rights>; Alexandra Dobrowolsky, "Mobilising Equality Through Canada's Constitution and Charter: Milestones, or Missed and Even Mistaken Opportunities?" in M Tremblay & J Everitt, eds, *The Palgrave Handbook on Gender, Sexuality, and Canadian Politics* (London: Springer, 2020) 123.
[6] See e.g., Christine Vézina, "Aide sociale et droits de la personne : regard sur la relation entre le législateur québécois et les tribunaux, ou la faille du constitutionnalisme" (2021) 51 Revue Générale de Droit 241; Martha Jackman, "Un pas en avant, deux pas en arrière : la pauvreté, la Charte canadienne des droits et libertés et l'héritage de l'affaire Gosselin c. Québec" (2020) 61:2 Les Cahiers de droit 427; Suzy Flader, "Fundamental Rights for All: Toward Equality as a Principle of Fundamental Justice under Section 7 of the Charter" (2020) 25 Appeal: Review of Current Law and Law Reform 43; Christine Vézina, "Culture juridique des droits de la personne et justiciabilité des droits économiques, sociaux et culturels : tendances à la Cour suprême du Canada" (2020) 61:2 Les Cahiers de droit 495; Christine Vézina & Margaux Gay, "Culture juridique des droits de la personne et justiciabilité des droits sociaux: nouvelles perspectives" (2020) 61:2 Les Cahiers de droit 277; David Landau & Rosalind Dixon, "Constitutional Non-Transformation? Socioeconomic Rights beyond the Poor" in Katherine G Young, ed, *The Future of Economic and Social Rights* (Cambridge: Cambridge University Press, 2019) 110; Colleen Sheppard, "Contester la discrimination systémique au Canada : Droit et changement organisationnel" (2018) 14 Revue des droits de l'homme 1; Martha

greater social justice is largely attributed to the prevalent notion that rights protection falls solely within the purview of courts, which, in turn, have often been hesitant to recognize and address the socio-economic dimensions of Charter rights.

Scholars have proposed a range of solutions to advance the protection of socio-economic rights in Canada, all of which hold value and significance.[7] Some have called for the explicit incorporation of socio-economic rights into the Charter.[8] Given the predominant place of the judiciary in rights protection, others have advocated for recognizing socio-economic rights through existing Charter rights[9] or for implementing international human rights standards in domestic law.[10]

In this thesis, I have opted to deploy an institutional lens on this problem to explore how the frameworks surrounding the Charter can facilitate or hinder effective and sustainable rights protection. Extensive literature confirms the impact of these institutional frameworks on inequalities.[11] By examining their influence on Charter protection, I aim to expand existing

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Jackman & Bruce Porter, "Social and Economic Rights" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook on the Canadian Constitution* (Oxford: Oxford University Press, 2017) 843; Colleen Sheppard, "'Bread and Roses': Economic Justice and Constitutional Rights" (2015) 5:1 Oñati Socio-legal Series 225; Bruce Porter & Martha Jackman, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014); Bruce Porter & Martha Jackman, "Rights-Based Strategies to Address Homelessness and Poverty in Canada: The Charter Framework" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014); Colleen Sheppard, "Inclusion, Voice, and Process-Based Constitutionalism" (2013) 50:3 Osgoode Hall Law Journal 547; Marie-Ève Sylvestre, "The Redistributive Potential of Section 7 of the Charter: Incorporating Socio-Economic Context in Criminal Law and in the Adjudication of Rights" (2012) 42 Ottawa Law Review 389.

[7] Many suggestions also pertain to matters that are not directly connected to the Charter or to bills of rights, including administrative frameworks or disparities within private systems. See e.g., Barbara Cameron, "Accountability Regimes for Federal Social Transfers: An Exercise in Deconstruction and Reconstruction" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014); Lorne Sossin & Andrea Hill, "Social Rights & Administrative Justice" in Bruce Porter & Martha Jackman, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014).

[8] Miriam Cohen & Martin-Olivier Dagenais, "The Implementation of Economic, Social and Cultural Rights in Canada: Between Utopia and Reality" (2021) 7:1 Constitutional Review 26 at 49. For an interesting discussion on constitutionalizing social rights, see Jeff King, *Judging Social Right* (Cambridge: Cambridge University Press, 2012).

[9] See e.g., Flader, *supra* note 6; Scott McAlpine, "More than Wishful Thinking: Recent Developments in Recognizing the Right to Housing under S 7 of the Charter" (2017) 38 Windsor Rev Legal Soc Issues 1; Bruce Porter & Martha Jackman, "Socio-Economic Rights Under the Canadian Charter" in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008).

[10] Se ee.g. Vézina, *supra* note 6 at 504; Porter & Jackman, *supra* note 9. Further, international human rights lawyer Alex Neve from the Institute for Research on Public Policy suggests creating a national framework for international human rights implementation: *Closing the Implementation Gap: Federalism and Respect for International Human Rights in Canada*, by Alex Neve, IRPP Study 90 (Montréal: Institute for Research on Public Policy, 2023) at 32.

[11] See e.g., Erica Rayment & Elizabeth McCallion, "Contexts and Constraints: The Substantive Representation of Women in the Canadian House of Commons and Senate" (2023) Representation 1; Colleen Sheppard, "Institutional Inequality and the Dynamics of Courage" (2013) 31:2 Windsor YB Access Just 103; Sheppard, *supra* note 6; Bruce Porter, "Enforcing the Right to Reasonableness in Social Rights Litigation: The Canadian Experience" (2013) 1 at 38;

knowledge on how policy processes are structured in ways that can perpetuate and reinforce unequal distributions of wealth and resources.

This thesis focuses on a specific portion of the federal human rights regime: Charter review in the lawmaking process, also known as pre-enactment review or legislative rights review. Institutional frameworks for pre-enactment review are composed of mechanisms of rights review implemented at the executive and parliamentary stages of lawmaking. These mechanisms support the capacity of the government and Parliament, as lawmaking institutions, to assess the compatibility of proposed legislation with the Charter before its adoption. As aptly explained by political scientist Janet Hiebert, the idea behind pre-enactment review is that human rights should be "a core consideration when assessing the merits of legislative objectives and how best to achieve these in the process of developing legislation, as well as during parliamentary scrutiny when deciding if amendments are warranted."[12] Mechanisms of rights review encompass a range of activities performed by different institutions and actors. They can take various forms, both formal and informal. Formal mechanisms include rights vetting, ministerial statements of compatibility, legal assessments, advice from human rights committees, and scrutiny by committees specialized in rights review. On the other hand, informal rights review can occur through discussions during the bill drafting process, scrutiny by generalist committees, debates in the legislative chamber, and questioning of the government regarding the rights considerations of proposed legislation. These mechanisms can be implemented at various stages of the lawmaking process, from the introduction of the policy proposal to the last readings in Parliament.

By focusing on pre-enactment review during lawmaking, this thesis seeks to find solutions to prevent passing legislation that might infringe on the Charter, thereby interfering with the effective and sustainable protection of Charter rights. To quote constitutionalist Grégoire Webber:

> To legislate – to change the law – is to take responsibility for the community's future by determining that the set of interpersonal relationships governed by the law should be this way rather than that. It is to determine what, as a matter of law, is to be

Susan Sturm, "The Architecture of Inclusion: Interdisciplinary Insights on Pursuing Institutional Citizenship" (2007) 30 Harvard Journal of Law & Gender 409. For an interesting discussion on an "Alternative Social Charter" as a nonjudicial institutional mean to implement socio-economic rights, see Jennifer Nedelsky, "Reconceiving Rights and Constitutionalism" (2008) 7:2 Journal of Human Rights 139 at 158.

[12] Janet Hiebert, "Parliamentary Engagement with the Charter: Rethinking the Idea of Legislative Rights Review" (2012) 58 The Supreme Court Law Review 87 at 88.

> prohibited, permitted, and required for the good and rights of the community's members.[13]

Legislation and legal regimes have far-reaching implications beyond their immediate impacts on individuals: they influence intergenerational and community dynamics, playing a role in generating systemic impacts.[14] Federal legislation regulating social welfare programs, criminal law, employment law and immigration law, for example, can have such impacts. In this sense, legislation and legal regimes can perpetuate socioeconomic inequalities by upholding and legitimizing significant wealth disparities, favouring certain interests while disadvantaging others.[15] Pre-enactment review can play a crucial role in identifying and preventing the passage of legislation that may reinforce such cycles.

In particular, this process enhances the likelihood of recognizing and safeguarding socio-economic rights under the Charter. Socio-economic rights are closely related to the deprivation of the resources essential to civil society's life and basic well-being. They include the rights to housing, food, education and social welfare. Despite its prosperity, Canada struggles with persistent poverty, significantly impacting countless lives.[16] This grim reality is highlighted by the well-documented issues of the housing crisis[17], food insecurity[18], barriers to accessing adequate

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[13] Grégoire Webber, "Past, Present, and Justice in the Exercise of Judicial Responsibility" in Geoffrey Signalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 129 at 135.
[14] Sheppard, *supra* note 6 at 229.
[15] Lucy A Williams, "The Legal Construction of Poverty: Gender, 'Work' and the 'Social Contract'" (2011) 22 Stellenbosch Law Review 463 at 468.
[16] *A Backgrounder on Poverty in Canada*, by Government of Canada (Canada: Government of Canada, 2016).
[17] Housing challenges disproportionality affect certain groups, such as Indigenous people, individuals with disabilities, single-parent families, and immigrants. Consequently, these groups have distinct housing needs and concerns: Margot Young, "Charter Eviction: Litigating out of House and Home" (2015) 24 Journal of Law and Social Policy 46 at 52. See also "Canada's Housing Supply Shortage: Restoring affordability by 2030", online: <https://www.cmhc-schl.gc.ca/blog/2022/canadas-housing-supply-shortage-restoring-affordability-2030>; Statistics Canada Government of Canada, "The Canadian Housing Survey, 2018: Core housing need of renter households living in social and affordable housing", (2 October 2020), online: <https://www150.statcan.gc.ca/n1/pub/75f0002m/75f0002m2020003-eng.htm>; Sarah E Hamill, "Caught between Deference and Indifference: The Right to Housing in Canada" (2018) 7 Canadian Journal of Human Rights 67; *What We Heard: Report on a Human Rights-Based Approach to Housing Consultation*, by National Consultation on a Human Rights-Based Approach to Housing, 05-11–18 (placetocallhome.ca, 2018); Emily Holton, Evie Gogosis & Stephen Hwan, *Housing Vulnerability and Health: Canada's Hidden Emergency* (Toronto: Research Alliance for Canadian Homelessness, Housing, and Health, 2010).
[18] See e.g., Audrey Tung, Denise Cloutier & Reuben Rose-Redwood, "Serving Us Rights: Securing the Right to Food in Canada" (2021) 81 Canadian Review of Social Policy 1.

healthcare[19] and criminalization of poverty.[20] Recognizing socio-economic rights under the Charter is essential in addressing these well-documented challenges and realizing the Charter's vision of promoting a more equitable and just society for all Canadians.

In this context, while pre-enactment review can contribute to rights protection in general, this thesis explicitly presents it as a mechanism to prevent the enactment of legislation that may perpetuate rights violations for the most disempowered and marginalized, including those affected by patterns of poverty. Institutional mechanisms of Charter review hold particular significance for marginalized groups who, as minorities, are more susceptible to having their interests overlooked. Not only do they commonly lack political influence, but their interests might diverge from those of the electoral majority.[21] As a result, they tend to experience more frequent and severe rights violations.[22] Hence, I investigate how pre-enactment review in federal lawmaking can foster effective and sustainable protection of Charter rights, particularly emphasizing its potential to recognize socio-economic rights under the Charter.

In that regard, I explore two key research questions: What are the roles and responsibilities of the legislative, executive, and judicial branches of government in protecting human rights within the framework of the Charter? And how can the current framework for pre-enactment review be strengthened to ensure a thorough assessment of the Charter compatibility of bills before their adoption? The first question examines how each of the three branches of government are situated within a conception of the Charter that aims to foster effective and sustainable rights protection.

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[19] See e.g., Sunam Jassar, "Access to Justice as a Social Determinant of Health: The Basis for Reducing Health Disparity and Advancing Health Equity of Marginalized Communities" (2021) 37:2 Windsor Yearbook of Access to Justice 359; Ibrahim Obadina, "The Future of Canadian Universal Health Care System: A Contextual Analysis of Section 7 of the Charter and Chaoulli" (2020) 9:1 International Journal of Legal Studies and Research; *Key Health Inequalities in Canada: A National Portrait*, by Public Health Agency of Canada (Government of Canada, 2018).

[20] See e.g., Justin Douglas, "The Criminalization of Poverty: Montreal's Policy of Ticketing Homeless Youth for Municipal and Transportation by-Law Infractions" (2011) 16:1 Appeal: Review of Current Law and Law Reform 49; Diane Crocker & Val Marie Johnson, *Poverty, Regulation & Social Justice: Readings on the Criminalization of Poverty* (Halifax: Fernwood Publishing, 2010); *Rethinking Criminal Justice in Canada*, by Institute for Research On Public Policy (Institute of Research On Public Policy, 2018) at 9.

[21] Emmett Macfarlane, Janet Hiebert & Anna Drake, *Legislating under the Charter: Parliament, Executive Power, and Rights* (Toronto: University of Toronto Press, 2023) at 68. A notable example illustrating this phenomenon is the implementation of "tough-on-crime" policies from 2008, further explored in Chapters 3 and 4. Under the guise of enhancing public safety, the Conservative government enacted these measures without adequately considering their impact on Charter rights or their systemic consequences on already marginalized groups, despite the disproportionate incarceration of Indigenous and Black individuals in Canada.

[22] Shaun O'Brien, Nadia Lambek & Amanda Dale, "Accounting for Deprivation: The Intersection of Sections 7 and 15 of the 'Charter' in the Context of Marginalized Groups" (2016) 35 Revue nationale de droit constitutionnel 153 at 160. See also O'Brien, Lambek & Dale, *supra* note; Sylvestre Marie-Ève, *supra* note 6.

The second question explores how the current framework for pre-enactment review can be supplemented to support robust Charter review of bills before legislation comes into force, acknowledging that the existing mechanisms of Charter review have limitations or gaps that must be addressed.

For this purpose, I conduct a comprehensive examination of the existing practices of Charter review in federal lawmaking, aiming to identify potential avenues for more effective and sustainable protection of Charter rights. The Charter does not provide for any form of Charter review during the lawmaking process.[23] The reason for this omission is uncertain, but it may be linked to the emphasis put on courts to enforce the Charter by striking down legislation incompatible with guaranteed rights.[24] Consequently, the Charter only minimally altered the fundamental institutional and political dynamics shaping our parliamentary system.[25] After critically assessing the current practices of Charter review, I propose institutional reforms aiming to reinforce the framework for pre-enactment review and ensure a comprehensive evaluation of the Charter compatibility of bills before they come into force.

Until recently, the extent and nature of the assessment conducted during the lawmaking process to ensure the compatibility of bills with the Charter were largely unknown. In 2016, the *Schmidt* case brought federal practices to light.[26] This case, which piqued my interest in mechanisms of rights review and their potential to foster or hinder rights protection, is particularly compelling as it represents the first judicial decision discussing pre-enactment review in federal lawmaking. In this recourse, Edgar Schmidt, a Department of Justice lawyer, filed a claim against his own ministry to contest the legality of the practices of the Minister of Justice under section 4.1(1) of the *Department of Justice Act.*[27] This provision provides that the Minister of Justice is

[23] The *Canadian Bill of Rights*, in contrast, establishes a requirement for the Minister of Justice to assess bills and regulations and report to Parliament if any inconsistency with the bill of rights are identified: "Canadian Bill of Rights, SC 1960, c 44", s 3(1). This mechanism of rights review is recognized as the first instance of its kind: Janet Hiebert, "Legislative Rights Review: Addressing the Gap between Ideals and Constraints" in Murray Hunt, Hayley J Hooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing: Portland, 2015) 39 at 41.
[24] Kent Roach, "Not Just the Government's Lawyer: The Attorney General as a Defender of the Rule of Law" (2006) 31 Queen's Law Journal 598 at 622. This authority stems from section 52 of the *Constitution Act, 1982*.
[25] Janet L Hiebert, "Parliamentary bills of rights: have they altered the norms for legislative decision-making?" in Gary Jacobsohn & Michael Schor, eds, *Comparative Constitutional Theory* (Cheltelham: Edward Elgar Publishing, 2018) 123 at 138.
[26] *Schmidt v Canada (Attorney General)*, [2016] 3 FCR 477 [*Schmidt*].
[27] *Department of Justice Act*, RSC, 1985, c J-2.

obliged to examine every bill introduced by the government to Parliament for adoption and report on any possible Charter incompatibilities.[28] Schmidt contended that the standards utilized by the Department of Justice for evaluating the existence of infringements in bills were established at such a minimal level that nearly all bills were considered consistent and did not require reporting to Parliament. He additionally petitioned the Federal Court to declare that section 4.1(1) necessitates a heightened standard for triggering this reporting obligation.[29] Schmidt's claim had some grounding: the standard used was so low that no report was submitted from the introduction of this mechanism in 1985 up until 2015. The Federal Court nevertheless dismissed Schmidt's recourse in 2016, as did the Federal Court of Appeal in 2018. Both courts ruled in favour of the federal government, confirming the legality of the interpretation made by the government of the reporting duty of the Minister of Justice.

Though it did not result in direct changes to the lawmaking process, the *Schmidt* case significantly impacted our understanding of rights review in Canada, both as a democratic process and a means to foster rights protection. First, this decision forced the government to disclose the internal practices of rights review occurring during the development and drafting of bills and the criteria used to determine their Charter compatibility. These elements were the object of a detailed analysis by Justice Noel for the Federal Court. This case also shed light on the executive-centred framework for pre-enactment review, focused on determining compatibility with the Charter as interpreted by the courts, especially with the Supreme Court decisions. Though some of these practices have since been updated, this decision provides a relevant overview of the federal pre-enactment process.

Another notable development following *Schmidt* is that starting in 2016, the government began reporting to Parliament on the Charter considerations identified by the Minister of Justice for several bills. Thus, parallel to the *Schmidt* proceedings, the government developed a practice similar to the one defended by Schmidt, later formalized in 2019. A Charter statement must now

[28] *Department of Justice Act*, section 4.1(1): "Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the Statutory Instruments Act and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity."
[29] *Statement of Claim*, 2012 Federal Court at para 27e).

accompany every bill introduced by the government for adoption, listing the Charter considerations that may arise.

A third significant contribution of the *Schmidt* case was Justice Noel's discussion regarding the roles and responsibilities of each branches of government under the Charter. This decision marked the first explicit examination by a Canadian court of these interconnected roles and responsibilities. Justice Noel's position in that regard, supported by the Federal Court of Appeal,[30] underscored a court-centric vision of rights protection based on a strict conception of the separation of powers:

> [T]he Executive governs and introduces bills to Parliament; Parliament examines and debates government bills and, if they are acceptable to Parliament, enacts them into law; the Judiciary, following litigation or a reference, determines whether or not legislation is compliant with guaranteed rights. Each branch of our democratic system is responsible for its respective role and should not count on the others to assume its responsibilities.[31]

This court-centric approach to rights protection prevails in Canada and many other democracies. Indeed, empowering courts to review the constitutionality of governmental action is one of the most significant trends observed in democratic states in the last decades.[32] The judiciary emerged as the primary guardian of constitutions in many democracies and, ultimately, as the leading institution responsible for giving effect to human rights through judicial review.[33]

However, constitutionalists and human rights scholars are increasingly challenging the standing of this court-centric vision to foster effective and sustainable rights protection,[34] notably

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[30] *Schmidt v Canada (Attorney General)*, 2018 FCA 55 at para 88.
[31] *Ibid*, para 277.
[32] Michael J Perry, "Protecting Human Rights in a Democracy: What Role for the Courts" (2003) 38 Wake Forest L Rev 635 at 636.
[33] Keith E Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and Responses" (2002) 80 North Carolina Law Review 773 at 774.
[34] See e.g., Maartje De Visser & Jaclyn L Neo, "What would a pluralist institutional approach to constitutional interpretation look like? Some methodological implications" (2022) 20:5 International Journal of Constitutional Law 1884–1913; Rosalind Dixon, "The Core Case for Weak-form Judicial Review" (2017) 39:6 Cardozo Law Review 2193; Donald E Bello Hutt, "Against Judicial Supremacy in Constitutional Interpretation" (2017) 31 Revus 7; Stephen Gardbaum, "Decoupling Judicial Review from Judicial Supremacy" in Thomas Bustamante & Bernardo Gonçalves Fernandes, eds, *Democratizing Constitutional Law* Law and Philosophy Library, 1st ed. ed (Berlin: springer, 2016) 93; Ming-Sung Kuo, "In the Shadow of Judicial Supremacy: Putting the Idea of Judicial Dialogue in in Its Place" (2016) 29:1 Ratio Juris 83; Richard Ekins, "Human Rights and the Separation of Powers" (2015) 34:2 University of Queensland Law Journal 217; Jeffrey Goldsworthy, *Losing Faith in Democracy: Why Judicial Supremacy is Rising and What to do about it* (2015); James E Fleming, "Judicial Review Without Judicial Supremacy: Taking the

in Canada.[35] The concrete ability of courts to provide optimal protection to human rights without the support of the executive and legislative branches of government is called into question.

The inadequacy of this court-centric approach is particularly evident in the realm of socio-economic rights. Despite Canadian courts recognizing the Charter as a "living tree",[36] the interpretation of this constitutional instrument has not extended to effectively safeguarding individuals and communities against socio-economic deprivations. In particular, courts in Canada have thus far refrained from acknowledging socio-economic interests as being constitutionally protected under sections 7 and 15 of the Charter. This reluctance stems from concerns of injusticiability, where the courts perceive certain socio-economic claims as beyond their institutional and epistemological capacity.[37] Additionally, it arises from a narrow interpretive approach that strictly defines rights within a positive-negative framework, thereby constraining rights protection to civil and political rights while neglecting the safeguarding of socio-economic rights.[38] As a result, courts have consistently interpreted section 7 as excluding a constitutional right to welfare,[39] publicly funded health care,[40] or housing, even for those experiencing homelessness.[41] They have also refused to recognize social conditions as a distinct ground for discrimination under section 15 and to acknowledge a positive obligation on the government to

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Constitution Seriously Outside the Courts" (2005) 73 Fordham Law Review 1377; Larry D Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2005); Robert Post & Reva Siegel, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy" (2004) 92 California Law Review 1027; Whittington, *supra* note 33; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 2000).

[35] See e.g., Macfarlane, Hiebert & Drake, *supra* note 21; Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen's University Press, 2010); Brian Slattery, "A Theory of the Charter" (1987) 25:4 Osgoode Hall Law Journal 701.

[36] *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 53.

[37] See e.g., Larissa Parker, "Let Our Living Tree Grow: Beyond Non-Justiciability for the Adjudication of Wicked Problems" (2023) 81:1 U Toronto Fac L Rev 54–89.

[38] See e.g., Jackman, *supra* note 6 at 442; Landau & Dixon, *supra* note 6 at 110. On the justiciability of socio-economic rights in general, see Kent Roach, "Remedies and Accountability for Economic and Social Rights" in Malcolm Langford & Katharine Young, eds, *The Oxford Handbook of Economic and Social Rights* (Oxford University Press, 2022); Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law.* (Leiden: Cambridge University Press, 2009); Aoife Nolan, Bruce Porter & Malcolm Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" (2009) CHRGJ working Paper No 15, online: <https://ssrn.com/abstract=1434944>; Alana Klein, "Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights" (2007) 39:2 Colum Hum Rts L Rev 351.

[39] *Gosselin v Québec (Attorney General)*, [2002] 4 SCR 429 [*Gosselin*].

[40] *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791 [*Chaoulli*]; *Allen v Alberta*, [2015] ABCA 277; *Canadian Doctors for Refugee Care v Canada (Attorney General)*, [2014] 2 FCR 267; *Toussaint v Canada (Citizenship and Immigration)*, 2011 FCA 146 [*Toussaint*].

[41] *Abbotsford (City) v Shantz*, 2015 BCSC 1909 [*Abbotsford (City)*]; *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja*]; *Victoria (City) v Adams*, 2009 BCCA 563 [*Victoria (City)*].

provide social programs to meet the needs of people experiencing poverty.[42] Socio-economic interests are thus currently considered as falling beyond the ambit of the Charter. As a result, courts have yet to hold governments accountable for enacting policies furthering the socio-economic exclusion of marginalized individuals and communities.

Although the Supreme Court has not foreclosed the possibility of recognizing certain socio-economic interests as constitutionally guaranteed under the Charter,[43] scholarly analysis of Charter jurisprudence indicates that the Court's current approach is unlikely to extend the scope of such interests protected by Charter rights.[44] In fact, the Supreme Court has consistently emphasized that the primary responsibility for protecting socio-economic interests lies with the legislative branch rather than the judiciary. In *Gosselin,*[45] the Supreme Court affirmed that:

> It is true that the legislature is in the best position to make the allocative choices necessary to implement a policy of social assistance. For a wide variety of reasons, courts are not in the best position to make such choices, and this is why this Court has historically shown judicial deference to governments in these matters.[46]

In response to the challenges and limitations of this court-centric approach to rights protection, scholars have proposed alternative approaches involving a range of extrajudicial actors in rights review. These approaches, identified in this thesis as "theories of shared responsibilities," advocate for a more inclusive distribution of interpreting and applying human rights among multiple actors, including the government, Parliament, and civil society. Most of these theories, including departmentalism and coordinate interpretation, emphasize the role of each branch of government in constitutional interpretation.[47] These approaches have in common the view that complementing judicial review with pre-enactment review would provide a fuller and more well-balanced rights review of legislation.

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[42] Cohen & Dagenais, *supra* note 8 at 37. See e.g., *Gosselin*, *supra* note 39. A notable exception is the decision *Sparks v. Dartmouth/Halifax,* which recognized reliance on public housing as analogous grounds under section 15: *Sparks v Dartmouth/Halifax County Regional Housing Authority*, [1993] NSCA 13 [*Sparks*].
[43] *Gosselin*, *supra* note 39 at paras 80 and 331.
[44] See e.g., Cohen & Dagenais, *supra* note 8; Vézina, *supra* note 6 at 538.
[45] *Gosselin*, *supra* note 39.
[46] *Ibid* at para 141. See also *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 85 [*Eldridge*].
[47] See e.g., Gabrielle Appleby & Anna Olijnyk, "Parliamentaty Deliberation on Constitutional Limits on the Legislative Process" (2017) 40:3 University of New South Wales Law Journal 976; Hutt, *supra* note 34; Kuo, *supra* note 34; Gardbaum, *supra* note 34; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013); Gabrielle J Appleby & Adam Webster, "Parliament's Role in Constitutional Interpretation" (2013) 37 Melbourne University Law Review 255; Whittington, *supra* note 33.

Canada has not escaped this tendency: a growing literature recognizes that it is insufficient to wait for courts to deal with possible Charter issues in legislation. Proponents of theories of shared responsibilities in Canada plead for moving away from a court-centric vision of the Charter in favour of a conception of the Charter as a framework that shapes and influences policymaking. Numerous scholars have examined how theories of shared responsibilities can enhance rights-consciousness in the context of federal lawmaking.[48] A particularly noteworthy contribution comes from Hiebert, a prominent proponent of enhancing Charter review in the policymaking process in Canada. In 2000, she proposed a relational model of the Charter, an alternative to the prevailing court-centric conception.[49] In numerous subsequent articles, Hiebert emphasized the importance of the government and Parliament taking rights protection seriously when fulfilling their lawmaking functions.[50]

In line with the work of these scholars, I maintain that a departure from the traditional court-centric conception of the roles and responsibilities of the branches of government under the Charter is necessary. Accordingly, I reject the approach to rights protection that currently prevails in Canada, according to which courts are accorded primary responsibility for giving effect to human rights. While judicial review remains an essential check to ensure the compatibility of legislation with the Charter, it should be viewed as a corrective mechanism. Providing access to courts to challenge the Charter compatibility of legislation and relying exclusively on courts for rights protection are two different concepts with distinct consequences on rights protection. A genuine commitment to human rights requires more than participation from the courts.

I instead endorse a more active role for the government and Parliament to interpret Charter rights in general and, in particular, to assess how proposed legislation might adversely impact them. Strengthening rights protection requires that both the government and Parliament, as

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[48] See e.g., Macfarlane, Hiebert & Drake, *supra* note 21; Vézina, *supra* note 6; Kent Roach, "The Judicial, Legislative and Executive Roles in Enforcing the Constitution: Three Manitoba Stories" in R Albert & David Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge: Cambridge University Press, 2017) 245; Eric M Adams, "Running from a Bear: Coordinate Constitutional Interpretation in Canada" (2012) 3:3 Transnational Legal Theory 324; Janet Hiebert, "A Relational Approach to Constitutional Interpretation: Shared Legislative and Judicial Responsibilities" (2000) 35:4 Journal of Canadian Studies 161; Slattery, *supra* note 35.
[49] Hiebert, *supra* note 48.
[50] *Enriching Constitutional Dialogue: Viewing Parliament's Role as Both Proactive and Reactive*, by Janet Hiebert (Department of Justice, Research and Statistics Division, 2000); Janet L Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" (2006) 69:1 The Modern Law Review 7; Hiebert, *supra* note 12; Janet Hiebert, "Interpreting a Bill of Rights: The Importance of Legislative Rights Review" (2005) 35 BJ Pol S 235; Hiebert, *supra* note 23.

lawmaking institutions, perform a robust assessment of the compatibility of bills to the Charter during the lawmaking process.[51] Lawmakers must consider the Charter compatibility of legislation during the adoption process rather than wait for the courts to do so. In other words, a proactive approach to ensuring the adoption of legislation compatible with the Charter is preferable to a reactive one.

My aim is not to take a position in favour of a human rights regime that relies primarily on pre-enactment review nor to support a universal institutional framework for pre-enactment review that would be optimal in all jurisdictions. Instead, I plan to offer an alternative perspective on pre-enactment review in Canada, one that better utilizes the distinct contribution of each branch of government to lead to more rights protection. Judicial review can exist in a human rights regime where the political branches have meaningful space to engage with the Charter normatively.[52]

Research on pre-enactment review in Canada is still scarce and lacks comprehensive coverage. Given the central role of courts and judicial interpretations in our understanding of rights protection, judicial review constitutes a vast part of the scholarship on rights protection and mechanisms of rights review. Some of the most popular topics in that regard are the rise of courts as "guardians of rights"[53], the democratic legitimacy of judicial review and its limits[54], as well as judicial interpretations of guaranteed rights.[55] Important scholarly contributions on the mechanisms of rights review composing the existing pre-enactment review in federal lawmaking

[51] I chose the expression "Charter compatibility" rather than "Charter compliance" because this thesis is grounded in the assumption that all branches of government must interpret and apply the Charter in the context of their functions. Compliance implies aligning with the interpretation made by another actor, so it appears inadequate in such a context.
[52] Gabrielle Appleby & Anna Olijnyk, "Executive Policy Development and Constitutional Norms: Practice and Perceptions" (2020) 18:4 ICON 1136 at 2.
[53] See e.g., Barry Friedman, *The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux, 2009); Jennifer Smith, "The Origins of Judicial Review in Canada" (1983) 16:1 Canadian Journal of Political Science 115; Barry L Strayer, "Comment on Smith's The Origins of Judicial Review in Canada" (1983) 16:3 Canadian Journal of Political Science 593.
[54] See e.g., Lawrence David, "Resource Allocation and Judicial Deference on Charter Review: The Price of Rights Protection according to the McLachlin Court" (2015) 73 U Toronto Fac L Rev 35; Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 2012).
[55] See e.g., Parker, *supra* note 37; Dobrowolsky, *supra* note 5; Benjamin J Oliphant, "Taking purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation under the Canadian Charter of Rights and Freedoms" (2015) 65:3 University of Toronto Law Journal 239.

have been provided by political scientists,[56] including Hiebert[57] and James B. Kelly.[58] Legal scholars have also examined pre-enactment review, with a key focus on the roles of the Department of Justice and the impact of mandating public lawyers with rights review, including governmental lawyers[59] and the Minister of Justice.[60] Nevertheless, the existing literature has not thoroughly delved into the strategies for proactive and efficient engagement in Charter review during the federal lawmaking process.

The present thesis is intended to fill this gap in the literature on rights protection, first by undertaking a wide-ranging examination of the current mechanisms of rights review, then by proposing an institutional reform to enhance pre-enactment review at each stage of the lawmaking process. Based on my research findings, the dominant court-centric approach to rights protection, aligned with the principles of judicial supremacy,[61] has posed significant obstacles to establishing effective pre-enactment review. The emphasis on judicial review has led to undervaluing the necessity of assessing bills' compatibility with Charter rights before their enactment. Consequently, the availability of effective mechanisms of rights review remains limited in the

[56] See also Heather MacIvor, *Canadian Politics and Government in the Charter Era* (Oxford: Oxford University Press, 2013).

[57] See e.g., Macfarlane, Hiebert & Drake, *supra* note 21; Hiebert, *supra* note 25; Janet L Hiebert, "The Charter's Influence on Legislation: Political Strategizing about Risk" (2018) 51:4 Canadian Journal of Political Science 727; Hiebert, *supra* note 23; Janet Hiebert & James B Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge: Cambridge University Press, 2015); Hiebert, *supra* note 12; Hiebert, *supra* note 50; Hiebert, *supra* note 50; Janet L Hiebert, "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?" (2004) 82 Texas Law Review 1963; Hiebert, *supra* note 50; Hiebert, *supra* note 48.

[58] James B Kelly & Matthew A Hennigar, "The Canadian Charter of Rights and the Minister of Justice: Weak-form Review within a Constitutional Charter of Rights" (2012) 10:1 ICON 35; James B Kelly, "Legislative Activism and Parliamentary Bills of Rights: Institutional Lessons for Canada" in *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2010) 86; James B Kelly, "Governing with the Charter of Rights and Freedoms" (2003) 21 Supreme Court Law Review 299; James B Kelly, "Bureaucratic Activism and the Charter of Rights and Freedoms: the Department of Justice and its Entry into the Centre of Government" (1999) 42:4 Canadian Public Administration 476.

[59] Adam M Dodek, "The 'Unique Role' of Government Lawyers in Canada" (2016) 49:1 Israel Law Review 23; Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers and Custudians of the Rule of Law" (2010) 33 Dalhousie LJ 1; Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2008) 31 Queen's Law Journal 598.

[60] Grant Huscroft, "Reconciling Duty and Discretion: The Attorney General in the Charter era" (2009) 34 Queen's Law Journal 773.

[61] See e.g., Rebecca L Brown, "Judicial Supremacy and Taking Conflicting Rights Seriously" (2016) 58:5 Wm & Mary L Rev 1433; Mark A Graber, "Judicial Supremacy and the Structure of Partisan Conflict Symposium" (2016) 50:1 Ind L Rev 140; Larry Alexander & Frederick Schauer, "On Extrajudicial Constitutional Interpretation" (1997) 110:7 Harvard Law Review 1359; Erwin Chemerinsky, "In Defense of Judicial Supremacy" (2016) 58:5 Wm & Mary L Rev 1459; Erwin Chemerinsky, "In Defense of Judicial Review: The Perils of Popular Constitutionalism" (2004) 3 University of Illinois Law Review 674.

context of federal lawmaking. And where these mechanisms exist, they prioritize assessing the compatibility of bills with jurisprudence rather than with the Charter itself.

Since the entrenchment of the Charter to the Constitution in 1982, various institutional adjustments were introduced to the federal lawmaking process to integrate and address the protection of the rights it guarantees. At the executive stage of lawmaking, multiple actors within the Department of Justice hold the responsibility of evaluating the impact of bills on the Charter: while government lawyers are vetting bills to identify possible rights infringements throughout their drafting, ministers of Justice conduct their own evaluation and report to Parliament on their Charter considerations when bills are ready for adoption.[62] These mechanisms of rights review are respectively known as "rights vetting" and "Charter statements." This reform of executive lawmaking institutions constitutes the principal institutional response to the Charter. In contrast, no institutionalized mechanism of rights review exists during the parliamentary stage of lawmaking: Charter considerations can be examined in parliamentary committees and chamber debates, but Charter review is neither formalized nor structured.

Within these mechanisms of rights review, "compatibility with the Charter" is equated with "compatibility with the Charter as interpreted by the courts." The purpose of Charter review is to assess if bills adhere to the judiciary's conclusions about the meaning and scope of the Charter, especially those of the Supreme Court. Charter review is thus limited to assessing the jurisprudential considerations of Charter rights, that is, where the legislation stands with regard to the existing body of case law. This limited understanding of Charter compatibility aligns with the dominant court-centric approach to rights protection prevailing in Canada, under which Charter rights are deemed to mean "whatever the Court says they do."[63] Consequently, lawmakers can be satisfied with adhering to the minimum standards set by the courts rather than thoroughly considering the potential adverse effects of bills that could be covered by the Charter.

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[62] *Department of Justice Act*, *supra* note 27, s 4.1(1).

[63] Mariano Melero de la Torre, "Overcoming Judicial Supremacy through Constitutional Amendment: Some Critical Reflections" (2021) 34:2 Ratio Juris 161 at 170; Rainer Knopff et al, "Dialogue: Clarified and Reconsidered" (2017) 54:2 Osgoode Hall Law Journal 609 at 623; Grant Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory" in *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2010) 50 at 50; Mark Tushnet, *Weak Courts, Strong Rights* (Princeton: Princeton University Press, 2008) at 47.

In the present thesis, I argue that such a narrow conception of Charter review is unlikely to result in effective and sustainable protection of Charter rights. Accordingly, I defend a broader understanding of "Charter compatibility" than the one currently privileged in the mechanisms of rights review mentioned above. Charter review should ensure compatibility with the Charter itself, not only with judicial interpretations of the rights. Charter review is more than a detached, impartial, or mechanical application of jurisprudence: it recognizes that constitutional interpretation requires a nuanced and holistic approach that considers broader societal dynamics and normative judgments.[64]

A broad conception of Charter compatibility would further align with Canada's international human rights obligations. As a signatory of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), Canada has committed to progressively realizing the economic, social, and cultural rights enshrined in this treaty. In the absence of explicitly guaranteed socio-economic rights in the Charter, abiding by these international obligations requires strengthening protection through existing Charter rights.[65] Though the Supreme Court acknowledged that international human rights treaties are guaranteed through Charter,[66] at this point, courts have failed to provide remedies for violations of international socio-economic rights.[67] These obligations have largely remained outside of judicial scrutiny.[68]

In this context, this thesis is grounded on the premise of the interdependence and overlap between civil and political rights and socio-economic rights, acknowledging that the dichotomy between them is subject to considerable debate. A consensus is slowly emerging that recognizes the interconnectedness and interdependencies of these rights, underscoring the imperative of

[64] Casey Connor, "The Constitution Outside the Courts - The Case for Parliamentary Involvement in Constitutional Review" (2019) 61 Irish Jurist 36 at 42.
[65] Cohen & Dagenais, *supra* note 8 at 27.
[66] See e.g., *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, [2015] 3 SCR 419; *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, [2007] 2 SCR 391 at para 69 ss [*Health Services*]; *Ontario (Attorney General) v Fraser*, [2011] 2 SCR 3; *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 RCS 313.
[67] Ania Kwadrans, "Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the Canadian Charter of Rights and Freedoms", (2016) 25:1 Journal of Law and Social Policy 78 at 107.
[68] Neve, *supra* note 10 at 14.

adopting a comprehensive approach to rights protection.[69] Charter issues inherently involve complex economic, social, and political interests that may conflict or require significant resources for realization. These issues encompass multifaceted matters and necessitate trade-offs among scarce resources to address the needs of civil society.[70] A more comprehensive and inclusive approach to rights protection can be developed by recognizing these complexities and specific vulnerabilities.

As a result, the government and Parliament must embrace expansive and inventive interpretations of Charter rights, extending beyond the confines of judicial definitions found in legal precedent. In particular, they should assess the socio-economic impacts of legislation that could be covered under the Charter, considering its practical implications on individuals and communities. Sections 7 and 15, respectively guaranteeing the right to life, liberty and security of the person as well as equality rights, are notably viewed as adequate vehicles for recognizing the protection of socio-economic deprivations through the Charter.[71] To exemplify, section 7 could be interpreted as encompassing homelessness and poverty due to their well-documented negative health consequences; these impacts include reduced life expectancy, chronic health conditions, limited healthcare access, and higher suicide rates.[72] Further, the intersectionality between poverty and various grounds of discrimination guaranteed under section 15 of the Charter is well-documented,[73] notably gender, sexual orientation, immigration status and Indigeneity.[74] A broadly

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[69] See e.g., Jan Essink, Alberto Quintavalla & Jeroen Temperman, "The Indivisibility of Human Rights: An Empirical Analysis" (2023) 23 Human Rights Law Review 1; Kwadrans, *supra* note 67 at 81; Sheppard, *supra* note 6 at 232; Porter & Jackman, *supra* note 6 at 1.

[70] Colleen M Flood & Bryan Thomas, "Conclusion: The Complex Dynamics of Canadian Medicare and the Constitution" in Colleen M Flood & Bryan Thomas, eds, *Is Two-Tier Health Care the Future?* (Ottawa: University of Ottawa Press, 2020) 335 at 344.

[71] Vézina, *supra* note 6 at 500; O'Brien, Lambek & Dale, *supra* note 22.

[72] See e.g., Porter & Jackman, *supra* note 6 at 5; Sylvestre Marie-Ève, *supra* note 6 at 401; Dennis Raphael, *Poverty in Canada: Implications for Health and Quality of Life*, 2nd ed (Toronto: Canadian Scholars Press, 2011); *At Home/Chez soi: Interim Report*, by Commission de la santé mentale du Canada (Commission de la santé mentale du Canada, 2009).

[73] *Canada's Colour Coded Income Inequalities*, by Sheila Block, Grace-Edward Galabuzi & Ricardo Tranjan (Canadian Centre for Policy Alternatives, 2019); Naomi Lightman & Luann Good Gingrich, "Measuring Economic Exclusion for Racialized Minorities Immigrants and women in Canada: Results from 2000 and 2010" (2018) 22:5 journal of Poverty 398; Shreya Atrey, "The Intersectional Case of Poverty in Discrimination Law" (2018) 18 Human Rights Law Review 411. "Intersectionality' refers to the idea that people's disadvantage is composed of multiple and interlocking systems of power": *Ibid* at 415.

[74] Members from groups within these protected categories often encounter systemic discrimination and significant obstacles in accessing resources essential for their overall well-being. For instance, women are disproportionately represented among the most economically vulnerable, with even more pronounced disparities observed among Indigenous and immigrant women: *Women in Canada: A Gender-based Statistical Report - The Economic Well-Being*

interpreted section 15 could serve as a means to address the structural and systemic patterns of discrimination and exclusion related to poverty and homelessness.[75] It could lead lawmakers to recognize social conditions as a distinct ground for discrimination or acknowledge that discrimination based on other grounds can have significant socio-economic impacts. In other words, the government and Parliament must inquire into more than the jurisprudential considerations ensuing from the legislation they adopt: they must evaluate the socio-economic impacts of legislation that might be guaranteed under the Charter, considering their practical implications and effects on individuals and communities.

Such a conception of Charter review would ensure a more comprehensive evaluation of bills, one that highlights the importance of considering the broader impacts of legislation on marginalized and vulnerable groups. This approach recognizes both the prominence of jurisprudence and the potential for lawmakers to advance their own interpretation of Charter rights in relation to proposed legislation.

This assessment should take place through effective mechanisms of rights review, that is, mechanisms specifically designed to support the capacity of lawmakers to conduct Charter review in a way fostering effective and sustainable rights protection. Concepts like "effective mechanism of rights review" and "effective and sustainable rights protection" are hard to delineate due to the complex and multifaceted nature of rights protection. They can change over time and vary from one jurisdiction to another: what is effective in a jurisdiction at a given time might not be appropriate in another jurisdiction or at another time. The outcomes of mechanisms of rights review are thus affected by the context in which they take place, including the prevailing human rights culture and the inequalities present in civil society.

In evaluating the formulation of mechanisms of rights review that can lead to effective and sustainable rights protection in Canada, a crucial aspect is examining how the tangible lived experiences of civil society members impact the safeguarding of rights. The Canadian population is far from homogenous; individuals have different backgrounds and capacities, which may impact

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*of Women in Canada*, by Dan Fox & Mélissa Moyser (Statistics Canada, 2018); Raphael, *supra* note 72 at 79. Similarly, individuals from the LGBT+ community are disproportionately represented among the economically marginalized population, often facing obstacles in accessing suitable housing: Marco Redden et al, "Housing as a determinant of health for older LGBT Canadians: Focus group findings from a national housing study" (2023) 50:1 Housing and Society 113.

[75] Porter & Jackman, *supra* note 6 at 18.

how they are affected by the Charter. For example, access to courts for judicial review is not equally available for everyone.[76] Moreover, members of marginalized and vulnerable groups are underrepresented in political institutions and participation processes. They also tend to be victims of more rights violations.[77] Consequently, the development of effective mechanisms for rights review demands the consideration of diverse realities, encompassing the viewpoints and practical experiences of civil society, particularly those from marginalized groups.

This research holds relevance both in its temporal and contextual dimensions. In recent years, the government has made notable efforts to broaden the scope of rights protection, including in areas that previously lacked safeguards under the Charter. One significant example of these efforts is reforming the reporting process under the *Department of Justice Act*, previously discussed as Charter statements. Despite the Federal Court of Appeal supporting the existing governmental practice, the Liberal government improved this mechanism to make it compulsory to include a Charter statement with every bill introduced by the government for adoption. While the extent to which these amendments will significantly enhance rights protection remains debatable, as explained in Chapter 3, this reform reflects a heightened obligation on the government to consider Charter considerations when drafting bills. The *National Housing Strategy Act* is another compelling illustration of a recent development furthering Charter protection through a broader interpretation of compatibility with the Charter.[78] Adopted by Parliament in 2019, this legislation represents the first legislation recognizing a right to housing in Canada. The government explicitly acknowledges that this legislation proposes to realize the right to housing internationally guaranteed by section 11 of the ICESR.[79] Despite the absence of a jurisprudentially construed right to housing in the Charter, the government developed legislation inspired by the concrete experience of civil society with housing, especially its most marginalized groups. The amended *Department of Justice Act* and the *National Housing Strategy Act* are grounded in a broad conception of Charter review such as the one defended in this thesis. These examples demonstrate

[76] Ayden I Scheim et al, "Intersecting Inequalities in Access to Justice for Trans and Non-binary Sex Workers in Canada" (2023) Sexuality Research and Social Policy, online: <https://doi.org/10.1007/s13178-023-00795-2>; Jassar, *supra* note 19; Carissima Mathen, "Access to Charter Justice" in *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 639.
[77] O'Brien, Lambek & Dale, *supra* note 22 at 160. See also O'Brien, Lambek & Dale, *supra* note 22; Sylvestre Marie-Ève, *supra* note 6.
[78] *National Housing Strategy Act*, SC 2019, c 29, s 313.
[79] "Human Rights-Based Approach to Housing," online: *A Place to Call Home* <https://www.placetocallhome.ca/human-rights-based-approach-to-housing>.

that federal lawmakers can go beyond the minimum requirements prescribed by jurisprudence: they can privilege a more expansive understanding of Charter rights and their obligations under this constitutional instrument.

This thesis makes a significant contribution to knowledge by elucidating how theories of shared responsibilities and the proactive role of lawmakers in Charter review can pave the way for recognizing socio-economic interests as guaranteed under the Charter. By examining the interplay between them, this thesis sheds light on the potential of pre-enactment review to enhance the protection of socio-economic interests within the Canadian constitutional framework. The importance of the lawmakers' roles in recognizing socio-economic interests under the Charter is especially underexplored.[80] The findings offer valuable insights into strengthening the recognition and realization of socio-economic rights under the Charter.

Further, examining federal pre-enactment review as a feature of a human rights regime in which all branches of government participate to rights protection is a noteworthy contribution to the body of knowledge on rights protection in Canada. The distinct roles and responsibilities of political institutions – particularly lawmaking institutions – are understudied in Canada, in contrast with the contribution of the judiciary through judicial review. They are often examined for their part in the dialogue allowed through sections 1 and 33.[81] However, the impact of lawmaking institutions on rights protection as institutions of policymaking remains insufficiently scrutinised. A discussion on how pre-enactment review can contribute to effective and sustainable rights protection as part of a human rights regime constitutes an essential advancement to knowledge on human rights in Canada and parliamentary democracies.[82] In conducting this research, I thus intend to expand the understanding of the non-judicial dimensions of rights protection, more precisely, how the institutional frameworks of policymaking processes are closely related to the effective and sustainable protection of human rights. Examining institutional frameworks, such as the human rights regime and lawmaking process, is crucial for a complete portrait of the context in

[80] Vézina, *supra* note 6 at 277.
[81] See e.g., Maxime St-Hilaire & Xavier Foccroulle Ménard, "Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonie Sirota on the Effects of the Notwithstanding Clause" (2020) 29 Forum Constitutionnel 37; Knopff et al, *supra* note 63; Peter W Hogg & Ravi Amarnath, "Understanding Dialogue Theory" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook on the Canadian Constitution* (Oxford: Oxford University Press, 2017) 1053; Peter W Hogg & Thornton Allison A Bushell, "Charter Dialogue Revisited: Or Much Ado About Metaphors" (2007) 45:1 Osgoode Hall Law Journal 1.
[82] Though the present thesis addresses pre-enactment review in federal lawmaking, its findings could apply to other parliamentary and Westminster systems, notably in provincial lawmaking.

which lawmakers evolve when enacting legislation. In a nutshell, this thesis aims to provide a deeper understanding of how the institutional characteristics of the lawmaking process can shape and condition how seriously lawmaking institutions take Charter considerations when enacting legislation.

For this purpose, the thesis assumes that institutional frameworks influence the conduct of lawmakers with regard to rights protection. This institutionalist approach conceives political actors as rational actors who base their decisions on calculations and risk assessments.[83] Institutional structures, rules, and practices encourage or discourage them to act a certain way. They shape their margin of maneuver, notably with regard to their conduct vis-à-vis the Charter.

In Westminster systems, various factors influence political behaviour, shaping the dynamics of the lawmaking process. These factors include governmental dominance in Parliament[84] – which results from strict party discipline –[85], the introduction of bills to Parliament at an advanced stage of development,[86] and responsible government.[87] Together, these factors shape the decision-making and functioning of lawmaking processes within Westminster systems such as Canada.

This institutionalist approach suggests that the framework governing lawmaking needs to be structured in a way that motivates lawmakers to assign the Charter the requisite significance when weighing policy goals against the broader public interest. While I recognise lawmakers as

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[83] See e.g., Richard Hoefer, "Institutionalism as a Theory for Understanding Policy Creation: an Underused Resource" (2022) 3 Journal of Policy Practice and Research 71; James G March & Johan P Olsen, "Elaborating the 'New Institutionalism'" in *The Oxford Handbook on Political Institutions* (Oxford: Oxford University Press, 2008) 3; Tom Ginsburg & Robert Kagnan, "Introduction: Institutionalist Approaches to Courts as Political Actors" in Tom Ginsburg & Robert A Kagnan, eds, *Institutions & Public Law: Comparative Approaches* (New York: Peter Lang Publishing, 2005) 1; Stephen Bell et al, "Institutionalism: Old and New" in *Government, Politics, Policy and Power in Australia* (Pearson Australia, 2002).

[84] Maria Thürk, "Small in Size but Powerful in Parliament? The Legislative Performance of Minority Governments" (2022) 47:1 Legislative Studies Quarterly 193; John Mark Keyes, "Parliamentary Scrutiny of the Quality of Legislation in Canada" (2021) 9:2 The Theory and Practice of Legislation 203; Simone Penasa, "The Canadian Form of Governement: Reconciling Parliamentary Sovereignty and Executive Dominance under a System of Constitutional Supremacy" (2019) 1 DPCE Online 673; Paul EJ Thomas & J P Lewis, "Executive Creep in Canadian Provincial Legislatures" (2019) 52 Canadian Journal of Political Science 363; Hiebert, *supra* note 25.

[85] Cristine de Clercy & Alex Marland, "Party Discipline in Canada: Former Members of Parliament Speak Up" in David Groves, Charles Feldman & Geneviève Tellier, eds, *Legislatures in Evolution: Les législatures en transformation* (Ottawa: University of Ottawa Press, 2022) 15; Alex Marland, *Whipped: Party Discipline in Canada* (Vancouver: UBC Press, 2020); Jean-François Godbout, *Lost in Division: Party Unity in the Canadian Parliament* (Toronto: University of Toronto Press, 2020); Hiebert, *supra* note 25.

[86] Hiebert, *supra* note 23 at 52.

[87] Macfarlane, Hiebert & Drake, *supra* note 21 at 6.

rational actors, I do not presume that they act in bad faith or systematically discard the interests of minorities that do not align with their agenda if given the opportunity. Nevertheless, the lawmaking process must provide a system of checks and balances incentivizing the enactment of legislation respectful of the Charter.

Currently, the lawmaking process provides limited formal opportunities to encourage lawmakers to determine if the bills they enact are compatible with the Charter. Where they exist, these mechanisms are inadequate to support a robust evaluation of their potential impacts on Charter rights. The two only formal mechanisms of rights review, namely rights vetting and Charter statements, are plagued with several issues that undermine their potential to foster effective and sustainable rights review. Primarily centralized at the Department of Justice, the related assessment occurs behind closed doors and purposes to prevent possible judicial invalidations, focusing mainly on adherence to jurisprudence. [88] Although Charter statements are now mandatory for every bill introduced by the government for adoption, they provide insufficient information regarding the extent and quality of the government's Charter review, as well as the policy choices made based on such review. Furthermore, despite the growing recognition in human rights scholarship that Parliament plays a crucial role in advancing rights protection[89] – mainly due to its role to oversee the government, the public nature of its debates and its ability to engage with civil society – Charter review remains peripheral at Parliament. Without a formal mechanism mandating parliamentarians to scrutinize Charter implications within bills, Parliament lacks an obligatory or organized procedure for conducting Charter review. Furthermore, if Parliament does choose to undertake such a review, it faces constraints of limited time and resources.[90] Currently, pre-enactment review in federal lawmaking thus highly subordinates the extent and quality of the Charter review performed to the willingness of the executive and parliamentary actors involved. As a result, such scrutiny is inconsistently performed from one bill to the other, if performed at all.

[88] *Schmidt*, *supra* note 26 at para 232; Macfarlane, Hiebert & Drake, *supra* note 21 at 45.
[89] See e.g., Connor, *supra* note 64; Grégoire Webber, Paul Yowell & Richard Ekins, eds, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge: Cambridge University Press, 2018); Ted Glenn, "Ten Canadian Legislatures, Public Policy and Policy Analysis" in Laurent Dobuzinskis & Michael Howlett, eds, *Policy Analysis in Canada* (Bristol: Bristol University Press, 2018) 211; Murray Hunt, Hayley J Hooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing: Portland, 2015); Appleby & Webster, *supra* note 47; Hiebert, *supra* note 12.
[90] Hiebert, *supra* note 12 at 100; Hiebert, *supra* note 57 at 1972.

Noting the deficiencies in the current pre-enactment review framework within federal lawmaking, this thesis argues that lawmakers should engage with Charter rights meaningfully during the development and debates of bills. This engagement entails determining what these rights permit and forbid, how they apply in the context of the laws developed, and how to properly balance their protection with other social interests and values.[91] To ensure thorough and principled deliberation on rights protection, it is crucial to establish dedicated institutional mechanisms that facilitate such assessments.[92]

Contrarily to the existing mechanisms of rights review, these mechanisms should be purposefully designed to foster effective and sustainable rights protection. I hold the view that good governance and its core principles can support the design of a framework for pre-enactment review in which lawmaking institutions are actively involved in rights protection. These principles include accountability, transparency, political equality, responsiveness and participation. This perspective has gained traction globally, with scholars and governments increasingly exploring institutional structures that promote good governance, including in the context of human rights.[93] Of course, even if designed in line with principles of good governance, the effectiveness and outcomes of mechanisms of rights review may vary in different contexts; they are notably influenced by the significance placed on the Charter by the governing party. However, good governance and its principles provide a solid foundation for designing a pre-enactment review framework that actively engages lawmaking institutions in rights protection. By adhering to these principles, mechanisms of rights review are more likely to foster effective and sustainable rights protection.

To enhance pre-enactment review in federal lawmaking and explore the features of effective mechanisms of rights review, I adopt a comparative and interdisciplinary approach. This approach allows for an in-depth analysis that considers various perspectives and draws from

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[91] Appleby & Olijnyk, *supra* note 52 at 9.
[92] *Ibid* at 10.
[93] See e.g., Henk Addink, *Good Governance: Concept and Context* (Oxford: Oxford University Press, 2019); Rainer Schmalz-Bruns, "The Normativity of Participatory Governance" in Hubert Heinelt, ed, *Handbook on Participatory Governance* (Cheltenham: Edward Elgar Publishing, 2018) 17; Alina Mungiu-Pippidi, "The Rise and Fall of Good Governance Promotion" (2020) 31:1 Journal of Democracy 88; Johanna Speer, "Participatory Governance Reform: A Good Strategy for Increasing Government Responsiveness and Improving Public Services?" (2012) 40:12 World Development 2379; John Gaventa, "Toward Participatory Governance: Assessing the Transformative Possibilities" in Samuel Hickey & Giles Mohan, eds, *Participation: From Tyranny to Transformation* (New York: Zed Books, 2004) 25.

different fields of study, mainly constitutional law and political science. Considering its unique characteristics and requirements, such an approach is relevant to propose innovative mechanisms well-suited to the Canadian human rights regime.

A functional comparative perspective, in particular, is helpful to gain a wide-ranging understanding of the federal lawmaking process,[94] including how lawmakers engage with and uphold the Charter. Drawing upon the experiences of other jurisdictions can offer valuable insights, notably to underscore best practices and areas for improvement in Canada.[95] In the context of this thesis, this comparative analysis involves examining how other jurisdictions handle pre-enactment review and identifying the different features of relevant mechanisms of rights review. My analysis primarily centers on examining these mechanisms' functional and structural characteristics and their influence on fostering effective and sustainable rights protection. Functional characteristics encompass the institution's mandates, responsibilities, and operational approaches, while structural characteristics pertain to its organization and governance. These dimensions can affect how institutions involved in rights review safeguard and uphold human rights. Accordingly, a functional comparative perspective enriched my understanding of pre-enactment review and guided my proposal of mechanisms of rights review that could likely foster effective and sustainable rights protection in the Canadian context.

This comparative exercise focuses on mechanisms of rights review and their characteristics rather than on specific jurisdictions. By considering various mechanisms of rights review, I can draw from a diverse range of experiences and identify different approaches that may be applicable to Canada. In my analysis of the executive stage of lawmaking, I refer to several national human rights institutions ("NHRIs") recognized for their reputable role in advising their respective governments throughout the development and drafting of bills. These NHRIs have been entrusted with providing valuable guidance and expertise to ensure that the proposed legislation aligns with human rights principles and standards. They serve as valuable sources of insights and expertise, shedding light on the features contributing to effective and sustainable rights protection. For the parliamentary stage of lawmaking, I turn to the parliamentary committees of rights review developed in the UK and Australia. These committees are relevant to reflect on a mechanism of

[94] Vicki C Jackson, "Comparative Constitutional Law: Methodologies" in *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 54 at 62.
[95] *Ibid* at 62.

rights review that could support robust Charter review at Parliament for two main reasons. First, these jurisdictions' parliaments reflect the political dynamics of Westminster systems like ours: bicameral legislatures characterized by parliamentary sovereignty, a fusion of powers between the executive and legislative branches, and responsible government.[96] Additionally, the UK and Australia's committees of rights review reflect the central and distinct role of Parliament in giving effect to human rights. The successes and failures of these parliamentary committees provide useful insights into how to support the distinctive role of Parliament in promoting rights protection. Overall, my comparative approach and consideration of various mechanisms of rights review in different stages of lawmaking and jurisdictions will provide a robust foundation for identifying potential avenues for enhancing rights protection in the Canadian federal lawmaking process.

Building upon this comparative analysis, I propose enhancing the existing pre-enactment review process of federal lawmaking by introducing two additional mechanisms for rights review. These mechanisms, carried out by specialized human rights institutions, could heighten awareness of potential Charter concerns in bills by infusing the lawmaking process with a greater emphasis on rights protection. The first mechanism involves establishing a human rights institution tasked with advising the government during the development of bills. This institution would provide valuable insights on the socio-economic ramifications of proposed bills that may intersect with Charter rights during the drafting stage, complementing the legal assessment conducted by the Department of Justice. At the parliamentary stage of lawmaking, a joint committee comprising members from the House of Commons and the Senate could be established to support the ability of Parliament to scrutinize bills and challenge the government's conclusions about their Charter compatibility. Aligned with scholarly discourse emphasizing the need for enhanced Senate involvement in lawmaking and rights protection[97], this joint committee would undertake a wide-ranging review of bills' implications for rights and subsequently report to Parliament; this process would occur concurrently with the inquiries carried out by regular parliamentary committees. While the advice and recommendations of these proposed institutions of rights review would not be binding on lawmakers, they would play a pivotal role in fostering rights protection by enhancing

[96] Anthony W Bradley & Cesare Pinelli, "Parliamentarism" in *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 650 at 651.

[97] See e.g., Jason Robert VandenBeukel, Christopher Cochrane & Jean-François Godbout, "Birds of a Feather? Loyalty and Partisanship in the Reformed Canadian Senate" (2021) 54 Canadian Journal of Political Science 830 at 831; Linda Cardinal & Sébastien Grammond, *Une tradition et un droit: la Sénat et la représentation de la francophonie canadienne* (Ottawa: Presses de l'Université d'Ottawa, 2017) at 87 ss.

transparency, facilitating governmental oversight by Parliament and the public, and encouraging greater civil society engagement in the lawmaking process.

In the upcoming chapters, I explore the unique contributions of the government and Parliament to rights protection as lawmaking institutions. Emphasizing the potential benefits of pre-enactment review for marginalized groups, I explore how various institutional components of the human rights regime – especially judicial review and the lawmaking process – influence the nature of the extent of the Charter review conducted during lawmaking.

Chapter 1 examines the potential shortcomings of Canada's court-centric approach to rights protection in safeguarding Charter rights. The chapter commences by substantiating the prevalence of this court-centric paradigm by exploring the perspectives held by lawmaking and judicial actors regarding the separation of powers outlined in the Charter. Subsequently, I explain the implications of placing excessive reliance on courts for ensuring the constitutionality of legislation, revealing how this approach might result in a partial safeguarding of rights due to challenges linked to access to justice and the inherent institutional and epistemological constraints faced by the judiciary.

Chapter 2 introduces the theoretical and normative grounds justifying a more active role of the government and Parliament in rights protection and Charter review. This normative framework is inspired by two theoretical and conceptual approaches to rights protection: theories of shared responsibilities and good governance. While the first provides a theoretical rationale for engaging the political branches in Charter review, good governance assists in developing mechanisms of rights review designed in a way favourable to fostering effective and sustainable rights protection. Together, these approaches create the normative framework grounding my critical assessment of the existing Charter review and the recommended institutional reforms.

Chapters 3 and 4 explore Charter review at the executive and parliamentary stages of lawmaking. In Chapter 3, I critically analyze the Charter review process that takes place during the development and drafting stages by the government. Performed by the Department of Justice, this mostly confidential assessment focuses on determining the compatibility of bills to jurisprudence rather than considering their genuine impacts on Charter rights. To strengthen executive rights review, I propose broadening the scope of the assessment currently conducted by establishing a federal human rights institution responsible for advising the government on the non-jurisprudential Charter impacts of bills, including their socio-economic implications. In Chapter

4, I argue for more active engagement of Parliament in Charter review during federal lawmaking. Due to the political dynamics characterizing deliberation and voting at the House of Commons and Senate – respectively due to partisanship and deference –, Charter review is unlikely to lead to robust scrutiny of bills during parliamentary processes. A joint committee for rights review, akin to those found in the UK and Australia, could enhance this assessment by addressing the current rights review challenges and leveraging both parliamentary chambers' strengths. The mechanisms of rights review recommended in Chapters 3 and 4 aim to enhance awareness during the lawmaking process on the potential socio-economic effects of proposed legislation on marginalized groups that could be covered under the Charter.

# Chapter 1 – Exploring Limitations and Gaps in Canada's Court-Centric Approach to Rights Protection

The supremacy of the Constitution over ordinary laws means that in addition to respecting formal conditions of lawmaking, the content of legislation must be compatible with the substantive principles constitutionally guaranteed[98] – including the Charter and other constitutional rights. This supremacy begs the fundamental question of who should interpret and enforce the rights it guarantees: the political branches, the judiciary, or both?[99] In this first Chapter, I discuss the court-centric approach to constitutional interpretation prevailing in Canada and the detrimental effects of this approach on rights protection, with a particular focus on marginalized groups.

In democratic states, courts are generally regarded as the locus of constitutional power,[100] the principal institution responsible for interpreting and applying the Constitution and guaranteed human rights.[101] Prevalent in the United States since the 19th century, this view gained traction in Europe following the end of World War II.[102] Even in states where courts have "weaker" judicial review powers, like the UK and Australia, the political branches tend to comply with judicial prescriptions on what the guaranteed rights demand.[103] This approach, referred to as judicial supremacy, entails that the judiciary holds ultimate authority in interpreting and applying human rights, often at the expense of the participation and influence of the government and legislatures.[104]

In Canada, the judiciary's mandate to interpret and apply the Constitution – and, incidentally, the Charter – is widely accepted by Canadians and the other branches of

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[98] Melero de la Torre, *supra* note 63 at 163.
[99] Maartje de Visser, "Non-judicial Constitutional Interpretation: The Netherland" in *Constitutionalism in Context* (Cambridge: Cambridge University Press, 2022) 216 at 3.
[100] Gabrielle Appleby, Vanessa MacDonnell & Eddie Synott, "The Pervasive Constitution: The Constitution Outside of the Courts" (2020) 48:4 Federal Law Review 437 at 438.
[101] Tom Ginsburg & Mila Versteeg, "Why do Countries Adopt Constitutional Review" (2014) 30:3 JLEO 587; Vanessa A MacDonnell, "The Constitution as Framework for Governance" (2013) 63 University of Toronto Law Journal 624 at 625.
[102] de Visser, *supra* note 99 at 216.
[103] Douglas Tomlinson, "Dialogue of the Deaf: Comparative Legislative Analysis of Weak-form Judicial Review" (2022) 46:1 Seton Hall Legislative Journal 1 at 71; Allison L Young, "Dialogue and Its Myths" in Geoffrey Signalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 35 at 43; The Honorable Philips Sales & Richard Ekins, "Rights-Consistent Interpretation and the Human Rights Act 1998" (2011) 127 Law Quarterly Review 217 at 227.
[104] Richard H Fallon Jr, "Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age" (2018) 96:3 Texas Law Review 487 at 515.

government.[105] In the words of legal scholar Grant Huscroft, "[t]he Charter is the Court's to interpret, so much so that for many there is no distinction between the Court and the Charter itself – the Charter's vaguely worded rights and freedoms are supposed to mean whatever the Court says they do."[106] Former minister and governmental lawyer Andrew Petter confirms that the prediction of many scholars that adopting the Charter would lead to a "legalisation of politics" had indeed materialized.[107] As a result, the discourse regarding rights protection has predominantly shifted towards legalistic language and viewpoints within Canadian society, sidelining the significance of political engagement and democratic participation.[108]

Indeed, in contrast, governments and Parliament tend to be perceived as potential rights infringers, "deviant institutions" as per their rights-respecting capacity[109] rather than institutions capable and willing to advance Charter rights.[110] In polls, Canadians consistently ranked elected representatives as less trustworthy than courts.[111] Challenging the courts' interpretations of the Charter is often deemed illegitimate and viewed as a violation of the principles of the rule of law.[112]

Accordingly, in the federal human rights regime, the distribution of the roles and responsibilities in rights protection reflects a legal form of constitutionalism. Although the Charter's enactment prompted the introduction of two mechanisms of rights review into the lawmaking process, namely rights vetting and Charter statement, these mechanisms are not intended to facilitate a thorough evaluation of bills' Charter compatibility. Instead, they focus on assessing their compliance with jurisprudence to prevent future judicial invalidations. Lawmakers merely try to anticipate judicial decisions when drafting legislation or re-enacting legislative sequels.[113] The judiciary, for its part, is mandated with rectifying infringements found in

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[105] Macfarlane, Hiebert & Drake, *supra* note 21 at 160; Huscroft, *supra* note 63 at 50.
[106] Huscroft, *supra* note 63 at 50.
[107] Andrew Petter, "Legalise it: The Chartening of Canadian Politics" in *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC University Press, 2010) 33 at 33. See also Richard Albert, "The Most Powerful Court in the World? Judicial Review of Constitutional Amendment in Canada" (2022) 110:(2d) Supreme Court Law Review 79. On the phenomenon of judicialization of politics, see Ran Hirschl, "The Judicialization of Politics" in Robert Goodin, ed, *The Oxford Handbook of Political Science* (Oxford University Press, 2011) 253; Martin Shapiro & Alec Stone Sweet, *On Laws, Politics & Judicialization* (Oxford: Oxford University Press, 2002).
[108] Petter, *supra* note 107 at 33.
[109] Janet Hiebert, "A Relational Approach to Constitutional Interpretation: Shared Legislative and Judicial Responsibilities", (2000) 35:4 J Can Stud 161 at 162.
[110] MacDonnell, *supra* note 101 at 626.
[111] David Docherty, *Legislatures* (Vancouver: UBC Press, 2014) at 3.
[112] Huscroft, *supra* note 63 at 50.
[113] Hiebert, *supra* note 50 at 19.

constitutionally challenged legislation after it enters into force.[114] This institutional framework closely aligns with the principles of judicial supremacy, one of the prevalent theories of constitutional interpretation and rights protection.

Despite its prominent position in many democratic systems, judicial supremacy is increasingly recognized as a flawed approach to rights protection, leading to incomplete protection of guaranteed rights.[115] Courts have played and continue to play a central role in upholding rights protection in Canada and abroad. The decisions of Canadian courts have been instrumental in driving numerous substantial rights advancements, many of which have been beneficial to the rights of minority groups.[116] But relying solely on courts to address rights issues creates gaps in rights protection and is unlikely to result in effective and sustainable protection of Charter rights.

Due to the challenges and limitations associated of overrelying on courts to give effect to guaranteed rights, scholars have proposed alternative approaches to constitutional interpretation. These theories advocate for a broader distribution of the responsibilities of interpreting and applying human rights among various actors, mainly the government, Parliament and civil society. In this thesis, these approaches are referred to as "theories of shared responsibilities." One such theory is the dialogue theory, formulated by constitutional scholars Peter W. Hogg and Allison A. Bushell.[117] According to this theory, sections 1 and 33 of the Charter facilitate an ongoing dialogue between courts and the political branches in Charter interpretation.

However, this dialogic conception of the Charter does not align with the reality of the federal human rights regime and the functioning of its mechanisms of rights review. This conception is increasingly contested by scholars for constituting monologue in favour of courts

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[114] Keith E Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and Responses" (2002) 80 N C Law Rev 773 at 784.

[115] See e.g., Gardbaum, *supra* note 34; Scott E Lemieux, "Judicial Supremacy, Judicial Power, and the Finality of Constitutional Rulings" (2017) 15:4 Perspectives on Politics 1067; Jeremy Waldron, "Judicial Review and Judicial Supremacy" (2014) (Public Law & Legal Theory Research Paper Series); Hutt, *supra* note 34.

[116] See e.g., *Carter*, *supra* note 3 (medical aid for dying); (*Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101 (prostitution law); *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134 [*Insite*] (access to supervised injection sites for drug users); *Reference re Same-Sex Marriage*, *supra* note 2 (same-sex marriage); *R v Morgentaler*, [1988] 1 SCR 30 [*Morgentaler*] (abortion rights).

[117] Peter W Hogg & Allison A Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" (1997) 35:1 Osgoode Hall Law Journal 75. See also Hogg & Allison A. Bushell, *supra* note 81.

rather than genuine dialogue.[118] This position is generally demonstrated by analyzing the legislators' reaction toward judicial invalidations and the Supreme Court's reaction to legislative sequels.[119] However, this standpoint is also supported by various indicators that uncover how both political and judicial figures view their duties and functions within the context of the Charter, as well as the roles of other branches. These indicators include public declarations of political actors, the attitude of lawmakers toward existing mechanisms of rights review, the positions defended in parliamentary debates, and the judicial discourse of "guardian of the Constitution." These indicators underscore two crucial aspects of rights protection in federal lawmaking: firstly, the predominant role of judicial review in rectifying violations of Charter rights in legislation; and secondly, the influential role of interpretations derived from judicial rulings in shaping how legislators assess Charter considerations in proposed bills. As a result, the federal human rights regime remains largely court-centric, though not one of pure judicial supremacy.

For this reason, most issues ensuing from judicial supremacy for rights protection also apply in Canada. In particular, this approach places a heavy burden on individuals to seek legal recourse through the justice system, creating barriers to accessing justice, particularly for marginalized groups who may lack resources or face systemic barriers. Furthermore, owing to institutional and epistemological constraints on the judicial handling of certain Charter claims, particularly those pertaining to socioeconomic rights, the body of case law presents a confined perspective on the meaning and scope of Charter rights. Hence, judicial protection alone cannot ensure Charter rights' effective and sustainable protection.

This Chapter proceeds in two parts. The first section introduces the main approaches to rights protection: judicial supremacy and theories of shared responsibilities. It elucidates the indicators substantiating the assertion that Canada's approach to rights protection, while not purely aligned with judicial supremacy, is significantly centred around the courts. In the second section, I explore the limitations of this court-centric approach in effectively and sustainably safeguarding

[118] Hiebert, *supra* note 48 at 164. See also Melero de la Torre, *supra* note 63 at 167; Richard Mailey, "The Notwithstanding Clause and the New Populism" (2019) 28:4 Constitutional Forum 9 at 10; Eugénie Brouillet & Félix-Antoine Michaud, "Les rapports entre les pouvoirs politique et judiciaire en droit constitutionnel canadien : dialogue ou monologue?" in *XIXe Conférence des juristes de l'État* (2011) 3 at 17; Huscroft, *supra* note 63; Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010) at 155; Grant Huscroft, "constitutionalism from the Top Down" (2007) 45:1 Osgoode Hall Law Journal 91.

[119] See e.g., Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Ruling on Rights" (2012) 34:1 International Political Science Review 39.

Charter rights. I discuss the two primary challenges underscoring this observation: issues of access to justice and the constraints of judicial decisions in determining the scope and meaning of Charter rights. By critically examining these limitations, this chapter reveals the implications and inadequacies inherent in Canada's court-centric model of rights protection, with a particular focus on its impact on marginalized groups.

## 1.1 – The Court's Central Role in Rights Review and Rights Protection within Federal Lawmaking

Judicial review has emerged as one of the fundamental characteristics of democracies, giving rise to a legalistic form of constitutionalism.[120] Courts play a significant role in interpreting and applying the Constitution and human rights, whether their decisions are considered binding or not. This legalistic approach is traditionally contrasted with political constitutionalism. Constitutionalist Aileen Kavanagh summarizes the distinction between them:

> On this view, political constitutionalism can be described loosely as a general pro-Parliament/anti-court outlook on public law issues, whereas legal constitutionalism may be grounded in a more supportive orientation towards judicial power and a sceptical view of elected politicians.[121]

If this dichotomy is growingly recognized as a "false choice"[122], the "seemingly unending" debates on legal versus political constitutionalism continue to take up an important part of recent constitutional scholarship, underscoring the central role of judicial review in democracies.[123] The form that judicial review should take is a prominent topic in scholarly discussions.

[120] Ming-Sung Kuo, "Politics and Constitutional Jurisgenesis: A Cautionary Note on Political Constitutionalism" (2018) 7:1 Global Constitutionalism 75 at 76.
[121] Aileen Kavanagh, "Recasting the Political Constitution: From Rivals to Relationships" (2019) 30:1 King's Law Journal 43 at 61.
[122] Adam Tomkins, "What's Left of the Political Constitution?" (2013) 14:12 German Law Journal 2275 at 2275.
[123] See e.g., Richard Bellamy, "Political Constitutionalism and Populism" (2023) Journal of Law and Society 1; Mariano C Melero, "Weak Constitutionalism and the Legal Dimension of the Constitution" (2022) 11:3 Global Constitutionalism 494; Mark S Harding, *Judicializing Everything?: the Clash of Constitutionalism in Canada, New Zealand, and the United Kingdom* (Toronto: University of Toronto Press, 2022); Alexander Latham-Gambi, "Political Constitutionalism and Legal Constitutionalism - an Imaginary Opposition?" (2020) 40:4 Oxford Journal of Legal Studies 737; Richard Bellamy, "The Republican Core of the Case for Judicial Review: A Reply to Tom Hickey. Why Political Constitutionalism Requires Equality of Power and Weak Review" (2019) 17:1 International Journal of Constitutional Law 317; Kuo, *supra* note 120; Cormac Mac Amhlaigh, "Putting political constitutionalism in its place" (2016) 14:1 International Journal of Constitutional Law 175–197; Adrienne Stone, "Putting political constitutionalism in its place?: A reply to Cormac Mac Amhlaigh" (2016) 14:1 International Journal of Constitutional Law 198.

Constitutionalist Mark Tushnet's distinction between "strong" and "weak" forms of judicial review often serves as a framework for analysis.[124] His categorization provides a basis for exploring the roles and powers of courts in constitutional interpretation and rights protection.[125]

The key distinction between these two forms of judicial review lies in the relative ease or difficulty for legislators to respond to judicial determinations.[126] Systems of judicial supremacy are often categorized as "strong" forms of judicial review, where courts can render declarations of invalidity immediately applicable or refuse to apply legislation incompatible with guaranteed rights.[127] In contrast, legislators can question judicial determinations without substantive restrictions or delays in weak-form systems.[128] In such systems, constitutional interpretative powers are shared between the courts and the political branches, theoretically aligning more closely with the prescriptions of theories of shared responsibilities.[129]

The existing regime created by the Constitution and the Charter lies between these two models. The classification of "weak" and "strong" models of judicial review allows for significant variation in legal frameworks, and this categorization should not be applied too rigidly.[130] In the case of Canada, the Constitution establishes a form of judicial review that can be considered "strong," as courts have the power to invalidate unconstitutional legislation. However, the effects of these invalidations are more nuanced in Canada compared to systems with strong judicial review, such as the United States, where lawmakers are prohibited from overriding judicial decisions. Because sections 1 and 33 of the Charter allow lawmakers to reverse, modify or avoid judicial invalidation, the Charter is viewed as creating a "weak," dialogic form of judicial review. Still, the Canadian human rights regime differs from weak systems like those found in the United Kingdom and Australia, where courts can only issue declarations of invalidity.[131]

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[124] Kuo, *supra* note 120 at 90.
[125] *Ibid*.
[126] Mark Tushnet, "Weak-Form Judicial Review: its Implications for Legislatures" (2004) 2:1 New Zealand Journal of Public and International Law 7 at 8–9.
[127] Melero de la Torre, *supra* note 63 at 164.
[128] *Ibid*.
[129] As explained in section 1.2, the judiciary occupies a central place in rights interpretation even in jurisdictions with weaker judicial powers, such as the UK and Australia.
[130] Kent Roach, "Dialogue in Canada and the Dangers of Simplified Comparative Law and Populism" in Geoffrey Signalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 267 at 306.
[131] *Ibid*.

In this section, I argue that although the regime under the Charter does not reflect a model of judicial supremacy, it unmistakably gravitates towards a court-centric approach. This has resulted in the emergence of a federal human rights regime that places significant emphasis on the role of the courts for both interpreting Charter rights and correcting infringements in legislation.

### 1.1.1 – Two Approaches to Rights Protection: Judicial Supremacy and Theories of Shared Responsibilities

Approaches to rights protection are not merely ways of describing or explaining bills of rights; judicial supremacy and theories of shared responsibilities deal with "the allocation of power between courts and legislatures on the resolution of constitutional issues."[132] Hence, these approaches endorse considerably different roles and responsibilities for each branch of government vis-à-vis the interpretation and application of guaranteed rights. They differ regarding which institutions are bound by the guaranteed rights, the duties they imply, and what duty bearers ought to do and not do.[133]

Privileging one approach over the other significantly impacts rights protection. It influences not only the framework of the human rights regime but also how seriously lawmakers take their constitutional obligations in lawmaking and how courts interpret these obligations in the event of a legal conflict like the *Schmidt* case.[134]

#### A) Judicial Supremacy

While there is no official definition of judicial supremacy[135], a common understanding arises from literature: courts are considered the final and authoritative interpreter of the Constitution or, at least, of guaranteed human rights.[136] While proponents of judicial supremacy are not a

[132] Gardbaum, *supra* note 34 at 94.
[133] Brian Slattery, "A Theory of the Charter" (1987) 25:4 Osgoode Hall Law J 701 at 712.
[134] In *Schmidt*, Justice Noel favored a court-centric approach to rights protection that centers courts as the main responsible for giving effect to the Charter, while imposing a limited obligation on the government and Parliament in that matter. Highly influenced by prescriptions of judicial supremacy, this pronouncement largely grounded his decision to reject Schmidt's claim that the Minister of Justice had to report to Parliament if a possible Charter incompatibility is identified under section 4.1 of the *Department of Justice Act*.
[135] Waldron, *supra* note 115 at 11.
[136] See e.g., Brown, *supra* note 61; Graber, *supra* note 61; Alexander & Schauer, *supra* note 61; Chemerinsky, *supra* note 61; Chemerinsky, *supra* note 61; Frederick Schauer, "Judicial Supremacy and the Modest Constitution" (2004)

homogenous group, they all value courts as the ultimate guardians of the rule of law, with "distinctive abilities to determine and enforce the Constitution's meaning."[137] In contrast, the political branches have a marginal – if not inexistent – role in determining what the Constitution entails.[138] Extrajudicial interpretations of the Constitution are viewed as anarchic, irrational and tyrannical.[139] In the words of legal scholar Richard H. Fallon Jr, judicial supremacists are:

> virtually unanimous in thinking that to allow other branches to countermand judicial interpretations would substitute politically motivated, self-interested decision-makers for the best, most impartial, most reliable arbiters of constitutional meaning-namely, the courts-that either the Constitution's framers or anyone else has been able to identify.[140]

A regime of judicial supremacy thus involves two key elements. Firstly, judges have the authority to interpret the Constitution and make decisions based on their interpretation.[141] Secondly, judicial interpretations are widely accepted and unquestioned by other branches of government.[142]

The second feature is specific to judicial supremacy. Judicial decisions, considered final and authoritative, determine the meaning of the Constitution for everyone[143]: once courts have interpreted the Constitution, "that's the end of it."[144] Interpretations of the rights made by the Supreme Court are binding not only for particular cases before them but also for a "wide variety of future, not-yet-contemplated cases"[145], unless overturned by the Supreme Court itself. Conversely, governments and legislatures must defer to judicial interpretations even when they believe that the Court made a substantive error on the meaning of the Constitution.[146] In this sense, judicial supremacy comes into play only if a disagreement arises between judicial and political

92:4 California Law Review 1045; Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985).
[137] Fallon Jr., *supra* note 104 at 515.
[138] Slattery, *supra* note 35 at 716.
[139] Whittington, *supra* note 33.
[140] Fallon Jr., *supra* note 104 at 515.
[141] Hutt, *supra* note 34 at 7.
[142] *Ibid*.
[143] Larry D Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford: Oxford University Press, 2005) at 125.
[144] Tushnet, *supra* note 34 at 7.
[145] Whittington, *supra* note 33 at 784.
[146] *Ibid*. Alexander & Schauer, *supra* note 61 at 1381.

understandings of guaranteed rights.[147] In such an event, a court's determination "prevails over the opinions of all other relevant parties and institutions presented in that proceeding."[148] Courts are thus entitled to "blind obeisance" from political institutions.[149]

Judicial supremacists attribute three main benefits to this approach: 1) the countermajoritarian function of the courts, 2) the deliberative function of the courts, and 3) the settlement function of judicial interpretations.[150]

Regarding the first benefit, proponents of judicial supremacy contend that by safeguarding guaranteed rights, courts serve as a necessary check on the potential tyranny of the majority. They consider that the counter-majoritarian character of judicial interpretations legitimizes the central role of courts in determining the meaning of the Constitution, rendering them more democratic.[151] The dynamics of polarization and partisanship characterizing legislatures further strengthen the importance of the judiciary in rights protection.[152] This concern is grounded in the work of theorists concerned with the counter-majoritarian difficulty, principally in Alexander Bickel's *The Least Dangerous Branch*.[153] Bickel supports that the judiciary constitutes the "least dangerous branch," maintaining the delicate balance of power and protecting individual rights in a democratic society. Judicial supremacists thus highlight the need for an empowered judiciary to check on the majority and protect guaranteed rights.

Secondly, proponents of judicial supremacy argue that judicial interpretations are more deliberative and less susceptible to political bias due to their depoliticized nature.[154] One of the leading proponents of judicial supremacy, Ronald Dworkin, opines that judges are likely to make better decisions than the political branches. In his opinion, political processes are "dominated by political alliances that are formed around a single issue and use the familiar tactics of pressure

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[147] Stephen Gardbaum, "What is Judicial Supremacy?" in *Comparative Constitutional Theory* (Cheltelham: Elgar Publishing, 2018) 21 at 39.
[148] Gardbaum, *supra* note 34 at 95.
[149] Christopher L Eisgruber, "The Most Competent Branches: A Response to Professor Paulsen" (1994) 83 The Georgetown Law Journal 347 at 348.
[150] Whittington, *supra* note 33 at 779.
[151] Jadson Correia de Oliveira, Raissa Fernanda Cardoso Toledo & Natanal Lima Santos, "Judicial Supremacy and Institutional Dialogues in the Brazilian Constitutional Order" (2020) 2:1 Revista Cientìfica Disruptiva 52 at 56.
[152] Graber, *supra* note 61 at 170.
[153] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986).
[154] de Oliveira, Cardoso Toledo & Lima Santos, *supra* note 151 at 56.

groups to bribe or blackmail legislators into voting as they wish."[155] Courts, on the other hand, offer a principled platform for engaging in reasoned debates to address matters concerning moral principles in constitutional interpretation. In a nutshell, the deliberative functions of courts would ensure a more objective and principled approach to rights interpretation.

Finally, judicial supremacists consider that one of the most important functions of law is its ability to "settle authoritatively what is to be done".[156] In their 1997 article *On Extrajudicial Constitutional Interpretation*, Larry Alexander and Frederick Schauer provided one of the most well-known defences of this function.[157] In their opinion, the absence of settlement on the meaning of the Constitution leads to interpretative anarchy.[158] They suggest:

> To the extent that the law is interpreted differently by different interpreters, an overwhelming probability for many socially important issues, it has failed to perform the settlement function. The reasons for having laws and a constitution that is treated as law are accordingly also reasons for establishing one interpreter's interpretation as authoritative.[159]

This settlement function is considered especially critical in the case of the Constitution, the "highest law."[160]

Despite the prominence of the judiciary in constitutional interpretation, in practice, most states do not exemplify a pure version of judicial supremacy.[161] Even in the United States, where judicial supremacy is commonly assumed to be deeply entrenched in constitutional practices, the adequacy of this concept to define American constitutionalism is increasingly contested.[162] Political scientist Scott E. Lemieux, among others, offers a noteworthy criticism of the affixed label of judicial supremacy in the United States, arguing that it fails to capture the complexities of constitutional politics accurately.[163] Looking at cases commonly contemplated as canonical

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[155] Ronald Dworkin, *Freedom's Law - The Moral Reading of the American Constitution* (New Haven: Harvard University Press, 1996) at 344–45.
[156] Alexander & Schauer, *supra* note 61 at 1371.
[157] Alexander & Schauer, *supra* note 61.
[158] Ibid at 1379.
[159] Ibid at 1377.
[160] Ibid at 1377.
[161] Miguel Schor, "Chapter 5: Constitutional dialogue and judicial supremacy" in *Comparative Constitutional Theory* (Cheltenham, UK: Edward Elgar Publishing, 2018) at 96.
[162] See e.g., Fallon Jr., *supra* note 104; Louis Fisher, "The Claim of Judicial Finality: Theory Undercut by Experience" (2018) 16 The University of New Hampshire Law Review 305; Lemieux, *supra* note 115.
[163] Lemieux, *supra* note 115.

examples of assertions of judicial supremacy – including *Cooper v. Aaron*[164] and *City of Boerne v. Flores*[165] – Lemieux found that the Supreme Court of the United States does not unilaterally resolve all constitutional issues, and interactions with other branches of government influence its decisions.[166] In light of these observations, it becomes evident that the understanding and application of judicial supremacy vary and require a nuanced analysis.

In a context where the existence of pure systems of judicial supremacy is increasingly questioned[167], legal scholar Stephen Gardbaum offers an interesting exploration of this approach in his 2018 article *What is Judicial Supremacy?* Through a systematic analysis of the conceptions of judicial supremacy in literature, he distinguishes between four distinct but sometimes overlapping senses: interpretative, attitudinal, decisional and political supremacy. Interpretative supremacy – or interpretative finality[168] – refers to the most common sense attributed to judicial supremacy, namely "the legal authority of a Supreme Court interpretation of the constitution."[169] Attitudinal supremacy, examined by legal philosopher Jeremy Waldron in *Judicial Review and Judicial Supremacy*,[170] depends on how the Supreme Court exercises its reviewing power. For example, attitudinal supremacy would ensue if the apex court systematically rejected constitutional interpretations of the political branches in favour of its own, or if it adopted an "inappropriately 'programmatic' approach to judicial review rather than a discrete, case-by-case, on the merits one."[171] The third sense of judicial supremacy is decisional supremacy, which relates to the dichotomy between weak- and strong-form of constitutional review established by Tushnet: "whether courts or the elected branches of government have the legal power to ensure that their view prevails as to whether a statute conflicts with the constitution/bill of rights and remains the

[164] *Cooper v. Aaron,* 358 U.S. 1 (1958).
[165] *City of Boerne v. Flores,* 521 U.S. 507 (1997).
[166] Lemieux, *supra* note 115 at 1068. He argues that "[e]ven the most famous examples of judicial supremacy generally do not involve the courts clearing the constitutional field, but show more complex interactions between political actors".
[167] For another reconceptualization of judicial supremacy capturing the broader range of constitutional inter-institutional relationships, see Manoj Mate, "Judicial Supremacy in Comparative Constitutional Law" (2017) 92:2 Tul L Rev 393–468.
[168] Gardbaum, *supra* note 147 at 43.
[169] *Ibid* at 22.
[170] Waldron, *supra* note 115.
[171] Gardbaum, *supra* note 147 at 25.

law of the land."[172] Finally, political supremacy refers to the empirical assessment of the actual political power of courts to determine constitutional issues versus the political branches:

> in terms of constitutional politics and not only constitutional law (or in the way that political science studies and measures), courts are the most powerful or consequential branch of government on constitutional issues and are able to impose their will on other recalcitrant political actors and institutions, either in particular instances or generally.[173]

Gardbaum's typography is enlightening to inform a discussion on the nature of the human rights regime in Canada: it offers a more nuanced vision of supremacy, one that illustrates the various senses in which it can materialize. Even if all these senses are not present in a state, one or more denotes a form of judicial dominance in constitutional interpretation. As further discussed in section 1.1.2, this dominance in Canada translates into a court-centric approach to rights protection.

#### B) Theories of Shared Responsibilities to Rights Protection: Judicial Review without Judicial Supremacy

In 2004, Schauer alleged that "judicial supremacy is under attack," observing an increasing number of political actors and academics challenging the supreme and authoritative status of the judiciary in constitutional interpretation.[174] This number has since significantly increased: a growing number of scholars are questioning the concept of judicial supremacy and the exclusive reliance on courts to ascertain the interpretation and extent of the Constitution and human rights.[175] Opponents of judicial supremacy generally believe that the judiciary is flawed in resolving fundamental policy issues in a pluralist society.[176]

Accordingly, numerous scholars reconceptualized the roles and responsibilities in constitutional interpretation. These theories are rooted in the normative tenets of political

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[172] *Ibid* at 27.
[173] *Ibid* at 30.I
[174] Schauer, *supra* note 136 at 1045.
[175] See e.g., Hutt, *supra* note 34; Gardbaum, *supra* note 34; Kuo, *supra* note 34; Goldsworthy, *supra* note 34; Fleming, *supra* note 34; Kramer, *supra* note 34; Post & Siegel, *supra* note 34; Whittington, *supra* note 33; Tushnet, *supra* note 34.
[176] Kuo, *supra* note 120 at 92.

constitutionalism, which challenges the notion that the judiciary should be solely responsible for enforcing the Constitution.[177] Instead, they advocate for a more expansive approach encompassing what Mark Tushnet termed the "constitution outside the courts" in 1992.[178] They propose that these roles and responsibilities should be shared among various actors, including the executive, legislative and, in some cases, citizens.[179] Some, including Gardbaum[180], Janet Hiebert[181] and Keith E. Whittington[182], embrace a diffusion of constitutional interpretation among the political and judicial branches.[183] Others, like Jeremy Waldron[184] and Tushnet[185], reject the institution of judicial review altogether, pleading in favour of constitutional interpretation by the people.[186] Despite substantial differences in this broad range of alternatives to judicial supremacy, these theories share a common feature: "the view that nonjudicial actors should be active constitutional interpreters whose interpretations are entitled to respect and deference from the courts."[187] Accordingly, they are labelled as "theories of shared responsibilities" in the present thesis.

These theories have impressive democratic credentials, going back to the founding of the American Republic.[188] Thomas Jefferson refused to accept judges as the "ultimate arbiters of all constitutional questions," instead declaring that "[t]he Constitution has erected no such single tribunal. (...) It has more wisely made all the departments coequal and co-sovereign within themselves."[189] Echoing this sentiment, Abraham Lincoln declared in 1861, when taking office:

> [I]f the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court... the people will have ceased

[177] Cristina Fasone, "Legislatures as Hostages of Obstructionism: Political Constitutionalism and the Due Process of Lawmaking" (2016) 21 Review of Constitutional Studies 63 at 64.
[178] Mark Tushnet, "The Constitution Outside the Courts: A Preliminary Inquiry" (1992) 26:2 Valparaison University Law Review 437.
[179] See also Allan C Hutchinson, *Democracy and Constitutions: Putting Citizens First* (Toronto: University of Toronto Press, 2021).
[180] See e.g., Gardbaum, *supra* note 147; Gardbaum, *supra* note 34; Gardbaum, *supra* note 47.
[181] See e.g., Hiebert, *supra* note 48; Hiebert, *supra* note 50; Hiebert, *supra* note 12. See also Slattery, *supra* note 35.
[182] Keith E Whittington, *Political Foundations of Judicial supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton: Princeton University Press, 2007); Whittington, *supra* note 33.
[183] See also Robert Post & Reva Siegel, "Roe Rage: Democratic Constitutionalism and Backlash" (2007) 42 Harvard Civil Rights-Civil Liberties Law Review 373; *ibid*; Slattery, *supra* note 35.
[184] Jeremy Waldron, "The Core of the Case against Judicial Review" (2006) 115:6 The Yale Law Journal 1346; Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).
[185] Tushnet, *supra* note 63; Tushnet, *supra* note 34; Tushnet, *supra* note 178.
[186] See also Kramer, *supra* note 34.
[187] Whittington, *supra* note 33 at 780.
[188] Kent Roach, "Dialogic Judicial Review and its Critics" (2004) 23 Supreme Court Law Review 49 at 91–92.
[189] Ernest A Young, "Constitutionalism Outside the Courts" in *The Oxford Handbook of the US Constitution* (Oxford: Oxford University Press, 2015) 843 at 846.

> to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[190]

These historical perspectives emphasize the significance of shared responsibilities and democratic engagement in interpreting and applying constitutional principles.

Over time, the conventional opposition to judicial review has diminished, even among proponents of constitutional thought emphasizing the legislature's role in constitutional interpretation.[191] Accordingly, a growing portion of scholarship in theories of shared responsibilities is devoted to distinguishing – or, in Gardbaum's words, "decoupling" – judicial supremacy from judicial review.[192] The idea behind this distinction is that recognizing the review powers of courts does not necessarily render their interpretations authoritative and final.[193] Judicial review, in itself, is not automatically conductive of judicial supremacy. As expressed by Whittington, "opposition to judicial supremacy can be distinguished from opposition to judicial review per se."[194] Political scientist Kenneth Ward aptly discerns the two concepts:

> A judge exercises judicial review when, in deciding a case, she refuses to give effect to what is deemed an unconstitutional act of another institution of government. Judicial supremacy describes what happens after judges exercise judicial review. It defines the status judicial precedents have when challenged by elected institutions, and it thus describes the political field on which judges and elected officials contest their disagreements about what the Constitution means.[195]

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[190] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in Inaugural Addresses of the President of the United States from George Washington 1789 to George Bush 1989, S. Doc. No. 10, 101st Cong., 1st Sess. 133, 139 (1989).

[191] Murray Hunt, "Introduction" in Murray Hunt, Hayley J Hooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing: Portland, 2015) 1 at 9.

[192] See e. g. Rosalind Dixon, "The Forms, Functions, and Varieties of Weak(ened) Judicial Review" (2019) 17:3 ICON 904; Fallon Jr., *supra* note 104; Patrick J Mulligan, "Examining the Role of Courts in Canada's Policy-Making Process" (2018) 3:1 Bridges: An Undergraduate Journal of Contemporary Connections 3; Gardbaum, *supra* note 34; Waldron, *supra* note 115; Alon Harel & Adam Shinar, "Between judicial and legislative supremacy: A cautious defense of constrained judicial review†" (2012) 10:4 International Journal of Constitutional Law 950–975; Robert Justin Lipkin, "What's Wrong with Judicial Supremacy? What's Right about Judicial Review" (2008) 14 Widener Law Review 1.

[193] Gardbaum, *supra* note 34 at 94.

[194] Whittington, *supra* note 33 at 783.

[195] Kenneth Ward, "Legislative Supremacy" (2012) 4 Washington University Jurisprudence Review 325 at 327.

While judicial review refers to the process itself, judicial supremacy alludes that judicial decisions should settle their meaning and scope for all and in the future.[196] Political philosopher Donald E. Bello Hutt states that what differentiates these two concepts is how relations between judicial and extrajudicial actors in interpreting the Constitution are conceived.[197] The way courts and the political branches act in the face of an interpretative conflict transforms mere judicial review into judicial supremacy.

Numerous theories are associated with the idea of judicial review without judicial supremacy. These theories, political scientist Jacob T. Levy explains, are:

> something less determinate than a doctrine or even a fully developed theory. Both were developed by commentators and scholarly observers as a way to draw out, tie together, and emphasize some practices of constitutional interpretation, construction, and politics. The ideas are simultaneously descriptive and prescriptive, aiming to make sense of things that official actors have already said and done and to show that they can be understood as part of an attractive ongoing model of constitutional engagement.[198]

By offering descriptive and normative perspectives, these theories provide alternative understandings of the roles and responsibilities of key stakeholders within human rights regimes.

Considered "a competitor approach to judicial supremacy"[199], departmentalism is one of the most prevalent theories promoting diffusion of interpretative powers. As expressed by Fallon, "[t]he basic idea of departmentalism is easily stated: each branch interprets the Constitution for itself."[200] Though departmentalists vary in the roles and responsibilities they associate with rights protection, they all repudiate any single interpreter of the Constitution as supreme.[201] Levy explains that departmentalism "denies judicial uniqueness or supremacy in the task of constitutional interpretation, in favour of the idea that, at least sometimes, the executive and the legislature must work out their own understanding of what is constitutionally forbidden, permitted,

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[196] Hutt, *supra* note 34 at 11.
[197] *Ibid*.
[198] Jacob T Levy, "Departmentalism and Dialogue" in Geoffrey Signalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 68 at 72.
[199] Kevin C Walsh, "Judicial Departmentalism: An Introduction" (2017) 58:5 William & Mary Law Review 1710 at 1721.
[200] Fallon Jr., *supra* note 104 at 494.
[201] Whittington, *supra* note 33 at 783.

or required."[202] Closely related to departmentalism, coordinated construction promotes the independence of each branch to interpret the Constitution as well as dialogue and cooperation between them.[203] Proponents of these approaches thus advocate for the diffusion of interpretative powers among branches, emphasizing that no single interpreter of the Constitution holds ultimate authority in rights protection.

Dialogic approaches to rights protection also fall into this category.[204] A term coined by Peter W. Hogg and Allison Bushell in their 1997 article, the "dialogue theory" describes the relationship between the courts and the political branches under the Charter. In their words,

> Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision.[205]

The authors state that the possibility offered to Parliament by sections 1 and 33 of the Charter to reverse, modify or avoid a judicial invalidation by adopting new legislation diminishes concerns about the legitimacy of judicial review.[206] Dialogic perspectives of the interinstitutional relations between the judiciary and the legislator are now common outside of Canada, including in New Zealand and Australia.[207]

While the dialogue theory was mostly offered as descriptive in nature, this theory has strong normative ideals.[208] Dialogue emphasizes the ongoing interaction and exchange between

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[202] Levy, *supra* note 198 at 72.
[203] See e.g., Dennis Baker, "A Feature, not a Bug: A Coordinate Moment in Canadian Constitutionalism" in Geoffrey Signalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 497; Baker, *supra* note 35; Christopher Manfredi, "Judicial Power and the Charter: Three Myths and a Political Analysis" (2001) 14 The Supreme Court Review 331.
[204] See e.g., Geoffrey Signalet, Grégoire Webber & Rosalind Dixon, "Introduction - The 'What' and 'Why' of Constitutional Dialogue" in Geoffrey Signalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 1; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?*, revised ed (Toronto: Irwin Law, 2016); Hogg & Allison A. Bushell, *supra* note 81; Hogg & Bushell, *supra* note 117; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* (Toronto: Irwin Law, 2001).
[205] Hogg & Bushell, *supra* note 117 at 75.
[206] Hogg & Allison A. Bushell, *supra* note 81.
[207] Signalet, Webber & Dixon, *supra* note 204 at 10. For an interesting discussion on the suitability of the notion of constitutional dialogue to New Zealand's constitutional arrangements, see Leonid Sirota, "Constitutional Dialogue: The New Zealand Bill of Rights Act and the Noble Dream" (2018) 27:4B New Zealand Universities Law Review 897.
[208] Signalet, Webber & Dixon, *supra* note 204 at 4.

different branches of government. This perspective acknowledges that judicial rulings are not final, allowing for ongoing discussions, interpretations, and refinements of Charter rights.[209] Between judicial supremacy and legislative supremacy, this dialogue would reflect a "new Commonwealth model of constitutionalism."[210]

This approach emphasizes the strengths and weaknesses of each branch of government: it aims to address the limitations of majoritarian democracy through the threat of judicial review while also providing an avenue for rectifying potential errors made by the judiciary through legislative sequels.[211] Legal scholar Jean-Christophe Bédard-Rubin summarizes the dialogue theory as pursuing a balance between judicial supremacy in constitutional interpretation and parliamentary sovereignty.[212] Levy contrasts departmentalism and the dialogue theory, noting that they seek to overcome different presumptions:

> Departmentalism is a response to strong-form American judicial review or judicial supremacy, and so it stresses the independent responsibility of legislatures and (especially) executives. The dialogue metaphor developed as a way to think about judicial review in a political culture that was still not quite used to it, to legitimize it against Westminsterian worries about the counter-pluralitarian difficulty.[213]

Theories of popular constitutionalism are another example of theories of shared responsibilities. In that case, the final authority to interpret the Constitution rests with the people rather than the courts. Tushnet's *Taking the Constitution Away from the Courts*[214] and Larry Kramer's *The People Themselves*[215] constitute two of the most well-known publications endorsing this view. While these theories do not explicitly pertain to the roles and responsibilities of lawmakers in Charter review, it still emphasizes the need for greater public involvement in determining the scope and meaning

[209] Rosalind Dixon, "Constitutional 'Dialogue' and Deference" in Geoffrey Signalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 161 at 161.
[210] Gardbaum, *supra* note 47 at 111.
[211] Roach, *supra* note 130 at 290. See also Swati Jhaveri, "Interrogating Dialogic Theories of Judicial Review" (2019) 17:3 International Journal of Constitutional Law 811 at 813–4.
[212] Jean-Christophe Bédard-Rubin, "Des causes et des conséquences du dialogue constitutionnel" (2018) 23:2 Review of Constitutional Studies 287 at 292.
[213] Levy, *supra* note 198 at 72–73.
[214] Tushnet, *supra* note 34.
[215] Kramer, *supra* note 34.

of human rights, advocating for a more inclusive and democratic approach to constitutional decision-making.

These theories of shared responsibilities offer different perspectives and frameworks for distributing constitutional interpretative powers between the judiciary and other branches of government.

### 1.1.2 – Canada's Court-Centric Approach to Rights Protection: Evidence and Scholarly Perspectives

The primacy of the judiciary – especially the Supreme Court – to interpret the Constitution and the Charter is broadly accepted in Canada. The strong remedial powers associated with section 52 of the *Constitution Act, 1982,* support this prevalence, even with opportunities for dialogue between the judicial and political branches. Still, as mentioned by Gardbaum, judicial supremacy is not limited to interpretative supremacy: there are multiple other ways courts can dominate constitutional interpretation.[216] The centrality of judicial rights protection in the federal human rights regime ensues from two elements: (1) judicial review is preferred to pre-enactment review as a means to ensure the Charter compatibility of legislation, and (2) compatibility with the guaranteed rights is equated with compatibility with jurisprudence. In this section, I explore several indicators related to the institutional framework of the human rights regime and the attitude of actors involved in Charter review that corroborate the existence of a court-centric approach to rights protection.

#### A) Indicators Revealing the Prevalent Approach to Rights Protection

Three types of indicators support the court-centric vision of rights protection: the stance and rhetoric of political actors concerning rights review, the judicial perspective and discourse on constitutional interpretation, and the nature of the limited mechanisms of rights review.

[216] Gardbaum, *supra* note 147.

*i. Political Actors and Charter Review*

Federal political actors seem to view the interpretation and protection of Charter rights primarily as the duty of the judiciary, while perceiving their own role in this matter as limited, if not nonexistent. Bills of rights are seen as "after the fact corrective instrument."[217] This position is sustained by four key elements: the attitude of Parliament toward Charter review reforms; the government's tolerance towards constitutional risks; the government's stance in the *Schmidt* case; and the legislative responses to judicial invalidations in dialogue cases.

**a. Parliament's response to proposals for institutionalizing Charter review**

Parliament has had numerous opportunities to deliberate on mechanisms of rights review and to define its own role in upholding and implementing Charter rights. However, in these instances, parliamentarians' actions and decisions have demonstrated a concerning lack of responsibility and, in some cases, a disregard for the significance of pre-enactment review in safeguarding Charter rights.

One such opportunity arose in 2012 when former Liberal MP Irwin Cotler introduced Bill C-537, *Constitution Compliance Review Act*, a private bill aiming at implementing a formal mechanism of rights review in Parliament. This bill proposed assigning the Law Clerk and Parliamentary Counsel of the House the responsibility to assess whether any provisions of a bill were likely to be inconsistent with the purposes and provisions of the Charter and the *Canadian Bill of Rights*.[218] If an inconsistency was identified, a summary of the reasons for the determination would be submitted to the Speaker of the respective chamber. The bill did not progress beyond the first reading stage. [219]

Four years later, in February 2016, the Standing Committee on Justice and Human Rights initiated a study on access to the justice system encompassing various matters, including the reporting duty of the Minister of Justice under section 4.1(1) of the *Department of Justice Act*. However, the committee, predominantly composed of Liberal members, devoted minimal attention to this mechanism of rights review. It failed to inquire about the rationale behind the

[217] Hiebert, *supra* note 50 at 243.
[218] Private Member's Bill C-537 (41-1) - First Reading - Constitution Compliance Review Act - Parliament of Canada [Private Member's Bill C-537].
[219] *Ibid*.

criteria employed by the Minister of Justice to determine when a report of inconsistency is deemed necessary under section 4.1(1)[220], despite witnesses invoking the detrimental impacts of this interpretation for rights protection.[221] Their lack of interest in this mechanism of rights review is all the more relevant because, up to that point, no report had ever been submitted to Parliament, indicating that no bill had been deemed to have an inconsistency warranting a report. The absence of reporting should have raised serious doubts about the effectiveness of the reporting mechanism. The limited attention devoted to investigating this matter suggests a lack of obligation or interest in strengthening Charter review during the lawmaking process.

The parliamentary debates surrounding the amendments to the Minister of Justice's reporting duty provided Parliament with another platform to express their understanding of their own roles, as well as the roles of other branches, in Charter review. On June 6, 2017, the Liberal government introduced Bill C-51, which addressed matters related to the justice system. In addition to clarifying sexual assault law and repealing specific criminal provisions, Bill C-51 proposed to reform the reporting duty of the Minister of Justice.[222] The purpose of the amendments was to convert the reporting duty from a discretionary to a legal obligation: submitting a Charter statement detailing the possible effects of bills on the guaranteed rights would now be required for every bill tabled to Parliament for adoption. The proposed amendment would formalize the practice adopted by the Minister of Justice Wilson-Raybould in 2016, soon after her appointment in this position.[223]

Interestingly, the proposed amendments were introduced to Parliament in parallel with the *Schmidt* recourse, between the decisions of the Federal Court in 2016 and the Federal Court of Appeal in 2018. Before the courts, the government defended a restrictive interpretation of the reporting duty, while reforming the mechanism in a way more extensive than what was requested by Edgar Schmidt.

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[220] Macfarlane, Hiebert & Drake, *supra* note 21 at 56.
[221] Cara Zwibel, Director at the Fundamental Freedoms Program, Canadian Civil Liberties Association, stated, "[t]he current interpretation of section 4.1 may actually have a perverse effect. When no report is made by the Minister of Justice, the government may take the position that there are effectively no constitutional concerns for Parliament to worry about. This is not only misleading, it impoverishes the level of debate and discussion on a bill.": Evidence - JUST (42-1) - No. 8 - House of Commons of Canada at 855.
[222] Department of Justice, "Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act", (8 March 2017) at 51.
[223] David McGuinty, Lib, Debates (Hansard) No. 195 - June 15, 2017 (42-1) - House of Commons of Canada at 12794.

Although receiving less attention than the other amendments proposed in Bill C-51, the debates surrounding the mandatory Charter statement provide valuable insights into how members of the major federal political parties perceive the roles and responsibilities of the three branches of government in safeguarding rights. These discussions revealed significant disparities in the views of these parties regarding the need and legitimacy of pre-enactment review. However, despite these differing perspectives, all the involved MPs shared a common recognition of the judiciary's fundamental role in constitutional interpretation.

On one end of the spectrum, Conservative MPs relied on a strict conception of judicial supremacy to oppose the proposed amendments. They opined that by passing judgment on the Charter compatibility of bills, the Minister of Justice was appropriating the role of the courts. They justified their choice of never reporting to Parliament on possible Charter considerations in bills when the Conservative government was in power due to their "respect the role of the courts".[224] Their position also highlighted the party's opposition to the idea of governments interpreting the scope and meaning of the Charter outside of judicial interpretations. They expressed concerns regarding the government doing its own balancing test under section 1, a task they believed must rest on the judiciary.[225] MP Erin O'Toole explicitly stated: "Is the government suggesting, with its charter statements, that its actions on a whole range of decisions are somehow inoculated because it is providing a charter assessment? That is political theatre. It cannot provide its own charter assessment."[226] He equated the government doing its own rights review with "trying to inoculate itself" from future judicial scrutiny" and publicly suggesting that there is no reasonable basis for concern about its validity under the Charter.[227] The position argued by Conservative representatives is clearly based on premisses of judicial supremacy: not only are courts the sole institutions responsible for assessing the Charter consistency of legislation, but it would be constitutionally illegitimate for the executive to do so.

On the other end of the spectrum, the deputies of the New Democratic Party ("NPD") supported the proposed amendments but considered that they were too weak. In their opinion, even

[224] Erin O'Toole, Debates (Hansard) No. 366 - December 6, 2018 (42-1) - House of Commons of Canada, Dec 6 2018, p 24504.
[225] "I am worried that the government is trying to suggest to do its own Oakes balancing test, its own Charter examination of issues when passing legislation". CPC, *Ibid* at 24502.
[226] CPC, *Ibid*.
[227] Erin O'Toole, CPC, *Ibid* at 24600.

if amended, the reporting mechanism might remain ineffective. They pleaded in favour of even more transparency in executive rights review, with MP Alistair MacGregor calling the amendments a "starting place for a fuller debate on that issue."[228] MP Eric Duncan mentioned that it would be better if the Department of Justice's analysis on Charter compliance were also made available, presumably referring to the Charter review done throughout the drafting of legislation.[229] The debates further indicated that the members of Parliament believe that any rights review should align with the judicial interpretations of the rights. MP Murray Rakin, while acknowledging the government's assumption that introduced bills are Charter compatible, expressed skepticism about the relevance of the Charter statement "in a court of law."[230] These discussions underscored the prevailing understanding among NPD members that the primary responsibility for constitutional interpretation lies with the judiciary.

Between these two positions stand members from the Liberal government. As the initiator of the proposed Charter statements, the government supported more involvement from lawmakers in Charter review. First, the amendments enhance the participation of the government in pre-enactment review: the transmission of a Charter statement is now required for every bill introduced by the government for adoption, whereas no report had ever been submitted from the introduction of the reporting duty in 1985 until 2016. Moreover, the amendments proposed the addition of an Alinea providing an implicit role for Parliament in rights review. Indeed, the new Aliena (2) states that the purpose of Charter statements is to "inform members of the Senate and the House of Commons as well as the public of those potential effects." Interestingly, in *Schmidt*, the Attorney general defended that the purpose of the reporting duty was not to inform Parliament on the rights compatibility of bills, claiming that "Parliament has its own mechanisms and resources which allow it to form its own opinion in regards to inconsistencies and in regards to resolving them."[231] The Federal Court and the Federal Court of Appeal shared this opinion.[232] Despite supporting a more active role for lawmakers in Charter review, Liberal MPs view the judiciary as the institution responsible for determining what the Constitution entails. Discussing the purpose of the Charter statement proposed by Bill C-51, MP McGuinty mentioned that it is to give Canadians and

[228] Alistar MacGregor, NPD, Debates (Hansard) No. 249 - December 11, 2017 (42-1) - House of Commons of Canada at 16275.
[229] Linda Duncan, NPD, *supra* note 223 at 12794.
[230] Murray Rankin, NPD, *supra* note 228 at 16225.
[231] *Schmidt*, *supra* note 26 at para 67.
[232] *Schmidt v. Canada (Attorney General)*, *supra* note 30 at para 81; *Schmidt*, *supra* note 26 at 277 and 289.

legislators a better sense of "what extent the bill would or would not be at variance with the rights, which evolved through the court system."[233]

The attitude of parliamentarians toward the proposed reforms and the debates on the mandatory Charter statements emphasized the judiciary's central role in constitutional interpretation.

**b. Governmental tolerance of constitutional risks in legislation**

The enactment of a law later declared unconstitutional by courts is not, in itself, evidence of recklessness from lawmakers toward Charter rights: the uncertainty of judicial interpretations and difficult-to-predict impacts of legislation, among other reasons, can lead lawmakers to unknowingly legislate in contradiction with future judicial pronouncements. In several instances, however, the attitude of governmental actors toward rights review and Charter compatibility displayed a definite tolerance for constitutional risks.[234]

As further detailed in Chapter 3, during the drafting of bills, government lawyers within the Department of Justice proceed to a risk assessment of bills and advise the government on the likeliness that legislation would be found incompatible with the Charter by courts and the risks associated with a judicial invalidation.[235] These risks include the potential administrative, reputational, financial and legal impacts of a negative judicial decision.[236] The recommendations provided by government lawyers during rights vetting are merely advisory. Regardless of the advice received, the sponsoring minister retains the authority to approve legislation that carries a high risk of being challenged in court or prioritize a means to achieve its objectives that may not be the least restrictive.[237]

The interviews of governmental lawyers conducted by Hiebert reveal that the extent to which their advice on the compatibility of bills to jurisprudence is accepted ultimately depends on the government's willingness to assume risks.[238] The strategic approach a government takes in

[233] David McGuinty, Liberal Party, *supra* note 223 at 12794.
[234] Hiebert, *supra* note 57.
[235] Macfarlane, Hiebert & Drake, *supra* note 21 at 43.
[236] *Schmidt*, *supra* note 26 at para 20.
[237] Macfarlane, Hiebert & Drake, *supra* note 21 at 50; Hiebert, *supra* note 57 at 735.
[238] Hiebert, *supra* note 57 at 735.

adopting legislation can vary depending on the level of risk involved, ranging from low to calculated and high risk.[239] In cases of low risk-taking, significant consideration is given to potential judicial concerns to preemptively address and rectify them to minimize the likelihood of judicial invalidation. Calculated risk-taking involves the government relying on the reasonable expectation that government lawyers can effectively argue for the constitutional validity of the legislation in case of a challenge, as seen in instances like the legislation enacted after *Carter*. On the other hand, high risk-taking entails the government proceeding with legislation highly susceptible to a successful Charter challenge, such as certain tough-on-crime policies implemented by the Conservative government, discussed below.[240] Risk tolerance emerges as a critical determinant influencing the decisions made by the government when confronted with advice regarding the possible incompatibility of legislation with judicial decisions on the Charter.

Governments have often been reluctant to abandon key parts of their political agenda in the face of possible risks under the Charter, prioritizing short-term gains.[241] The consequences of judicial rulings may arise years after the enactment of the legislation. Legislation might not be constitutionally challenged. If it is, the government responsible for the contested legislation may no longer be in power when a judicial review is initiated or all appeal options are exhausted.[242] In Hiebert's words, "[w]hy strive for pre-emptive compliance with the Court's interpretation of the Charter, if so doing alters the government's preferred legislative approach and there is yet uncertainty about whether a revised position will actually satisfy the court?"[243] As legislation generally remains in effect during the constitutional contestation, the government can advance its agenda for numerous years even if the legislation is constitutionally contested, especially if determined to defend it up to the Supreme Court.

As a result, governments have sometimes introduced for adoption and publicly defended the constitutionality of bills that could be qualified, at best, as constitutionally ambiguous. They denied being aware that these bills might contradict jurisprudence or have not provided explanations to justify the Charter compatibility of controversial bills.[244]

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[239] *Ibid* at 741–44.
[240] *Ibid*.
[241] *Ibid* at 741.
[242] Hiebert, *supra* note 25 at 139.
[243] Hiebert, *supra* note 57 at 741.
[244] Macfarlane, Hiebert & Drake, *supra* note 21 at 51.

The Harper government is well-known for introducing multiple laws that were considered blatantly unconstitutional, all the while declaring that they had been reviewed and were consistent with the Charter.[245] Several major laws enacted as part of the Conservative's promised reform of the criminal justice system and "tough on crime" approach were particularly controversial per their compatibility with judicial interpretations of the Charter. The provisions dealing with minimum mandatory sentences and drug-related offences notably appeared to contradict existing jurisprudence. The Supreme Court ultimately invalidated a number of these provisions.[246] For instance, the *Abolition of Early Parole Act* applied to offenders already sentenced, clearly violating the principle of non-retroactivity and the interdiction of double punishment dictated by sections 11(h) and (i) of the Charter. Speaking for a unanimous Supreme Court, Justice Wagner qualified the effect of automatically lengthening the offender's period of incarceration created by this retrospective change as "one of the clearest of cases of a retrospective change that constitutes double punishment in the context of s. 11(h)".[247]

The several policies implementing minimum mandatory sentences for certain criminal offences serve as another relevant example. The Charter compatibility of these measures was highly contentious, given that the Supreme Court's previous rulings deemed such sentences in violation of section 12 of the Charter.[248] Yet, the Conservative government defended their constitutionality while simultaneously refusing to disclose the reasons supporting its stance. For instance, during the parliamentary debates on Bill C-10*, Safe Streets and Communities Act*, then Minister of Justice Rob Nicholson provided no clarification on the Charter compatibility of the bill or why it did not require a report under section 4.1 of the *Department of Justice Act*.[249] Despite attempts by opposition members to obtain information about the government's Charter review process during the drafting of Bill C-10, their endeavours proved unsuccessful.[250] The mandatory

[245] See e.g., Emmett Macfarlane, "'You Can't Always Get What You Want': Regime Politics, the Supreme Court of Canada, and the Harper Government" (2018) 51:1 Canadian Journal of Political Science 1; Daniel Mockle, "La justice constitutionnelle face au mouvement conservateur: la Cour suprême du Canada et le gouvernement Harper (2006-2015)" (2017) 58:4 Les Cahiers de droit 653.
[246] For example, several policies providing for minimum mandatory sentences were invalidated by the Supreme Court: *R v Boudreault*, [2018] 3 SCR 599; *R v Lloyd*, [2016] 1 SCR 130; *R v Nur*, [2015] 1 SCR 773.
[247] *Canada (Attorney General) v Whaling*, [2014] 1 SCR 392 at para 60.
[248] Macfarlane, Hiebert & Drake, *supra* note 21 at 80. The Supreme Court first invalidated a mandatory minimum sentence in *R v Smith (Edward Dewey)*, [1987] 1 SCR 1045.
[249] Macfarlane, Hiebert & Drake, *supra* note 21 at 80. At this time, the submission of a report was discretionary.
[250] Evidence - JUST (41-1) - No. 4 - House of Commons of Canada at 0925.

minimum sentences prescribed by this legislation, along with several others, were unsurprisingly struck down by the Supreme Court of Canada.[251]

Another element underscoring an apparent tolerance for constitutional risks is the treatment of the reporting duty provided by the *Department of Justice Act* by governments before 2016. In the *Schmidt* case, former government lawyer Schmidt claimed that bills were deemed compatible with the Charter as long as they had a minimum 5% chance of withstanding a legal challenge. The government, on the other hand, asserted that the reporting duty was triggered only when there was no credible argument that could be made in good faith to support the legislation before the courts. While the specific criteria for triggering the duty is unknown, one fact remains: no report was ever submitted from the implementation of the reporting duty in 1985 until 2016. This lack of reporting raises questions about the government's approach to assessing and addressing potential Charter concerns in bills. The lack of reporting could imply that apart from reasons out of their control, like changes in judicial interpretations of the rights or unpredictable effects of legislation, ministers of Justice were confident that every bill introduced to Parliament by the government was compatible with the Charter. However, the subsequent invalidation of numerous bills throughout the years casts doubt on the government's claims that the reporting duty was interpreted in good faith. Further, senior members of the Department of Justice under the Conservative government anonymously revealed that the reporting duty was seen as a procedural hurdle rather than a serious constraint on the government's legislative objectives: "[t]the prevailing attitude was: We'll sign the certification saying that thus is Charter-proof – and let the judiciary fix it later… There is a real fix-it-later attitude".[252] The government's handling of the reporting duty before 2016 reflects a significant tolerance for constitutional risks.

A possible explanation for this tolerance to constitutional risk is the considerable discretion provided by section 1 of the Charter to establish constitutionality. Discussing the reporting duty of the Minister of Justice under the *Department of Justice Act,* Kelly and Hennigar note that determinations on the Charter compatibility can result from three conclusions:

> first, a bill is considered by the Department of Justice and the cabinet to be constitutional because it does not engage any protected right or freedom; secondly, a bill engages a right or freedom, but the limitation is considered reasonable under

[251] See e.g., *R. v. Lloyd*, *supra* note 246; *R. v. Nur*, *supra* note 246.
[252] Kirk Makin, Canadian Crime and American Punishment, Globe & Mail (Quebec ed.), Nov. 27, 2009 at F7, cited in Kelly & Hennigar, *supra* note 58 at 53.

> section 1 of the Charter by the Department of Justice and the cabinet; finally, the limitation is only considered reasonable by the cabinet despite advice from the Department of Justice to the contrary.[253]

As they rightly put forward, due to the highly discretional nature of this determination, "a government with a very different approach to reasonable limits under section 1 of the Charter will result in legislation with a very different constitutional architecture to one with a deferential approach to the advice provided by the Department of Justice".[254] Similarly, when considering the Supreme Court's interpretation of the limitation clause, Hiebert notes that the Court's emphasis on assessing the reasonableness of rights restrictions enables the government to effectively argue that its legislation represents a legitimate and justifiable limitation on Charter rights.[255] In fact, governments have sometimes recognized that some bills or laws may infringe on Charter rights but assert that such infringements were justified under section 1.[256] These acknowledgments have occurred in Charter statements[257] or during judicial review.[258] Hence, public declarations of constitutionality typically do not mean that a bill is considered free from rights violation; it is rather viewed as justified under section 1.[259]

For example, Kelly and Hennigar advance that the only way to consider Bill C-2 as compatible with the Charter is through reasonableness under section 1.[260] The constitutionality of Bill C-2, *An Act to amend the Criminal Code and to make consequential amendments to other acts*, adopted in 2008, was highly questioned by scholars.[261] Kelly and Hennigar summarize the concerns related to the constitutionality of this proposed legislation, which modified the process for determining the status of dangerous offenders:

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[253] *Ibid* at 52.
[254] *Ibid*.
[255] Hiebert, *supra* note 57 at 741.
[256] Matthew A Hennigar, "Exploring Complex Judicial–Executive Interaction: Federal Government Concessions in Charter of Rights Cases" (2010) 43:4 Canadian Journal of Political Science 821.
[257] For example, in the Charter statement of Bill C-7 regarding medical aid in dying, the Minister of Justice conceded that the bill "as the potential to engage liberty and security of the person": Department of Justice Government of Canada, "Charter Statement - Bill C-7: An Act to amend the Criminal Code (medical assistance in dying)", (21 October 2020).
[258] *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519 [*Sauvé II*]; *R c Sharpe*, [2001] 1 RCS 45 [*Sharpe*].
[259] Kelly & Hennigar, *supra* note 58 at 53.
[260] *Ibid*.
[261] See also Jayson Laplante, "Playing Hardball with Repeat Offenders: Some Thoughts on the "Three-Strikes" Reverse Onus Dangerous Offender Law (2008) 32:2 Manitoba Law Journal 65.

> It is debatable whether this bill is in fact constitutional because it will be decided by section 1 of the Charter: it limits judicial discretion and is a violation of section 11(d) (judicial independence), it infringes the right to be presumed innocent and it brings in a reverse-onus provision which the Supreme Court has been reluctant to accept as consistent with the Charter's legal rights guarantees.[262]

The broad discretion afforded to lawmakers under section 1 of the Charter thus allows them to take risks calculated risks with the Charter compatibility of bills, as long as they can make a plausible argument to justify that an infringement is reasonable. This approach aligns with the government's argumentative process during judicial review. As Hiebert explains, before courts, the challenge lies less in persuading judges that legislation aligns with rights but rather in convincing judges that the methods employed to enact rights-restricting legislation adhere to judicial standards of proportionality.[263]

The tolerance to constitutional risks often exhibited by governments exemplifies "fix-it-later attitude"[264] in line with a court-centric approach to rights protection, which puts limited responsibility on lawmakers to ensure the Charter compatibility of the legislation they adopt.

### c. The Attorney General's defence in *Schmidt*

The *Schmidt* case is also informative when it comes to discovering the approach to rights protection prevailing among political actors. In particular, this case underscores the government's perspective on the distribution of the roles and responsibilities in interpreting the Constitution and, by extension, assessing the compatibility of legislation with the Charter. This case was the first one where a mechanism of pre-enactment review was contested before a Canadian court, namely the Minister of Justice's reporting process under the *Department of Justice Act*. The *Schmidt* case forced the government to reveal the political and bureaucratic process underlying the drafting and development of bills. Before then, little was known about the existing mechanisms of rights review.

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[262] Kelly & Hennigar, *supra* note 58 at 53.
[263] Janet L Hiebert, "The Canadian Charter of Rights and Freedoms" in *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 54 at 60.
[264] Kelly & Hennigar, *supra* note 58 at 53.

To determine the level of obligation of the Minister of Justice regarding its reporting duty, the Federal Court undertook an in-depth examination of the constitutional context within which the reporting obligation occurs. In Justice Noel's writings, the Court discussed at length the roles and responsibilities of the three branches of government in rights protection. This discussion was based on general concepts of constitutional law and on the affidavits of governmental actors who were at one point involved in the lawmaking process.

This discussion provided a valuable opportunity for the government to disclose its perspective on the perceived allocation of roles and responsibilities under the Charter. The arguments put forth by the government undeniably align with the principles of judicial supremacy. In his affidavit, deputy Minister of Justice William F. Pentney maintained:

> Elected governments shape policy and introduce legislation as they think best, while remaining mindful of the outer boundaries set by the *Constitution* and by guaranteed rights. Parliament debates and enacts legislation, including giving consideration to its consistency with the *Constitution* and the *Bill of Rights*; Courts have the ultimate responsibility to decide whether legislation is constitutional. The credible argument standard is intended to allow each Branch of Government to perform its appropriate role in ensuring that guaranteed rights are respected.[265]

In addition to this affidavit, three elements support the government's perspective that lawmakers, both executive and parliamentarians, bear limited responsibility in upholding and implementing Charter rights: the application of section 4.1 of the *Department of Justice Act*, the understanding of the government's obligation towards Parliament, and the significance of judicial decisions in both the assessment of rights and the reporting procedure.

First, as discussed above, the Attorney general's interpretation of section 4.1, defended in *Schmidt*, shows little consideration for the effectiveness of the reporting mechanism as a mechanism of rights review and, incidentally, a tool to foster rights protection. This application is guided by a restrictive interpretation of this provision: the Minister of Justice's reporting duty is triggered only if no credible argument can be made in good faith to defend the legislation before the courts successfully. As described by Justice Noel, "if there is a credible argument to be made in favour of consistency, there is no inconsistency, hence the duty to report is not triggered."[266]

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[265] *Schmidt*, *supra* note 26 at para 278.
[266] Ibid at para 179.

Under such a standard, the Minister of Justice benefits from a high discretion in determining what is considered a sufficient argument, "credible" enough to spare them from having to alert Parliament on possible Charter risks. Using such a low standard for reporting, to the detriment of the mechanism's effectiveness, supports the position of a minimal role for the executive in rights protection.

Second, the Attorney general argues that the government has no obligation to inform Parliament of possible Charter inconsistencies in the bills it develops and tables for adoption. The standard triggering the Minister of Justice's reporting obligation, in the words of deputy Minister of Justice Pentney, "must reflect the role of Parliament in our constitution".[267] In *Schmidt*, the Attorney general argues that it is not the Department of Justice's role to act as an advisor to Parliament or foster parliamentary debates on bills' compatibility with the Charter.[268] The Minister of Justice provides legal advice to the government. Parliament is responsible for assessing the bills when they are tabled for adoption and debating how they measure against Charter rights, proposing amendments if necessary. This position supports a strict separation of powers, one closely related to judicial supremacy, where each branch has its role in rights protection with little to no collaboration between them. This position was accepted by Justice Noel, who acquiesced:

> We must not conflate the duties of each actor with those of the others. Notably, Parliament should assume its respective responsibility to review and debate legislation emanating from the Executive with its own chosen means. If Parliament requires further resources to fulfil its duties, it should call for them.[269]

Finally, in this recourse, the government submitted that the primary purpose of the reporting duty is to avoid judicial invalidation, and not to ensure the Charter compatibility of bills.[270] Accordingly, the Minister of Justice's examination focuses on determining compatibility with jurisprudence, thus with the Charter as interpreted by the courts. As further discussed in the next section, judicial determinations on the scope and meaning of Charter rights are generally considered determinative in existing mechanisms of Charter review.

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[267] Ibid at para 278.
[268] *Ibid* at para 67.
[269] *Ibid* at para 289. This position was shared by the Federal Court of Appeal: *Schmidt v. Canada (Attorney General)*, *supra* note 30 at paras 84–85.
[270] *Schmidt*, *supra* note 26 at para 20.

The position advocated by the Attorney General in *Schmidt* unmistakably reflects a marginal role for government to interpret or give effect to Charter rights. This role does not require the government to actively promote rights protection by assessing Charter compatibility of bills and reporting to Parliament. Concurrently, it places courts at the forefront of rights interpretation and protection. These aspects embody a perspective centred on the judiciary, indicating a strong inclination towards a court-centric view of rights protection.

**d. Dialogue cases: Legislative responses**

An established indicator demonstrating the interaction between lawmakers and courts, legislative reactions in dialogue cases highlight that legislators tend to view themselves as bound by decisions of the Supreme Court following an invalidation. A look at dialogue cases reveals that even though governments may vigorously defend the Charter compatibility of contested legislation, often reaching the Supreme Court, they ultimately adhere to judicial rulings that declare such legislation unconstitutional. Hiebert aptly highlights the stark contrast between the government's initial "short-term risky behavior" in developing and introducing legislation, as discussed earlier, and their compliant stance towards judicial decisions following invalidation.[271] With Emmett Macfarlane and Anna Drake, she recently reaffirmed that, based on empirical evidence, instances of explicit defiance of court decisions are infrequent and uncommon.[272] The legislative sequels enacted in response to judicial invalidations thus further underscore the central role of the judiciary and its decisions in rights protection.

In 2012, Macfarlane conducted a study analyzing the reactions of federal and provincial legislatures to Supreme Court decisions invalidating legislation.[273] Following this study, the most comprehensive on legislative responses measuring dialogue[274], he found that the legislator generally chose to offer no follow-up to these rulings, thus leaving the legislation without effect, or to revise the invalidated legislation in a way compliant with the judicial prescriptions.

[271] Hiebert, *supra* note 25 at 141.
[272] Macfarlane, Hiebert & Drake, *supra* note 21 at 24.
[273] Macfarlane, *supra* note 119.
[274] Macfarlane, Hiebert & Drake, *supra* note 21 at 18.

In approximately one-third of the cases, legislators did not provide any response or take action in light of the court's rulings.[275] For instance, it did not reenact the ban on prisoners from exercising their voting rights invalidated for a second time in *Sauvé II*.[276] Also, though the Conservative government quickly began working on recriminalizing abortion in a way that would survive judicial scrutiny after the Supreme Court rendered *Morgentaler*[277], the revised legislation failed to pass in Parliament after a tie vote in Senate. No subsequent efforts were made to enact another version.[278] Legislators, thus, often take no action following the Court's rulings.

Legislators responded by amending the invalidated legislation in around half of the cases, replacing it in some instances.[279] Most of these responses complied with the Court's prescriptions, with no apparent attempt to modify, avoid, or reverse the rulings.[280] For instance, the revision of the *Tabacco Act*, following the invalidation of the absolute ban on tobacco advertising in *RJR-MacDonald*[281], aligned with the limits suggested by MacLachlin C.J. for the majority. The Court acknowledged the legislative response's compliance when it was subsequently challenged.[282]

In a few instances, legislators passed legislative sequels that deliberately disregarded judicial prescriptions, openly disagreeing with the judicial determinations regarding the scope of Charter rights.[283] In these cases, they favored an alternative interpretation of the rights, despite being aware that it contradicted the Supreme Court's stance. These cases can be classified into two categories: those where the revised legislation aligned with the minority position and those where it diverged completely from the position taken by the Supreme Court.

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[275] Macfarlane, *supra* note 119 at 44.
[276] *Sauvé II*, *supra* note 258. See also *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295; *R v Zundel*, [1992] 2 SCR 731; *Canada (Attorney General) v Hislop*, [2007] 1 SCR 429; *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, [2003] 2 SCR 504.
[277] *Morgentaler*, *supra* note 116.
[278] Jonathan Parent, "Institutional Norms, Parliament, and the Courts: Explaining the Absence of Abortion Restrictions in Canada" in Susan M Sterett & Lee D Walker, eds, *Research Handbook on Law and Courts* (Cheltenham: Edward Elgar Publishing, 2012) 173 at 176.
[279] Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Ruling on Rights" (2012) 34:1 Int Polit Sci Rev 39 at 44.
[280] See e.g., *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350; *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569; *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577. See also *R. v Brown,* [2022] SCC 18 [*Brown*]. The legislative sequel implemented after the Quebec case *Truchon*, which invalidated the constitutionally contentious response to *Carter*, adhered to the Quebec Superior Court's ruling: Macfarlane, Hiebert & Drake, *supra* note 21 at 152.
[281] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199.
[282] *Canada (Attorney General) v JTI-Macdonald Corp*, [2007] 2 SCR 610 at para 8.
[283] Macfarlane, *supra* note 119 at 47.

First, when the Court was profoundly divided, legislators sometimes relied on the decision of the dissenting minority to revise the invalidated legislation.[284] For example, in *Daviault*[285], the Supreme Court modified the common law rule prohibiting drunkenness as a permissible defence in sexual assault cases. Responding to the public outrage caused by this decision, the legislator eliminated the defence created by the majority: it enacted a response which followed the minority opinion, maintaining the pre-Daviault *status quo*.[286] In such instances, legislators challenge the Court to reconsider and reverse its original judgment.[287] Now invalidated by the Supreme Court[288], constitutionalist Kent Roach estimates that the response to *Daviault* corresponds to a form of dialogue in line with theories of shared responsibilities. In his opinion, it assumes that "Parliament is entitled to act on its own interpretation of the constitution, even when it is at odds with that of the Court."[289] However, this interpretation still occurred within judicial boundaries, following a minority of four judges instead of a majority of five.

In rare instances, legislators revised the invalidated provision in a manner that deviated from the Court's interpretations.[290] In doing so, they explicitly rejected the judicial rulings, deeming the Court's interpretations incorrect or unacceptable.[291] These cases are often labelled as "in-your-face" legislative sequels. A relevant example is the case of medical assistance in dying. In *Carter*, the Supreme Court struck down the *Criminal Code*'s prohibition on assisted dying and suspended the declaration of invalidity for a year.[292] Parliament's response to this decision, Bill C-14, specified limitations to access to assisted dying that were much more restrictive than the Court's

[284] See also the legislative sequels enacted following the decisions *R v Morales*, [1992] 3 SCR 711 [*Morales*] and *R v O'Connor*, [1995] 4 SCR 411 [*O'Connor*].
[285] *R v Daviault*, [1994] 3 SCR 63 [*Daviault*].
[286] MacIvor, *supra* note 56 at 147.
[287] Knopff et al, *supra* note 63 at 637.
[288] *Brown*, *supra* note 280.
[289] Roach, *supra* note 204 at 638.
[290] Another relevant example is the *Respect for Communities Act*, SC 2015, c. 22, enacted by the Conservative government in response to *Insite*, *supra* note 116. This new regime added twenty-six conditions for obtaining exemption under 56.1 of the *Canadian Controlled Drugs and Substances Act*, SC 1996, c.19. Two years later, these conditions were loosened by the introduction of Bill C-37: *An Act to amend the Controlled Drugs and Substances Act and to make related amendments to other Acts*. See also the legislative response to *Sauvé v Canada (Attorney General)*, [1993] 2 SCR 438 [*Sauvé I*].
[291] Dennis Baker & Rainer Knopff, "Daviault Dialogue: the Strange Journey of Canada's Intoxication Defence" (2014) 19:1 Review of Constitutional Studies 35 at 37.
[292] The suspension was extended for four additional months: *Carter v Canada (Attorney General)*, [2016] 1 SCR 13 [*Carter II*].

guidelines.[293] During the Bill C-14 debates, then Minister of Justice Jody Wilson-Raybould maintained that Parliament was not bound to "slavish conformity" with judicial rulings.[294] She defended that the "reasonable foreseeable" criterion put forward by the government struck a careful balance between respecting individual autonomy and protecting the vulnerable.[295] The newly enacted legislation was highly criticized for codifying criteria inconsistent with the constitutional parameters set out in *Carter*, thus for being almost certainly unconstitutional under the Supreme Court's prescriptions. [296] The Minister of Justice's statement of compatibility on Bill C-14, in fact, explicitly specifies the possibility that the new provisions infringe sections 7 and 15.[297] By modifying the scope of the judicial interpretation, several scholars consider that this legislative response constitutes a genuine example of dialogue[298], or coordinated construction in action.[299] In the same vein, several scholars questionned the *Protection of Communities and Exploited Persons Act*'s compliance with the Supreme Court's prescriptions in *Bedford*.[300] In these instances, lawmakers prioritized their own understanding of Charter rights, even if it meant contradicting or disregarding the judicial prescriptions related to the invalidated provisions.

As explored in the following subsection, various legislative sequels that were enacted in violation of judicial prescriptions were subsequently challenged in courts. A few of these cases made their way to the Supreme Court, allowing the highest court to express its position on the extent of deference owed to competing political interpretations of rights.[301] Nevertheless, in most

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[293] Emmett Macfarlane, "Dialogue, Remedies, and Positive Rights: Carter v Canada as a Microcosm for Past and Future Issues Under the Charter of Rights and Freedoms" (2017) 49:1 Rev Droit Ott 109 at 113.
[294] "Justice minister: Assisted dying bill need not comply with Supreme Court ruling," (14 June 2016), online: *Macleans.ca* <https://macleans.ca/news/canada/justice-minister-assisted-dying-bill-need-not-comply-with-supreme-court-ruling/>.
[295] *Ibid*.
[296] Macfarlane, Hiebert & Drake, *supra* note 21 at 137; Macfarlane, *supra* note 293 at 113.
[297] Department of Justice Government of Canada, "Part 3, Part 4 - Legislative Background: Medical Assistance in Dying (Bill C-14, as Assented to on June 17, 2016)", (8 July 2016), online: <https://www.justice.gc.ca/eng/rp-pr/other-autre/adra-amsr/p4.html#p4>.
[298] Macfarlane, *supra* note 293 at 113.
[299] Baker, *supra* note 203; Eleni Nicolaides & Matthew Hennigar, "Carter Conflicts: The Supreme Court of Canada's Impact on Medical Assistance in Dying Policy" in *Policy Change, Courts, and the Canadian Constitution* (Toronto: University of Toronto Press, 2018) 313 at 323.
[300] Macfarlane, Hiebert & Drake, *supra* note 21 at 126; Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in Bedford and Bill C-26" (2015) 30:1 Canadian Journal of Law and Society 5; Lauren Sampson, "'The Obscenities of the Country': Canada v. Bedford and the Reform of Canadian Prostitution Laws" (2014) 22 Duke Journal of Gender Law & Policy 137 at 139; Michael Plaxton, "First Impressions of Bill C-36 in Light of Bedford" (2014), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447006>.
[301] See e.g., *Canada (Citizenship and Immigration) v Harkat*, [2014] 2 SCR 33; *Sauvé II*, *supra* note 258; *R v Hall*, [2002] 3 SCR 309 [*Hall*]; *R v Mills*, [1999] 3 SCR 668 [*Mills*].

instances, lawmakers adhered to judicial interpretations of rights, underscoring the tendency of the political branches to acknowledge and accept the predominant role of the courts in interpreting and safeguarding Charter rights.

The federal government has never used the notwithstanding clause to override judicial rulings and uphold its interpretation of Charter rights. This provision allows legislators to suspend the application of sections 2 and 7 to 15 of the Charter to the legislation at hand for a renewable period of five years. As detailed subsequently, the political cost for using this clause and the broad discretion to determine constitutionality provided by section 1 could explain the rare resort to the notwithstanding clause.[302] While the reasons behind the federal legislator's consistent abstention from utilizing the notwithstanding clause remain unclear, its absence reinforces the perception that the government generally chooses to abide by judicial rulings. The acceptance of judicial decisions underlines the pivotal role of the judiciary in interpreting the Charter.

The government's approach can be characterized as reactive, as it often exhibits a propensity for taking risks regarding the compatibility of its bills with the Charter, yet tends to acquiesce to judicial decisions when legislation is subsequently invalidated.[303]

### *ii. The Role of Judicial Decisions and Discourse in Shaping Rights Protection*

The judicial discourse prevailing in Canada with regard to the roles and responsibilities of the three branches of government under the Charter supports the prevalence of the judiciary in rights protection. Despite the absence of any explicit mention of this status in the Constitution, the Supreme Court quickly asserted its prevalent role in rights protection after the enactment of the Charter.[304] Courts have generally maintained that the government and Parliament have a low responsibility to give effect to the Charter. In this sense, judicial discourse reflects a judicial-centric approach to rights protection. This conclusion arises from three elements: the Supreme Court's guardianship discourse, its attitude in dialogue cases, and the conclusions reached by the Federal Court in *Schmidt*.

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[302] Appleby & Olijnyk, *supra* note 52 at 8–9. James B Kelly & Matthew A Hennigar, "The Canadian Charter of Rights and the Minister of justice: Weak-form Review within a Constitutional Charter of Rights" (2012) 10:1 ICON 35 at 53–4.
[303] Hiebert, *supra* note 25 at 141.
[304] Hunter et al. v Southam Inc, [1984] 2 SCR 145 (C) at 169.

**a. The Supreme Court's guardianship discourse**

While not explicitly granting interpretive authority, section 52(1) of the *Constitution Act, 1982* has been consistently invoked by courts as the legal basis for striking down unconstitutional legislation.[305] This section strengthened the practice of judicial review already in place since 1867, wherein courts assessed the constitutionality of laws relating to various aspects of the Constitution, primarily the separation of powers. This practice was then based on the *de facto* supremacy clause in the *Colonial Laws Validity Act 1865*, rendered obsolete by section 52(1).[306] The latter expanded the judiciary's remedial role, providing a broader scope for the courts to intervene.[307]

In 1984, two years after the Charter entered into force, the Supreme Court asserted its authority when Dickson J. declared that "[t]he judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."[308] This case was the first of a series of judicial decisions invalidating important laws based on their inconsistency with the Charter in the first half of the 1980s.[309] Canadian courts have since reiterated the guardian status of the judiciary in more than three hundred decisions, including many recent.[310] In *Manitoba Metis Federation Inc*, notably, the Supreme Court submitted that the principles of legality, constitutionality, and the rule of law support the guardian status of the courts.[311]

The guardianship rationale is at the core of judicial supremacy.[312] Though the Supreme Court of Canada has not explicitly stated the supremacy of its interpretation – as did the US Supreme Court in *Cooper* v. *Aaron* and following decisions[313] – the guardianship language used asserts its authority over the political branches in terms of rights protection. Guardianship implies

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[305] Brian Bird, "The Unbroken Supremacy of the Canadian Constitution" (2018) 55:3 Alberta Law Review 755 at 755.
[306] *Ibid*. See *R. v. Big M Drug Mart Ltd.*, *supra* note 276 at 313; *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 482; *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 746.]
[307] Bird, *supra* note 305 at 773; Peter H Russell, "The Effect of a Charter of Rights on the Policy-making role of Canadian Courts" (1982) 25:1 Canadian Public Administration 1.
[308] *Hunter et al. v Southam Inc*, [1984] 2 SCR 145 (C) at 169.
[309] The decisions include *Schachter v Canada*, [1992] 2 SCR 679; *R v Oakes*, 1 SCR 103 [*Oakes*]; *Singh v Minister of Employment and Immigration*, 1 SCR 177: Hiebert, *supra* note 12 at 92.
[310] See e.g., *R v Desautel*, [2021] SCC 17 at para 84; *R v Chouhan*, [2021] SCC 26 at para 135; *R v Albashir*, 2021 Supreme Court of Canada 48 at para 47; *Ontario (Attorney General) v G*, [2020] SCC 38 at para 98; *Reference re Supreme Court Act*, [2014] 1 SCR 433 at para 89.
[311] Manitoba Metis Federation Inc v Canada (Attorney General), [2013] 1 SCR 623 at para 140. These principles were recognized as fundamental in the Canadian constitutional system in *Reference re Secession of Quebec*, [1998] 2 RCS 217.
[312] Lipkin, *supra* note 192 at 10.
[313] See e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

more than mere interpretation of the Constitution: it implies actively protecting and defending it.[314] It elevates the judiciary to the status of an ultimate guardian rather than an interpreter among others.[315] Legal scholar Brian Christopher Jones notes that by suggesting a sole decision-making responsibility, the use of such language has the effect of excluding or dissuading the political branches from taking part in interpreting the Constitution. He considers this language "exceedingly and unnecessarily paternalistic."[316] In his opinion, this language is more in line with a "legalized conception of the role" than adherence to a general responsibility to protect and defend.[317] This general responsibility, in contrast, would allow more space for the participation of political branches, similar to the ones defended by theorists of shared responsibilities.[318] The status of "guardian of the Constitution" connotes an exclusivity and finality in rights interpretation that can transform mere judicial review into judicial supremacy.

**b. Judicial attitude toward political interpretations of the Charter**

Courts have not only claimed their role as guardians but have also been reluctant to recognize the active involvement of political branches in determining the scope and meaning of Charter rights. Judicial decisions reveal that the Supreme Court is not inclined to accept alternative interpretations of the Charter put forth by legislators.[319] While certain cases show a slight openness to political interpretation of rights, existing cases generally confine these interpretations within the framework of the Court's own prescriptions. This consistent dismissal of political interpretations of the rights in favour of the Court's own reflects a form of judicial supremacy known as attitudinal supremacy. [320]

[314] Brian Christop her Jones, "Constitutional Paternalism: The Rise and Problematic Use of Constitutional Guardian Rhetoric" (2019) 51 NYUJ 773 at 795.
[315] Ibid.
[316] Ibid.
[317] Ibid.
[318] Ibid at 803.
[319] Waldron, *supra* note 115 at 36. An exception, detailed in the next section, arises with claims for socio-economic rights recognition under the existing Charter. In such cases, judges often defer to legislators: *Gosselin*, *supra* note 39 at para 141; *Eldridge*, *supra* note 46 at para 85. See also *Ibid* at para 85.
[320] Gardbaum, *supra* note 38 at 25.

(i) Dialogue cases: Revision of legislative sequels

The impact of the courts' guardian role is evident when looking at cases where the Supreme Court had the opportunity to review legislative responses to judicial invalidations. These cases allowed the Supreme Court to contemplate the level of deference due to the political branches' interpretations of the Charter.

Legislative sequels can be drafted in line with the judicial decision that previously invalidated it or embodies a competing interpretation of the Charter. Without surprise, the government has traditionally succeeded in defending contested legislative sequels enacted in line with the judicial decision invalidating its previous version.[321] When the contested legislative sequels were not enacted in line with judicial prescriptions, the Supreme Court showed varying deference to the political rights interpretations.

Currently, no clear and definitive guidelines emerge from the Supreme Court decisions on the margin of maneuver available to political branches to determine the meaning and scope of the Charter. When evaluating legislative sequels that deviate from a prior judicial invalidation, the Supreme Court has occasionally demonstrated deference to the lawmakers' assessments of their constitutionality[322], while in other cases, it has not.[323] The margin of appreciation in judicial decision-making depends on many factors, such as the perceived significance of the right at hand, the actions of the legislature or government, and the availability of viable alternatives.[324]

In *Mills* and *Hall,* the Supreme Court showed increased openness to accept an interpretation of the political branch that is not in line with its own, though under certain

[321] In *JTI-MacDonald*, for example, a unanimous court upheld the revised legislation enacted by Parliament following the invalidation of the advertising provisions of the *Tobacco Products Control Act*. The new legislation was considerably inspired by the guidelines and limits articulated by a majority of five judges twelve years before. The Supreme Court concluded that it represented a "genuine attempt by Parliament to craft controls on advertising and promotion that would meet its objectives as well as the concerns expressed by the majority of this Court in RJR": *Canada (Attorney General) v. JTI-Macdonald Corp.*, *supra* note 282 at para 7. See also *Canada (Citizenship and Immigration) v. Harkat*, *supra* note 301 [*Harkat*]; *R v Darrach*, [2000] 2 SCR 443 [*Darrach*].

[322] See also *Harkat*, *supra* note 301. In *Harkat*, the Supreme Court unanimously upheld the revised security certificate scheme, enacted in response to the Court's invalidation in *Charkoui.* Though the Court did not extend on the question of deference, it stated that "Parliament amended the *IRPA* scheme with the intent of making it compliant with the s. 7 requirements expounded in *Charkaoui I*, and it should be interpreted in light of this intention": *Ibid* at para 55. See also *Harper v Canada (Attorney General)*, [2004] 1 SCR 827.

[323] *Brown*, *supra* note 280.

[324] Thomas McMorrow, "MAID in Canada: Debating the Constitutionality of Canada's New Medical Assistance in Dying Law" (2018) 44:1 Queen's Law Journal 69 at 105; Carissima Mathen, "Dialogue Theory, Judicial Review, and Judicial Supremacy" (2007) 45:1 Osgoode Hall Law Journal 125 at 145.

conditions. In these cases, the Court deferred to legislative judgments and upheld legislative sequels based on the careful consideration lawmakers gave to judicial prescriptions.

In *Mills*[325], the Supreme Court deferred to political interpretations of the Charter when reviewing the Charter compatibility of the revised statutory regime dealing with the disclosure of the accused confidential records in sexual assault cases. The regime had been enacted in response to its previous invalidation two years before in *R. v. O'Connor*, in a highly divided five-against-four decision.[326] Though differing significantly from the majority's prescriptions, the new regime followed the position of the minority of four judges. The Supreme Court acknowledged the extensive consultation process that preceded the enactment of this regime, which provided ample time for Parliament to consider the constitutional standards outlined in *O'Connor* and evaluate their practical effectiveness.[327] Manfredi cites the decision *Mills* as a genuine example of dialogue between the political and judicial branches as the Court was willing to uphold a legislative scheme differing from its prescriptions.[328] Lamer C.J. also invoked this decision and the "dialogue" it represented in *Darrach* to support that "[t]he mere fact that the wording differs between the Court's guidelines and Parliament's enactment is itself immaterial".[329] He points out that:

> In *Mills*, *supra*, the Court affirmed that "[t]o insist on slavish conformity" by Parliament to judicial pronouncements "would belie the mutual respect that underpins the relationship" between the two institutions (para. 55). In this case, the legislation follows the Court's suggestions very closely.[330]

Three years later, in *Hall*[331], the Court analyzed the revised provision of the *Criminal Code* pertaining to the bail of an accused person in custody. This provision was enacted in response to the Court's ruling in *Morales*[332], which declared the previous provision unconstitutional. The Court unanimously decided that the revised ground for refusing bail "on any other just cause being shown" was still too vague to be consistent with section 11(e) of the Charter. However, it was highly divided on the consistency of the more specific ground regarding the maintaining of

[325] *Mills*, *supra* note 301.
[326] Hogg & Allison A. Bushell, *supra* note 81 at 20.
[327] *Ibid*.
[328] Manfredi, *supra* note 203 at 336–337. *Mills*, *supra* note 301 at para 55.
[329] *Darrach*, *supra* note 321 at para 34.
[330] Ibid.
[331] *Hall*, *supra* note 301.
[332] *Morales*, *supra* note 284.

confidence in the administration of justice. A majority of five judges determined that Parliament had duly considered the Court's reasoning in *Morales* when enacting the new regime, and they upheld the new provision as it demonstrated respect for the minority position.

In both the *Mills* and *Hall* cases, the Supreme Court justified its deferential approach by highlighting the efforts made by lawmakers to consider the Court's reasons before enacting the revised provisions.[333] The Supreme Court thereby implicitly acknowledged a certain authority of the political branches to develop alternative interpretations of the rights.[334] At this point, this authority's recognition remains conditional to meaningfully considering the judicial prescriptions. These cases are said by certain to reflect a coordinated and dialogic judicial response to a legislative sequel.[335]

Still, if the Supreme Court showed some flexibility in *Mills* and *Hall* with regard to its predominant role in Charter interpretation and protection, these cases cannot be interpreted as a rejection of its guardian status. It continues to emerge from jurisprudence that the Supreme Court deems itself the primary institution responsible for deciding on the Charter's meaning and scope.

In *Sauvé II*, a couple of years after *Mills* and *Hall,* the Supreme Court examined the newly enacted provisions imposing narrower voting disqualifications on prisoners of the *Canada Elections Act*. These provisions had previously been invalidated in *Sauvé I* for constituting an unjustified infringement of the right to vote guaranteed by section 3 of the Charter. In *Sauvé II*, the discussion focused exclusively on the justifiability of the provision under section 1, as the government conceded that the new provisions were not compatible with the Charter as interpreted by the Supreme Court. A majority of five to four judges concluded that this violation was unjustified under section 1. The Court explicitly declared that deference is not due to Parliament when reviewing legislation enacted in response to a judicial decision:

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[333] In *Mills*, for example, the Court upheld the new statutory regime for the disclosure of the accused confidential records in sexual assault cases enacted in response to its invalidation two years before in O'Connor. Though differing significantly from the majority's earlier judgment, the sequel is conforming to the minority of four judges. For the majority, McLachlin C.J. and Iacobucci J concluded that The Court noted that the long process of consultation preceding this regime's enactment allowed Parliament to consider the constitutional standards laid down in O'Connor and how the legislation would work in practice. See also *Hall*, *supra* note 301; *Canada (Attorney General) v. JTI-Macdonald Corp.*, *supra* note 282.

[334] Geoffrey Signalet, Grégoire Webber & Rosalind Dixon, "Introduction - The 'What' and 'Why' of Constitutional Dialogue" in Geoffrey Signalet, Grégoire Webber & Rosalind Dixon, eds, Constitutional Dialogue: Rights, Democracy, Institutions (Cambridge: Cambridge University Press, 2019) 1 at 6.

[335] See e.g., Macfarlane, Hiebert & Drake, *supra* note 21 at 24; Baker, *supra* note 35 at 17.

> Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again."[336]

Given the fundamental importance of the right to vote, McLachlin J., for the majority, declared that any limit on these rights requires "not deference, but careful examination."[337] The dissenting four judges, in the writings of Gonthier J., would have shown deference, rather suggesting:

> after a full and rigorous s. 1 analysis, Parliament has satisfied the court that it has established a reasonable limit to a right that is demonstrably justified in a free and democratic society, the dialogue ends; the court lets Parliament have the last word and does not substitute Parliament's reasonable choices with its own.[338]

In Baker's opinion, *Sauvé II* shows the end of the Supreme Court' "flirtation" with coordinate construction that transpired from *Mills* and *Hall.*[339]

More recently, the Supreme Court had the opportunity to revise section 33.1 of the *Criminal Code*, adopted in reaction to *Daviault*.[340] This legislative response reinstated the prohibition of self-inducing intoxication defence that the Supreme Court had struck down in 1995 and had yet to be contested for 25 years. The Ontario Court of Appeal's decision to reinstate voluntary intoxication as an automatism defence in the *R. v. Sullivan*[341] caused a major public backlash, as did the *Daviault* case when it was rendered.[342] While acknowledging the need for deference to Parliament in assessing the reasonableness of policy alternatives during the minimal impairment stage of the *Oakes* test, – "in its choice for the difficult moral issues"[343] – the Court ultimately found that section 33.1 fell short on the final branch of the proportionality test.[344]

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[336] *Sauvé II*, *supra* note 258 at para 17. See also *Canada (Attorney General) v. JTI-Macdonald Corp.*, *supra* note 282 at para 11.
[337] *Sauvé II*, *supra* note 258 at para 11.
[338] *Ibid* at para 104.
[339] Baker, *supra* note 35 at 37.
[340] *Brown*, *supra* note 280; *R v Sullivan*, [2020] ONCA 333.
[341] *R. v. Sullivan*, *supra* note 340.
[342] Lisa M Kelly & Nadya Gill, "The punishing response to the defence of extreme intoxication," (13 October 2020), online: *Policy Options* <https://policyoptions.irpp.org/magazines/october-2020/the-punishing-response-to-the-defence-of-extreme-intoxication/>.
[343] *Brown*, *supra* note 280 at para 37.
[344] *Ibid* at para 142.

Further, even in *Mills* and *Hall*, the Court was highly divided in its decision to uphold the revised legislation despite its inconsistency with a previous judicial decision; only a small majority of five judges favoured accepting a competing political interpretation. In *Hall,* for the minority of four judges, Iacobucci J. contrasted this case to *Mills*, which he considers demonstrates the "mutual respect between the courts and legislatures that is so fundamental to the concept of constitutional dialogue between these institutions."[345] In the case at hand, however, he considered that Parliament had responded to *Morales* without due regard for the constitutional standards set by the Court. In his opinion, upholding the impugned provision transformed "dialogue into abdication."[346]

A look at the few "Second Look" cases thus reveals a somewhat ambiguous stance of the Supreme Court regarding the legitimacy of the political branches to put forward alternative interpretations of rights. Discussing the review of legislative sequels, MacLachlin J. declared in 1994 that "the mere fact that the legislation represents Parliament's response to a decision of this Court does not militate for or against deference."[347] To this day, the Supreme Court appears to stick to this approach, showing a variable – if not inconsistent – level of deference toward legislative sequels.

An opportunity to witness the level of deference privileged by the Supreme Court might arise from the recent contestation of the prostitution law provisions enacted in response to *Bedford.* These provisions have been contested in recent years, but none reached the Supreme Court.[348]

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[345] "In the legislation under consideration in Mills, Parliament duly considered the constitutional standards set out in O'Connor and responded by enacting a production regime which broadly conformed to these standards. In response, this Court examined this legislative scheme in light of the particular societal concerns faced by Parliament and, with due regard for Parliament's considered view of how the production regime should be structured, upheld the legislation as constitutional": *Hall*, *supra* note 301 at para 126.

[346] Ibid at para 127.

[347] *Canada (Attorney General) v. JTI-Macdonald Corp.*, *supra* note 282 at para 11.

[348] The Ontario Superior Court recently rejected a request introduced by the Canadian Alliance for Sex Work Law Reform contesting the constitutionality of the *Criminal Code* sex work provisions, notably regarding the criminalization of advertising sexual services: *Canadian Alliance for Sex Work Law Reform v. Attorney General*, 2023 ONSC 5197. Further, in *Anwar,* the Ontario Court of Justice found that the provisions dealing with advertising ban, procuring and material benefits were unconstitutional, a decision which was not appealed: *R v Anwar*, [2020] ONCJ 103 [*Anwar*]. The Court reached the same conclusion on *R v NS*, [2022] 2022 ONCA 160, a decision which was overturned by the Appeal Court of Ontario: *Ibid*. The Supreme Court dismissed the application for leave to appeal following the decision of the Appeal Court of Ontario. See also *R v Boodhoo and others*, [2018] ONSC 7207.

(ii) Invitations to re-enact invalidated legislation

On some occasions, the Supreme Court encouraged lawmakers to re-enact a new version of legislation invalidated under the Charter in a way that would minimally impair the rights, offering alternatives that would be less restrictive on the rights.[349] An illustrative example is the case of *Morgentaler*[350], in which a majority of judges recognized that the legislator still had the considerable latitude to pass legislation that would meet constitutional standards as set out in this decision.[351] Although no revised legislation was ultimately enacted, the ruling highlights the Court's inclination to invite lawmakers to exercise their discretion in crafting new laws by presenting various options that could withstand judicial scrutiny.[352]

While such invitations to reenact legislation grants legislators a certain degree of discretion, this discretion is not without limits: the reenactment must conform to the boundaries set by the judiciary. For instance, in *Carter*, after striking down the criminal provisions prohibiting physician-assisted death, the Court explicitly called upon Parliament and the provincial legislatures to respond "by enacting legislation consistent with the constitutional parameters set out in these reasons." [353] Such a declaration underscores the need for lawmakers to align their legislative choices with the prescriptions defined by the Supreme Court.

Suspensions of invalidity, which aim to allow lawmakers to revise and re-enact legislation found inconsistent with the Charter before the invalidation takes effect, are increasingly used in courts.[354] A practice that had no textual basis[355], it allows political institutions to properly engage with the rights instead of rushing to replace the legislation judicially invalidated.[356] While courts often suggest a range of remedies, the task of redrafting the legislation rests in the hands of lawmakers.[357] Scholars have applauded this growing use of suspensions of invalidation, as it

[349] Robert Leckey, "Assisted Dying, Suspended Declarations, and Dialogue's Time" (2019) 69:1 University of Toronto Law Journal 64 at 76.
[350] *R c Morgentaler*, [1988] 1 RCS 30 [*Morgentaler*]. See also *Brown*, *supra* note 280 at para 136.
[351] Parent, *supra* note 278 at 178.
[352] *Ibid* at 182.
[353] *Carter*, *supra* note 3 at para 401. See also *Brown*, *supra* note 280 at para 136 ss.
[354] For an interesting discussion on the use of declaration of suspension in the case of in cases related to socio-economic rights, see Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021) at 415.
[355] Robert Leckey, "Remedial Practice Beyond Constitutional Text" (2016) 64:1 The American Journal of Comparative Law 1 at 19.
[356] Leckey, *supra* note 349 at 64.
[357] *Ibid* at 66; Hogg & Allison A. Bushell, *supra* note 81 at 18.

indicates the Supreme Court's recognition that lawmakers are better suited to determine the most appropriate remedy from the available corrective measures. [358]

If suspensions of invalidity are perceived as more "dialogic",[359] a form of judicial restraint,[360] they do not amount to weak-form judicial review. The government and Parliament still lack the authority to determine the outcome of the invalidated law; their role is largely confined to a limited discretion in executing the judicial decision.[361] Further, a delay of one year is commonly granted, a short timeframe that might imply that courts do not always engage in genuine deference when issuing suspensions.[362] Notably, legal scholar Robert Leckey opines that this delay is insufficient to allow lawmakers to adequately revise and re-enact complex social policies, especially if they intend to hold public consultations.[363] In reviewing the criminal provisions invalidated in *Bedford*, for example, lawmakers struggled to grapple with the complexity and sensitivity of prostitution law issues within the one-year suspension, feeling pressured by the delay granted by the Supreme Court.[364] As a result, the practical limitations of the one-year suspension period may hinder the ability of lawmakers to engage in thorough and inclusive processes for revising legislation in response to judicial invalidation. The Supreme Court's invitation to lawmakers to review unconstitutional legislation, even when accompanied by a suspension of invalidity, falls short of demonstrating openness to political interpretations of rights.

### c. Discussion of the Federal Court on rights protection in *Schmidt*

If dialogue cases provide certain clues on its view toward the roles and responsibilities in rights protection, the Supreme Court has yet to explicitly take a stance on that matter. In the *Schmidt* case, however, the Federal Court discussed these roles and responsibilities at length. It was the first time a court provided such a detailed account of the constitutional context surrounding

[358] See e.g., Leckey, *supra* note 349 at 64; Kent Roach, "Dialogic remedies" (2019) 17:3 International Journal of Constitutional Law 860–883 at 868; Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford: Oxford University Press, 2012) at 105.
[359] Gardbaum, *supra* note 147 at 41.
[360] Sathanapally, *supra* note 358 at 105.
[361] Gardbaum, *supra* note 147 at 41.
[362] Leckey, *supra* note 349 at 79.
[363] Leckey, *supra* note 349.
[364] Cara Locke, "Debating the Rule of Law: The Curious Re-enactment of the Solicitation Offence" (2021) 58:3 Alberta Law Review 687 at 698.

rights protection in Canada. It was also the first time a mechanism of rights review was subjected to judicial scrutiny.

To offer a thorough constitutional context for assessing the legality of this mechanism, Justice Noel devoted a substantial section of his judgment to examining the roles and functions of the three branches of government in safeguarding rights. He extensively deliberated on the lawmaking process as an integral component of the federal human rights regime. In his own words, he aimed to "distinguish each branch's responsibilities from that of the others and to determine whether the outcome of this analysis supports or contradicts our findings in relation to the content and performance of the Minister's examination and reporting duties."[365] Though the executive and legislative branches were most relevant to the matter at hand, he also investigated the judiciary's role in interpreting legislation and deciding on its compatibility with Charter rights. He emphasized the significance of the balance between the three branches of government in comprehending the complete constitutional context of the case at hand.[366]

While assessing the Minister of Justice's responsibilities under the *Department of Justice Act*, Justice Noel emphasized that each branch of the government has its own role in the lawmaking process, creating a system of "checks and balances." His position, supported by the Federal Court of Appeal[367], is unmistakably based on the traditional formulation of judicial supremacy:

> To each his own obligation: the Executive governs and introduces bills to Parliament; Parliament examines and debates government bills and, if they are acceptable to Parliament, enacts them into law; the Judiciary, following litigation or a reference, determines whether or not legislation is compliant with guaranteed rights. Each branch of our democratic system is responsible for its respective role and should not count on the others to assume its responsibilities.[368]

As the request to appeal to the Supreme Court was denied, the highest Canadian court did not hear Schmidt's claim and precise its position on the roles and responsibilities of the judicial and political branches in rights protection.

[365] *Schmidt*, *supra* note 26 at para 184.
[366] Ibid at para 188.
[367] *Schmidt v. Canada (Attorney General)*, *supra* note 30.
[368] *Schmidt*, *supra* note 26 at para 277.

*iii. A Limited Pre-enactment Review Focused on Judicial Decisions*

The court-centric character of rights protection is evident through the limited number of mechanisms for Charter review in federal lawmaking, which, when present, tend to adopt a legalistic approach.

**a. The limited presence of mechanisms of rights review**

Charter review can take place through formal or informal mechanisms of rights review. Formal mechanisms involve institutional structures or processes explicitly designed to assist lawmakers in assessing the compatibility of bills with the Charter. They impose an obligation on lawmakers to engage in a structured process of Charter review. In contrast, informal mechanisms allow lawmakers to address Charter concerns but are not specifically designed for that purpose.[369] They do not require lawmakers to consider or raise issues related to Charter compatibility.[370] Informal opportunities may arise during interactions such as questions to the government or witnesses, and during committee or chamber debates. The availability of formal and informal mechanisms offers lawmakers diverse avenues to engage with Charter considerations throughout the lawmaking process.

As defended throughout this thesis, effective and sustainable rights protection requires that lawmakers perform a robust evaluation of the impacts of bills on the Charter. This level of assessment can only be achieved through mechanisms of rights review that support lawmakers in interpreting and applying the Charter to the bills under consideration. For example, when questioning witnesses during public hearings, parliamentary committees can assist in discovering certain impacts or identifying avenues to minimize rights infringements.[371] However, these informal mechanisms cannot compel the government to conduct a thorough evaluation or even invoke the Charter. As a result, they fall short of fostering effective and sustainable rights protection. Given the importance of robust assessment for rights protection, it is crucial to have

[369] Charlie Feldman, "Legislative Vehicles and Formalized Charter Review" (2016) 25:3 Constitutional Forum 79 at 79.
[370] *Ibid* at 80.
[371] Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia* (Singapore: Springer, 2020) at 186. See also Malcolm Shaw, "Parliamentary Committees: A Global Perspective" (1998) 4:1 The Journal of Legislative Studies 225; Gareth Griffith, "Parliament and Accountability: The Role of Parliamentary Oversight Committees" (2006) 21:1 Australian Parliamentary Review 7.

formal mechanisms of rights review that support lawmakers in interpreting and applying the Charter to the bills under consideration.

If the enactment of the Charter did lead to several changes to the lawmaking process, the pre-enactment review currently comprises few formal mechanisms of rights review. Only two formal mechanisms of rights review currently exist, both of which occur during the drafting of bills by the government: the rights vetting performed by governmental lawyers and the Minister of Justice's Charter statements. While the first is part of the internal practices of the executive stage of lawmaking, the latter is provided by the *Department of Justice Act*. In contrast with the institutionalized Charter review conducted during the executive stage of lawmaking, Charter review at Parliament is, at best, underdeveloped: no explicit mandate to review the Charter compatibility of legislation was attributed to any parliamentary actor or entity. Though concerns about the Charter compatibility of bills can be raised at any point in the parliamentary process, there is no formal or structured process of rights review nor guidelines assisting parliamentarians, whether in committee or chamber debates.

As a result, Charter review in the federal lawmaking context is primarily centered around the executive branch and encompasses only a limited number of rights review mechanisms.

**b. The determinative nature of judicial decisions in Charter review**

The federal institutional framework for lawmaking currently comprises two mechanisms of rights review, both of which highlight the determinative nature of judicial decisions in Charter review: the rights vetting done by governmental lawyers and the Minister of Justice's Charter statements. The purpose of both assessments is to evaluate the likelihood and impacts of a potential judicial contestation of proposed legislation. Judicial decisions are central to this assessment[372]: instead of assessing the conformity of bills to Charter rights themselves, lawmakers assess their adherence to judicial decisions. The key role of judicial decisions in rights vetting reinforces the role of the judiciary as the central institution responsible for assessing the consistency of legislation to the Charter.

[372] *Schmidt*, *supra* note 26 at para 20. Macfarlane, Hiebert & Drake, *supra* note 21 at 45.

The prevalence of judicial interpretations during pre-enactment review can be attributed to two main factors: the purpose of the institutional mechanisms implemented and the centralization of Charter review within the Department of Justice.

First, both mechanisms of rights review were established in response to Supreme Court decisions that struck down important legislation a couple of years after the adoption of the Charter.[373] These invalidations highlighted the strong remedial approach privileged by the Supreme Court to give effect to the Charter.[374] Hiebert suggests that the increased emphasis on judicial norms during pre-enactment review directly results from the threat of judicial review and invalidation.[375] She contrasts the strong remedial powers of the courts with New Zealand, Australia, and Victoria, where the absence of a significant threat of judicial censure eliminates the necessity for risk-based assessments. As a result, pre-enactment review in these jurisdictions focuses on the rights-based principles derived from pertinent jurisprudence, rather than merely their invalidation risks.[376] The risks associated with judicial invalidation highlighted the need for lawmakers to anticipate judicial trends.[377] This recognition led to a more proactive role of the Department of Justice in drafting bills.[378]

Second, this central role of the Department of Justice in Charter review implies a central role for lawyers in Charter review. Mandated to provide legal advice to the government, this institution is largely composed of lawyers and legal advisors,[379] including the two institutions mandated with reviewing the bills, the Human Rights Law Sections ("HRLS") and the Legal Services Units ("LSUs"). Despite lacking a defined constitutional role or explicit legal framework, government legal advisers provide the legal advice that informs the government's determination of a bill's compatibility with rights and, ultimately, their decision to take action or not.[380]

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[373] Kelly, *supra* note 58 at 495; Janet L Hiebert, "Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes" (2005) 3 NZJPIL 63 at 70. The decisions include *Schachter v. Canada*, *supra* note 309; *Oakes*, *supra* note 309; *Singh v. Minister of Employment and Immigration*, *supra* note 309.
[374] Kelly, *supra* note 58 at 495.
[375] Hiebert, *supra* note 25 at 130.
[376] *Ibid* at 139–40.
[377] Kelly, *supra* note 58 at 495.
[378] *Ibid*.
[379] *Report of the Auditor General of Canada to the House of Commons - Chapter 5: Managing the Delivery of Legal Services to Government* (Ottawa: Office of the Auditor General of Canada, 2007) at 5.
[380] Conor Casey & David Kenny, "The Gatekeepers: Executive Lawyers and he Executive Power in Comparative Constitutional Law" (2022) ICON 1 at 1.

Hiebert's interviews with Department of Justice lawyers reveal that the assessment process involves bureaucratic actors attempting to anticipate the courts' response to legislation by relying on existing case law. [381] This process entails a risk-based evaluation, where the focus is on the potential risk of the legislation being deemed unconstitutional under the Charter and the level of difficulty in justifying any potential violations under section 1.[382] In *Schmidt*, Justice Noel explicitly stated that because the government is the Department of Justice's client, the risk assesses only refers to "risk to government operations" and not the "risk to the state as a whole" or "risk to the public."[383] The analysis is driven by the aim of minimizing the risk of constitutional challenge and ensuring that proposed legislation can withstand legal scrutiny.

Further, Charter statements, prepared by ministers of Justice, discuss the Charter rights possibly engaged by bills from a legal standpoint. This emphasis on jurisprudence and legal test is expected, given the role of the Minister of Justice as the government's primary legal adviser. The introductory sections of Charter statements explicitly state their purpose as providing legal information, highlighting their focus on legal analysis and interpretation. When there are existing judicial decisions directly addressing the subject matter of the bills, Charter statements concentrate on situating the bill within the framework of those decisions.[384] In any cases, Charter statements tend to invoke the rights that could potentially be engaged by the bill and explains the considerations that support its compatibility with the Charter.[385] Charter statements do not address the potential socio-economic impacts of proposed legislation or provide empirical evidence to support their analysis, even when bills raise evident socio-economic concerns.[386] An illustrative example is the Charter statement of Bill C-28, *An Act to amend the Criminal Code (self-induced extreme intoxication)*, which reinstates the provision on extreme intoxication defence. Despite the

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[381] Macfarlane, Hiebert & Drake, *supra* note 21 at 45.
[382] Janet Hiebert, Charter Conflicts: What is Parliament's Role? (Montréal: McGill-Queen's University Press, 2002) at 8. Janet Hiebert, *Charter Evaluations: Straining the Notion of Credibility* (Ottawa, 2015) at 6.
[383] *Schmidt*, *supra* note 26 at para 19.
[384] See e.g., *Charter Statement - Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 2017; Government of Canada, *supra* note 257; Department of Justice Government of Canada, "Charter Statement - Bill C-28: An Act to amend the Criminal Code (self-induced extreme intoxication)", (22 June 2020), online: <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c28_1.html>.
[385] See e.g., Department of Justice Government of Canada, "Charter Statement - Bill C-22: An Act to amend the Criminal Code and the Controlled Drug and Substances Act", (8 June 2021), online: <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c22.html>; Department of Justice Government of Canada, "Charter Statement - Bill C-16: An Act to amend the Canadian Human Rights Act and the Criminal Code", (15 June 2016), online: <https://www.justice.gc.ca/eng/csj-sjc/pl/identity-identite/statement-enonce.html>.
[386] Government of Canada, *supra* note 385.

well-documented higher risk of violence among women, children, and individuals living in poverty[387], the Charter statement failed to discuss the impacts of these amendments on these groups.[388] The primary focus of Charter statement remains on legal considerations and the constitutional implications of the bill.

Despite the absence of formal mechanisms of rights review in Parliament, the Charter is often invoked during parliamentary debates. Parliamentary deliberations on Charter compatibility are traditionally addressed in terms of compliance with jurisprudence.[389] However, as further explained in Chapter 4, Charter review in Parliament remains minimal: it is typically limited to citing relevant Charter provisions and mentioning Supreme Court decisions. Witnesses frequently raise Charter concerns, particularly regarding the potential socio-economic impacts of bills that fall outside the scope of jurisprudence. However, reference to the Charter in parliamentary debates are predominantly used to support a bill's alignment or conflict with the Charter, based on the court's interpretation, aligning with the political stance of the respective party. As is the case at the executive stage of lawmaking, Charter review at Parliament primarily revolves around considering adherence with judicial decisions.

The strong adherence of lawmakers to jurisprudence when drafting legislation exemplifies the judicial branch's predominant role in rights protection. All the existing mechanisms of rights review indeed aim at assessing the risk of judicial invalidation in the event of contestation in courts rather than to engage with what the Charter entails. Even if considered an example of weak-form constitutionalism, courts retain the final say on the meaning and scope of Charter rights.[390] Judicial interpretations are generally determinative when considering the rights compatibility of bills during legislative rights review.

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[387] See e.g., Kerri A Froc & Elizabeth Sheehy, "Last among Equals: Women's Equality, R v Brown, and the Extreme Intoxication Defence Part III: Comment" (2022) 73 UNBLJ 268–300; Loanna Heidinger, "Intimate Partner Violence: Experiences of First Nations, Métis and Inuit Women in Canada" (2021) 1 Juristat 3; "Violence against women", online: <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.
[388] Government of Canada, *supra* note 384 at 28.
[389] See e.g., Zoe Goodall, "United by the Problem, Divided by the Solution: How the Issue of Indigenous Women in Prostitution Was Represented at the Deliberations on Canada's Bill C-36," (2019) 31:2 Canadian Journal of Women and the Law 232 at 258.
[390] Melero de la Torre, *supra* note 63 at 166.

B) Discussion: A Court-Centric Approach to Rights Protection

The discussion above indicates that while not a system of pure judicial supremacy, Canada's approach to rights protection is unmistakably court-centric. This finding aligns with contemporary scholarship, which increasingly challenges the characterization of Canada as an example of a "weak" form of constitutionalism. Despite sections 1 and 33 of the Charter seemingly providing a shared political and judicial responsibility in constitutional interpretation[391], the view of the Charter as creating a dialogic system is expressly questioned.[392] The prevailing evidence demonstrates that rights protection in Canada remains largely centred around the judiciary, thus highlighting the continued centrality of judicial institutions in the process of rights protection.

Under Gardbaum's typology of judicial supremacy, dialogue requires that courts do not have decisional supremacy[393]: political interpretations could prevail in the presence of an inter-institutional conflict on what the Charter entails. Similarly, Roach suggests that dialogue can only occur if:

> The courts will discharge their legitimate role when they defend the rights of the unpopular and consider the evidence that the government presents about why limits on rights are proportionate. The legislature will discharge its legitimate role when it engages in a responsive manner with proportionality concerns articulated by the courts and when it takes responsibility for derogating from rights.[394]

In practice, despite the potential for dialogue between branches, the indicators discussed above strongly suggest that rights protection in Canada is predominantly court-centric.

First, the Supreme Court has almost consistently required compliance from lawmakers toward its own interpretations. While some argue that *Mills* and *Hall* represent a coordinated or dialogic response to legislative sequels,[395] these cases remain the exception. The Supreme Court has generally exhibited limited deference toward political interpretations of the Charter, even when they are reflected in sequels enacted in response to a previous invalidation. As constitutionalist

[391] See e.g., Signalet, Webber & Dixon, *supra* note 204; Hogg & Allison A. Bushell, *supra* note 81; Hogg & Bushell, *supra* note 117; Roach, *supra* note 204.
[392] Macfarlane, Hiebert & Drake, *supra* note 21 at 4 ss; Melero de la Torre, *supra* note 63; Knopff et al, *supra* note 63 at 610.
[393] Gardbaum, *supra* note 147 at 27.
[394] Roach, *supra* note 130 at 299.
[395] Macfarlane, Hiebert & Drake, *supra* note 21 at 24; Baker, *supra* note 35 at 17.

Rosalind Dixon expresses, without deference toward "Second look" cases, judicial judgements continue to be seen as final.[396] Court's refusal to recognize the constitutional interpretations of lawmakers when reviewing legislative sequels, though not systematic, reflects a form of judicial supremacy – that is, under Gardhaum's typology, attitudinal supremacy.[397]

Additionally, federal lawmakers seldom put forward their own interpretations of Charter rights. Pre-enactment review exhibits a notable lack of commitment to effectively uphold and give effect to Charter rights, both in its institutional framework and how lawmakers approach their potential obligations under the Charter. Existing mechanisms for rights review during federal lawmaking are limited in number and primarily oriented toward ensuring compliance with jurisprudence. Further, when revisiting invalidated legislation, legislators rarely deviate from judicial rulings. Section 1 of the Charter is construed as allowing reasonable limits "within judicially determined boundaries."[398]

A central tenet of the dialogue theory is the possibility of suspending the application of certain Charter rights through the notwithstanding clause.[399] This provision was incorporated into the Charter as a compromise between legislative supremacy and final judicial review.[400] Section 33 is indeed said to enable a dialogue between the courts and Parliament, weakening judicial supremacy by granting the final authority to courts only if the legislator accepts, at least implicitly, their decisions.[401]

In practice, the notwithstanding clause does not foster a sufficiently robust dialogue to rebalance the interpretative powers between the courts and Parliament, thereby perpetuating the values of judicial supremacy.

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[396] Dixon, *supra* note 209 at 162.
[397] Gardbaum, *supra* note 147 at 25.
[398] Baker, *supra* note 35 at 6.
[399] Section 33(1) of the Charter states: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter".
[400] Lorraine E Weinrib, "The Canadian Charter's Override Clause: Lessons for Israel" (2016) 49:1 Israel Law Review 67 at 68.
[401] Bédard-Rubin, *supra* note 212 at 311. See also Noura Karazivan & Jean-Francois Gaudreault-DesBiens, "Rights Trivialization, Constitutional Legitimacy Deficit, and Derogation Clauses: the Example of Quebec's Laïcity Act" (2020) 99 Supreme Court Law Review 487 at 500.

On the one hand, section 33 has been interpreted as allowing to override Charter rights "as judicially construed."[402] This dialogue presumes that legislatures operate within interpretive boundaries established by judges regarding the Constitution, a perspective which perpetuates the status of judges as "guardians of the Constitution."[403] As a result, the notwithstanding clause should not be used pre-emptively, that is before a judicial decision on the matter. Hiebert opines that pre-emptive use of the notwithstanding clause would deny "the polity the benefit of the Supreme Court's contribution to constitutional deliberations."[404] It should not be viewed, in her opinion, as a "raw power for reinstating Parliament's judgement" when it does not agree with the Court's interpretation of a right or with how it reconciles conflicting rights and values.[405] The recent attempt of the Ontarian government to rely on the notwithstanding clause to end work negotiation has prompted the federal government to express its viewpoint on the legitimate use of the notwithstanding clause. The Ontarian government introduced Bill-28, *Keeping Students in Class Act, 2022* in the context of its negotiations with the Canadian Union of Public Employees. This controversial legislation aimed at preventing education workers from going on strike for the duration of their imposed a new four-year collective agreement. The Prime Minister Justin Trudeau condemned the Ontarian government's decision, denouncing the pre-emptive invocation of the notwithstanding clause as an "assault on fundamental rights."[406] This conception of section 33 means that the notwithstanding clause should be used if courts have previously adjudicated the matter and provided their interpretation of the rights at stake.

Further, while provincial legislators have at times invoked the notwithstanding clause[407], it has never been utilized by the federal government. Section 33 of the *Constitution Act, 1982* has

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[402] Baker, *supra* note 35 at 6.
[403] Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in Geoffrey Signalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 209 at 222.
[404] Hiebert, *supra* note 48 at 172.
[405] *Ibid*.
[406] "Preemptive use of notwithstanding clause an 'attack on people's fundamental rights:' Trudeau | Watch News Videos Online", online: *Global News* <https://globalnews.ca/video/9254094/preemptive-use-of-notwithstanding-clause-an-attack-on-peoples-fundamental-rights-trudeau/>.
[407] For example, following the decision of the Queen's Bench for Saskatchewan that admission and funding of non-Catholic students in Catholic schools were in contravention of section 2(a) of the *Charter* in *Good Spirit*, the Saskatchewan government invoked the notwithstanding clause to continue funding non-Catholic students. In the face of a competing interpretation of the freedom of religion, the government responded to the court's decision with "detailed value-oriented reasons that justify its decision to take a different interpretation of human rights": Meghan Campbell, "Reigniting the Dialogue: The Latest Use of the Notwithstanding Clause in Canada" (2018) Public Law, online: <https://pure-oai.bham.ac.uk/ws/files/52512709/Campbell_Reigniting_the_Dialogue_Public_Law.pdf> at 7.

predominantly been invoked in Quebec, often in relation to laws pertaining to language and culture, when the "collective interest of the Quebec people" was deemed to be on the line.[408] One possible explanation for the reluctance of federal lawmakers to invoke the notwithstanding clause is the high political costs associated with this clause.[409] Constitutionalist Adam Dodek qualifies this provision as "the *bête noire* of Canadian constitutional politics".[410] In his opinion, the utilization of the notwithstanding clause up until now has contributed to its negative reputation. He points to Quebec's use of the clause in 1988 as the starting point for the animosity towards it. Subsequently, several attempts by provincial legislatures to apply the clause in a manner unfavourable to vulnerable groups, such as Alberta's endeavour to employ it to limit compensation for victims of forced sterilization, have further added to the negative perception.[411] Civil society often interprets the notwithstanding clause as a deliberate intention to override Charter rights rather than a decision to put forward an alternative interpretation of those rights.[412] Its recent use by Ontario supports this view. The decision to suspend workers' rights was met with intense backlash, leading the Ontarian government to rescind the measures.[413]

Another possible explanation for the federal legislator's lack of usage of section 33 is the considerable discretion provided by section 1 to establish constitutionality.[414] As previously explained, section 1 allows for the justification of limitations on rights if they are deemed reasonable and justifiable in a free and democratic society. This broad scope of justification,

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[408] For example, Québec recently subtracted the application of *An Act respecting French, the official and common language of Québec,* SQ 2022 c.14, from the application of section 2 and 7 to 15 of the Charter. On the use of the notwithstanding clause in Québec, see See e.g., Louis-Philippe Lampron, "La Loi sur la laïcité de l'État et les conditions de la fondation juridique d'un modèle interculturel au Québec" (2021) 36:2 Canadian journal of Law and Society 323; Guillaume Rousseau & François Côté, "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights" (2017) 47:2 Revue Générale de Droit 343.

[409] Knopff et al, *supra* note 63 at 625; Baker, *supra* note 35 at 44.

[410] Adam Dodek, "The Canadian Override: Constitutional Model or Bête Noire of Constitutional Politics" (2016) 49:1 Israel Law Review 45 at 57.

[411] *Ibid* at 62. For an interesting recent discussion on the uses of the notwithstanding clause targeting minorities, see Tsvi Kahana, "The Notwithstanding Clause in Canada: The First Forty Years" (2023) 60:1 Osgoode Hall Law Journal 1.

[412] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010) at 202.

[413] Renée-Claude Drouin, "Les lois spéciales de retour au travail au Canada" (2023) 1 Revue de droit comparé du travail et de la sécurité sociale 198 at 200.

[414] James B Kelly & Matthew A Hennigar, "The Canadian Charter of Rights and the Minister of justice: Weak-form Review within a Constitutional Charter of Rights" (2012) 10:1 ICON 35 at 53–4.

assessed through the criteria developed in *Oakes*,[415] gives lawmakers flexibility in interpreting constitutionality. Based on their own interpretation and judgment, they can easily defend that the bills they enact are compatible with the Charter.[416] Yet, given the lack of utilization of the notwithstanding clause by the federal legislator, the adequacy of this mechanism to foster meaningful dialogue between the courts and Parliament is questionable.

The dialogic conception of the Charter is increasingly criticized for being "little more than legislative obedience to judicial command"[417], a monologue in favour of courts rather than genuine dialogue.[418] Multiple scholars express skepticism about the merits of conceiving the relationship between the political branches and the courts in dialogic terms.[419] Already in 2001, political scientist Christopher P. Manfredi asserted that the "dialogue metaphor" constitutes the "most important myth" about judicial power and the Charter.[420] With Kelly, he had further argued that "[g]enuine dialogue only exists when legislatures are recognized as legitimate interpreters of the constitution and have an effective means to assert that interpretation."[421] Tushnet adequately summarizes the current state of dialogue in Canada, opining that legislators exercise their dialogic powers so rarely that "a natural inference is that the political-legal culture in nations with weak-form review has come to treat judicial interpretations as authoritative and final.[422] In their recent examination of how governments and Parliament justify their legislative choices under the Charter, Macfarlane, Hiebert and Drake suggest that neither the dialogue theory nor coordinate construction reflects how lawmakers deal with their Charter obligations.[423] They maintain that the dialogue

[415] *Oakes*, *supra* note 309. 1) Is the objective pressing and substantial? 2) Is the law or policy rationally connected to the pressing and substantial objective. 3) Is the law or policy minimally impairing of the *Charter* right. 4) Are the beneficial effects of the law or policy outweighed by its negative effects on the Charter right in question?
[416] Kelly & Hennigar, *supra* note 58 at 52.
[417] Rainer Knopff et al, "Dialogue: Clarified and Reconsidered" (2017) 54:2 Osgoode Hall Law J 609 at 610.
[418] Hiebert, *supra* note 48 at 164.
[419] See also Melero de la Torre, *supra* note 63 at 167; Mailey, *supra* note 118 at 10; Brouillet & Michaud, *supra* note 118 at 17; Huscroft, *supra* note 63; Petter, *supra* note 118 at 155; Huscroft, *supra* note 118.
[420] Christopher Manfredi, "Judicial Power and the Charter: Three Myths and a Political Analysis" (2001) 14 Supreme Court Rev 331 at 336.
[421] Christopher P Manfredi & James B Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37:3 Osgoode Hall Law Journal 513. See also Christopher Manfredi, "The Day the Dialogue Died: A Comment on Sauve v Canada" (2007) 45 Osgoode Hall Law Journal 105; Christopher P Manfredi, "The Unfulfilled Promise of Dialogic Constitutionalism: Judicial–Legislative Relationships under the Canadian Charter of Rights and Freedoms" in *Protecting Rights Without a Bill of Rights*, 1st ed (London: Routledge, 2006) 239.
[422] Manfredi & Kelly, *supra* note 421 at 524.
[423] Macfarlane, Hiebert & Drake, *supra* note 21 at 18–19.

theory "empirically and conceptually contested" fails to capture the intricate complexities of how legislatures and governments address rights issues within the lawmaking process.[424]

Given this quasi-total obedience to judicial interpretations, in practice, the approach to Charter protection in Canada is certainly "court-centric."[425] Gardbaum, among others, states that "the Charter system is currently operating in a way that is too close to judicial supremacy for it to be the most distinct or successful version of the new model."[426] Similarly, legal scholar Maartje De Visser submits that the arrangement in Canada resembles those of conventional systems of strong review, given the unwillingness of the political branch to override or ignore the courts.[427] This conclusion is hardly surprising because, as explained by Melero de la Torres, "weak-form constitutionalism such as that of Canada or the United Kingdom is likely to produce de facto judicial supremacy over the interpretation of rights."[428] The significance of the judiciary in shaping and defining the scope and meaning of Charter rights reflects a court-centric approach to rights protection.

Due to the prevalence of the judiciary in rights protection, the federal human rights regime is plagued with flaws similar to the ones associated with judicial supremacy. In this next section, I address the concerns related to this court-centric approach in the context of lawmaking, explaining how these concerns can lead to incomplete rights protection.

## 1.2 – Beyond the Judiciary: Exploring Gaps in Rights Protection Arising from a Court-Centric Approach

The court-centric approach to rights protection prevailing in Canada has two concrete and interrelated implications for Charter protection: judicial review is the primary avenue for addressing potential infringements of Charter rights in legislation, and judicial decisions are viewed as reflecting the Charter's meaning and scope.

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[424] *Ibid*.
[425] Knopff et al, *supra* note 63 at 623.
[426] Stephen Gardbaum, "Canada" in *The Commonwealth Model of Constitutionalism - Theory and Practice* (Cambridge: Cambridge University Press, 2013) 97 at 128.
[427] de Visser, *supra* note 99 at 219.
[428] Melero de la Torre, *supra* note 63 at 170.

Granting access to courts to challenge the constitutionality of legislation and relying exclusively on courts for rights protection are two different approaches with distinct consequences on rights protection. The latter raises concerns regarding access to justice, particularly for marginalized groups who face obstacles in navigating the judicial system and seeking redress. Not only do they face significant procedural obstacles to access Charter litigation, but judges have also been reluctant to interpret Charter rights as encompassing basic social and economic entitlements.[429] Judicial decisions therefore present a limited account of the protection that could be offered by the Charter. Lawmakers exclusively depending on these constrained interpretations of Charter rights instead of exploring broader and contextually appropriate interpretations could impede progress and inadequately address evolving societal demands. To quote Petter, "[t]he institutional barrier created by money not only denies the disadvantaged access to the courts; in doing so, it also serves to shape Charter rights".[430]

### 1.2.1 – Access to Justice

Constitutional rights entail the acknowledgment of entitlements that individuals can assert against the state;[431] "there is no right without remedy."[432] Without the appropriate mechanisms for effective rights enforcement, such as access to legal remedies, rights are "abstract and meaningless."[433] The Supreme Court has consistently reiterated the importance of effective access to justice, notably when exercising Charter rights.[434] This entitlement materializes through recourses in judicial review, which allow the public to challenge legislation constitutionally after it enters into force.

However, relying on judicial review as the primary mechanism for addressing Charter infringements in legislation poses challenges regarding access to justice. Given that courts cannot initiate judicial review proceedings on their own, contesting the constitutionality of legislation

[429] Sheppard, *supra* note 6 at 237.
[430] Petter, *supra* note 118 at 26.
[431] King, *supra* note 8 at 48.
[432]Gerard Kennedy & Lorne Sossin, "Justiciability, Access to Justice & the Development of Constitutional Law in Canada" (2017) 45:4 Federal Law Review 707 at 707.
[433] Robin J Nobleman, "Addressing Access to Justice as a Social Determinant of Health" (2014) 21 Health Law J 49 at 51.
[434] See e.g., *British Columbia (Attorney General) v Council of Canadians with Disabilities*, [2022] SCC 27; *British Columbia (Attorney General) v Christie*, [2007] 1 SCR 873 [*Christie*]; *Hryniak v Mauldin*, [2014] 1 SCR 87.

necessitates that individuals introduce a constitutional challenge against the government. Consequently, the burden of ensuring the compatibility of legislation with the Charter shifts from lawmakers to civil society, who must access courts to challenge and neutralize the adverse impacts on their rights resulting from such legislation.[435] Legislation with detrimental impacts continues to affect affected parties until it is contested and potentially invalidated by courts, prolonging the period of harm and injustice.

The impacts of access to justice issues on effective and sustainable rights protection are well-documented.[436] Various barriers can impact the ability of individuals to contest the constitutionality of bills, including financial constraints and procedural complexities. Hiring lawyers and using legal institutions involve significant costs. They often require individuals to take time away from income-generating activities.[437] A lack of stable funding can severely impact individuals' and organizations' capacity to seek legal remedies.[438] Multiple studies have shown that underrepresented litigants tend to be disadvantaged in litigation, revealing that individuals from marginalized communities, low-income backgrounds, or with limited access to legal resources often struggle to navigate the complexities of litigation.[439] Engaging in litigation is often beyond the reach of numerous individuals, and most lawyers are unwilling or unable to provide pro bono services in such cases.[440]

These challenges are exacerbated in the case of Charter litigation, where the costs of legal representation and navigating complex legal procedures can be even more burdensome.[441] Litigants are automatically disadvantaged in pursuing judicial review, both financially and

[435] Hiebert, *supra* note 57 at 728.
[436] See e.g., Nandini Ramanijam, Nicholas Caivano & Semahagen Abebe, "From Justiciability to Justice: Realizing the Human Right to Food" (2005) 11:1 McGill Int J Sustain Dev Law Policy 1 at 15.
[437] Michael R Anderson, *Access to Justice and Legal Process: Making Legal Institutions Responsive To Poor People in LDCs* (Brighton: Institute of Development Studies, 2003) at 16.
[438] Carissima Mathen, "Access to Charter Justice" in The Oxford Handbook of the Canadian Constitution (Oxford: Oxford University Press, 2017) 639 at 647.
[439] See e.g., The Honorable Thomas A Cromwell, "Access to Justice and Administrative Law" (2015) 28 Canadian Journal of Administrative Law & Practice 259 at 40; Micah B Rankin, "Access to Justice and the Institutional Limits of Independent Courts" (2012) 30 Windsor YB Access Just 101 at 108; Catherine R Albiston & Rebecca L Sandefur, "Expanding the Empirical Study of Access to Justice" (2013) Wis L Review 101 at 106.
[440] Joseph J Arvay, "Cost Strategies for Litigants: The Significance of R. v. Caron" (2011) 54 Supreme Court Law Rev 427 at 428.
[441] Petter, *supra* note 118 at 23.

strategically.[442] These recourses are, by definition, taken against the Crown. In the words of Gerard J. Kennedy and Lorne Sossin, "people can run out of money but the Crown cannot".[443] Governments are commonly motivated to appeal adverse rulings in constitutional challenges, up to the Supreme Court if necessary. Experiencing a loss in Charter litigation carries substantial consequences for governments, encompassing both policy and financial dimensions. Beyond the invalidation of the policy itself, governments are compelled to undertake measures to address this setback. Further, contesting the constitutionality of legislation is a task that can hardly be undertaken successfully without legal assistance.[444] Bringing constitutional challenges before courts often represents a daunting challenge for most individuals.

Access to Charter litigation in such circumstances remains elusive for many marginalized individuals, particularly those who face economic hardship.[445] The challenges low- and middle-income individuals face to access justice are largely documented in Canada,[446] especially those of marginalized groups.[447] Despite experiencing multiple problems that can be considered rights-related, they are less inclined to turn to the courts to resolve these problems.[448] They tend to have less knowledge of the nature of their legal rights.[449] If they want to challenge legislation, linguistics barriers, analphabetism, and disabilities can also hinder their ability to explain their claim and difficulties to a judge or lawyer.[450]

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[442] Kennedy & Sossin, *supra* note 432 at 713. In *Christie*, the Supreme Court decided that there is no constitutional right to access aided by a lawyer under section 10(b) of the Charter, even if rights are at stake: *Christie*, *supra* note 434. See also *The Canadian Bar Association v Her Majesty the Queen et al*, [2007] BCSC 182.
[443] Gerard Kennedy & Lorne Sossin, "Justiciability, Access to Justice & the Development of Constitutional Law in Canada" (2017) 45:4 Fed Law Rev 707 at 713.
[444] Dana Phillips, "Public Interest Standing, Access to Justice, and Democracy under the Charter: Canada (AG) v Downtown Against Violence" (2013) 22 Const Forum 21 at 23.
[445] Petter, *supra* note 118 at 26; Ramanijam, Caivano & Abebe, *supra* note 436 at 15.
[446] *Poverty and Access to Justice - Review of the Literature*, by Y Dandurand (International Centre for Criminal Law Reform and Criminal Justice Policy, 2022); Lorne Sossin, MJ Trebilcock & AJ Duggan, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012); *Reaching Equal Justice*, by Canadian Bar Association (Ottawa: Canadian Bar Association, 2013).
[447] See e.g., Scheim et al, *supra* note 76; Institute for Research on Public Policy, *supra* note 20 at 10; Phillips, *supra* note 444.
[448] Phillips, *supra* note 444 at 23.
[449] Beverley McLachlin, "Accès à la justice et marginalisation: l'aspect humain de l'accès à la justice" (2016) 57:2 Les Cahiers de droit 341 at 344; Phillips, *supra* note 444 at 23.
[450] McLachlin, *supra* note 449 at 344.

As a result, marginalized groups often need assistance to undertake Charter litigation, notably from public interest advocacy organizations.[451] Without this support, they are more likely to experience ongoing infringements of their rights due to problematic legislation. Legal aid and similar government programs can play a crucial role in promoting access to justice by providing eligible individuals with access to necessary legal services. In Canada, the Court Challenge Program assists individuals in Charter rights cases, providing "financial support to individuals and groups in Canada to bring cases of national significance related to certain constitutional and quasi-constitutional official language and human rights before the courts."[452] However, such programs do not address the multifaceted challenges of access to justice and can be altered and abolished at the discretion of governments. In fact, it was reinstated and modernized in 2017 by the Liberal government after being abolished by the Conservatives in 2006.[453] Though legal aid programs help bridge the gap in access to legal representation, they do not provide a complete solution to the broader issues at hand.

Thus, relying on judicial review as the primary means of ensuring the compatibility of legislation with the Charter is insufficient for achieving effective and sustainable rights protection. Such a level of rights protection demands that bills be assessed before they enter into force and impact civil society. Pre-enactment review serves as a vital avenue to prevent the enactment of legislation that may later necessitate judicial recourse or remain unchallenged, thereby remaining in force.[454] This proactive approach helps avoid costly and time-consuming legal challenges, supporting the enactment of legislation that aligns with constitutional standards and upholds Charter rights.

### 1.2.2 – Limits of Judicial Decisions to Determine the Meaning and Scope of Charter Rights

Another impact of the court-centric approach to rights protection is that judicial decisions reflect the scope and meaning of Charter rights. This view suggests that the interpretation and

[451] Dana Phillips, "Public Interest Standing, Access to Justice, and Democracy under the Charter: Canada (AG) v Downtown Against Violence" (2013) 22 Const Forum 21 at 23.
[452] Canadian Heritage, "Court Challenges Program", (19 June 2020), online: <https://www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program.html>.
[453] *Access to Justice - Part 1: Court Challenges Program*, by Commons Standing Committee on Justice and Human Rights, 42nd Parliament, 1st session (Parliament of Canada, 2016).
[454] Macfarlane, Hiebert & Drake, *supra* note 21 at 66.

application of Charter rights are solely determined by the Supreme Court, equating the Court's determinations with the authoritative understanding of the Charter.[455]

This reliance on judicial interpretations as the primary source for determining what the Charter entails can limit the potential for alternative or evolving interpretations that may better reflect changing societal needs and values. Judicial interpretations of the rights, expressed in jurisprudence, embody an incomplete portrait of the meaning and scope of the rights. If the Supreme Court adopts a narrow or deferential interpretation of rights, excluding certain aspects or situations from their scope and meaning, relying on these limited judicial interpretations as the basis for legislative judgments may impede the advancement of rights.

First, judicial interpretations of the rights only represent certain facets of rights matters, those relating to the specific claims at hand, and their success highly depends on the evidence presented by the claimants and the court's treatment of this evidence. Second, courts have traditionally adopted a negative conception of Charter rights, which does not require direct action by the government to ensure their protection.

### A) An Issue of Evidence

Whereas lawmakers have access to extensive information and data, judicial review occurs within the boundaries of the case at hand. Judges examine Charter issues through a "slow and deliberate adversarial process featuring arguments by the parties affected and a reasoned decision."[456] They can generally only consider the evidence presented by the parties. The nature of the evidence necessary to uphold Charter-related claims, particularly social science evidence, can give rise to challenges for both claimants and judges. These challenges significantly restrict the capacity of courts to render decisions that genuinely reflect the values of the society in which they operate.[457]

[455] Huscroft, *supra* note 63 at 50.
[456] Slattery, *supra* note 35 at 719.
[457] Lara Pratt, "Political Protections of Fundamental Rights as a Means of Mitigating the Weakness of Legal Protections" (2012) 10 Maquarie Law Journal 77 at 115.

*i. The Relevance of Social Science in Charter Litigation*

Charter litigation gives rise to multifaceted issues encompassing broad social, economic, and political dimensions.[458] Adjudicating such cases goes beyond the traditional role of judges: they are required to consider not only the facts presented by the parties but also broader social facts that underpin policy-making and recurring patterns of behaviour in society.[459] This broader perspective is essential to allow judges to fully grasp the implications of Charter rights and make informed decisions that account for the complex realities and contexts in which these rights are exercised.

Evidence from social sciences plays a vital role in enabling judges to access insights and viewpoints beyond their own expertise and understanding. Benjamin Perryman defines social science evidence as "expert evidence that attempts to explicate, using quantitative or qualitative methods, the impact of law on human behavior or experience and, conversely, the impact of human behavior or experience on legally relevant principles or rules".[460] Including social science evidence in Charter litigation is imperative to provide a comprehensive understanding of the impacts of legislation on affected individuals and groups.

In the last two decades, courts' treatment of social science evidence in Charter litigation evolved "from distrust or hostility" to "firmly established."[461] In 2005, the Supreme Court recognized the relevance of social science evidence in to "construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case."[462] In *Bedford*, the Court submitted that non-adjudicative facts – social and economic facts surrounding rights challenges – no longer justified deference.[463]

Constitutional challenges often draw heavily on social science data and empirical evidence.[464] Without such evidence, adjudicating the questions involved in Charter litigation might

[458] Jodi Lazare, "Judging the Social Sciences in Carter v Canada (AG)" (2016) 10 McGill Journal of Law and Health S35 at S46.
[459] Jeff King, "Constitutional Rights and Social Welfare: A Comment on the Canadian Chaoulli Health Care Decision" (2006) 69 Modern Law Review 631 at 637.
[460] Benjamin Perryman, "Adducing Social Science Evidence in Constitutional Cases" (2018) 44:1 Queen's Law Journal 121 at 126.
[461] *Ibid* at 124.
[462] *R v Spence*, [2005] 3 SCR 458 at para 57.
[463] *Canada (Attorney General) v. Bedford*, *supra* note 116 at para 53.
[464] Lazare, *supra* note 458 at S46.

be determined in a "factual vacuum."[465] Legal scholar Jocelyn Downie opines that the social science evidence presented by the claimants in *Carter* partially explains why the court's conclusions differed from the ones in *Rodriguez*[466], despite addressing the same *Criminal Code* provision:[467]

> The result in Carter was different because the social science and humanities evidence submitted by the plaintiffs persuaded the court that the facts of the world had changed sufficiently between Rodriguez and Carter; that there was no morally defensible distinction between assisted dying and end of life practices that were legal and widely practised; that the slippery slope (from voluntary euthanasia to nonvoluntary or involuntary euthanasia) had not manifest in permissive regimes; and that procedural safeguards could be put in place to protect the vulnerable.[468]

Social science evidence is all the more important given the Charter's objective to "protect minority rights in the face of majoritarian legislation and state actions"[469] Claimants using social science often seek to "make a marginalised perspective legally intelligible."[470] It was pivotal for marginalized groups to bring about policy transformations through successful litigation, notably in areas such as safe injection sites, sex work and medical aid for dying. This type of evidence is a powerful tool for equality-seeking advocates to highlight the lack of understanding of the systemic and intersectional dimensions of discrimination.[471] In essence, the utilization of social science evidence stands as a potent means through which marginalized groups can amplify their

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[465] *Ibid*.
[466] *Rodriguez v British Columbia (Attorney General)*, [1993] 3 RCS 519.
[467] Jocelyn Downie, "Social science and humanities evidence in Charter litigation: Lessons from Carter v Canada (Attorney General)" (2018) 22:3 The International Journal of Evidence & Proof 305 at 307. She notes that the jurisprudential changes with respect to the principles of fundamental justice under section 7 could also explain this difference.
[468] *Ibid*.
[469] Dana Erin Phillips, "Loosening the Law's Bite: Law, Fact, and Expert Evidence in R v JA and R v NS" (2017) 21:3 The International Journal of Evidence & Proof 242 at 248.
[470] *Ibid* at 258.
[471] Dana Phillips, "'Social Science Facts' in Feminist Interventions" (2018) 35 Windsor Yearbook of Access to Justice 99 at 100. Establishing that the litigants have experienced an adverse impact in respect of the criteria developed in *Moore*, Ranjan K. Agarwal and al submit, "requires 'proof of differential treatment', but it can be challenging for applicants to show at which point on the continuum of differences in treatment discrimination occurs." They say that without direct evidence linking the protected characteristic to the differential treatment or the adverse impact, litigants must often rely on circumstantial evidence of discrimination – as did Mr. Latif: Ranjan K Agarwal, Faiz M Lalani & Misha Boutilier, "Lessons from Latif: Guidance on the Use of Social Science Expert Evidence in Discrimination Cases" (2018) 96:1 Canadian Bar Review 36 at 42.

voices, translate marginalized perspectives into legal language, and catalyze significant policy changes.

### *ii. The Challenges in Utilizing Social Science Evidence: Implications for Charter Litigation*

The challenges arising from social science evidence lie in the burden it places on claimants to present such evidence and on judges to appropriately consider and assess it.

#### a. Burden for the claimants

Despite its usefulness, using social science evidence in Charter litigation is not without dangers and can be detrimental to litigants. In the words of Benjamin Perryman, effectively using social science to address rights issues and win cases can be a "bumpy road."[472] Litigants must compile and present comprehensive evidentiary records, navigate the process of having the evidence admitted as relevant and reliable, and overcome the challenges associated with meeting stringent admissibility standards.[473] This complex task underscores the difficulty litigants face in effectively using social science evidence in Charter litigation.

Social science evidence comes to courts through expert witnesses. The expert evidence adduced by the parties is the only expert evidence treated by the trial judge and subsequent judges. All parties can retain a qualified expert during litigation. They can also challenge the admissibility, expertise, and position of the expert called by the other party. Courts can question expert witnesses presented by the parties, but they cannot complete this information through their own research or expertise.[474]

Claimants in Charter litigation bear the burden of proving rights violations, which can be arduous if they have limited access to data and statistics, especially when faced with the evidence

[472] Perryman, *supra* note 460 at 128.
[473] *Ibid*.
[474] Judicial notices have at times been used to introduce social science evidence as facts: Phillips, *supra* note 471 at 155; Graham Mayeda, "Taking Notice of Equality: Judicial Notice and Expert Evidence in Trials Involving Equality Seeking Groups" (2009) 6:2 Journal of Law and Equality 201. See e.g., *R. v. Zundel*, *supra* note 276; *Ishaq v Canada (Citizenship and Immigration)*, [2015] 1 FCR 686.

presented by the government.[475] In *White Burgess*, Justice Cromwell expressed concern about using social science evidence, emphasizing that "it may lead to an inordinate expenditure of time and money."[476] In Charter litigation, particularly, there is a clear risk of unbalanced access to resources.[477] As mentioned by Nicholas Bala and Jane Thomson, "the financial inability of a party litigating against the state to retain his or her own qualified expert to rebut the evidence of the state-retained expert may compromise the fairness of the trial process."[478] While claimants have access to variable resources, they challenge the Crown,[479] a public entity with virtually unlimited access to monetary and expert resources. Furthermore, even if claimants possess the necessary expert evidence to substantiate their claim, the trial judge might deem this evidence inadmissible, uncredible or assigned a low probative value. The party calling an expert to the dispute bears the responsibility of establishing that their testimony is reliable, including the qualification and expertise of the witness.[480] Claimants might thus be unable to adduce the evidence required to successfully support their case, whether because they cannot provide the necessary evidence or if the trial judge rejects such evidence.

**b. Judicial treatment of social science evidence**

The admission of social science evidence in Charter litigation entails the judicial scrutiny of such evidence, which brings its particular challenges.[481] Judicial treatment of social science evidence is a complex task. As expressed by Justice Smith at the trial in *Carter*, judges must assess:

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[475] Colleen Sheppard, "Contester la discrimination systémique au Canada: Droit et changement organisationnel" 14 Revue du Centre de recherches et d'études sur les droits fondamentaux (2018) 1 at 6. It is worth noting that if an organization challenges the rights compatibility of legislation or acts as an intervener, the burden is not the same as if an individual or group is contesting the constitutionality of legislation on their own. These organizations, Phillips mentions, "are often well positioned to offer such perspectives, due to their greater (albeit still limited) resources, their experience working with multiple similarly situated individuals (where the organization offers frontline services), and their familiarity with the social science literature." In *Insite*, for example, the recourse was introduced by PHS Community Services and Vancouver Area Network of Drug Users, respectively, the non-profit organization overseeing the operation of Insite and a non-profit society advocating on behalf of drug users. The organizations had myriad expertise, as the facility had been the object of deep scrutiny and evaluation to study its impacts. The BC Center has published twenty-two peers reviewed studies in reputable scientific periodicals. The government could hardly refute the evidence provided in that case. Phillips, *supra* note 471 at 121.
[476] *White Burgess Langille Inman c Abbott and Haliburton Co*, [2015] 2 RCS 182 at para 18.
[477] Nicholas Bala & Jane Thomson, "Expert Evidence and Assessments in Child Welfare Cases" (2015) 63 Queens Law - Research Paper Series at 6.
[478] *Ibid* at 22.
[479] Mayeda, *supra* note 474 at 223.
[480] Bala & Thomson, *supra* note 477 at 4.
[481] Lazare, *supra* note 458 at 68.

> the weight to be given to the expert opinion evidence, taking into consideration the particular expertise of the witness, whether the opinion was within that expert's scope of expertise, the consistency of the opinion with that of other experts, and the apparent impartiality or partiality of the expert in question.[482]

The potential for misconstruing or misinterpreting complex evidence is significant, particularly when judges lack specialized training and may be influenced by their own biases, further exacerbating the challenges of admitting social science evidence in Charter litigation.

The first obstacle to utilizing social science evidence in Charter litigation is the limited training of judges in scientific theories and methods. According to legal scholar Jodi Lazare, judges often lack the necessary skills and knowledge to analyze complex empirical data provided by experts from outside the legal field. This deficiency in skills and knowledge hampers their ability to make well-informed determinations in Charter litigation cases.[483] These cases frequently imply adjudicating matters involving "multifaceted trade-off of scarce resources across the needs of an entire population."[484] These matters contrast with the courts' core institutional competence, namely sorting through past interactions between the parties. Even in their realm of assessing the "who, what, when, where and how" of adjudicative facts, judicial decision-making is not infallible.[485] Lazare rightfully opines that judicial inexperience with scientific concepts and methodologies might impact the evaluation of social science evidence.[486] She identifies multiple risks associated with this "knowledge gap":

> Among them is the risk that without real knowledge about science, judges might fall prey to the 'mystique of science,' and, in turn, struggle to determine what constitutes expert evidence, ultimately accepting too much potentially unreliable empirical evidence. Further, the limited capacity to critically evaluate social science data in the courtroom means that judges may misinterpret the evidence or prefer evidence from one witness over another for reasons unrelated to the validity or reliability of the evidence.[487]

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[482] *Carter*, *supra* note 3 at para 116.
[483] Lazare, *supra* note 458 at 57.
[484] Flood & Thomas, *supra* note 70 at 344.
[485] Alan N Young, "Proving a Violation: Rhetoric, Research and Remedy" (2014) 67:1 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conferences 617 at 642.
[486] Lazare, *supra* note 458 at S55.
[487] *Ibid* at 48.

Another barrier that can hinder judicial treatment of social science evidence is the risks associated with an "uncritical promulgation of beliefs" derived from own life experience, past judges and legislators, or common-sense assumptions.[488] Canadian courts have at times shown a clear lack of understanding in numerous socio-economic fields, resulting in detrimental decisions to vulnerable groups. In the words of Justice Bastarache in *M. v. H.*, "[w]hen dealing with studies exploring the general characteristics of a socially disadvantaged group, a court should be cautious not to adopt conclusions that may, in fact, be based on, or influenced by, the very discrimination that the courts are bound to eradicate.[489] By relying solely on their own perspectives and expertise, judges may unintentionally perpetuate the marginalization of minority groups and exclude alternative perspectives outside their privileged realms of understanding.[490]

For instance, bias and stereotypes against economically vulnerable individuals impact how judges engage with evidence. In *Gosselin* case, which addressed the potential discrimination in the social assistance scheme for individuals under 30, both the trial judge and Justice McLachlin of the Supreme Court displayed a handling of evidence that was influenced by harmful stereotypes regarding the nature and causes of poverty.[491] They made unfounded generalizations about individuals living in poverty[492], arguing that the challenges faced by young social assistance recipients were solely a result of their actions and personal choices, thereby absolving the government of any responsibility.[493] Similarly, in *Tanujada*[494]*,* despite ample evidence highlighting the adverse effects of affordable housing policies on marginalized groups and homelessness, the Superior Court and Court of Appeal of Ontario attributed the prejudice experienced by individuals to their own actions rather than recognizing the role of governmental decisions and programs in contributing to these challenges.[495] The Supreme Court's decision in *Chaoulli*[496] also faced criticism for its perceived lack of consideration for socio-economically vulnerable groups.[497] In this decision, the Court found that prohibiting private health insurance for

[488] Phillips, *supra* note 469 at 248, 255.
[489] *M v H*, [1999] 2 SCR 3 at para 296.
[490] Phillips, *supra* note 469 at 248, 255.
[491] Jackman, *supra* note 6 at 448.
[492] *Ibid*.
[493] *Ibid* at 450; *Gosselin*, *supra* note 39 at para 48.
[494] *Tanudjaja*, *supra* note 41; *Tanudjaja v Attorney General (Canada) (Application)*, [2013] ONSC 5410 at para 113.
[495] Jackman, *supra* note 6 at 455.
[496] *Chaoulli*, *supra* note 40.
[497] King, *supra* note 459 at 643.

medically necessary services in Quebec violated the Quebec *Charter of Human Rights and Freedoms*.[498] If the Court had favoured protecting vulnerable groups, it is unlikely that it would have prioritized the interests of wealthier Canadians over those unable to afford private insurance and depend on public healthcare services.[499] The judicial treatment of evidence frequently demonstrated bias and stereotypes against economically vulnerable individuals, which had a detrimental effect on their claims.

Another area in which judges have frequently shown a troubling lack of comprehension, if not outright ignorance, is abuse and violence against women. In numerous instances, judges have disregarded or misunderstood the experiences of women who have faced violence and abuse.[500] As explained by legal scholar Michaël Lessard, judges tend to perpetuate the myth of the "good victim" in their treatment of victims of sexual assaults.[501] Phillips submits that this judicial inability to recognize instances of abuse adequately can at least partly be explained by judges' lack of knowledge of kinky sexuality and poor understanding of the related social practices.[502] In addition to resulting in reprehensible comments against victims of sexual abuse and violence[503], this bias can also lead to decisions that undermine women's rights and fail to consider their lived experiences. To quote legal scholars Elaine Craig and Isis Hatte discussing the treatment of a sexual assault case by Justice Steven Mandziuk, more precisely regarding the belief that a woman's initial refusal often masks a concealed desire for sex:

> "Life teaches that persistence is sometimes rewarded with success." Declared by the valedictorian in a high school convocation address, this sounds about right. When proclaimed by a judge in a sexual assault case to deal with the fact that a complainant had already expressed "no" when the incident occurred, it's wrong.[504]

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[498] *Charter of Human Rights and Freedoms*, CQLR c C-12 1975.
[499] King, *supra* note 459 at 641.
[500] Phillips, *supra* note 469 at 247.
[501] Michaël Lessard, "'Why Couldn't You Just Keep your Knees Together?' L'obligation déontologique des juges face aux victimes de violences sexuelles" (2017) 63:1 McGill Law Journal 155.
[502] Phillips, *supra* note 469 at 247. See also Elaine Craig, *Putting Trials in Trials: Sexual Assault and the Failure of the Legal Profession* (Montréal: McGill-Queen's University Press, 2018) at 9; Paul Craig, "Accountability and Judicial Review in the UK and EU: Central Precepts" in *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013) 180 at 195.
[503] Canadian Judicial Council, *In the Matter of an Inquiry Pursuant to s.63(1) of the Judges Act Regarding the Honorable Justice Robin Camp: Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council,* November 29, 2016, para 137.
[504] Elaine Craig, Isis Hatte "Rape myths endure in judicial decisions," online: *Policy Options* <https://policyoptions.irpp.org/magazines/march-2023/judges-and-rape-myths/>.

Since 2021, federal judges must undertake training regarding sexual assault as a criterion of eligibility for nomination[505], a training required after the nomination of judges in some provinces.[506] Still, the concrete impacts of these recent measures on judicial treatment of sexual assault remain questionable.[507] By disregarding or misinterpreting the experiences of women facing abuse, an issue disproportionately affecting marginalized and economically disadvantaged communities,[508] judges risk perpetuating systemic injustice, notably in Charter cases involving assessing how legislation can impact violence against women.

Given the issues aforementioned, scholars have expressed concerns about the risk that social science evidence lead to the enshrinement of ill-informed findings, including findings that might reflect stereotypical assumptions detrimental to marginalized groups.[509] Legal scholar Margot Young maintains that misinterpretation of data in the context of contentious moral, social and political debate exceeds mere "innocent misinterpretation of research data."[510] They can have far-reaching consequences, potentially resulting in significant and irreversible changes to complex governmental programs.[511] For example, in 1990, based on an extensive review of statistical data, the Supreme Court concluded that the right to be tried within a reasonable time guaranteed by section 11(b) of the Charter required that a trial in the lower courts be completed within six to eight months of the charge being laid.[512] As a result of this ruling, approximately 50,000 charges in Ontario were dismissed due to unreasonable delay.[513] Two years later, it was discovered that the Court had misinterpreted and misapplied these data. Recognizing its error, the Court modified its prescriptions in *R. v. Morin*.[514] Young qualifies this case as "infamous example of the dangers or

[505] *Judges Act,* RSC 1985, c J-1, s 3(b).
[506] Since 2019, training on sexual assault law has been mandatory for provincial judges in Prince Edward Island: *Provincial Court Act*, 2019, s 18(2)c).
[507] See e.g., Craig & Hatte, *supra* note 504; Jessica Doria-Brown · CBC News ·, "P.E.I.'s new sexual assault education law little more than 'window dressing,' says sexual assault centre | CBC News", (13 May 2019), online: *CBC* <https://www.cbc.ca/news/canada/prince-edward-island/pei-sexual-assault-training-judges-1.5130890>.
[508] Heidinger, *supra* note 387; Victoria Sit & Lana Stermac, "Improving Formal Support After Sexual Assault: Recommendations from Survivors Living in Poverty in Canada" (2021) 36:3–4 J Interpers Violence 1823; Catherine Flynn et al, "When Structural Violences Create a Context that Facilitates Sexual Assault and Intimate Partner Violence against Street-involved Young Women" (2018) 68 Women's Studies International Forum 94.
[509] Phillips, *supra* note 471 at 111.
[510] Young, *supra* note 485 at 643.
[511] King, *supra* note 459 at 637.
[512] *R v Askov*, [1990] 2 SCR 1199.
[513] Young, *supra* note 485 at 643.
[514] *R v Morin*, [1992] 1 SCR 771 at para 51.

pitfalls of making constitutional determinations based upon statistics and social science studies."[515] Since then, she suggests that the Supreme Court has been approaching social science data with "some caution" since then.[516]

The potential for success in the judicial treatment of social science evidence should not be automatically dismissed.[517] Judges have, at times, proven willing to approach this task carefully. In *Carter*, the trial judge showed awareness toward the inherent limitations of quantitative studies like the survey of legislative regimes governing assisted dying, recognizing that the reliability of such studies depends in part on their response rate and sample size.[518] Further, according to legal scholar Alan N. Young, the trial judge in *Bedford* displayed a critical attitude towards evidence he deemed to have methodological weaknesses, demonstrating that the judiciary can be open and willing to integrate social science data into their decision-making process.[519] Still, the judicial treatment of social science evidence remains a contentious and complex issue within Charter litigation.

In summary, the burden of evidence faced by claimants and the manner in which the judiciary treats evidence can result in decisions that inadequately reflect the comprehensive nature of Charter issues and fail to consider the lived experiences of individuals involved. The complexity of social issues and the intersectionality of factors at play demand a nuanced and wide-ranging understanding, which may not always align with the traditional legal framework.

### B) An Issue of Deference

The pivotal role of judicial interpretations in defining the meaning and scope of Charter rights has profound implications for individuals and interested groups seeking to assert their

[515] Young, *supra* note 485 at 642.
[516] *Ibid* at 643. For example, in *M. v. H.*, the Court mentions, "While this evidence is an important source of information for this Court, I must stress that care should be taken with social science data.": *M. v. H.*, *supra* note 489 at para 296.
[517] See also *Insite*, *supra* note 116.
[518] Lazare, *supra* note 458 at 56. The trial judge also distinguishes reliable evidence from unreliable ones because of the methods by which it was gathered or obtained, notably assigning weaker weight to evidence-based on second-hand knowledge, in contrast with expert opinion based on "evidence-based thinking".
[519] Young, *supra* note 485 at 645. The trial judge recognized that the statistical studies about sex work submitted by the government could be affected by severe methodological flaws, given that sex workers are a harder demographic to reach for statistical studies. She accordingly placed little weight on the studies, introduced as conclusive by the government. Still, Young concedes, the lack of neutrality among these expert witnesses was "very transparent and easily detected in this context" and may be due to the strong political divisiveness associated with sex work issues.

claims. Depending on their breadth or restrictiveness, such interpretations can either facilitate or hinder the advancement of rights. As a result, when governments adhere to judicial interpretations without engaging in their own interpretation, the potential for a more expansive and generous understanding of rights may be missed.

While courts have played a crucial role in advancing rights protection in various domains, including same-sex marriage[520] and prostitution law[521], their approach has been deferential and restrictive in cases involving recognizing socio-economic interests under existing Charter rights. In these instances, courts have prioritized restrictive interpretations of the meaning and scope of Charter rights, seemingly keen to avoid appearing to overreach their own institutional and epistemological limitations.[522]

Judicial concerns about institutional and epistemological limitations have commonly translated into deference lawmaking institutions. Aileen Kavanagh defines judicial deference as occurring when "judges assign varying degrees of weight to the judgments of the political branches, out of respect for their superior expertise, competence or democratic legitimacy."[523] This deference is most commonly observed when the claim necessitates the acknowledgment that a right requires direct government action to ensure its protection and realization, particularly when adjudicating Charter challenges to major social programs.[524] A direct correlation exists between the risks that a claim engages resource allocation and the likelihood that courts will intervene.[525] High level of deference is favoured when the remedies sought to involve allocating economic resources, especially if "the remedy sought exceeds compensation of the individual claimant, but potentially extends to broader categories of individuals."[526] This approach acknowledges the expertise of executive and legislative branches in making budgetary and policy decisions related to resource allocation.

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[520] *Reference re Same-Sex Marriage*, *supra* note 2.
[521] *Canada (Attorney General) v. Bedford*, *supra* note 116.
[522] Flood & Thomas, *supra* note 70 at 345; Vasuda Sinha, Lorne Sossin & Jenna Meguid, "Charter Litigation, Social and Economic Rights & Civil Procedure" (2017) 26 Journal of Law and Social Policy 43 at 52.
[523] Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Review" (2010) 126 Law Quarterly Review 222.
[524] Flood & Thomas, *supra* note 70 at 345.
[525] David, *supra* note 54 at 46.
[526] *Ibid* at 55–56.

In 1989, the Supreme Court opened the possibility of recognizing socio-economic rights under the Charter in the decision *Irwin Toy*.[527] In this decision, after differentiating between commercial economic rights and the economic rights of individuals, the Supreme Court emphasized that it was too early to exclude the latter from Charter protection.[528] Since then, the highest court has abstained from construing Charter rights to encompass socio-economic interests. In *Gosselin*,[529] which marked the first instance after *Irwin Toy* where the Supreme Court addressed socio-economic interests under the Charter, the Court determined that a law withholding welfare benefits from individuals below the age of thirty for not participating in a workfare program did not violate the Charter. The Court concluded that section 7 did not establish a right to welfare. Although the Court signalled that such an interpretation could be possible in the future,[530] it has continued to privilege a deferent interpretation of these provisions in subsequent cases, a stance shared by lower courts in most instances.[531]

The discourse surrounding rights, often dichotomized as negative and positive, has led courts to overlook the narrative of marginalization and the unique circumstances experienced by diverse communities.[532] The court's deferential perspective has inadequately understood the complex realities faced by diverse groups impacted by government actions.[533] This judicial hesitance in addressing systemic shortcomings has been particularly evident in healthcare and housing. In these contexts, claims have predominantly found success when framed within the confines of a negative conception of Charter rights. This inclination toward a constrained interpretation has limited the courts' ability to fully acknowledge or address the multifaceted challenges that claimants seek redress in these critical areas face.

Regarding healthcare, courts have frequently displayed reluctance in compelling governments to introduce substantial and organized improvements to the healthcare system. Though the Charter does not explicitly guarantee the right to health, multiple claims have been brought to courts to recognize its protection under sections 7 and 15. Courts have clung to a negative conception of these sections that exclude a positive obligation on the state to guarantee

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[527] *Irwin Toy Ltd c Québec (Procureur général)*, [1989] 1 RCS 927 [*Irwin Toy*].
[528] *Ibid* at 1003.
[529] *Gosselin*, *supra* note 39.
[530] See e.g., *Ibid* at para 82.
[531] See e.g., *Tanudjaja*, *supra* note 41; *Toussaint*, *supra* note 40. An exception is *Sparks*, *supra* note 42.
[532] O'Brien, Lambek & Dale, *supra* note 22 at 169.
[533] *Ibid* at 160.

the right to health, for example in *Auton.*[534] The only successful constitutional challenges were those where claimants aligned their claims with a negative interpretation of section 7, asserting that healthcare denial was considered an infringement of this provision. In *Chaoulli*, for example, the Supreme Court only recognized the right to be free from unnecessary state interference when purchasing health care privately.[535] An example of a successful challenge is *PHS Community Services*[536]*,* in which the claimants contested the government's denial of an exemption from federal drug laws needed for the Insite safe injection clinic to serve intravenous drug users. The Supreme Court ruled that the government's actions endangered the lives and well-being of these users, breaching the claimants' rights to life and personal security.[537] This also holds true for remedies sought under section 15. In the 1997 *Eldridge* case, deaf individuals successfully claimed that the government's omission to finance sign language interpretation services within the publicly funded healthcare system constituted a breach of section 15.[538] The deferential approach of the Supreme Court is mirrored in lower courts' decisions.[539] Colleen M. Flood and Bryan Thomas suggest that the court's reluctance to recognize positive rights in healthcare stems from concerns about fiscal responsibility rather than just the complexity of establishing "workable constitutional criteria."[540] This is linked to the significant financial impact of healthcare on provincial budgets and potential strains on public funding.[541] The precedent set by the Supreme Court suggests that attempting to frame a demand for the right to health as a positive rights is unlikely to succeed.

Courts have also showed deference in recourses questioning the constitutionality of policies related to housing.[542] While the Supreme Court has not yet addressed a claim directly related to housing rights, lower courts have had the chance to consider such claims. Similar to cases involving health-related rights, courts have been willing to accept claims that are grounded in a negative conception of sections 7 and 15 of the Charter. For example, in *Tanudjaja*, four homeless individuals and the Centre for Equality Rights in Accommodation asked the court to declare that guaranteeing sections 7 and 15 of the Charter require that the governments of Canada

[534] *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 SCR 657 [*Auton*].
[535] *Chaoulli*, *supra* note 40.
[536] *Insite*, *supra* note 116.
[537] See also *Chaoulli*, *supra* note 40.
[538] See also *Carter*, *supra* note 3; *Morgentaler*, *supra* note 116.
[539] See e.g., *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, *supra* note 40.
[540] Flood & Thomas, *supra* note 70 at 346.
[541] *Ibid*.
[542] See also *Abbotsford (City)*, *supra* note 41.

and Ontario implement strategies reducing homelessness and inadequate housing. In line with the traditional judicial claim that positive rights are not justiciable, the Court of Appeal for Ontario rejected their claim. Justice Pardu, for the majority, contrasted this recourse with others based on a negative conception of the Charter. She declared that "unlike in PHS Community Services (where a specific state action was challenged) and Chaoulli (where a specific law was challenged) there is no sufficient legal component to engage the decision-making capacity of the courts."[543] In her opinion, broad economic policy issues and priorities like those involved with housing policies are "unsuited to judicial review."[544] The only successes for housing in courts are *Victoria (City) v Adams*[545] and *Abbotsford (City) v Shantz.*[546] These recourse aims to permit homeless individuals to rest in temporary shelters located in parks, particularly in situations where suitable shelter options are lacking. Despite constituting lengthy judgments that consider international law and the extent and causes of homelessness in Canada, neither *Victoria (City) v Adams* nor *Shantz* establishes a positive right to housing under the Charter.[547] Legal scholar Sarah E. Hamill declares that these cases underline that "the right to housing is understood as a policy choice rather than an enforceable right," cornering those without adequate housing between judicial deference and political indifference.[548]

In addition to this deference toward positive claims under section 7 and 15, courts have generally refused to recognize poverty or economic status as an analogous ground of discrimination under section 15. A notable exception is the 1993 decision *Sparks v. Dartmouth/Halifax*,[549] which recognized poverty and reliance on public housing as analogous grounds under section 15. This reluctance to acknowledge economic status as a protected ground has been evident in several cases where individuals or groups have sought to challenge discriminatory policies or practices based on their economic circumstances. For instance, in the case *Gosselin*, the Supreme Court declined to consider economic status as an analogous ground for discrimination in a challenge against welfare benefit reductions.[550] This approach was also

[543] *Tanudjaja*, *supra* note 41 at para 27.
[544] *Ibid* at para 33.
[545] *Victoria (City)*, *supra* note 41.
[546] *Abbotsford (City)*, *supra* note 41.
[547] McAlpine, *supra* note 9 at 13.
[548] Hamill, *supra* note 17 at 72.
[549] *Sparks*, *supra* note 42.
[550] See also *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016; *Thibaudeau v Canada*, [1995] 2 SCR 627.

privileged in lower courts.[551] Certain claims were successful when the claimant could correlate their economic status with a ground of discrimination explicitly outlined in section 15, for example, women who were beneficiaries of social assistance.[552] These examples highlight the courts' tendency to limit the scope of section 15 protections in cases related to economic inequalities.

The central place of judicial interpretations in shaping the meaning and scope of Charter rights has far-reaching consequences. If the Supreme Court settles for a restrictive interpretation of the rights or acts deferentially, excluding certain aspects or situations from the right's safeguard, the prevailing restrictive interpretation might hinder rights advancement. It can impact the capability of individuals or interested groups to advance their claims. Moreover, once a court decides on an issue, it applies to the case at hand but also creates a principle applied to subsequent decisions with similar parameters – as dictated by the *stare decisis*.

Further, the deferential stance courts on socio-economic claims do not necessarily translate into active political engagement toward the issues at hand. It does not guarantee that lawmakers will fully address these concerns.[553] Deference thus does not automatically lead to comprehensive policy consideration or action on socio-economic challenges.

While scholars have maintained that *Gosselin* and *Chaoulli* lay the groundwork for possible recognition of positive rights under the Charter – especially section 7 –[554], at this point, courts have shown deference toward the recognition of socio-economic interests under the Charter. Judicial decisions concerning these interests offer a constrained perspective on the potential scope and meaning of Charter rights. Reliance on judicial interpretations during pre-enactment review may inadvertently sideline the broader societal context, exacerbating the marginalization of vulnerable individuals and groups dealing with socio-economic challenges.

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[551] See e.g., *Toussaint*, *supra* note 40; *Boulter v Nova Scotia Power Incorporation*, 2009 NSCA 17; *R v Banks*, 2007 ONCA 19; *Bailey v Canada (Attorney General)*, [2005] NR 186; *Donovan v The Queen*, [2005] TTC 667.
[552] *Falkiner v Ontario (Minister of Community and Social Services)*, [2002] 59 OR (3d) 481. See also *Schaff (B) v Canada*, [1993] 2 CTC 2695.
[553] Connor, *supra* note 64 at 49.
[554] See e.g., Jackman, *supra* note 6; McAlpine, *supra* note 9; Jamie Cameron, "Positive Obligations under Sections 15 and 7 of the Charter: A Comment on Gosselin v. Québec" (2003) 20 Supreme Court Law Review 65.

In sum, relying primarily on courts and judicial interpretations of Charter rights can impact the population's enjoyment of rights, especially its marginalized groups. This implies that lawmakers should expand beyond mere judicial viewpoints, embracing the ability to develop their own Charter interpretations, potentially resulting in broader perspectives that encompass aspects overlooked by the courts.

## Conclusion

In this first chapter, I presented Canada's prevailing court-centric approach to constitutional interpretation, highlighting the judiciary's privileged position in rights protection. This approach has hindered the development of institutional mechanisms for lawmakers to interpret Charter rights outside of what is judicially prescribed. The existing framework for pre-enactment review places limited responsibility on lawmakers and prioritizes judicial interpretations of Charter rights. However, this reliance on courts for Charter compatibility can result in incomplete rights protection. In addition to putting the burden on individuals to pursue a constitutional challenge and produce the evidence supporting their claims, the limited portrait of Charter rights reflected in jurisprudence can hinder rights advancements if lawmakers rely solely on this narrow account.

Of course, this does not imply that judicial review is unnecessary in a human rights regime aimed at achieving effective and sustainable rights protection. Regardless of the extent of Charter review performed during lawmaking, enacting legislation that conflicts with the guaranteed rights remains inevitable. Due to the indeterminate nature of Charter rights, divergent judgments can also arise between the political and judicial branches on constitutionality.[555] Even with extensive Charter review, some of the impacts of bills on rights may be challenging to anticipate. Furthermore, lawmakers may face pressures to prioritize majority interests over protecting Charter rights. Political actors are frequently aware of their re-election prospects, putting them at risk of prioritizing public opinion as represented by the majority while disregarding the interests of minorities, particularly if those interests are unpopular. Insulated from electoral pressures, courts can protect the rights of minorities when majoritarian institutions fail to do so.[556] In such cases,

[555] Hiebert, *supra* note 48 at 163.
[556] See e.g., Sonja C Grover, "Judicial Activism and Its Intersection with Democratic Rule of Law" in Sonja C Grover, ed, *Judicial Activism and the Democratic Rule of Law: Selected Case Studies* (Cham: Springer International Publishing, 2020) 1; *Are Courts Representative Bodies? A Canadian Perspective*, by Robert J Sharpe (The Foundation

courts play a crucial role in safeguarding minority rights and preventing majoritarian tyranny. The benefits of judicial to advance the rights of marginalized groups and promote equality are particularly evident in cases involving discriminatory legislation or legal regimes; courts have notably played a crucial role in compelling lawmakers to recognize and uphold certain Indigenous rights[557], same-sex marriage as a constitutionally protected right, healthcare and criminal justice reforms[558], and voting rights of prisoners.[559] In this context, the judiciary acts as an institutional "veto" on governmental action.[560] The contestation of public policies also forces governments to justify and defend their public decision, disclosing publicly "what it has done and why."[561] As a result, lawmakers will continue to enact legislation that could potentially infringe upon the rights of civil society, whether intentionally or not. In this context, judicial review serves as a corrective mechanism, granting courts the authority to address rights infringements, nullify legislation, and impose sanctions.[562] As a consequence, judicial review remains an indispensable element within an effective human rights framework.

However, granting access to courts to challenge the constitutionality of legislation and relying exclusively on courts for rights protection are two different approaches with distinct consequences on rights protection. The presence of judicial review should not prevent a more active role of the other branches of government in Charter review and rights protection.[563] Instead, judicial decisions should be viewed as the minimal baseline providing a foundation upon which lawmakers can build. In the context of their functions, lawmakers can expand and clarify the scope and meaning of Charter rights, considering society's diverse perspectives and interests. As do

for Law, Justice and Society, 2013) at 6; Terrance Sandalow, "Judicial Protection of Minorities" (1977) 75 Mich L Rev 1162 at 1165; Frank B Cross, "Institutions and Enforcement of the Bill of Rights" (2000) 85:6 Cornell Law Review 1529 at 1551; Wojciech Sadurski, "Judicial Review and the Protection of Constitutional Rights" (2002) 22:2 Oxford Journal of Legal Studies 275 at 281; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

[557] See e.g., *Daniels v Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99; *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257; *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.

[558] *Carter*, *supra* note 3; *Insite*, *supra* note 116.

[559] James Kelly, "Legislative Capacity and Human Rights in the Age of Populism–Two Challenges for Legislated Rights: Discussion of Legislated Rights – Securing Human Rights Through Legislation" (2020) 21:1 Jerusalem Review of Legal Studies 94 at 100. *Sauvé II*, *supra* note 258; *Sauvé I*, *supra* note 290.

[560] Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (New York: Palgrave, 2003) at 75.

[561] *Ibid*.

[562] *Ibid* at 80.

[563] Jones, *supra* note 314 at 5.

numerous proponents of theories of shared responsibilities', I maintain that accepting the primacy of judicial review is feasible while also defending that the other branches must have significant space to engage normatively with the Charter.[564] As I now discuss in Chapter 2, lawmaking institutions must have opportunities to engage with the Charter, through purposefully designed mechanisms of rights review.

[564] Appleby & Olijnyk, *supra* note 52 at 2.

# Chapter 2 – A Normative Framework for Charter Review in Federal Lawmaking

This chapter presents the normative framework guiding the critical assessment of existing mechanisms of rights review in federal lawmaking and the associated institutional reforms discussed in Chapters 3 and 4. Central to this framework is the recognition that both the government and Parliament, as lawmaking institutions, play essential roles in rights protection. These roles encompass the crucial task of evaluating the Charter compatibility of the bills they enact.

Complementing judicial review with pre-enactment review offers a more comprehensive and balanced approach to rights review in legislation. Treating the Charter solely as an "after-the-fact corrective instrument"[565] is not conducive to effective and sustainable rights protection. By engaging with the Charter during the lawmaking process, lawmakers can reduce the necessity of judicial review to address infringements on Charter rights within enacted legislation. This active engagement could particularly strengthen safeguards against rights violations for marginalized communities. Indeed, these communities often encounter challenges when seeking legal redress through judicial review. Considering the prevailing jurisprudence, economically vulnerable groups, especially, are less likely to receive sufficient protection from Canadian courts.[566] Pre-enactment review increases the likelihood that relevant limits on rights will be identified and considered, whether or not the matter is subsequently brought before the courts.[567]

The institutional framework for pre-enactment review should aim to prevent the enactment of legislation that could undermine Charter rights. As Janet Hiebert advocates, the lawmaking process should provide incentives and obligations for political judgment about rights: government and parliamentary actors involved in the lawmaking process must try to identify potential rights conflicts in bills and resolve or minimize them before their enactment.[568] The heightened awareness of Charter rights resulting from pre-enactment review could encourage the adoption of

[565] Hiebert, *supra* note 50 at 243.
[566] See e.g., Dandurand, *supra* note 446; Cohen & Dagenais, *supra* note 8; Jackman, *supra* note 6; Vézina, *supra* note 6 at 538.
[567] Appleby & Olijnyk, *supra* note 52 at 11.
[568] Hiebert, *supra* note 57.

more rights-conscious legislation or, at the very least, foster a more rights-conscious approach during the lawmaking process.

Effective and sustainable rights protection requires establishing formal mechanisms of rights review, compelling lawmakers to develop their own understanding of the rights at stake and apply them in the context of their lawmaking functions. This thesis draws upon two theoretical and conceptual approaches to establish a normative framework for analyzing and reforming mechanisms of rights review: theories of shared responsibilities and principles of good governance These approaches provide valuable insights and guidance for designing effective mechanisms enhancing the protection of Charter rights in lawmaking.

Theories of shared responsibilities emphasize that all three branches of government—executive, legislative, and judicial—are responsible for giving effect to Charter rights within their respective functions. Under theories of shared responsibilities, bills of rights are binding on all three branches, which must determine the rights' meaning and scope.[569] Subsequently, they must carry out their constitutional responsibilities based on their distinct interpretations of the Charter implications.[570] Rather than relying solely on courts to address rights violations, lawmakers are expected to assess the rights compatibility of their acts and decisions before enacting them.[571]

Theories of shared responsibilities have important normative and procedural dimensions: the positive obligations they entail for lawmaking institutions imply the need for mechanisms of rights review that facilitate the robust assessment of Charter compatibility. In this context, principles of good governance can guide the creation and reform of mechanisms for rights review that foster effective and sustainable rights protection. Scholarly research highlights that human rights and good governance are mutually reinforcing and interdependent.[572] Principles of good governance, which includes accountability, transparency, participation, responsiveness, and political equality, are crucial to inform the design of effective mechanisms for rights review.

Together, theories of shared responsibilities and principles of good governance establish a normative framework for pre-enactment review that justifies and encourages the active involvement of both the government and Parliament in Charter review. This chapter sequentially

[569] Alexander & Schauer, *supra* note 61 at 1359.
[570] Baker, *supra* note 35 at 4.
[571] Mulligan, *supra* note 192 at 6.
[572] See e.g., Addink, *supra* note 93 at 171.

examines each approach, delineating their fundamental attributes and relevance in shaping an institutional framework for pre-enactment review to enhance the effectiveness and sustainability of rights protection. The resulting normative framework subsequently guides the evaluation of Charter review during the executive and parliamentary phases of lawmaking, as explored in Chapters 3 and 4.

## 2.1 – Theories of Shared Responsibilities in Rights Protection: A Theoretical Rationale for Pre-enactment Review

In this first section, the theoretical basis for pre-enactment review is introduced, emphasizing the active involvement of lawmakers in Charter review. For both the government and Parliament, reconciling rights and legislative objectives is essential to their lawmaking functions.[573] To decide on how they intend to satisfy these obligations, they must interpret Charter rights to determine the nature of the obligations they impose upon them. In doing so, they should not merely be guided by the judiciary's articulation of these obligations as stated in prior cases: they must also "determine the nature of this obligation in relation to a 'particular' need or threat to constitutional interests."[574] This involvement entails not only engaging in Charter review in the context of their lawmaking functions but also the formulation of their own interpretations of the Charter.

In this context, relying on a shared responsibilities perspective to rights protection enables a departure from the predominant court-centric approach. Theories of shared responsibilities recognize the viability of judicial review within a human rights regime where the political branches assume a substantive role in normatively engaging with the Charter.[575] Furthermore, these theories contribute to addressing the interactions between the government and Parliament in the lawmaking process. Acknowledging the intricate dynamics among distinct branches of government, this approach provides a more holistic and intricate outlook on rights protection, one that has the potential to facilitate the achievement of effective and sustainable rights protection.

[573] Hiebert, *supra* note 21 at 168.
[574] MacDonnell, *supra* note 101 at 639.
[575] Appleby & Olijnyk, *supra* note 52 at 2.

After introducing two normative models developed by scholars that contribute to a shared responsibilities understanding of the Charter – Hiebert's Relational Approach[576] and Brian Slattery's Coordinate Model[577] –, this section examines the three key characteristics of theories of shared responsibilities. This examination aims to elucidate their relevance within the context of proposing reforms for effective pre-enactment review.

### 2.1.1 – The Charter Through the Lens of Theories of Shared Responsibilities

Several scholars have endorsed a shared responsibilities understanding of the Charter, whether from a coordinated[578] or a dialogic approach.[579] Two prominent approaches to the Charter present a particularly compelling rationale for implementing mechanisms of rights review that enhance lawmakers' ability to conduct thorough Charter assessments: Hiebert's Relational Approach and Brian Slattery's Coordinate Model. These approaches are distinct by their substantial institutional and normative attributes. They thereby provide a solid basis to reflecting on the roles and responsibilities of the political branches under the Charter and developing an institutional framework for pre-enactment review that would foster effective and sustainable rights protection.

#### A) Janet Hiebert's Relational Approach

In numerous articles[580], Hiebert critically examined the prevalent reliance on judicial review and the interpretive role of courts to give effect to the Charter, scrutinizing their underlying rationale and justification.[581] In her opinion, the assumption that only courts can interpret rights by fixing inconsistencies through judicial review is troubling as it conveys the messages to society that:

> a singular correct or obviously better answer exists for rights conflicts and that judges alone can distil this answer. These messages lull a political community into a false sense of security that judges can objectively resolve complex dilemmas and, at the

[576] Hiebert, *supra* note 48.
[577] Slattery, *supra* note 35.
[578] See e.g., Macfarlane, Hiebert & Drake, *supra* note 21; Baker, *supra* note 35; Slattery, *supra* note 35.
[579] See e.g., Signalet, Webber & Dixon, *supra* note 204; Roach, *supra* note 204; Hogg & Allison A. Bushell, *supra* note 81; Hogg & Bushell, *supra* note 117; Roach, *supra* note 204.
[580] See e.g., Hiebert, *supra* note 50; Hiebert, *supra* note 48; Hiebert, *supra* note 12; Hiebert, *supra* note 382.
[581] Hiebert, *supra* note 50 at 235.

> same time, make it harder for political communities to consider and debate alternative perspectives. [582]

Hiebert suggests that the proposition that there is a range of reasonable answers to rights conflicts is more persuasive than the proposition that only one actor – generally judges – can distill the single "right" answer.[583] She notes that "[n]ewer or different perspectives will challenge views from the past by trying to show why these provide for more persuasive interpretations of the normative ideals reflected in constitutional principles."[584] In her opinion, the necessity to reassess earlier definitions of rights implies that a right does not have an "enduring and stable constitutional meaning," challenging the position that courts alone can identify the best or even the most reasonable answer to a rights conflict.[585] Furthermore, judges cannot claim particular relevance or unique insights for evaluating policy choices or social problems.[586] Since reasonable people can differ on the meaning and scope of rights and the proper resolution to rights conflicts, she suggests that it is neither prudent nor democratic to confine this judgment to courts.[587]

In one of her articles, she discussed the types of relationships created by the Charter between the courts and Parliament, especially regarding how they influence each other's judgments in the face of conflicts.[588] The first relationship arises:

> from the fact that Parliament and the judiciary are situated differently, relative to the Charter conflict. The way the respective institutions approach Charter considerations varies because of their different vantage points and due to the distinct roles and responsibilities they possess.[589]

Decisions made by political and judicial entities regarding Charter conflicts are thus shaped by their distinct frames of reference, unique institutional, and specific responsibilities.[590]

The second form of relationship relates to the need for both institutions to reflect and react

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[582] *Ibid* at 242.
[583] Hiebert, *supra* note 48 at 163.
[584] *Ibid*.
[585] *Ibid*.
[586] *Ibid* at 171.
[587] Hiebert, *supra* note 50 at 240. See also Jeremy Waldron, *The Dignity of Legislation*, The Seeley Lectures (Cambridge: Cambridge University Press, 1999).
[588] Hiebert, *supra* note 48 at 162.
[589] *Ibid* at 165.
[590] *Ibid*.

to each other's judgments on rights. Hiebert's approach recognizes the valuable contributions of both Parliament and the courts in addressing legislative objectives while upholding the normative values of the Charter.[591] Each body should be satisfied with conforming its judgments to the Charter, especially in the face of contrary judgments.[592]

A constraint in utilizing Hiebert's Relational model as a guide for structuring a pre-enactment review framework lies in its lack of clear differentiation between the distinct roles and responsibilities of the government and Parliament in the realm of rights protection. As legislative judgments made by the government require Parliament's approval to be enacted into law, she limits her analysis to the relationships between Parliament and the courts. However, the government still plays a central role in the lawmaking process: its institutions are responsible for initiating policy proposals and drafting them into legislation. There is significant room for encountering and resolving conflicts in that process, and a shared responsibilities approach to rights protection should reflect this institutional reality and the distinct role of the government.

In multiple subsequent articles[593], Hiebert does acknowledge this distinct role, recognizing the specific responsibilities of the government in pre-enactment review. She discusses government's roles in interpreting and applying the Charter through the idea of "political rights review," which includes the rights vetting and the reporting duty of the Minister of Justice. She recently published *Legislating under the Charter* with Emmett Macfarlane and Ana Drake, which combines, updates and strengthens these authors' previous findings on pre-enactment review, including on the inter-institutional relationships between the government and Parliament in rights protection.[594] Her subsequent analysis of the government's role in interpreting and applying the Charter thus completes her Relational model and provides a valuable framework to reflect on the roles and responsibilities of each branch under a shared responsibilities approach.

[591] *Ibid*.
[592] *Ibid* at 166.
[593] Hiebert, *supra* note 50 at 9. See e.g., Hiebert, *supra* note 57; Hiebert, *supra* note 373.
[594] Macfarlane, Hiebert & Drake, *supra* note 21 at 18.

B) Brian Slattery's Coordinate Model

In *Theory of the Charter*, published five years after the Charter came into force, Slattery criticized judicial supremacy for bringing only a "partial and distorted" account of the Charter.[595] He suggests that the Charter "sets up a complex scheme of constitutional duties and review powers that are distributed among governments, legislatures, and the courts."[596] His Coordinate Model captures this "multi-faceted nature" of the Charter.[597]

Under Slattery's Coordinate Model, all institutions must act following the Constitution.[598] The three branches of government have equal responsibilities to carry out the Charter's mandate, and their roles are reciprocal.[599] They each have a particular set of aptitudes, experience and expertise and should all work in a coordinated way. Responsibility for Charter review should thus not be confined to courts alone; all institutions should have the ability to review the actions of one another in order to ensure adequate checks and balances rights protection.[600]

He distinguishes "first-order" and "second-order" functions. First-order functions refer to the governmental bodies' assessment of their own anticipated acts to ensure they comply with the Charter. Second-order functions necessitate the review of acts performed by bodies engaged in first-order functions to ensure their Charter compatibility.[601] Both first- and second-order functions are distributed among the three branches of government.

While second-order functions generally refer to the duty of courts to review the actions of the executive and legislative branches, Slattery opines that the second-order functions of courts are insufficient to carry the Charter's guarantees properly. Heather MacIvor concurs with his position, suggesting that "[w]hen Parliament takes its first-order and second-order duties seriously, the courts' second-order function becomes less important," and vice versa.[602] Ensuring the proper

[595] Slattery, *supra* note 35 at 706.
[596] *Ibid*.
[597] *Ibid*.
[598] Douglas V Verney, "Parliamentary Supremacy versus Judicial Review: Is a Compromise Possible?" (1989) 27:2 Journal of Commonwealth & Comparative Politics 185 at 194.
[599] Slattery, *supra* note 35 at 707.
[600] Verney, *supra* note 99 at 194.
[601] Slattery, *supra* note 35 at 707.
[602] MacIvor, *supra* note 56 at 139.

functioning of this constitutional instrument requires that all the parties bounded by the Charter perform their first-order functions.[603]

The fundamental tenet of Slattery's Coordinate Model is that the Charter allows for a continuous exchange between the government, Parliament and courts concerning the "true nature" of Charter rights and the reasonableness of any constraints imposed upon them.[604] Slattery notes that while these bodies might at times be at odds with each other, they usually work in a coordinated way, "for only thus are they able to achieve the broader goals they all share."[605] He describes the relationship between the three branches as "reciprocal and not confrontational" and their attitude toward one another as "flexible and founded on mutual respect."[606] Thus, this dialogue can only transpire if the roles of the three branches under the Charter are viewed as complementary rather than adversarial, and if their attitudes towards one another is flexible and rooted in mutual esteem.[607]

According to Slattery, his Coordinate Model offers "a more complete understanding of the at the theoretical level" than a model considering the Charter as mandating only courts to deal with rights issues.[608] He suggests that this approach is also more respectful of the Canadian constitutional framework: the division of powers should not be understood as a set of directives to courts to invalidate law exceeding the specified jurisdictional boundaries but rather as a code governing the conduct of the three branches of government.[609]

### 2.1.2 – Features of A Theory of Shared Responsibilities to the Charter

As ensue from Hiebert and Slattery's models, theories of shared responsibilities to Charter protection propose that bills of rights do not simply mandate courts to ensure the conformity of legislation through judicial review. When carrying out their respective institutional responsibilities, all three branches of government are obligated to give effect to the Charter.[610] They must approach this exercise in view of their respective understanding of the guaranteed

[603] Slattery, *supra* note 35 at 709.
[604] *Ibid* at 710.
[605] *Ibid* at 707.
[606] *Ibid* at 710.
[607] *Ibid* at 710.
[608] *Ibid* at 712.
[609] *Ibid* at 728.
[610] *Ibid* at 706.

rights.[611] To quote political scientist Dennis Baker, "each branch of government – executive, legislative, and judicial – is entitled and obligated to exercise what the constitution entails."[612]

Theories of shared responsibilities encompass three propositions in the context of pre-enactment review: (1) the responsibility to interpret the meaning and scope of the rights is dispersed among the three branches; (2) the three branches are distinct partners in rights interpretation; and (3) the Charter places positive obligations on lawmakers to ensure the protection of the rights.

The first proposition emphasizes that lawmakers should go beyond merely making claims about the Charter compatibility of bills or their adherence to jurisprudence: they should instead engage in meaningful constitutional arguments.[613] They must make their own assessment to determine the appropriate equilibrium between protected rights and other societal values.[614] They must deliberate on Charter matters regularly and seriously in the context of their lawmaking duties.[615] In the words of Slattery, all governmental bodies should "assess the reasonableness of *their own* anticipated acts in light of fundamental rights and to act accordingly."[616] Theories of shared responsibilities thus encourage lawmakers to undertake a robust assessment of the impacts of bills on Charter rights, determining what the Charter demands.

The second proposition entails that though the three branches of government are tasked with determining the meaning and scope of the rights, their roles and responsibilities in constitutional interpretation are dictated by their distinct characteristics.[617] Due to these characteristics, they do not similarly address possible rights inconsistencies in legislation.[618] They must not be content with mimicking each other's approach.[619] Acting at different stages of the lawmaking process, the government, Parliament and courts have unique institutional features,

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[611] Macfarlane, Hiebert & Drake, *supra* note 21 at 22.
[612] Baker, *supra* note 35 at 4.
[613] Hiebert, *supra* note 1 at 243.
[614] Scott E Gant, "Judicial Supremacy and Nonjudicial Interpretation of the Constitution" (1997) 24 Hasting Constitutional Law Quarterly 359 at 393.
[615] *Ibid* at 393. See also Jennifer Nedelsky, "Legislative Judgment and the Enlarged Mentality: Taking Religious Perspectives" in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 93 at 95.
[616] Slattery, *supra* note 35 at 707.
[617] Appleby & Webster, *supra* note 47 at 259; Roach, *supra* note 204 at 246; Slattery, *supra* note 35 at 719.
[618] Heather MacIvor, *Canadian Politics and Government in the Charter Era* (Oxford: Oxford University Press, 2012) at 138.
[619] Hiebert, *supra* note 382 at 53.

expertise and a set of resources to enforce bills of rights and improve rights protection.

Lawmakers and courts, firstly, do not engage in rights review in a similar manner. Lawmakers are responsible for agenda-setting and the development of legislation. At this stage, there are "no well-defined parties."[620] Rights considerations are contemplated as part of lawmakers' broader policy inquiry and in light of various other concerns, notably how to best achieve their legislative objectives.[621] Courts, in contrast, approach rights conflicts when legislation is contested, through a "slow and deliberate adversarial process featuring arguments by the parties affected and a reasoned decision" with legal arguments and considered reasons.[622] To inquire whether legislation infringes the rights to the degree that cannot be justified under section 1, they identify relevant provisions, the values underlying them and applicable jurisprudence. Courts then apply them to the situation under consideration[623] and issue a ruling on the constitutionality of the contested provisions. Both lawmakers and the courts have a valuable and distinctive role to play to give effect to the Charter.[624]

The functions of the executive and parliamentary branches as lawmaking institutions are also distinct: while the first is responsible for developing and drafting legislation, the second debates its content and enacts it into force. The contributions of the government and Parliament in pre-enactment review are distinct and complementary:

> The executive brings technical and operational expertise to bear on questions of constitutionality, which are institutionally distinct from the characteristics that legislators and judges will bring in their own consideration on the question. Legislatures bring publicity, and associated accountability, to deliberation, as well as a greater plurality to the debate.[625]

Given its responsibility in deciding to introduce and develop legislation, the government bears the primary duty of ensuring that proposed legislation does not excessively encroach upon Charter

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[620] Slattery, *supra* note 35 at 730.
[621] Julie Debeljak, "Rights Dialogue Where There is Disagreement under the Victorian Charter" in Julie Debeljak & Laura Grenfell, eds, *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Toronto: Thomson Reuters, 2020) 267 at 276; Hiebert, *supra* note 382 at 53; Hiebert, *supra* note 48 at 166.
[622] Slattery, *supra* note 35 at 719.
[623] Jason Murphy, "Dialogic Responses to M. v. H.: From Compliance to Defiance" (2001) 59:2 University of Toronto Fac L Rev 299 at 314.
[624] McMorrow, *supra* note 324 at 103.
[625] Appleby & Olijnyk, *supra* note 52 at 11.

rights.[626] Involved later in the lawmaking process, Parliament's primary role is to scrutinize legislation for adoption to ensure it does not unjustly infringe upon Charter rights. It holds the government accountable for introducing potentially unconstitutional legislation, subjecting it to public scrutiny and the possibility of amendments. The specific responsibilities and institutional characteristics of government and Parliament thus impact how they ought to address Charter concerns in legislation.

Further, given the inherently political nature of Charter issues, which involve complex considerations and balancing various societal interests, the government and Parliament are uniquely positioned to engage with rights issues in legislation.[627] They have access to a diverse range of experts, evidence, and resources that enable them to robustly assess the potential impacts of bills and how they can affect Charter rights. As a result, they are well-suited to reflect on how to effectively give effect to socio-economic rights, which involve budgetary and fiscal policy decisions.[628]

Finally, the last proposition highlights the necessity for lawmakers to adopt a proactive approach in fulfilling their functions to ensure the effective implementation of the Charter. This instrument constitutes a "constitutional code of behavior directly regulating governmental activities as a whole."[629] In the words of legal scholar Vanessa A. MacDonnell, it would be "unacceptable to suggest that Charter values ought not to guide the government in designing policy."[630] Bills of rights obligate policymakers to exercise their functions in line with the rights they guarantee.[631] Lawmakers must "self-police" to ensure they act following Charter rights rather than wait for courts to remedy rights inconsistencies in legislation.[632]

In this sense, theories of shared responsibilities have important institutional and procedural considerations. They demand the presence of institutional mechanisms and processes allowing

[626] Slattery, *supra* note 35 at 714.
[627] Pratt, *supra* note 457 at 118.
[628] Louis Lebel, "Une tension dans la culture juridique canadienne : la réticence des tribunaux à l'égard de la mise en œuvre des droits socioéconomiques" (2020) 61:2 Les Cahiers de droit 315 at 328.
[629] Baker, *supra* note 35 at 4.
[630] MacDonnell, *supra* note 101 at 638.
[631] Ekins, *supra* note 34 at 218; Baker, *supra* note 35 at 4.
[632] Simon V Potter & Emily MacKinnon, *The Executive Branch: Defender of Canadian Liberties* (Ottawa, Canada, 2014) at 3; Hiebert, *supra* note 50 at 243.

lawmakers to ascertain the compatibility of bills to the Charter during the lawmaking process.[633] As MacDonnell aptly observes, Charter rights can shape the lawmaking process by placing demands on political actors and influencing the policies they pursue and their structural design.[634] Mechanisms of rights review serve as an institutional means to fulfill the positive obligation of self-policing, enabling lawmakers to actively evaluate the compatibility of their actions with the Charter.

This thesis does not adhere strictly to the application of theories of shared responsibilities, specifically refraining from endorsing a definitive authority in cases of conflict between political and judicial interpretations of the Charter. Some proponents of such theories debate the ultimate decision-maker regarding the interpretation and scope of Charter rights. Departmentalists, for example, deny that courts should be the final interpretative authority, often privileging executive and legislative interpretations.[635] Popular constitutionalists, for their part, grant this power to the people. [636] Though these debates are of significant importance, I agree with Murray Hunt that "to always ask 'who should have the final say on human rights?' can be an unhelpful distraction from the task of devising better institutional mechanisms which reflect the shared responsibility for protecting and promoting human rights".[637] Therefore, this debate holds limited relevance within the specific context of this thesis's objectives.

However, given the approach of this thesis to explore the potential of pre-enactment review to foster rights protection for marginalized groups, it is worth highlighting that in the era of populism, giving lawmakers unchecked authority to reject judicial interpretations of Charter rights can pose significant concerns. Marginalized communities, as minorities, might find their rights disregarded by lawmakers, particularly if they diverge from the majority viewpoint.[638] They often have distinct needs and interests that might not align with those of the majority, thereby increasing their vulnerability to populism.

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[633] For an interesting discussion on process-based constitutional standards and their possible impact on the realization of the rights, see Sheppard, *supra* note 6.
[634] Vanessa MacDonnell, "The New Parliamentary Sovereignty" (2016) 21:1 Review of Constitutional Studies 13 at 29.
[635] Levy, *supra* note 198 at 72.
[636] See e.g., Kramer, *supra* note 34; Tushnet, *supra* note 34.
[637] Hunt, *supra* note 191 at 13.
[638] Roach, *supra* note 130 at 306.

Even if not strictly applied, theories of shared responsibilities provide a relevant lens through which to examine the roles of the government and Parliament as lawmaking institutions involved in pre-enactment review.[639] More precisely, it provides a solid theoretical groundwork to reflect on the institutional framework for pre-enactment review propitious to fostering effective and sustainable rights protection in federal lawmaking. This framework should be designed to provide opportunities for lawmakers to engage seriously with Charter rights, that is, determining what they permit and forbid, how they apply in the context of the laws developed, and how to properly balance their protection with other social interests and values.[640]

This assessment requires a "separate, rigorous and principled deliberation" through institutional mechanisms and processes specially designed to promote rights protection.[641] These mechanisms can help mitigate the "democratic deficit" identified by Murray Hunt by integrating human rights into executive and parliamentary policymaking and enhancing government accountability for human rights compliance.[642] In considering the design for such a framework, principles of good governance offer a pertinent foundation for examining the institutional features of effective mechanisms of rights review.

## 2.2 – Good Governance: A Conceptual Framework for Pre-enactment Review

The importance of delivering effective governance is increasingly acknowledged as pivotal in establishing the legitimacy of democratic systems worldwide.[643] Good governance is now considered one of the cornerstones of modern states, along with the rule of law and democracy. These concepts are distinct yet overlapping; in Addink's words, "[g]ood governance is not only about the further development of the rule of law and democracy but it also includes the elements of accountability and efficiency of the government."[644]

Scholars and governments worldwide have been growingly interested in implementing institutional structures that could foster good governance, notably with regard to human rights

[639] Macfarlane, Hiebert & Drake, *supra* note 21 at 23.
[640] Appleby & Olijnyk, *supra* note 52 at 9.
[641] *Ibid* at 10.
[642] Hunt, *supra* note 191 at 12.
[643] Francis Fukuyama, "Why is Democracy Performing so Poorly" (2015) 26:1 journal of Democracy 11 at 15.
[644] Addink, *supra* note 93 at 4.

structures.[645] As a guide toward a better exercise of power[646], good governance and its core principles support the design of a framework for pre-enactment review in which the government and Parliament lawmaking institutions are actively involved in rights protection.

### 2.2.1 – The Shift from Government to Governance

One of the most important theoretical developments of the last decades in political science[647], the shift "from government to governance," emerged in response to the traditional state's inability to cope with a range of contemporary social problems.[648] These challenges include issues such as opaque decision-making processes, implementing policies that do not align with the demands of civil society, and insufficient accountability mechanisms.[649] As a result, a growing lack of confidence and disillusionment toward governments and political leaders is observed among citizens of democracies, manifesting most clearly in a disinterest in voting.[650] In that context, the concept of governance evolved to identify and explain new modes of problem-solving and decision-making to fill these gaps.[651]

A popular yet vague concept, governance has been given multiple definitions across disciplines.[652] It is generally conceived as covering "the whole range of institutions and relationships involved in governing."[653] These processes relate to decision-making processes, the implementation of decisions, and all the interactive arrangements through which public and private actors solve societal problems. [654] Governance thus broadly refers to the process in which policies are formulated, legitimized and implemented, linking the political system to its environment.[655]

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[645] See e.g., Gaventa, *supra* note 93 at 27. *Guide to Good Governance Programming* (MercyCorps) at 11.
[646] Jilles LJ Hazenberg, "Good Governance Contested: Exploring Human Rights and Sustainability as Normative Goals" in Ronald L Holzhacker, Rafael Wittek & Johan Woltjer, eds, *Decentralization and Governance in Indonesia* (New York: Springer, 2016) 31 at 32.
[647] Frank Fischer, "Participatory Governance as Deliberative Empowerment: The Cultural Politics of Discursive Space" (2006) 36:1 American Review of Public Administration 19 at 19.
[648] *Ibid*. Hubert Heinelt, *Governing Modern Societies: Toward Participatory Governance* (London; New York: Routledge and K. Paul, 2010) at 15.
[649] Pippa Norris, *Critical Citizens: Global Support for Democratic Government* (Oxford: Oxford University Press, 1999) at 24.
[650] Peter Bachrach & Aryeh Botwinick, *Power and Empowerment: A Radical Theory of Participatory Democracy* (Philadelphia: Temple University Press, 1992) at ix.
[651] Fischer, *supra* note 647 at 19.
[652] Heinelt, *supra* note 648 at 18.
[653] Jon Pierre & B Guy Peters, *Governance, Politics and the State* (New York: St. Martin's Press inc., 2000) at 1.
[654] *Ibid*.
[655] *Ibid*.

For public institutions, this shift from government to governance implies that policy outcomes are not merely viewed as "the product of actions by central government";[656] they are seen as the result of its interactions with multiple actors, including local governments, expert authorities, the voluntary sector, the private sector and individual citizens.[657] These actors and institutions need one another, each contributing relevant knowledge or resources to governance.[658] As political scientist R.A.W. Rhodes puts it, the central government is no longer supreme and political systems are increasingly differentiated.[659]

Good governance emerged as a critical concept in discourses about governance in international organizations and then, from the 1990s, in the broader progress of democratization.[660] As is the case for governance, there is no universally accepted definition of "good" governance.[661] Ann Seidman and al. define this concept as "the effective use of state power in predictable, transparent and accountable ways to advance the public interest."[662] The Office of the United Nations High Commissioner for Human Rights ("OHCHR"), for its part, suggests that it refers to "the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights in a manner essentially free of abuse and corruption, and with due respect for the rule of law."[663] Legal scholar Henk Addink recently provided a comprehensive definition of this concept:

> Good governance is not only about the proper use of the government's powers in a transparent and participative way, it also requires a good and faithful exercise of power. In essence, it concerns the fulfilment of the three elementary tasks of government: to guarantee the security of persons and society; to manage an effective and accountable framework for the public sector; and to promote the economic and social aims of the country in accordance with the wishes of the population.[664]

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[656] RAW Rhodes, "The New Governance: Governing without Government" in Richard Bellamy & Antonio Palumbo, eds, *From Government to Governance* (New York: Routledge, 2016) 3 at 8.
[657] *Ibid* at 8.
[658] Rhodes, *supra* note 91 at 8.
[659] *Ibid*.
[660] Jens Steffek & Philip Wegmann, "The Standardization of 'Good Governance' in the Age of Reflexive Modernity" (2021) 1:4 Global Studies Quarterly 1 at 4; Friedl Weiss & Silke Steiner, "Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison" (2007) 30 Fordham International Law Journal 1545 at 1545–46.
[661] "Good Governance and Human Rights", online: *OHCHR* <https://www.ohchr.org/en/issues/development/goodgovernance/pages/goodgovernanceindex.aspx>. [*OHCHR*]
[662] Ann Seidman, Robert B Seidman & Theodosio Uate, "Assessing Legislation to Serve the Public Interest: Experiences from Mozambique" (1999) 20:1 Statute Law Review 1 at 3.
[663] *OHCHR*, *supra* note 661.
[664] Addink, *supra* note 93 at 16.

"Bad" governance, in contrast, would refer to governments acting secretly, unaccountably or unpredictably, generally favouring the interests of those with power and privileges.[665]

Several fundamental principles emerged as central to good governance, a "remarkable overlap of criteria and recurring components"[666], including accountability, transparency, participation, responsiveness, as well as political equality. These principles can guide designing policymaking processes that foster effective and sustainable rights protection, including effective mechanisms of rights review.

### 2.2.2 – The Role of Good Governance Principles in Designing Effective Mechanisms of Rights Review

As a part of the broader field of the rule of law, the guarantee of human rights is recognized as constituting an essential component of good governance.[667] The respect and protection of human rights sustainably can only be attained through good governance[668]; the two are generally considered "mutually reinforcing."[669] In Addink's words, "[b]oth groups of norms for the government—human rights norms and good governance norms—can only be realized by each other, so these norms are complementary to each other. Human rights need good governance, and good governance needs human rights".[670] Effectiveness is implicit in principles of good governance.[671] Accordingly, good governance principles can guide designing institutional structures fostering effective and sustainable rights protection.

This section delves into five core principles of good governance: transparency, accountability, responsiveness, participation, and political equality. It examines their relevance in shaping an effective institutional framework for pre-enactment review process in federal lawmaking.

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[665] Seidman, Seidman & Uate, *supra* note 662 at 3.
[666] Steffek & Wegmann, *supra* note 660 at 5.
[667] Hartmut Schneider, "Participatory Governance for Poverty Reduction" (1999) 11 Journal of International Development 521 at 526; Steffek & Wegmann, *supra* note 660 at 5.
[668] *OHCHR*, *supra* note 661.
[669] *Ibid*.
[670] Addink, *supra* note 93 at 171.
[671] *Ibid* at 18.

A) Accountability

Normatively and structurally intrinsic to democracy,[672] accountability is considered one of the core values of democratic governance.[673] To quote Addink, "democracy remains a paper tiger if those in power cannot be held accountable in public for their acts and omissions, decisions, policies, and expenditures."[674] Growing demands for accountability in democratic states are attributed to the increasing discontentment of the public toward the political actors mandated with pursuing the public's interest. Political actors frequently lack willingness and transparency in addressing questions and demands from civil society.[675] Accountability constitutes an essential tool in making governments deliver on their promises by "keeping the public informed and the powerful in check."[676]

*i. Accountability as a Principle of Good Governance*

A concept historically related to financial accounting, accountability is now a hallmark of good governance in the public sector.[677] Despite its central role in democracy and its increasing presence in political discourse, accountability remains a highly contested concept.[678] There is no universally agreed-upon set of standards for accountable conduct.[679]

Accountability is often characterized as a "broad" or "narrow" concept. In its broad sense, accountability is an evaluative concept used to "qualify positively a state of affairs or the performance of an actor."[680] This understanding of accountability is therefore connected to the readiness of actors to behave in a "transparent, fair, and equitable" manner.[681] The present thesis, however, refers to accountability in its narrow sense, understood as a concrete practice of account giving, as the "obligation to explain and justify conduct."[682] As a narrow concept, accountability

[672] Mark E Warren, "Accountability and Democracy" in Mark Bovens, Robert E Goodin & Thomas Schillemans, eds, *The Oxford Handbook of Public Accountability* (Oxford: Oxford University Press, 2014) at 42.
[673] Mulgan, *supra* note 560 at ix.
[674] Addink, *supra* note 93 at 158.
[675] Mulgan, *supra* note 560 at 1.
[676] *Ibid*. See also Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13:4 European Law Journal 447 at 463–464.
[677] Addink, *supra* note 93 at 159.
[678] Mulgan, *supra* note 560 at 5. See also T Schillemans & Paul Hart, "Does Public Accountability Work? An Assessment Tool" (2008) 86:1 Public Administration 225 at 226.
[679] Schillemans & Hart, *supra* note 678 at 227.
[680] Bovens, *supra* note 676 at 450.
[681] *Ibid*.
[682] *Ibid*.

strives to uncover and address instances of power misuse, including both authorized and unauthorized exercises of power, as well as decisions that are considered unwise or unjust by those responsible for holding others accountable.[683] The focus is not on the behaviour of policymakers itself, but rather on "whether they are or can be held accountable *ex post facto* by accountability forums."[684]

One of the most well-known definitions of accountability in its narrow sense originates from public administration scholar Mark Bovens. His definition centers around tangible practices that facilitate accountability.[685] He defines this concept through a principal-agent relationship[686], a relationship characterized by at least three elements:

1. the actor is obliged to inform the forum about his or her conduct,
2. the forum can interrogate the actor and question the information's adequacy or the conduct's legitimacy; and
3. the forum may pass judgment on the conduct of the actor.[687]

These constitutive elements distinguish accountability from other fundamental principles of good governance. Transparency, for example, is a prerequisite of accountability as agents must have access to the necessary information to assess the performance of principals.[688] It does not, however, necessarily involve scrutiny by a forum.[689] Accountability can also be differentiated from responsiveness and participation, which involve active contributions that shape the policy process rather than reactive retrospection.[690]

### *ii. Accountability in Westminster States*

In Westminster systems, the significance of accountability rests on two foundational principles. The first pertains to the transfer of authority from the population to the government, establishing an inherent duty of the government to be accountable to the people. The second

[683] Ruth W Grant & Robert O Keohane, "Accountability and Abuses of Power in World Politics" (2005) 99:1 American Political Science Review 29 at 30.
[684] Schillemans & Hart, *supra* note 678 at 227.
[685] Addink, *supra* note 93 at 159.
[686] Mark Philp, "Delimiting Democratic Accountability" (2009) 57 Political Studies 28 at 29.
[687] Bovens, *supra* note 49 at 451. See also Mulgan, *supra* note 560 at 10; Bovens, *supra* note 676 at 452.
[688] Heidi Kitrosser, *Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution* (Chicago: Chicago Scholarship Online, 2015) at 2.
[689] Bovens, *supra* note 676 at 453.
[690] *Ibid*.

principle recognizes the entitlement of individuals whose rights or interests have been negatively affected to demand that the government be answerable for its exercise of power.[691] Accountability is facilitated through various institutional mechanisms, which can be classified as vertical or horizontal, depending on the actors who can legitimately demand accountability. Vertical mechanisms involve accountability relationships between political institutions and citizens. On the other hand, horizontal mechanisms pertain to accountability relationships among branches of government, ensuring checks and balances and promoting accountability within the state itself.[692] This section discusses both types of accountabilities as they pertain to pre-enactment review in Westminster democracies.

**a. Vertical relationships: Public accountability**

Vertical accountability is due to actors external to the state, that is, to the public and voters.[693] Vertical accountability mechanisms allow the population to hold public institutions and actors directly to account.

Periodic general elections, i.e. the election or re-election of representatives[694], are the main means for vertical accountability.[695] When seeking to renew their mandate to govern, governments need to "explain and justify their actions and give citizens the opportunity to listen and impose a verdict."[696] Voters can punish or reward governmental performance.[697] In the words of Addink, "[a] vote is a formal expression of an individual's choice in voting, for or against some motion (e.g. a proposed resolution), for a certain candidate, a selection of candidates, or a political party."[698] In parliamentary systems, citizens get to indirectly hold the executive accountable at the same time as the legislature, as the leading party is the one with the most seats in Parliament.[699]

[691] Mulgan, *supra* note 560 at 13.
[692] Anne Marie Goetz & Rob Jenkins, "Multilateralism and Building Stronger International Institutions" in Alnoor Ebrahim & Edward Weisband, eds, *Global Accountabilities: Participation, Pluralism, and Public Ethics* (Cambridge: Cambridge University Press, 2007) 65 at 68.
[693] Mikel Barreda, "The Quality of Democratic Accountability: A Comparative View of Latin America" (2014) 47:2 Canadian Journal of Political Science 307 at 308.
[694] Alnoor Ebrahim & Edward Weisband, "Introduction: Forging Global Accountabilities" in Alnoor Ebrahim & Edward Weisband, eds, *Global Accountabilities: Participation, Pluralism, and Public Ethics* (Cambridge: Cambridge University Press, 2007) 1 at 6.
[695] Barreda, *supra* note 693 at 308.
[696] Mulgan, *supra* note 560 at 41.
[697] Barreda, *supra* note 693 at 308.
[698] Addink, *supra* note 93 at 165.
[699] Mulgan, *supra* note 560 at 41.

Between elections, the public does not detain any direct way to hold elected representatives accountable.[700]

**b. Horizontal relationships: Legal and political accountability**

Horizontal accountability occurs through inter-institutional mechanisms of "checks and balances."[701] Certain institutions are indeed authorized to prevent, remedy or punish presumable illegal actions of others.[702] Mechanisms of horizontal accountability involve the judiciary ensuring that public authorities are acting within the bounds of their legal authority or a public entity overseeing the activities of another;[703] the first refers to legal accountability, and the other to political accountability.

The most well-known accountability relationship in the context of rights protection is courts holding the government – and, incidentally, Parliament – to account for introducing legislation that infringes on the Charter. In Westminster systems, legal accountability through judicial review has gained significant importance, partly due to the high level of trust placed in courts compared to political institutions.[704] Judicial review allows courts to exercise an institutional "veto" on governmental action.[705] When rights are infringed, courts can sanction by overturning governmental decisions and invalidating legislation, thus serving as a core element of accountability.[706] The potential cost of having legislation contested in courts and potentially invalidated can act as a deterrent, reducing the likelihood of such legislation being passed into law.[707]

Furthermore, in the context of judicial recourses, governments must justify their contested decisions, disclosing publicly "what it has done and why."[708] In *Schmidt*, for example, the federal government was compelled to disclose previously confidential information regarding the Charter review performed during the development and drafting of legislation, as well as the criteria for

[700] Addink, *supra* note 93 at 161.
[701] Ebrahim & Weisband, *supra* note 694 at 6.
[702] Barreda, *supra* note 693 at 308.
[703] Goetz & Jenkins, *supra* note 692 at 68.
[704] Bovens, *supra* note 676 at 456.
[705] Mulgan, *supra* note 560 at 75.
[706] *Ibid* at 80.
[707] Cross, *supra* note 556 at 1577.
[708] Mulgan, *supra* note 560 at 75.

triggering the Minister of Justice's obligation under the *Department of Justice Act*. This case exemplifies the impact of judicial review in promoting transparency and accountability within the lawmaking process.

For its part, in the context of lawmaking, political accountability refers to the accountability relationship between the government and Parliament. According to political philosopher Mark Philp, democracy is made possible by establishing formal processes and accountability mechanisms that structure political systems and determine the extent of political responsibility.[709] Political accountability focuses on whether the government exercises its authority in a manner that aligns with the expectations and approval of its political constituencies.[710]

In parliamentarian systems, the executive is not accountable directly to the public, as in presidential systems: it is rather accountable to legislatures.[711] Bovens describes the chain of the principal-agent relationship of political accountability in parliamentary systems as such:

> Voters delegate their sovereignty to popular representatives, who, in turn, at least in parliamentary democracies, delegate the majority of their authorities to a cabinet of ministers. The ministers subsequently delegate many of their authorities to their civil servants or to various, more or less independent, administrative bodies. The mechanism of political accountability operates precisely in the opposite direction to that of delegation.[712]

In Westminster systems, political accountability encompasses two aspects: responsible government and the scrutiny of government actions by the Parliament. Under the principle of responsible government, a government may remain in power only if it maintains the confidence of the elected members of the legislature. Indeed, if unsatisfied with a minister or the government's performance, opposition parties can pass a motion of no confidence, signalling their withdrawal of support. This principle implies a responsibility for these elected representatives to hold the government to account.[713] Parliaments also play a vital role in promoting political accountability

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[709] Philp, *supra* note 686 at 39.
[710] *Ibid* at 38–39.
[711] Meg Russell & Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford University Press, 2017) at 5; Torsten Personn, Gerard Roland & Guido Tabellini, "Separation of Powers and Political Accountability" (1997) 112:4 The Quarterly Journal of Economics 1163.
[712] Bovens, *supra* note 676 at 455.
[713] Bede Harris, *Constitutional Reform as a Remedy for Political Disenchantment in Australia: The Discussion We Need* (Singapore: Springer, 2020) at 138; Thomas & Lewis, *supra* note 84 at 366.

by subjecting governments to scrutiny.[714] The public nature of parliamentary debates encourages ongoing dialogue between governments and civil society, facilitating the dissemination of information about decisions taken and their underlying rationales. [715]

The effectiveness of political accountability is contingent upon the specific political context in which the government operates, with a greater likelihood of effectiveness when the opposition parties take their oversight role seriously and are supported by mainstream media. Conversely, political accountability may be compromised when party discipline creates a sense of comfort within the government.[716]

### *iii. Accountability and Charter Review*

Charter review involves a range of vertical and political accountability relationships aimed at holding the government or Parliament to account for enacting legislation that infringes Charter rights.

#### a. Accountability and rights protection[717]

As discussed in Chapter 1, though judicial review is essential to giving effect to Charter rights, overrelying on courts is detrimental to effective and sustainable rights protection. Judicial dominance in constitutional interpretation weakens political accountability in two main ways: (1) it reduces the opportunities to hold the government accountable for enacting legislation incompatible with the Charter, and (2) it can result in issues of policy distortion and democratic debilitation.

To start, courts only assess the compatibility of a fraction of the legislation enacted: the portion that is judicially contested.[718] Some laws infringing the Charter might never be reviewed, for example, if the harm caused is significant "only in a cumulative sense" or if the individuals or

[714] Mulgan, *supra* note 560 at 59.
[715] *Ibid* at 37.
[716] Richard Mulgan, "Accountability Deficits" in *The Oxford Handbook of Public Accountability* (Oxford: Oxford University Press, 2014) 545 at 553.
[717] For an interesting discussion on the benefits of legal accountability for rights protection, see Jeff King, "The Instrumental Value of Legal Accountability" in Nicholas Bamforth & Peter Leyland, eds, *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013).
[718] Hiebert, *supra* note 57 at 727.

groups affected are ill-equipped to exercise their rights before courts.[719] Discussing systemic sex discrimination concerning the wage pay gap, Fay Faraday claims that the structural roots of systemic discrimination are rarely brought before courts.[720] As a result, a substantial portion of the legislation is not judicially reviewed. [721] In the case of uncontested legislation, decisions of the political branches on their compatibility with the Charter constitute the final and authoritative judgment on legislation's constitutionality.[722] The Charter cannot be interpreted as establishing rights for citizens that the government can disregard, allowing it to operate without consideration unless compelled by judicial review.[723] Waiting for courts to deal with possible Charter issues might lead to unconstitutional legislation remaining in effect.[724]

Even when incompatible legislation is judicially invalidated, its detrimental impacts on Charter rights materialized, presumably from its enactment up to its invalidation. The contested legislation typically remains in effect during the constitutional recourse unless an injunction is granted[725], which is rarely the case. Obtaining a judicial invalidation takes significant time, especially if the recourse goes up to the Supreme Court. The case *Moore,*[726] in which parent litigants successfully argued to the Supreme Court that school districts must provide accommodations to students with learning disabilities, spanned for fifteen years. The litigants' son, diagnosed with a severe learning disability, completed both primary and high school in private schools before the Supreme Court's decision.[727] They thus could not benefit from the ruling. Hence, subjecting legislation to rigorous examination before enactment becomes vital to identify and rectify potential Charter incompatibilities. This is especially significant in cases where legislation remains unchallenged or continues to produce adverse effects during the process of contestation.

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[719] Martha Jackman, "The Cabinet and the Constitution: Participatory Rights and Charter Interests: Manicom v. Country of Oxford" (1990) 35 McGill Law J 943 at 944.
[720] Fay Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada" (2020) 94:2nd series Supreme Court Law Review. Some examples include *Auton*, *supra* note 534, *Eldridge, supra* note 46, and *Vriend*, *supra* note 4.
[721] Janet L Hiebert, "The Charter's Influence on Legislation: Political Strategizing about Risk" (2018) 51:4 Can J Polit Sci 727 at 727.
[722] Hiebert, *supra* note 382 at 14; Hiebert, *supra* note 57 at 727.
[723] Potter & MacKinnon, *supra* note 632 at 2.
[724] Mary Dawson, "The Impact of the Charter on the Public Policy Process and the Department of Justice" (1992) 30:3 Osgoode Hall Law J 595 at 601.
[725] *Manitoba (AG) v Metropolitan Stores Ltd*, 1 SCR 110.
[726] *Moore v British Columbia (Education)*, [2012] 3 SCR 360.
[727] Sheppard, *supra* note 475 at 5.

Additionally, considering the Charter as an "after-the-fact corrective instrument" has a detrimental effect on accountability by diminishing political responsibility to reflect on the meaning and scope of Charter rights during lawmaking. The predominant role of courts in rights protection can lead to lawmakers granting too much or too little attention to the Charter considerations. Mark Tushnet labels the first phenomenon "policy distortion" and the second "democratic debilitation."[728]

Policy distortion ensues when lawmakers privilege less effective policies that appear more easily defensible in courts than other constitutionally acceptable alternatives.[729] According to legal scholars Gabrielle Appleby and Anna Olijnyk, the predominant focus on Charter compatibility as interpreted by the judiciary leads lawmakers to neglect crucial considerations such as the merits of proposed legislation, its responsiveness to community needs, proportionality, and effectiveness.[730] The second phenomenon, democratic deliberation, occurs when legislation is enacted "without regard to constitutional considerations, counting on the courts to strike from the statute books those laws that violate the Constitution."[731] Lawmakers are discouraged from formulating and discussing constitutional norms, notably how Charter rights should be interpreted and applied in the contexts in which they are invoked.[732] As their legislative judgements might still be litigated, why would lawmakers put considerable resources and attention into assessing the Charter compatibility of proposed legislation? They might become reckless or even "pass the buck" to courts when faced with controversial or unpopular legislative decisions.[733] In addition to undermining the rule of law[734] and representative democracy[735], this lack of legislative scrutiny comes at the expense of "more independent political judgment that takes a broader and more direct approach to the moral and policy issues involved."[736] In this sense, overreliance on courts diminishes political

[728] Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty" (1995) 94:2 Michigan Law Review 245.
[729] *Ibid* at 250. Seel also Conor Casey & David Kenny, "The Gatekeepers: Executive Lawyers and the Executive Power in Comparative Constitutional Law" (2022) 20:2 International Journal of Constitutional Law 664 at 689.
[730] Appleby & Olijnyk, *supra* note 47 at 980.
[731] Tushnet, *supra* note 728 at 247.
[732] Michael J Perry, "Protecting Human Rights in a Democracy: What Role for the Courts" (2003) 38 Wake For Rev 635 at 662. See also Frank B Cross, "Institutions and Enforcement of the Bill of Rights" (2000) 85:6 Cornell Law Rev 1529 at 1600.
[733] Goldsworthy, *supra* note 412 at 213. See also Goldsworthy, *supra* note 34 at 16–17.
[734] Appleby & Olijnyk, *supra* note 47 at 1006.
[735] Goldsworthy, *supra* note 34 at 16–17.
[736] Gardbaum, *supra* note 47 at 237.

responsibility to reflect on legislation's constitutional validity, including how Charter rights should be interpreted in general and applied in the particular contexts in which they are invoked.[737]

To uphold the principle of accountability, particularly in relation to government accountability to the public and Parliament, it is imperative to implement mechanisms of rights review within federal lawmaking. These mechanisms should incentivize both the government and Parliament to thoroughly assess the compatibility of bills with the Charter. Furthermore, as elaborated upon below, these mechanisms should reinforce Parliament's role in promoting political and public accountability.

**b. The key role of Parliament**

Charter review within Parliament plays a pivotal role in bolstering both political and public accountability.

Regarding political accountability, Charter review at Parliament subjects government bills to external scrutiny.[738] Legislatures are not tasked with initiating legislation: they instead examine and debate the bills developed and introduced by the government.[739] In his classical conception of legislatures, John Stuart Mill recognized the role of Parliament to control governmental action by exposing its acts to public scrutiny.[740] Public policy scholar Kirsten Roberts Lyer, among others,[741] submits that legislatures can engage with human rights by overseeing the executive's actions and

[737] Michael J Perry, "Protecting Human Rights in a Democracy: What Role for the Courts" (2003) 38 Wake For Rev 635 at 662. See also Macfarlane, Hiebert & Drake, *supra* note 21 at 63; Cross, *supra* note 556 at 1600.
[738] Connor, *supra* note 64 at 38.
[739] Dominique Leydet, "Débats parlementaires et délibération démocratique" in Loïc Blondiaux & Bernanrd Manin, eds, *Le tournant délibératif de la démocratie* (Paris: Presses de Sciences Po, 2021) 177 at 182.
[740] John Stuart Mills (2009), Considérations sur le gouvernement représentatif [1861], p 98, cited in *Ibid* at 179.
[741] See e.g., Zoe Hutchinson, "The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Year" (2018) 33:1 Australasian Parliamentary Review 72 at 93; Docherty, *supra* note 111 at 15; Paul G Thomas, "Comparing the Lawmaking Roles of the Senate and the House of Commons" in Serge Joyal, ed, *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal: McGill-Queen's University Press, 2003) 189 at 197.

promoting accountability.[742] Through their oversight functions, legislatures act as "watchdog[s] on the government of the day."[743]

One of the most critical functions of legislatures,[744] parliamentary scrutiny of governmental action occurs throughout parliamentary debates. Opposition members and government backbenchers enforce this accountability.[745] As legal scholar Richard Ekins affirms, if the governing party enjoys an advantage in settling debates, especially in the case of a majority, oppositions continue to participate in an "ongoing argument about how best to serve the common good"; they can notably question the governing party and present new facts and alternatives.[746] In this process, the Charter statements of ministers of Justice cannot be accepted uncritically by parliamentarians, nor should they be a determinant factor in their own assessment.[747] Parliamentarians should satisfy themselves that they exercised "careful and reasoned judgment" in concluding that the bills introduced for adoption are justified and responsible in light of Charter rights.[748]

Committee scrutiny is an important mean for parliamentarians to engage in public debates and report on government actions. Through their inquiries, parliamentary committees contribute to overseeing governmental actions, including by examining the content, effects, and merits of bills proposed by the government.[749] In particular, they can question the government and challenge its conclusions regarding the Charter compatibility of bills.[750] In a nutshell, parliamentary committees can conceivably be "effective and powerful accountability mechanisms."[751]

Moreover, Charter review within the Senate is a valuable complement to the assessment conducted in the House of Commons, counterbalancing majoritarian tendencies and ensuring a

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[742] Kirsten Roberts Lyer, "Parliaments as Human Rights Actors: The Potential for International Principles on Parliamentary Human Rights Committees" (2019) 37:3 Nordic Journal of Human Rights 195 at 196. See also Kirsten Roberts Lyer & Philippa Webb, "Effective Parliamentary Oversight of Human Rights" in Matthew Saul, Andreas Follesdal & Geir Ulfstein, eds, *The International Human Rights Judiciary and National Parliaments* (Cambridge: Cambridge University Press, 2017) 32 at 32.
[743] Docherty, *supra* note 111 at 15.
[744] *Ibid* at 16.
[745] *Ibid*.
[746] Richard Ekins, "Legislation as Reasoned Action" in Grégoire Webber & Paul Yowell, eds, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge: Cambridge University Press, 2018) 88 at 109.
[747] Appleby & Olijnyk, *supra* note 47 at 1006.
[748] Hiebert, *supra* note 48 at 175.
[749] Moulds, *supra* note 371 at 44.
[750] Pratt, *supra* note 457 at 93.
[751] Griffith, *supra* note 371 at 18.

more comprehensive evaluation of bills' compatibility with the Charter.[752] A mandate of Charter review aligns with the Senate's four primary functions, which include legislative review, regional representation, checks on executive power, and safeguarding the interests of minority groups.[753] In particular, the Senate's role in protecting marginalized populations, such as the poor, Indigenous communities, and the elderly, emphasizes the Senate's need to focus on individuals whose rights and interests are often overlooked.[754]

Lower levels of partisanship and party discipline are primordial to the Senate's role as an institution of Charter review. First, the increasing number of independent senators following several reforms since 2015 solidified the institution's non-partisanship[755], thus strengthening its role of "singular complementary chamber of sober second thought."[756] Charter review also benefits from the flexible procedures and smoother deliberations characterizing the Senate.[757] For example, during the third reading on Bill C-14 regarding medical aid for dying, Senators held an "exceptional meeting" during which Senators could intervene multiple times and move targeted amendments, leading to a "coherent, focussed debate."[758] Accordingly, the Senate has traditionally been more willing and productive in performing its duty to supervise government action, often engaging in Charter review and submitting amendments that could resolve Charter issues in bills.[759]

Charter review in Parliament also supports public accountability. Indeed, parliamentary debates are public, as are the reports published by parliamentary committees. In this context, Parliament's contribution to good governance is noteworthy: it strengthens public scrutiny of the

[752] The Honorable V Peter Harder, "Complementarity: The Constitutional Role of the Senate of Canada" (2019) 36:2 National Journal of Constitutional Law 223 at 224.
[753] Thomas, *supra* note 741 at 190.
[754] *Ibid* at 190.
[755] See e.g., Andrew Heard, "The Effect of Trudeau's New Senate Selection Process in Perspective: The Senate's Review of Commons Bills, 1997-2019" (2019) 13:1 Canadian Political Science Review 75; Elizabeth McCallion, "From Private Influence to Public Amendment? The Senate's Amendments Rate in the 41st, 42nd and 43nd Canadian Parliaments" (2022) 55 Canadian Journal of Political Science 583; Aengus Bridgman, "A Nonpartisan Legislative Chamber: The Influence of the Canadian Senate" (2021) 27:5 Party Politics 1009; Robert VandenBeukel, Cochrane & Godbout, *supra* note 97.
[756] Gary O'Brien, "Discovering the Senate's Fundamental Nature: Moving beyond the Supreme Court's 2014 Opinion" (2019) 52 Canadian Journal of Political Science 539 at 552.
[757] Bridgman, *supra* note 755 at 1010; Thomas, *supra* note 741 at 218; CES Franks, "The Canadian Senate in Modern Times" in Serge Joyal, ed, *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal: McGill-Queen's University Press, 2003) 151.
[758] Hon George J Furey, "The New Senate: Still in Transition" (2017) Spring Canadian Parliamentary Review 2 at 4.
[759] Hiebert, *supra* note 25 at 133; Franks, *supra* note 757 at 171.

government's engagement with the Charter and the alignment of bills with Charter rights. Parliamentary debates serve as a valuable source of information for the public, providing them with essential insights to make informed judgments during elections.

For accountability to be effective, the appropriate institutional structures and processes must be in place. These structures and processes should require the government to provide explanations and justifications for their actions while offering avenues for imposing sanctions when necessary.[760] Without such structures and processes, prospects of accountability remain elusive.

With regard to federal lawmaking, more specifically, the institutional framework for pre-enactment review must support the capacity of Parliament to subject bills introduced by the government to public scrutiny. To be in the position of holding the government accountable for proposing the enactment of legislation that might contravene the Charter rights, Parliament must first proceed to its own assessment of the rights compatibility of bills. It cannot simply accept the government's interpretations of the rights: it must be able to support or challenge conclusions of the government, notably those presented in Charter statements.

In conducting a critical analysis of the existing and proposed mechanisms of rights review in Chapters 3 and 4 to assess their alignment with the principle of accountability, the following questions are examined: can Parliament effectively scrutinize the Charter compatibility of bills introduced for adoption? Is the government obligated to provide Parliament and the public with information regarding its approach to Charter review? Are the decisions and processes related to the Charter compatibility of bills transparent to Parliament and the public? In all cases, what are the consequences or sanctions for acting in contravention of the Charter?

### B) Transparency

Since the 1990s, international institutions and NGOs have emphasized the significance of transparency as a necessary component for improving government quality, enhancing accountability, and reducing corruption and impunity.[761] Holding the government to account, especially, requires that those in charge of supporting or challenging governmental action have

[760] Bovens, *supra* note 676 at 466.
[761] *What is Government Transparency?*, by Monika Bauhr & Marcia Grimes, The Quality of Government (Göteborg: University of Gothenburg, 2012) at 3.

access to the information essential to construct a reasoned argument.[762] Important transparency measures were developed in the public sector to foster government accountability, such as public sessions of representative bodies and the publication of government documents. Such measures are now considered basic requirements of democratic governance.[763]

### *i. Transparency as a Principle of Good Governance*

Transparency involves conducting public affairs openly. As is the case for accountability, transparency is an ambiguous term that is generally addressed through a broad or narrow conception. While its broad sense accounts for diverse concepts such as openness, communication and accountability, its narrow sense relates to the openness of governmental action.[764] Relevant to this normative framework, this narrow conception refers to the collection of information, which should be made available for public scrutiny.[765] It involves "recording, reporting and publishing of information about the processes, decisions, and outcomes of an institution."[766] Observable records of official decisions and activities should be kept for subsequent access.[767] To quote Addink, "[c]omplexity, disorder, and secrecy are features that transparency seeks to combat."[768] Not only should this information be available, but it should also be easy for the public to understand.[769] The language used should be "as accessible and as comprehensible as possible."[770] Transparent policy measures can be distinguished from opaque ones, where it is unclear "what they are, who decides on them, and what they cost."[771]

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[762] Addink, *supra* note 93 at 112.
[763] Albert Meijer, "Transparency" in *The Oxford Handbook of Public Accountability* (Oxford: Oxford University Press, 2014) 507 at 507; *Ibid*.
[764] Addink, *supra* note 93 at 94.
[765] Patrick Birkinshaw, "Freedom of Information and Openness: Fundamental Human Rights?" (2006) 58:1 Adm Law Rev 177 at 189.
[766] Ngaire Woods, "Multilateralism and Building Stronger International Institutions" in Alnoor Ebrahim & Edward Weisband, eds, *Global Accountabilities: Participation, Pluralism, and Public Ethics* (Cambridge: Cambridge University Press,2007) 27 at 39.
[767] Patrick Birkinshaw, "Freedom of Information and Openness: Fundamental Human Rights?" (2006) 58:1 Administrative Law Review 177 at 189.
[768] Addink, *supra* note 93 at 112.
[769] Birkinshaw, *supra* note 767 at 189.
[770] Addink, *supra* note 93 at 112.
[771] Nigar Hashimzade, Gareth Myles & John Black, eds, "Opaque policy measures" in *A Dictionary of Economics*, 5th ed (Oxford: Oxford University Press, 2017).

Transparency is instrumental to good governance by providing accessible and comprehensible information relevant to accountability processes.[772] Assessing an actor's or institution's performance requires access to relevant information;[773] it is essential to understanding the motives behind governmental and parliamentary actions.[774]

### *ii. Transparency and Charter Review*

In the context of Charter review, the presence of a transparent mechanism for rights review ensures that external actors are adequately informed on the considerations taken into account during the process and the conclusions reached regarding the bills' compatibility with Charter rights. Transparent mechanisms of rights review enhance accountability and public grasp of the impacts and justifications of bills, enabling parliamentary and public scrutiny of the government's actions regarding Charter rights. For example, the publication of judicial decisions and the public nature of trials foster transparency in judicial review.[775] The public nature of parliamentary debates and committee reports, for their part, fosters transparent parliamentary debates on the Charter compatibility of bills.[776]

In the current framework for lawmaking, due to the confidential nature of executive lawmaking, transparency mainly occurs in parliamentary processes. The development and drafting of bills mostly takes place behind closed doors. Confidentiality requirements from diverse sources hamper the principle of transparency during executive rights review. A vast array of documents and communications are protected under Cabinet confidentiality, now formalized in section 39 of the *Canada Evidence Act*, or under the attorney-client privilege. Most communications and documents pertaining to drafting bills – including those regarding executive Charter review – are thus treated as confidential.

Various reforms could allow for more transparency in executive rights review. Increasing transparency in executive lawmaking would provide valuable insights into the advice received by

[772] Meijer, *supra* note 763 at 512.
[773] Kitrosser, *supra* note 688 at 2. See also Meijer, *supra* note 763 at 511.
[774] Addink, *supra* note 93 at 112.
[775] *Ibid* at 113.
[776] *Ibid*.

the government and its practical implementation in governance.[777] One possible approach would be to exempt documents and communications related to executive rights review from the scope of the *Canada Evidence Act*, allowing for the publication of advice by government lawyers responsible for rights vetting. Alternatively, the government could waive Cabinet confidentiality and attorney-general privilege when requested by parliamentarians. Another option would be to expand the content of Charter statements to include more information on the justification for considering that a bill is Charter compatible and what alternatives were considered.[778] Nevertheless, at this moment, parliamentary lawmaking remains the most practical avenue for transparent governance at present.

An opaque process like executive rights review is "effectively immune from any real external scrutiny."[779] To quote Connor, "[s]imply put, in a secretive executive dominated process, Parliament and the public cannot scrutinise what they cannot see."[780] Discussing government scrutiny in Australia, constitutionalist Bede Harris aptly summarizes how opaque executive lawmaking can impact the ability of Parliament to scrutinize government action:

> Provision of information is obviously central to the effectiveness of scrutiny of government. Without access to information, parliamentarians have no way of knowing how the government is exercising its powers or of calling the government to account in cases of inefficiency or wrongdoing. It follows that since the government controls all the information relating to its own activities, those seeking to hold the government to account rely on the government itself voluntarily to provide such information as is requested.[781]

In contrast to the secretive nature of executive lawmaking, the public nature of parliamentary debates increases transparency in the pre-enactment review. In the context of the accountability relationships discussed in the section above, transparency in parliamentary rights review principally pertains to two types of relationships. First, it relates to the Parliament holding the government to account for introducing adoption bills infringing the Charter – that is, political accountability. Second, it allows the public to hold to account both the government and Parliament

[777] Casey & Kenny, *supra* note 729 at 693.
[778] Macfarlane, Hiebert & Drake, *supra* note 21 at 168.
[779] Connor, *supra* note 64 at 44. See also Hiebert, *supra* note 382 at 15.
[780] Connor, *supra* note 64 at 44.
[781] Harris, *supra* note 713 at 138.

for going forward with enacting legislation without sufficiently considering or minimizing Charter concerns in bills – that is, public accountability.

In the first case, parliamentary debates shed light on the assumptions behind the government's conclusions on bills' compatibility with the Charter. They publicize the considerations grounding these conclusions and ensure they can be examined and questioned.[782] Parliamentarians can publicly question sponsoring ministers and compel them to provide additional information on their conclusions regarding the constitutionality of bills, exposing the government to critical debate and scrutiny.[783] Such scrutiny can effectively expose whether the conclusions drawn in the rights review process are influenced by overly conservative or lenient interpretations of the Charter.[784] Even if Parliament reaches the same conclusion as the government regarding a bill's alignment with Charter rights, it can still provide greater transparency and an improved explanation of the bill.[785]

Furthermore, the publicity of this process is a "mark of recognition of the value of public accountability."[786] Deliberations in committees and chambers are recorded, archived, and presented on the Cable Public Affairs Channel. In most cases, they can also be attended at Parliament. Excerpts or clips are often presented in mainstream media. The media acts as a link between Parliament and the public by publicizing parliamentary debates.[787] Reports from parliamentary committees are also available to the public on the Parliament website. The public can thus be informed of the positions and arguments defended by the government and the opposition parties on the Charter compatibility of bills.[788]

Marginalized groups stand to benefit significantly from transparent mechanisms of rights review. Lawmakers frequently lack in-depth knowledge of these groups' specific needs and interests, which are further underrepresented within political institutions. Consequently, legislation enacted by the government might inadvertently or intentionally harm their interests due to a lack of awareness or purposeful neglect. In a secretive Charter review process, lawmakers might feel

[782] Pratt, *supra* note 457 at 93.
[783] Mulgan, *supra* note 560 at 59.
[784] Connor, *supra* note 64 at 44. See also Hiebert, *supra* note 382 at 15.
[785] Hutchinson, *supra* note 741 at 104.
[786] John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge: Cambridge University Press, 1998) at 96.
[787] Leydet, *supra* note 739 at 188.
[788] *Ibid*.

more at ease neglecting or disregarding the interests of marginalized groups, as the lack of transparency shields public scrutiny and accountability for such actions. Implementing a transparent mechanism of rights review would emphasize the diligence taken to collect information about their unique needs and interests, as well as the subsequent decision-making processes informed by this information.

In Chapters 3 and 4, my critical analysis of the existing mechanisms of rights review and associated institutional reforms primarily seeks to ascertain whether these mechanisms facilitate the access of external parties to necessary information concerning the nature and extent of the Charter review undertaken. This includes information on the potential repercussions of bills on identified rights, the lawmakers' findings on Charter compatibility, the measures taken to handle or minimize conflicts arising from the Charter, and the evidential basis underlying this evaluation.

### C) Participation

Another central feature of good governance,[789] participation has gained significant recognition in political debates since the 1960s and 1970s.[790] It has become an integral part of the mainstream vocabulary when discussing governance and democracy. Modern constitutionalists and proponents of participatory democracy, in particular, consider participation as an essential element of a democratic system.[791] In the context of good governance, participation entails actively engaging individuals and communities in the decision-making processes of government.[792]

#### *i. Participation as a Principle of Good Governance*

Participation is closely related to the concept of democracy, which, in its purest form, requires "everyone to participate equally in making decisions."[793] It implies that every member of

[789] Frank Fischer, "Participatory Governance: From Theory to Practice" in *The Oxford Handbook of Governance* (Oxford: Oxford University Press, 2012) 457 at 466.
[790] Carole Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 2014) at I; Denise Vitale, "Between Deliberative and Participatory Democracy: A Contribution on Habermas" (2006) 32:6 Philosophy & Social Criticism 739 at 749.
[791] See e.g., Larry Diamond & Leonardo Morlino, "The Quality of Democracy" (2004) 15:4 Project Muse 20 at 23.
[792] Sheppard, *supra* note 6 at 556.
[793] Mulgan, *supra* note 560 at 12.

civil society possesses an equal entitlement to participate in decisions that impact their lives.[794]

The right of individuals to participate in decisions affecting their fundamental interests has long been recognized by international human rights law.[795] The protection of political participation indeed figures in numerous important international instruments,[796] including in Article 25 of the *International Covenant on Civil and Political Rights*[797] and Article 21 of the *Universal Declaration of Human Rights*.[798] Both these international provisions require at least periodic and genuine elections.[799]

Two main avenues allow members of civil society to participate in decision-making: elections and participation processes. In constitutional systems, periodic elections are the traditional institutional mean allowing for democratic participation.[800] Participation processes, for their part, provide opportunities for civil society to partake in decision-making by sharing their views on policies in-between elections.

Participatory governance requires that citizens actively engage and have a genuine influence on decisions that impact their lives.[801] When elections serve as the primary avenue for public involvement, as is the case under representative democracy, citizens often become passive constituents of their representatives; they are subject to laws that they did not contribute to creating.[802] In contrast, participatory democracy emphasizes that policymakers, while not necessarily bound by popular opinion, must directly engage with those affected by their decisions and seek their input.[803] Participation extends beyond elections to encompass other facets of political and social life, such as engaging in public policy debates, holding elected representatives

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[794] *Human Rights: Handbook for Parliamentarians*, by Inter-Parliamentary Union (Office of the United Nations High Commissioner for Human Rights, 2005) at 8.
[795] Penelope Simons & Lynda Collins, "Participatory Rights in the Ontario Mining Sector: an International Human Rights Perspective" (2010) 6 McGill International Journal of Sustainable Development Law and Policy 177 at 186.
[796] Henry J Steiner, "Political Participation as a Human Right" (1988) 1 Harvard Human Rights Y B 77 at 77.
[797] *International Covenant on Civil and Political Rights*, 1966, resolution 2200A (XXI).
[798] *Universal Declaration of Human Rights*, 1948, resolution 217 A.
[799] Steiner, *supra* note 796 at 106.
[800] David, *supra* note 77 at 1. Karen Syma Czapanskiy & Rashida Manjoo, "The Right of Public Participation in the Law-Making Process and the Role of Legislature in the Promotion of this Right" (2008) 19:1 Duke Journal of Comparative and International Law 1 at 1.
[801] Carmen Malena, "Building Political Will for Participatory Governance: An Introduction" in Carmen Malena, ed, *From Political Won't to Political Will: Building Support for Participatory Governance* (Sterling: Kumarian Press, 2009) 3 at 7.
[802] Benjamin R Barber, *Strong Democracy: Participatory Politics for a New Age* (Los Angeles: University of California Press, 2003) at 147.
[803] Syma Czapanskiy & Manjoo, *supra* note 800 at 17.

accountable, and monitoring official conduct.[804] Forms of participation, political scientist Hubert Heinelt suggests, must thus be "(re)designed and (re)considered" to go beyond those offered by traditional forms of representative democracy.[805] Organizing participation processes can allow to engage civil society between elections.

Access to civil society is one of the political branches' main advantages over courts as Charter review institutions. Through participation processes, they can take the pulse of the population on human rights matters and draw on the lived experience and knowledge that reside among them. Civil society can provide the government with the information, data, statistics, knowledge and expertise necessary to discharge their policymaking responsibilities.[806] Conventional definitions of governance imply that policymakers possess perfect, or at least sufficient, information about existing resources, needs, and ways and means for meeting those needs. It is, however, rarely the case.[807] Bringing together diverse perspectives allows decision-makers to gather much greater informational resources.[808] Policymakers can obtain a completer and more accurate portrait of the lived experience of the population on which to base their policy.

Extensive knowledge and expertise reside in civil society. People come from various backgrounds and have different experiences.[809] Including groups affected explicitly by legislation – for example, patients and health professionals, or parents and teachers – ensures that "different views are heard and special needs are understood."[810] As put forward by political scientist Hélène Landemore, the idea behind public participation now goes further than being grounded on their right to participate: "they build on the assumption of the "wisdom of crowds" and the idea that ordinary citizens can be a source of information and knowledge, not just validation".[811]

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[804] Diamond & Morlino, *supra* note 791 at 23.
[805] Heinelt, *supra* note 648 at 50.
[806] Daniela Obradovic, Jose A Alonso Vizcaino & Heiko Pleines, "Good Governance Requirements for the Participation of Interest Groups in EU Constitutions" in *Participation of Civil Society in New Modes of Governance The Case of the New EU Member States Part 3: Involvement at the EU Level* (Bremen: Forschungsstelle Osteuropa an der Universität Bremen, 2006) 19 at 22.
[807] Schneider, *supra* note 667 at 522–523.
[808] Jeremy Waldron, "Representative Lawmaking" (2009) 89 Boston University Law Review 335 at 343.
[809] Stephen Coleman & John Gøtze, *Bowling Together: Online Public Engagement in Policy Deliberation* (London: Hansard Society, 2002) at 12.
[810] Peter Littlejohns et al, "Creating Sustainable Health Care Systems Agreeing Social (Societal) Priorities through Public Participation" (2019) 33:1 Journal of Health Organization and Management 18 at 21.
[811] Hélène Landemore, "When Public Participation Matters: The 2010–2013 Icelandic Constitutional Process" (2020) 18:1 ICON 179 at 181.

Information is not solely technical; it also carries a socio-political dimension.[812] The insights provided by civil society complement the information held by the political branches, as they capture the pulse of the population's lived experiences in relation to the various aspects associated with the policy under consideration.

Incorporating input from civil society can contribute to enhanced decision-making and more efficient outcomes.[813] The participation processes implemented in some democracies, including participatory policymaking, budgeting and expenditure tracking, have indeed resulted in improved governance, particularly concerning government transparency, responsiveness, and accountability.[814] Laws based on information gathered through participation processes can also be more effectively targeted and need fewer further adjustments.[815] Participatory governance has thus improved public policies, public services, and development outcomes.[816]

Merely organizing participation processes does not guarantee they will contribute to good governance. These processes must be designed to reach a wide range of individuals affected by the policies and employ effective means to engage with them. Transparency plays a vital role in participation processes, enabling citizens to grasp how their input influence lawmakers and the ultimate decision.[817] Furthermore, policymakers should be genuinely receptive to incorporating the inputs gathered through participatory processes into policies.[818] Transparency, inclusivity, and a genuine willingness to incorporate public input into decision-making are all the while important when it comes to organizing participation processes supporting Charter review.

### *ii. Participation and Charter Review*

The broad conception of Charter review defended in this thesis involves confronting proposed legislation with considerations other than jurisprudential, including their socio-economic impacts. Civil society plays a crucial role in providing lawmakers with the necessary information,

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[812] Schneider, *supra* note 667 at 522.
[813] *Ibid* at 523.
[814] Malena, *supra* note 801 at 6.
[815] *Ibid* at 13.
[816] *Ibid*.
[817] Nancy Bouchard, "The Dark Side of Public Participation: Participative Processes that Legitimize Elected Officials Values" (2016) 59:4 Canadian Public Administration 516 at 520.
[818] Sherry Arnstein, "A Ladder of Citizen Participation" (2019) 85:1 Journal of the American Planning Association 24; Kalina Kamenova & Nicole Goodman, "The Edmonton Citizens' Jury on Internet Voting" (2013) Canadian Parliamentary Review 13 at 18.

data, statistics, knowledge, and expertise to perform such assessment.[819] The views expressed can assist them in making their own interpretation of the Charter and, potentially, discover infringements to the rights or less intrusive means to reach the bill's objectives. By implying that lawmakers cannot be trusted with decisions involving rights, the predominance of judicial interpretation of the rights tends to dilute public participation in lawmaking.[820]

Charter review promotes participation by allowing for greater engagement from civil society in shaping the Charter commitments rather than confining this role solely to a narrow group of judges and elite lawyers.[821] As suggested by Steiner, human rights are of such paramount importance that ordinary citizens must have a stronger voice in these discussions.[822] To achieve democratic legitimacy, the discourse surrounding human rights must allow ordinary citizens to express their perspectives. Defining human rights should not only occur from a top-down approach but also incorporate bottom-up inputs, ensuring the active involvement of the general public.[823]

As further explained in the section on political equality, engagement in participation processes can amplify the voices of groups traditionally underrepresented within representative institutions. Through citizen engagement, these groups can communicate their specific needs and interests to the government. However, for citizen engagement to contribute to good governance in lawmaking, participation processes should be designed to promote inclusivity and representativeness. Otherwise, there is a risk of reinforcing the influence of already influential groups in political institutions and providing a distorted perception of the population's needs and concerns.

In Canadian law, apart from the duty of the government to consult Aboriginal people when proposed actions can impact their constitutionally protected rights, there is no legal obligation to engage in public consultation with the population.[824] The government and Parliament have the discretion to determine when and how to organize participation processes. Most participation

[819] Obradovic, Alonso Vizcaino & Pleines, *supra* note 806 at 22.
[820] Pratt, *supra* note 457 at 115.
[821] Connor, *supra* note 64 at 42.
[822] Jürg Steiner, "Citizens' Deliberation and Human Rights" in *The International Human Rights Judiciary and National Parliaments* (Cambridge: Cambridge University Press, 2017) 59 at 59.
[823] *Ibid*.
[824] On the duty to consult Aboriginal people, see Nigel Bankes, "The Duty to Consult in Canada Post-Haida Nation" (2020) 11:0 Arctic Review 256–279; Dwight G Newman, *Revisiting the Duty to Consult Aboriginal People* (Saskatoon: Purich Publihsing Limited, 2019).

occurs during parliamentary debates, with parliamentary committees traditionally hearing witnesses during their inquiries of bills. However, governments have punctually organized participation processes supporting their ability to gauge the needs and interests of civil society in fields associated with human rights.

**a. Participation during the development of bills**

At the executive stage of lawmaking, participation processes can assist in developing and drafting bills exempt from unjustified infringements of the Charter. Citizens can provide input on specific issues and legislative solutions during the development of a bill.[825] Public engagement can occur both during the agenda-setting stage and when shaping the content of a bill. To ensure effective and meaningful participation, participation processes should be conducted earlier in the lawmaking process, closer to agenda-setting than to formulation or adoption.[826] There must be enough time to consider the information gathered and allow it to guide policy formulation. Public participation might become symbolic once the agenda has been established and a policy formulated.[827] Engaging the public early in the decision-making process further help reduce public opposition.[828] For that reason, government-sponsored consultations are typically more likely to be conducted in a timely manner compared to those occurring during parliamentary processes, as the government is involved earlier in the bill development. Participation during the executive stage of lawmaking allows to hear from civil society while a range of options is still open, rather than when the lawmaking process is mostly completed.[829] Earlier participation means that public input can have a meaningful impact on shaping the final legislation.

While the government has shown a growing inclination to organize participation processes,[830] the occurrence of substantial processes centered on aspects related to Charter rights

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[825] *Toolkit: Citizen Participation in the Legislative Process*, by ParlAmericas at 13.
[826] Bouchard, *supra* note 817 at 519.
[827] Arnstein, *supra* note 818 at 24; Sherry R Arnstein, "A Ladder of Citizen Participation" (1969) 35:4 Journal of the American Planning Association 216 at 217.
[828] Anahita A Jami & Philip R Walsh, "From Consultation to Collaboration: A participatory framework for positive community engagement with wind energy projects in Ontario, Canada" (2017) 27 Energy Research & Social Science 14 at 19.
[829] Bouchard, *supra* note 817 at 519; ParlAmericas, *supra* note 825 at 17.
[830] In recent years, the government has multiplied the opportunities for civil involvement from a few consultations held annually in 2016 to more than 400 per year in 2022: Treasury Board of Canada Secretariat, "Consulting with Canadians", (19 October 2020), online: <https://www.canada.ca/en/government/system/consultations/consultingcanadians.html>.

remains rare and often inadequately designed to support robust rights protection.[831] This issue underscores the need for a more systematic and comprehensive approach to participation in the context of executive rights review.

**b. Participation during parliamentary debates**

The parliamentary process provides opportunities to include civil society in policy debates, notably on the compatibility of bills to Charter rights.[832] As David Docherty states, while there are no binding requirements on governments to hold prelegislative hearings or hear from the public, "there must be three readings and two sessions of debate on it."[833] Even if the majority view predominates, the parliamentary process can provide a forum for minorities and dissenting voices to be heard on Charter issues.[834]

For one thing, Parliament assembles a large group of members selected to act on behalf of all citizens, who may represent particular groups or districts. Parliament provides a platform to consider a broad spectrum of opinions regarding rights when scrutinizing proposed legislation.[835] In theory, Richard Ekins submits, legislatures are structured to represent the community as a whole "in a form that can reason and act well."[836] Each elected representative, he suggests, "to some extent identifies with and has interests in common with the part of the community he represents."[837] In this sense, the legislature plays a crucial role as a body that brings together the diverse interests and perspectives of the community through engaged participants who deliberate and make decisions.[838] Ideally, the composition of the chamber should also reflect the diversity of society as a whole, including individuals of different genders, with diverse political opinions, various ethnic groups, minorities, and disadvantaged groups.[839] While it is true that legislatures may not fully represent the entire range of views and interests present in the population, they still come closer to

[831] See e.g., Bouchard, *supra* note 817; Michael R Woodforth & Susan Preston, "Strenghtening Citizen Participation in Public Policy-Making: A Canadian Perspective" (2013) 66 Parliamentary Affairs 345.
[832] Docherty, *supra* note 111 at 20.
[833] *Ibid* at 19–20.
[834] Ron Levy & Graeme Orr, *The Law of Deliberative Democracy* (London: Routledge, 2018) at 21.
[835] Pratt, *supra* note 457 at 104.
[836] Ekins, *supra* note 746 at 107.
[837] *Ibid* at 109.
[838] *Ibid*.
[839] *Human Rights Handbook for Parliamentarians*, by Inter-Parliamentary Union, no 26 (United Nations Human Rights Office of the High Commissioner, 2016) at 90.

representing civil society as a whole compared to the government.

Furthermore, parliamentary scrutiny offers a platform for civil society to express their opinions and knowledge about debated bills. Committee inquiries provide formal avenues for citizen engagement through written submissions and public hearings. These processes facilitate direct interaction between parliamentarians and the viewpoints of their constituents.[840] By gathering inputs from individuals from various groups of civil society, Parliament can obtain a completer and more accurate portrait of the population's lived experience on which to base responsive policy. More parliamentary involvement in rights review can therefore ensure that a broader range of perspectives is considered before the passage of legislation, notably regarding the potential impact of legislation on the rights.[841]

Good governance reforms could foster Charter protection by creating avenues promoting the involvement of civil society and its diverse communities in lawmaking.[842] Though some decision-making spaces might remain closed to participation[843], strengthening participation in the lawmaking process would involve creating spaces where citizens are invited to voice their opinions and concerns during the drafting and debates of bills. To critically analyze the existing mechanisms and proposed solutions in Chapters 3 and 4 regarding the principle of participation, I inquire the following questions: Are members of civil society given the opportunity to express their views on bills? Who is invited to participate, and how are participants identified? Is there an inclusive structure that ensures the engagement of all affected groups, including marginalized groups?

### D) Responsiveness to the Needs of the Population

Responsiveness to mass preferences is a defining element of democracy.[844] In democratic states, citizens must be able to influence public policy.[845] Democratic institutions should be responsive.[846]

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[840] Moulds, *supra* note 371 at 44.
[841] Pratt, *supra* note 457 at 104.
[842] *OHCHR*, *supra* note 661.
[843] Gaventa, *supra* note 93 at 35.
[844] Bernhard Webels, "Political Representation and Democracy" in *The Oxford Handbook of Political Behavior* (Oxford: Oxford University Press, 2007) 832 at 833.
[845] Martin Gilens, "Inequality and Democratic Responsiveness" (2005) 69:5 Public Opinion Quarterly 778 at 778.
[846] Docherty, *supra* note 111 at 5.

*i. Responsiveness as a Principle of Good Governance*

Governments are expected to be responsive to the preferences of their constituents in the absence of compelling justifications not to.[847] They should take the appropriate measures to ensure that citizens can signal their preferred policies and adjust policies based on their preferences.[848] While responsiveness does not require the constant activity of responding, it does necessitate a constant state of readiness and willingness to respond.[849]

Historically, voting for or against a political party has been the primary means to structurally generate responsiveness.[850] The competitive nature of elections incentivizes governments to align their policies with the people's preferences.[851] Policymakers may lack the motivation to consider the population's preferences in the absence of elections and the competitive struggle for votes.[852] Due to the threat of electoral sanctions, elected representatives are thus expected to respond to public preferences.[853]

While elections undoubtedly bear significant weight in democratic systems, their infrequent occurrence renders them inadequate in guaranteeing a consistent level of responsiveness.[854] The need for continuous citizen input necessitates mechanisms beyond elections, allowing individuals to communicate their preferences between electoral cycles. Governments must be equipped to swiftly discern evolving public sentiments.[855] Thus, it is imperative to structure policymaking processes in a manner that offers regular and accessible avenues for citizens to express their changing preferences, ensuring timely and effective

[847] F Leslie Seidle, "Democratic Reform: The Search for Guiding Principles" in *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 506 at 509.
[848] Thamy Pogrebinschi, "Can Participatory Governance Improve the Quality of Democracy? A Response from Latin America" in Hubert Heinelt, ed, *Handbook on Participatory Governance* (Cheltenham: Edward Elgar Publishing, 2018) 94 at 108.
[849] Hanna F Pitkin, *The Concept of Representation* (Berkley: University of California Press, 1972) at 23.
[850] Dieter Fuchs, "Participatory, Liberal and Electronic Democracy" in Thomas Zittel & Dieter Fuchs, eds, *Participatory Democracy and Political Participation: Can Participatory Engineering Bring Citizens Back in?* (London: New York: Routledge, 2007) 29 at 34.
[851] Sara Binzer Hobolt & Robert Klemmensen, "Government Responsiveness and Political Competition in Comparative Perspective" (2008) 41:3 Comparative Political Studies 309 at 309.
[852] Gilens, *supra* note 845 at 779.
[853] Sara Binzer Hobolt & Robert Klemmensen, "Responsive Government? Public Opinion and Government Policy Preferences in Britain and Denmark" (2005) 53 Political Studies 379 at 380.
[854] Pogrebinschi, *supra* note 848 at 108.
[855] *Ibid*.

governance. [856]

*ii. Responsiveness and Charter Review*

The idea of responsive institutions begs an obvious question: "responsive to what or to whom?"[857] Responsiveness is usually associated with responding to the majority's preferences: parties converge toward the median voters as they seek to maximize votes.[858] But in the context of Charter review, responsiveness is equally due to all members of civil society as rights holders; it thus requires attempting to accommodate minorities and marginalized groups.[859] For example, the preferences of lower-income people might be less clearly reflected in policy in contrast with those of the well-off.[860] To achieve proper responsiveness, governments must go beyond catering solely to the majority's preferences.

For mechanisms of rights review to promote responsive legislation, they must be designed to gather inputs from a wide range of relevant perspectives and be organized in a manner that fosters meaningful engagement with civil society. Genuine interest and commitment from lawmakers to engage with the population and empower them to influence policies are prerequisites for meaningful citizen engagement.[861] Empowered consultations involving citizens in policymaking and collaborative efforts contrast superficial engagement that merely serves as window dressing.[862] Merely consulting the population is insufficient; governments must show a genuine commitment to respecting the decisions and recommendations of civil society regarding the issues at stake.[863]

The substantial degree of party discipline observed within Westminster parliamentary systems poses a challenge to achieving responsive governance for minorities and marginalized groups. This challenge is especially prominent in the House of Commons, where elevated

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[856] Thomas Zittel & Dieter Fuchs, "Introduction: Democratic Reform and Political Participation" in Thomas Zittel & Dieter Fuchs, eds, *Participatory Democracy and Political Participation: Can Participatory Engineering Bring Citizens Back in?* (London: New York: Routledge, 2007) 1 at 3.
[857] Docherty, *supra* note 111 at 5.
[858] Hobolt & Klemmensen, *supra* note 851 at 312.
[859] Christine Bell, "Power-Sharing and Human Rights Law" (2013) 17:2 The International Journal of Human Rights 204 at 207.
[860] Gilens, *supra* note 845 at 788.
[861] Arnstein, *supra* note 818 at 24; Arnstein, *supra* note 827 at 219.
[862] Arnstein, *supra* note 818 at 25; Arnstein, *supra* note 827 at 219.
[863] Genevieve Fuji Johnson & Robert Howsam, "Can Consultation ever be Collaborative?" (2018) 1:4 Policy Design and Practice 253 at 255.

partisanship and party discipline undermine the chamber's capacity to effectively hold the government accountable, including if its actions ignore or disregard the interests of these minorities.[864] Although opposition members can utilize question periods, committee hearings, and press releases to highlight bills that fail to adequately address the needs of marginalized groups, they often lack the authority to enforce amendments.[865]

In this context, the Senate plays an amplified role in promoting the protection of minorities and marginalized communities by acting as a check on the Cabinet and House of Commons. Discussing the representation of women's interests in legislatures, Elizabeth McCallion and found that

> the unelected, less partisan Senate enabled senators to become critical actors on behalf of women. By contrast, norms of cabinet solidarity and party discipline in the House of Commons meant that MPs who might have been promising critical actors were unable to substantively represent women.[866]

Further, though a far cry from representing all strata of civil society, the Senate's membership is more diverse than the House of Commons.[867] As Docherty emphasizes, a legislature encompassing members from diverse communities within the Canadian cultural mosaic will likely be better equipped to address the specific challenges these communities face.[868] Including diverse perspectives in the lawmaking process enhances the potential for effective and responsive decision-making that considers the unique needs and experiences of the various communities of civil society. Further, the Senate has traditionally been more engaged with Charter concerns during its deliberations, especially in committee.[869] Charter review at Senate thus serves as a counterbalance to majoritarianism at the House of Commons ensure that the rights and interests of

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[864] Lowell Murray, "Which Criticisms are Founded?" in Serge Joyal, ed, *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal: McGill-Queen's University Press, 2003) 133 at 136.
[865] Docherty, *supra* note 111 at 7.
[866] Rayment & McCallion, *supra* note 11 at 13.
[867] John R McAndrews et al, "Nonelectoral Motivations to Represent Marginalized Groups in a Democracy: Evidence from an Unelected Legislature" (2021) 46:4 Legislative Studies Quarterly 961 at 970; David E Smith, "The Senate of Canada: Renewed Life to an Original Intent" in Nikolaj Bijleveld, Colin Grittner & David E Smith, eds, *Reforming Senates: Upper Legislative Houses in North Atlantic Small Powers 1800 - Present* (London: New York: Routledge, 2020) 75 at 83; Harder, *supra* note 752 at 232.
[868] Docherty, *supra* note 111 at 26.
[869] Hiebert, *supra* note 25 at 133.

marginalized communities are taken into account.[870]

In my critical analysis of the existing mechanisms and proposals in Chapters 3 and 4, I examine their alignment with the principle of responsiveness by asking the following questions: Do members of civil society have opportunities to inform lawmakers about their needs and interests? Are these opportunities inclusive of marginalized and vulnerable groups? Does the institutional framework promote responsiveness toward marginalized groups and not just the majority?

E) Political Equality

Political equality requires treating everyone as political equals, with the same ability to participate in political life, the same ability to rule[871] and an equal chance to influence the policymaking process.[872] This principle is an essential feature of democracy, if not the most important.[873]

Participation is instrumental in diminishing social inequalities and achieving a "substantive, *de facto*, rather than a simply formal, democracy."[874] According to proponents of participatory democracy, when individuals and groups that were previously excluded, ignored, or underserved are empowered, "politics becomes more pluralistic and democratic."[875] Deliberative democrats John S. Dryzek and Jürg Steiner emphasize the importance of including marginalized groups in the political process as a central aspect of democratization. [876] Democracy requires the active participation and representation of all society members, including those historically marginalized or excluded.

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[870] Janet Ajzenstat, "Bicameralism and Canada's Founders: The Origins of the Canadian Senate" in Serge Joyal, ed, *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal: McGill-Queen's University Press, 2003) 3 at 4.
[871] Kanchan Chandra, "Ethnic Invention: A New Principle for Institutional Design in Ethnically Divided Democracies" in Margaret Levi et al, eds, *Designing Democratic Government* (New York: Russell Sage Foundation, 2008) at 93.
[872] Ben Saunders, "Democracy, Political Equality, and Majority Rule" (2010) 121 Ethics 148 at 150.
[873] Eva Erman, "Introduction: In Search of Political Equality" in Eva Erman, Sofia Näsström & Sofia Näsström, eds, *Political Equality in Transnational Democracy* (New York: Palgrave Macmillan US, 2013) 1 at 1.
[874] Vitale, *supra* note 790 at 750. *Ibid*.
[875] William R Nylen, *Participatory Democracy versus Elitist Democracy: Lessons from Brazil* (New York: Palgrave Macmillan, 2003) at 28.
[876] Jürg Steiner, *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications* (Cambridge: Cambridge University Press, 2012) at 248; John S Dryzek, "Political Inclusion and the Dynamics of Democratization" (1996) 90:1 American Political Science Review 475 at 475.

*i. Political Equality as a Principle of Good Governance*

In most democracies, a gap persists between the aspiration of political equality and its actual realization.[877] Evidence shows that under neoliberal notions of participation, the local elite tends to be empowered with little consideration given to the voices and interests of minorities and marginalized groups.[878] As acknowledged by the Supreme Court of the United States in the famous Footnote 4 of *United States v. Carolene Products Co*, discrete and insular minorities, which may be viewed unfavourably by the majority, often face consistent disadvantages in political processes.[879] Consequently, these minority groups are often marginalized and excluded from governance and decision-making processes, despite being directly impacted by the outcomes of those decisions.[880] Barriers to participation further contribute to their political exclusion by limiting or denying their influence within democratic institutions.[881] As a result, minorities may find themselves disregarded or overlooked by representative institutions, exacerbating their vulnerability to systemic inequalities and challenges. [882]

Political equality is often associated with the egalitarian concept of universal suffrage, which is at the root of representative systems.[883] While equal access to voting is an important aspect of democracy, it does not guarantee equal treatment or outcomes for all citizens.[884] Political representation is increasingly recognized as insufficient in ensuring equitable distribution of a nation's resources.[885] If the majority rule may be unobjectionable in many contexts, there are instances where it leads to the systematic exclusion of certain groups.[886] Members of minorities and marginalized groups have criticized the majority rules, which they consider "simply serves to exclude them from influence."[887]

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[877] Robert A Dahl, *On Political Equality* (New Haven: Yale University Press, 2006) at 1.
[878] Gaventa, *supra* note 155 at 32. John Gledhill, "The Rights of the Rich versus the Rights of the Poor" in Diana Mitlin & Sam Hickey, eds, *Rights-Based Approaches Dev Explore Potential Pitfalls* (Sterling: Kumarian Press, 2009) 31 at 43.
[879] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
[880] Malena, *supra* note 801 at 5.
[881] Suzanne Dovi, "In Praise of Exclusion" (2009) 71:3 The Journal of Politics 1172 at 1173.
[882] Roach, *supra* note 188 at 93–94.
[883] Bachrach & Botwinick, *supra* note 650 at 26.
[884] Saunders, *supra* note 872 at 156.
[885] Archon Fung & Erik Olin Wright, "Deepening Democracy: Innovations in Empowered Participatory Governance" (2001) 29:1 Politics & Society 5 at 5.
[886] Saunders, *supra* note 872 at 151.
[887] *Ibid* at 156.

Consequently, minority and marginalized groups often find themselves excluded from governance and decision-making processes, even when the outcomes directly impact them.[888] Representative systems can contribute to political marginalization, which public policy scholar Suzanne Dovi describes as occurring "when informal norms and practices constrain, mute, or render less effective the representatives of certain interests, opinions, and perspectives in formal democratic institutions."[889] The cumulative impact of these norms and practices can effectively silence certain groups and deny them an influential political voice. [890] This situation highlights the importance of addressing these barriers and fostering a more inclusive and representative democracy that ensures the meaningful participation and influence of all members of society.

### *ii. Political Equality and Charter Review*

The principle of political equality has implications on the institutional aspects of Charter review, specifically concerning the parliamentary process and participation processes.

#### a. Political equality in lawmaking

Charter review during the lawmaking process is closely linked to the principle of political equality and the protection of minority rights. Due to their unique challenges and specific vulnerabilities resulting from a history of marginalization, certain groups experience more frequent and severe rights violations. By conducting a robust Charter review, lawmakers can ensure that proposed bills do not infringe on the rights of these groups, thereby furthering their marginalization.[891] This process empowers lawmakers to identify and mitigate potential disparities or unequal treatment, thus promoting more equitable and inclusive lawmaking.

As is the case for responsiveness, the Senate plays a unique role in fostering political equality during parliamentary debates. The protection of minorities constitutes one of the primary functions of upper chambers. Political scientist Jason Robert VandenBeukel, Christopher Cochrane and Jean-François Godbout submit that this function overlaps with the Senate's reviewing functions "since one of the main ways in which the Senate can promote minority

[888] Malena, *supra* note 801 at 5.
[889] Dovi, *supra* note 881 at 1174.
[890] *Ibid*.
[891] O'Brien, Lambek & Dale, *supra* note 22 at 160.

interests is by amending or defeating legislation."[892] Charter review at the Senate not only offers an additional opportunity to address any infringements present in bills but also ensures that the legislation enacted takes into account a wide range of perspectives.[893]

Moreover, the Senate, through its appointment process, has historically contributed to achieving a more balanced gender representation and ensuring a direct voice for members from groups that are underrepresented in the House of Commons.[894] Since the new appointment process of Senators in 2015, more attention is given to this representation of various groups. John R McAndrews and al found that this increased diversity "appears to have come, hand in hand, with an expanded emphasis on the defence of marginalized groups more broadly."[895] In particular, the researchers observed a significant difference in the level of interest between Senators from visible minorities and white Senators regarding survey data that was disaggregated according to citizens' ethnicity and indigenous identity.[896] By appointing individuals from diverse backgrounds, Charter review at the Senate promotes political equality by facilitating the inclusion of marginalized groups in the lawmaking process.

The importance of diversity and increased rights awareness at the Senate is amplified by the limited representation of minorities among elected representatives in the House of Commons. Not only is the House of Commons less diverse, but party discipline and partisanship are propitious to limiting the impact of a more diverse lower house. For instance, socio-legal scholar Laura J. Kwak found that even elected representatives from minority backgrounds may adhere to hegemonic national narratives during parliamentary debates on immigration, perpetuating "good immigrant" stories that differentiate between "legitimate" and "illegitimate" immigrants.[897] As the House of Commons struggles with diversity and is influenced by party discipline and partisanship, the Senate's role in promoting political equality in lawmaking becomes vital.

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[892] Robert VandenBeukel, Cochrane & Godbout, *supra* note 97 at 832.
[893] *Ibid*.
[894] McAndrews et al, *supra* note 867 at 970; Smith, *supra* note 867 at 83; Harder, *supra* note 752 at 232.
[895] McAndrews et al, *supra* note 867 at 971.
[896] *Ibid* at 981.
[897] Kaura J Kwak, "Still Making Canada White: Racial Governmentality and the 'Good Immigrant' in Canadian Parliamentary Immigration Debates" (2018) 30:3 Canadian Journal of Women and the Law 447.

**b. Political equality in participation processes**

The principle of political equality is intimately related to the principle of participation.[898] Participatory systems offer potential benefits to marginalized groups, as their rights often go unrecognized or unaddressed in representative democracies.[899] Fischer highlights that participation holds the potential to achieve a balance between efficiency and equity by providing less powerful groups with greater opportunities to influence resource distribution by expressing their preferences.[900] Participatory systems promote political equality by engaging marginalized groups in decision-making processes and ensuring their voices are heard in shaping policies and resource allocation.

Processes of public participation can lead to the systematic exclusion of certain groups if they are not organized to strengthen the voice of the parties affected by the policies at stake. To ensure political equality, these processes must be structured to foster authentic participation, enabling all individuals and communities to engage meaningfully in decision-making. By prioritizing inclusivity and providing avenues for diverse perspectives to be heard and considered, participation processes can strengthen political equality and mitigate the risk of marginalization or exclusion.

First, political equality requires the participation of many individuals from varied backgrounds.[901] They should be inclusive in terms of the number of participants according to social class, gender, education level and other social indicators.[902] If a participation process aims to represent public opinion, its participants should share the socio-economic and demographic characteristics of the public.[903]

Second, the power relations existing in society must be fully considered when designing participatory spaces.[904] Existing power relations inherently influence these spaces, often

[898] Pateman, *supra* note 790 at 14.
[899] Dovi, *supra* note 881 at 1174.
[900] Fischer, *supra* note 789 at 461.
[901] *Civic Engagement and Political Participation in Canada*, by Martin Turcotte (Ottawa: Statistics Canada, 2015) at 4.
[902] Pogrebinschi, *supra* note 318 at 104.
[903] Bouchard, *supra* note 817 at 520.
[904] Henedina Abad, "Revisiting Participatory Governance: An Instrument for Empowerment or Co-optation?" in Carmen Malena, ed, *From Political Won't to Political Will: Building Support for Participatory Governance* (Sterling: Kumarian Press, 2009) 31 at 35.

perpetuating hierarchies and inequalities rather than challenging them.[905] Constitutionalist Louis Fischer argues that the inherent asymmetrical power relations in modern societies can hinder genuine and effective participation.[906] The influence of political and economic power must be acknowledged and addressed in the design of participatory processes.[907] Material inequalities and poverty, for example, can create political inequalities if they hinder participants' willingness and ability to engage effectively in deliberation.[908] As a result, participation processes are susceptible to being constantly dominated by the powerful and influential groups of society. Specific efforts should be made to prevent "elite capture" and ensure the meaningful inclusion and participation of less powerful groups.[909] Without transforming participatory spaces to avoid replicating the status quo, established patterns of behaviour, perceptions, and stereotypes between groups and social classes can continue to shape the decision-making process within these spaces.[910]

Ill-designed participation processes give rise to two significant issues: (1) they offer a limited and narrow representation of the priorities, concerns, and needs of civil society, and (2) they can inadvertently exacerbate existing power imbalances within society and political institutions.

Regarding the first issue, the availability and quality of inputs in participatory processes are inherently influenced by who participates and how they participate. The diversity and inclusivity of participants are essential in capturing a wide range of perspectives, experiences, and expertise in developing legislation. By ensuring that participation processes reflect the views and interests of the population, particularly those of the most affected groups, policies can be better tailored to address the specific lived experiences of different demographics. If a participation process fails to effectively reach and engage members from affected groups, the inputs gathered

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[905] Andrea Cornwall, "Spaces for Transformation? Reflections on Issues of Power and Difference in Participation in Development" in Samuel Hickey & Giles Mohan, eds, *Participation: From Tyranny to Transformation* (New York: Zed Books, 2004) 75 at 81.
[906] Fischer, *supra* note 789 at 462–463.
[907] Abad, *supra* note 380 at 35.
[908] John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2000) at 4.
[909] Malena, *supra* note 801 at 16; *Rights-Based Approaches to Social Protection*, by Laure-Hélène Piron (London: Overseas Development Institute, 2004) at 18.
[910] Janine Hicks & Imraan Buccus, "Building Political Will for Refining Public Participation Policy in South Africa" in Carmen Malena, ed, *From Political Won't to Political Will: Building Support for Participatory Governance* (Sterling: Kumarian Press, 2009) 211 at 217.

may offer a narrow and limited representation of civil society's priorities and needs.[911] In such cases, the inputs would primarily reflect the perspectives of those who could participate and felt comfortable sharing their views. This limited representation can exclude the voices and experiences of marginalized or underrepresented groups, leading to an incomplete understanding of the related societal issues.

Regarding the second issue, the individuals who benefit the most from participation processes tend to be the same who are already present and influential in political institutions. The majority of participants in such processes belong to groups that already hold influence in society and political institutions, including individuals who are white, middle-class, possess higher education levels, and reside in urban areas.[912] In contrast, members from marginalized and vulnerable groups tend to be systematically underrepresented in participation processes.[913] As a result, flawed participation processes amplify existing power imbalances in society and political institutions; they exacerbate the systemic exclusion of groups already marginalized from political institutions. If participation processes primarily attract individuals who are already influential and privileged, there is a significant risk that the perspectives and interests of marginalized groups will not receive sufficient attention when guiding the lawmaking process.

Efforts should be made to reach affected groups, especially those who tend to participate less, to prevent these issues and lead to well-designed participation processes. Ensuring the inclusion of underrepresented groups involves, on the one hand, actively engaging with them and, on the other, creating conditions that enable their effective participation. Regarding the first facet, the government must take additional means to ensure that civil society is aware of the opportunities for participation. Reaching members of marginalized groups requires going beyond mainstream media platforms, extending to community media, community organizations, homeless shelters, and religious gatherings. These alternative communication channels can effectively reach marginalized groups with limited access to or engagement with mainstream media. Regarding the second aspect, to be inclusive, participation processes must be carefully designed to address the specific needs and circumstances of the affected groups, including marginalized communities.

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[911] Bouchard, *supra* note 817 at 520.
[912] See e.g., Christian Boudreau & Daniel J Caron, "La participation citoyenne en ligne au Québec : Conditions organisationnelles et leviers de transformation" (2016) 57:1 Manifestations contemporaines de la vie familiale 155 at 164–5.
[913] *Handbook on Citizen Engagement: Beyond Consultation*, by Amanda Sheedy (2008).

Participation processes must be thoughtfully developed to ensure that these particular demographics are reached, and their voices are heard.

Diversifying the modes of participation, such as combining in-person and online methods, can assist in reaching a broader range of individuals. Some individuals may face challenges attending in-person processes due to distance, work commitments, lack of physical accessibility, or language barriers.[914] Known for their greater inclusivity than in-person consultations, online modes of participation serve as a valuable means to encourage engagement in public hearings.[915] They can allow to diversify the sources of input in participation processes, going beyond the "usual suspects."[916] However, the inclusive nature of online participation is mitigated by inequalities in access to technologies and digital skills. The well-documented "digital divide" phenomenon contributes to excluding specific groups from participating in online engagement processes.[917] Individuals with low income, older individuals and those with disabilities, as well as individuals in rural areas are particularly at risk.[918] Measures should be implemented to ensure that technological barriers do not hinder individuals from contributing to the process. The technological means required to participate, such as a computer, sufficient broadband, or tools to assist people with disabilities, can also be lent to individuals in exchange for their input.[919] Access to computers in public libraries is one potential avenue for offering such resources. Traditional avenues of participation, such as phone conversations, mail-based communication and fax submissions can

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[914] *Ibid* at 15.

[915] See e.g., Boudreau & Caron, *supra* note 912 at 166; Kathleen McNutt, "Citizen Engagement through On-line Consultation" (2009) 15:1 IRPP Choices 27 at 27.

[916] Joseph Peters & Manon Abud, "E-Consultation: Enabling Democracy between Elections" (2009) 15:1 IRPP Choices 2 at 2.

[917] See e.g., Sophie Lythreatis, Sanjay Kumar Singh & Abdul-Nasser El-Kassar, "The Digital Divide: A Review and Future Research Agenda" (2022) 175 Technological Forecasting and Social Change 121359; Bouchard, *supra* note 817 at 524; Brigitte Bouquet & Marcel Jaeger, "L'e-inclusion, un levier?" (2015) 3:11 Vie Sociale 185 at 185; Houssein Charmarkeh, "Les personnes âgées et la fracture numérique de « second degré » : l'apport de la perspective critique en communication" (2015) 6 Revue française des Sciences de l'information et de la communication; Scott Baum & Arun Mahizhnan, eds, *E-Governance and Social Inclusion* (Pennsylvania: IGI Global, 2014).

[918] See e.g., Vikkram Singh & Joshua Chobotaru, "Digital Divide: Barriers to Accessing Online Government Services in Canada" (2022) 12:3 Administrative Sciences at 112; T Ahmmed et al, "The Digital Divide in Canada and the Role of LEO Satellites in Bridging the Gap" (2022) 60:6 IEEE Communications Magazine 24–30; Bouchard, *supra* note 817 at 524; Charmarkeh, *supra* note 917.

[919] Currently, witnesses appearing virtually must use an approved headset and conduct an onboarding test before their testimony. They are provided with a headset or can be reimbursed for the expenses incurred to acquire an approved headset. Using a computer is highly recommended, rather than a mobile device such as a cellphone. "Guide for Witnesses Appearing Before House of Commons Committees - ProceduralInfo - House of Commons of Canada," online: https://www.ourcommons.ca/procedure/guides/witness-e.html [Guide for Witnesses Appearing Before House of Commons Committees].

also be employed to engage groups that may be less receptive to other forms of consultation, such as older individuals and those facing significant economic challenges. Failing to accommodate participants' needs in participation processes can further perpetuate the systematic exclusion of marginalized groups from lawmaking, potentially resulting in the adoption of legislation that fails to align with civil society's diverse needs and concerns.

In my critical analysis of existing and proposed mechanisms of rights review in Chapters 3 and 4, I examine their adherence to the principle of political equality by posing the following questions: Are members of underrepresented groups, including marginalized and vulnerable communities, given the opportunity to voice their views during lawmaking? Are participation processes designed to facilitate their meaningful engagement in shaping legislation?

In conclusion, the principles of good governance are central to the design and implementation of mechanisms of rights review that foster effective and sustainable rights protection. By adhering to these principles, such mechanisms can ensure transparency, accountability, and inclusivity in the lawmaking process, thereby promoting the protection of human rights for all. Incorporating good governance principles is essential for establishing a robust framework of pre-enactment review that upholds the values enshrined in human rights and facilitates the meaningful engagement of all stakeholders – including the government, Parliament and civil society – in the process of rights protection.

**Conclusion**

In conclusion, the normative framework presented in this chapter highlights the crucial role of formal mechanisms of rights review in achieving effective and sustainable rights protection in federal lawmaking. It emphasizes the importance of robust rights assessment, proactive engagement, and adherence to principles of good governance in achieving such a level of rights protection. Theories of shared responsibilities underscore the obligations of all branches of government to ensure compatibility of legislation with the Charter and the need for proactive assessment of Charter compatibility during lawmaking. This approach empowers lawmakers to develop their own understanding of rights and their application in the context of their lawmaking functions rather than solely relying on the courts and judicial interpretations. Additionally, the

principles of good governance provide valuable guidance in designing mechanisms for rights review that uphold accountability, transparency, and meaningful engagement of stakeholders.

This normative framework enables a critical examination and exploration of institutional reforms to strengthen pre-enactment review. It grounds both my critical assessment of the Charter review currently performed during lawmaking and my proposed institutional reforms. These reforms seek to enhance the capacity of lawmakers to effectively assess the Charter compatibility of proposed legislation before its enactment. They aim to establish a more comprehensive and balanced approach to Charter review in lawmaking. By doing so, the proposed normative framework promotes a human rights regime better equipped to prevent the enactment of legislation that may infringe upon Charter rights.

The scope of this thesis does not extend to determining the criteria that should guide lawmakers in the Charter review process or their specific methods and tools of interpretation. Nevertheless, it is essential to emphasize that this evaluation should not solely rely on legal precedents: it should also consider the wider socio-economic consequences of legislation that could potentially impact Charter rights. Judicial decisions provide the lowest level regarding the scope and meaning of the rights: the political branch retains the freedom to adopt more generous or expansive interpretations than the Supreme Court's.

Such a conception of rights review implies collecting and consulting empirical and experiential data on which to base this assessment. The availability and quality of these data are central to assessing the impacts of legislation on Charter rights that is as close as possible to both the constitutionally guaranteed interests of the population and the lived experience of its various groups. This evidence can impact the nature of the review executed and its potential to foster rights protection.

Multiple means are available to lawmakers to conduct Charter review outside of the realm of jurisprudence. In addition to the specific means discussed for each proposed institution in Chapters 3 and 4, lawmakers can rely on international sources to interpret the scope and meaning of the rights. International organizations and treaties guide mainstreaming human rights values into national law. The General Comments of the international human rights committees, in particular, provide a comprehensive overview of the rights internationally guaranteed, including the obligations of the states and the diverse facets guaranteed by the rights. The concept of

minimum core, especially, could be a valuable interpretative aid for recognizing socio-economic interests under sections 7 and 15 in a way propitious to protecting marginalized groups from severe deprivations.[920] International human rights law can provide a general guide to incorporating good governance principles into institutional processes.[921] Further, lawmakers should rely on existing empirical data and statistics. Statistics Canada, among others, provides essential information on Canada's economy, society and environment. Other governmental agencies can also offer lawmakers information on critical aspects related to human rights, including the National Housing Council and Women and Gender Equality. Through these means, lawmakers could gather relevant and comprehensive data to robustly assess the Charter compatibility of bills.

In the realm of interpretative methods and tools, scholars have offered substantial contributions that could steer lawmakers toward an alternative approach in interpreting and applying Charter rights to the proposed legislation, diverging from the conventional legalistic standpoint. These contributions encompass diverse avenues, such as reinterpreting the limitation clause[922] and embracing evidence-based lawmaking.[923] The incorporation of such methods and tools into rights review and lawmaking processes holds the promise of accommodating broader socio-economic factors, ultimately resulting in the formulation of legislation that more closely resonates with the requirements and aspirations of civil society, with particular attention to marginalized groups.

The following chapters thoroughly examine the institutional framework for pre-enactment review at the executive and parliamentary stages of the federal lawmaking process. This examination is firmly rooted in the insights derived from theories of shared responsibilities and good governance. This analysis aims to cast a critical eye on the existing mechanisms of rights review and put forth specific reforms that can enhance the effectiveness of Charter review in

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[920] Ania Kwadrans, "Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the Canadian Charter of Rights and Freedoms," (2016) 25:1 Journal of Law and Social Policy 78 at 102.

[921] Aaron Fellmeth & Siobhán McInerney-Lankford, "International Human Rights Law and the Concept of Good Governance" (2022) 44:1 Human Rights Quarterly 1 at 4.

[922] Grégoire Webber, "What Oakes Could Have Said (or How Else to Read a Limitations Clause)" (2022) Queen's University Legal Research Paper No 2022-002, online: <https://ssrn.com/abstract=4214646>; Grégoire C N Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009).

[923] Evidence-based legislation is relevant in many areas, including public safety, public health, immigration and reproductive rights: Sean J Kealy & Alex Forney, "The Reliability of Evidence in Evidence-Based Legislation" (2018) 20:1 Eur JL Reform 40 at 49. See also Ann Seidman & Robert B Seidman, "Instrumentalism 2.0: Legislative Drafting for Democratic Social Change" (2011) 5 Legisprudence 95.

federal lawmaking.

# Chapter 3 – Executive Rights Review: Broadening the Scope of Charter Review during the Drafting of Bills

In this Chapter, I evaluate the institutional framework for executive rights review against the normative framework outlined in Chapter 2 and propose a targeted reform to encourage robust Charter review within executive lawmaking. Specifically, I suggest establishing a federal human rights institution mandated with advising the government on the broader impact of legislation on civil society to complement the legal advice offered by the Department of Justice, resulting in a thorough assessment of Charter-related issues in bills during their drafting.

The Charter significantly impacted federal policymaking and how proposed policies are conceived.[924] The government plays a critical role in the day-to-day implementation of constitutional law and constitutional rights.[925] It has four main functions: initiating and developing policy, issuing regulation and executive orders, administrating and enforcing the laws, as well as foreign affairs and national defence. All of these functions were affected by the entrenchment of the Charter.[926]

The present thesis contemplates the first function, more precisely, the government's responsibility to initiate and develop legislation. Its obligation to uphold Charter rights impacts all aspects of the lawmaking process, from the development of the initial proposal to the drafting of its detailed provisions, and continues until the bill is introduced for adoption.[927]

At the executive stage of lawmaking, rights review seeks to ensure that the bills developed by the government are compatible with guaranteed rights or, at the very least, that they constitute a reasonable limitation to these rights.[928] It involves governmental entities striving to achieve legislative objectives while safeguarding the rights guaranteed to the population.[929] In most Westminster states, executive rights review is primarily conducted through a process known as rights vetting, which involves government lawyers evaluating the rights compatibility of bills. In

[924] Hiebert, *supra* note 57 at 735.
[925] Appleby & Olijnyk, *supra* note 52 at 1136.
[926] Miriam Smith, "The Impact of the Charter: Untangling the Effects of Institutional Change" (2007) 36 International Journal of Canadian Studies 17 at 32.
[927] Slattery, *supra* note 35 at 713.
[928] Kelly, *supra* note 58 at 96.
[929] Hiebert, *supra* note 12 at 88.

some jurisdictions, a report that outlines the government's position on specific rights considerations arising from bills is submitted to Parliament[930]; these documents are known as "ministerial statements of compatibility."

In Canada, to adequately address Charter concerns while drafting bills, the government adjusted its internal practices and redefined the responsibilities of executive lawmaking institutions.[931] More precisely, two formal mechanisms of rights review were created to allow the government to assess the compatibility of bills to the Charter: a process of rights vetting performed by government lawyers and the Minister of Justice's statutory reporting duty.[932] An intersectional Gender-Based Analysis Plus ("GBA+") was also implemented among government departments.[933]

The executive branch exerts significant influence over the lawmaking process in Canada, both at the federal and provincial levels.[934] The "inherent power imbalance" between the government and Parliament restricts the extent to which robust scrutiny and amendments are achievable once a bill is introduced for adoption.[935] With limited opportunities for opposition scrutiny and a high level of party discipline within the governing party, it is imperative to have a robust evaluation of the potential impacts of legislation on Charter rights before bills' introduction for adoption.

In 2016, the recourse of Edgar Schmidt forced the federal government to disclose its internal practices for dealing with Charter concerns in bills.[936] Beforehand, little was known about the functioning of the two main mechanisms of executive rights review. The evidence and testimonies presented in the *Schmidt* case provide a deeper understanding of the nature and functioning of these mechanisms, offering valuable insights into the government's practices in Charter review.[937] This case thereby sheds light on how these mechanisms effectively protect and uphold rights.

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[930] Ministerial statements of compatibility are notably found in Canada, the UK, Australia and New Zealand: Hiebert, *supra* note 25 at 127.
[931] Smith, *supra* note 926 at 19.
[932] *Department of Justice Act*, *supra* note 27, s 4.1(1).
[933] As explained in section 3.1, its potential to further support the government's capacity to give effect to the Charter remains contested.
[934] Richard Albert & Michael Pal, "The Democratic Resilience of the Canadian Constitution" in Mark A Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracies in Crisis?* (2018) at 7.
[935] Kelly, *supra* note 559 at 104.
[936] *Schmidt*, *supra* note 26.
[937] See e.g., *Ibid* at 228.

In particular, the *Schmidt* decision highlighted two critical characteristics of the institutional framework for executive rights review: the predominant role of the Department of Justice in Charter review and the correlative prevalence of jurisprudence to determine the scope and meaning of Charter rights. The Department of Justice is indeed in charge of both the rights vetting and ministerial statements of compatibility: while its governmental lawyers are responsible for the first, the Minister of Justice handles the second. The adoption of the Charter hence elevated the Department of Justice as a "central support agency of the government."[938] Given the mandate of this federal department, which is to provide legal advice to the Cabinet, Charter review focuses on determining if bills adhere to judicial interpretations of the Charter as expressed in jurisprudence.

The court-centric nature of executive rights review has negative implications for good governance and rights protection, particularly for marginalized groups. First, as explained in Chapter 1, judicial decisions embody a limited, incomplete portrait of the meaning and scope of Charter rights. Courts can only review the portion of case law that is contested, thereby giving rise to concerns of access to justice. Further, courts are traditionally deferent toward legislators toward claims seeking the recognition of socio-economic interests under the Charter. Members from marginalized groups are especially at risk of being penalized by a court-centric approach to Charter review: they are more likely to be the victims of rights violations while seeing their interests poorly guaranteed in courts.[939]

Further, it diminishes the distinct contribution of government in Charter review. By all means, assessing the conformity of bills to judicial decisions is an essential part of an effective process of Charter review, as lawmaking occurs in the shadow of the strong remedial powers of courts. But due to their focus on adherence to judicial interpretations of the rights, the two existing mechanisms of rights review are inadequate on their own to reach the underlying purpose of executive rights review: they do not prompt the government to prioritize rights considerations in their evaluation of the merits of legislative goals and the optimal strategies for their realization during the drafting of bills.[940] As a result, this court-centric approach to Charter review poses

[938] Kelly, *supra* note 58 at 478.
[939] Scheim et al, *supra* note 76; Institute for Research on Public Policy, *supra* note 20 at 10; Phillips, *supra* note 444.
[940] Hiebert, *supra* note 12 at 88.

particular risks for marginalized groups, who find their interests inadequately protected within the judicial system.

While extensive scholarship has already examined the flaws of the current executive rights review[941], this chapter's unique contribution lies in exploring these criticisms from the perspective of good governance and through the lens of theories of shared responsibilities. To address the inadequacies arising from the current executive rights review, I contend that strengthening the existing institutional framework with an additional mechanism of rights review is imperative. This mechanism should be designed to evaluate the broader societal implications of bills on rights that fall beyond the scope of the assessments conducted by the Department of Justice. More specifically, an independent institution should assist the government in identifying potential Charter infringements beyond jurisprudential considerations and suggest less intrusive alternatives to achieve legislative goals, thus reducing violations of Charter rights.

For that purpose, I hold the view that a human rights institution would be best positioned to assess the Charter impacts of proposed legislation in a way that fosters effective and sustainable rights protection during executive lawmaking. As institutions exclusively mandated with protecting and promoting human rights, national human rights institutions ("NHRIs") are uniquely equipped to support good governance in lawmaking.[942] Their contribution in that regard is two-fold. First, they can provide governments with a deeper understanding of the lived realities of civil society and its differently situated groups. Their assessment could highlight adverse impacts of legislation absent from the Department of Justice's Charter review, particularly as per their socio-economic impacts. NHRIs can also enhance transparency and accountability in lawmaking by making their advice publicly available, in part or full. In doing so, they can grant Parliament and the public access to a portion of the information held by the government regarding the impacts of proposed legislation on the Charter.[943]

Human rights institutions exist at Canada's federal and provincial levels, mainly in the form of human rights commissions, tribunals and ombudspersons. At the federal level, the Canadian Human Rights Commission ("CHRC") is the primary human rights institution responsible for

[941] See e.g., Macfarlane, Hiebert & Drake, *supra* note 21; Hiebert, *supra* note 23; Kelly & Hennigar, *supra* note 58.
[942] C Raj Kumar, "National Human Rights Institutions and Economic, Social, and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights" (2006) 28 Human Rights Quarterly 755 at 768.
[943] *Ibid*.

protecting and promoting human rights, more specifically against the discrimination proscribed under the *Canadian Human Rights Act.*[944] However, this institution does not have explicit advisory functions in lawmaking: it mainly deals with complaints under the *Canadian Human Rights Act*, conducts research and assists federal organizations in complying with federal legislation.

A meaningful commitment to rights protection requires a human rights institution with a broader mandate and a more active role in executive lawmaking. Therefore, I advocate for creating an advisory human rights institution responsible for informing the government on the Charter concerns arising from proposed legislation, including their socio-economic concerns. This institution, distinct from the CHRC, would complement the federal human rights regime in a way propitious to preventing the enactment of legislation infringing the Charter. If there have been discussions on the establishment of new NHRIs or possible reforms of the CHRC,[945] this Chapter presents the first comprehensive examination of the essential characteristics such an institution should possess to contribute to robust executive rights review. This examination focuses on how these characteristics can promote good governance and foster rights protection.

This Chapter proceeds in two parts. In section 3.1, I critically examine the current framework for executive rights review, highlighting the distinct concerns associated with each mechanism of rights review and their implications for rights protection. Rights vetting and Charter statement, both performed by the Department of Justice, raise similar issues as per their potential to contribute to effective and sustainable rights protection: they focus on the legal risks incurred by the government instead of attempting to meaningfully determine how legislation can affect the rights of the population; they are mostly performed behind closed doors; and they provide for limited if not inexistent civil engagement. Furthermore, despite the reinvigoration of GBA+ in recent years, this practice is flawed to complement the legalistic Charter review conducted at the Department of Justice.

In the second section, I recommend strengthening the current framework for executive rights review with a new federal human rights institution. This institution would be mandated with advising the government on the possible Charter considerations that might arise during the development and drafting of bills. Contrary to the Charter review performed at the Department of

[944] *Canadian Human Rights Act*, c H-6 1985.
[945] See e.g., *Promises to Keep: Implementing Canada's Human Rights Obligations*, by Standing Senate Committee on Human Rights (Senate of Canada, 2001).

Justice, this institution would ground its advice on the non-jurisprudential considerations of bills, including their socio-economic impacts that might be guaranteed under the Charter. After discussing how NHRIs can contribute to good governance in executive lawmaking, I outline the minimal functional and structural requirements that can create the ideal conditions for such an advisory institution to fully realize its potential as an entity for executive rights review.

## 3.1 – Charter Review during Bill Drafting: An Institutional Framework Propitious to Neglecting Charter Rights

In this section, I argue that the current framework for executive rights review may not fully support the integration of Charter considerations into executive lawmaking, raising concerns about the extent to which rights are effectively protected during bill drafting.

The executive stage of lawmaking offers limited opportunities for the government to engage meaningfully with the Charter. Both formal mechanisms of executive rights review – rights vetting and Charter statements – are performed by actors of the Department of Justice. This centralization of Charter review within the Department of Justice creates conditions conducive to neglecting Charter concerns. Both assessments focus primarily on legal risks and are conducted behind closed doors with limited civil engagement. A process of GBA+ was also implemented in many governmental departments for evaluating the various intersecting identity factors that might impact the effectiveness of bills.[946] In its current format, however, this process is inadequate to supplement the legalistic assessment performed at the Department of Justice. Consequently, Charter concerns may not receive the attention and scrutiny they deserve during the drafting of bills, potentially compromising effective and sustainable rights protection.

### 3.1.1 – Charter Review at the Department of Justice

The Department of Justice assumes a prominent role in conducting Charter review during executive lawmaking. This department's mandate as the government's legal advisor greatly impacts the nature and extent of the rights review undertaken during the drafting of bills. In

[946] Women and Gender Equality Canada, "What is Gender-based Analysis Plus", (31 March 2021), online: <https://women-gender-equality.canada.ca/en/gender-based-analysis-plus/what-gender-based-analysis-plus.html>.

particular, the centralization of Charter review within the Department of Justice establishes an environment that fosters the disregard of Charter concerns, primarily due to its prioritization of legal risks, inherently confidential approach, and limited civil engagement. The combination of these factors contributes to a limited consideration of Charter rights during bill drafting, resulting in insufficient executive rights review to foster effective and sustainable rights protection.

### A) The Rise of the Department of Justice as an Institution of Charter Review

When the Charter was adopted in 1982, the Department of Justice was not participating in policy development; its role was confined to the review of existing legislation.[947] This department was principally mandated with reviewing existing statutes to identify conflicts with the newly enacted constitutional instrument.[948] The Human Rights Law Section ("HRLS") was created for that purpose. Its initial role was to audit existing laws and propose amendments to align them with the Charter. The HRLS was also responsible for addressing judicial rulings that invalidated laws on the grounds of their incompatibility with Charter rights.[949] At this point, the role of the Department of Justice could be characterized as "reactive."[950]

During that period, the Department of Justice initiated an educational campaign within the administrative state to emphasize that the Charter was not merely a policy framework but a legal document with significant constitutional implications, distinct from the *Canadian Bill of Rights*.[951] Initially, there was resistance within departments to take the Charter seriously in policy exercises. They viewed this instrument as a pretext from the Department of Justice to enlarge its jurisdiction under cover of reviewing departmental proposals for potential rights infringements.[952] Seminars and workshops were held to sensitize policymakers to the importance of the Charter in all policy exercises.[953]

The Department of Justice shifted from a "reactive" to a "proactive" approach toward the

[947] Kelly, *supra* note 58 at 493.
[948] *Ibid* at 493.
[949] Hiebert, *supra* note 373 at 70; Kelly, *supra* note 58 at 494.
[950] Kelly, *supra* note 58 at 491.
[951] *Ibid* at 494.
[952] *Ibid* at 493.
[953] *Ibid*.

Charter in the following years.[954] According to James B. Kelly and Janet Hiebert, this shift in perspective can primarily be attributed to a series of Supreme Court decisions that struck down significant legislation, resulting in an enhanced acknowledgment of the legal authority of the Charter and its implications for the validity of legislation.[955] These significant losses underscored the inherent limitations of the Department of Justice's reactive approach.[956] Taken aback by the robust remedy approach adopted by courts and its impact on governance, the government recognized the need to anticipate judicial trends and avert avoidable Charter risks.[957] These judicial invalidations served as a powerful demonstration of the far-reaching implications of the Charter for governance, leading departments to become more receptive, or at least resigned, to the new role of the Department of Justice in addressing Charter concerns.[958] This new role primarily materialized through the implementation of two mechanisms of rights review, introduced to executive lawmaking three years after the adoption of the Charter. As further explained below, these mechanisms provide the Department of Justice with a significant role in policy development, including lawmaking.

While the strong remedial approach adopted by courts partially contributed to the decision to assign a Charter review mandate to the Department of Justice, establishing a formal mechanism for this purpose was already being considered during the Charter's adoption. However, no concrete mechanism was ultimately implemented at that time. Indeed, in *Schmidt*, Justice Noel noted that at the Charter's adoption, "[t]he idea that the Department of Justice would assume such a responsibility was only in its embryonic stage, but the persons involved in the discussions at the time envisioned that the responsibility of the Department of Justice would gradually grow."[959] He adds that the objective of establishing the examination process "clearly intended" to provide this department with "a major participatory role in that examination process."[960]

The 1991 memorandum of Paul Tellier, clerk of the Privy Council, further encouraged the evolution of the Department of Justice to an executive-support agency. At the insistence of the

[954] *Ibid* at 495.
[955] *Ibid* at 495; Hiebert, *supra* note 373 at 70. The decisions include *Schachter v. Canada*, *supra* note 309; *Oakes*, *supra* note 309; *Singh v. Minister of Employment and Immigration*, *supra* note 309. : Hiebert, *supra* note 12 at 92.
[956] Kelly, *supra* note 58 at 495.
[957] *Ibid*.
[958] Hiebert, *supra* note 373 at 70.
[959] *Schmidt*, *supra* note 26 at para 163.
[960] *Ibid* at para 167.

deputy Minister of Justice John Tait, he ordered all deputies to conduct a Charter risk analysis as early as possible in the policy development, even before the Cabinet considers policy proposals.[961] The Tellier Memorandum outlined that this evaluation encompasses factors such as the potential for a legal challenge to succeed, the consequences of an unfavourable ruling and potential expenses related to legislative action.[962] Kelly considers that the Tellier Memorandum significantly advanced the evolution of the Department of Justice's proactive role by legitimizing its involvement in the activities of the departments; it would now evaluate the substantive implications of policy proposals rather than merely ensuring that proposals were consistent with the division of powers.[963]

## B) Two Mechanisms of Executive Rights Review: A Brief Overview

This section introduces the two formal mechanisms composing the institutional framework for executive rights review – rights vetting and Charter statements – laying the groundwork for my critical assessment of their potential to foster effective and sustainable rights protection.

### *i. Rights Vetting*

The first mechanism of rights review during executive lawmaking is rights vetting. This process involves the assessment of proposed legislation by government lawyers at the Department of Justice to ensure its adherence to jurisprudence. This mechanism was implemented in 1985 as an internal practice of the Department of Justice to prevent avoidable judicial invalidations.[964]

The rights vetting of bills begins at the earliest stage of the development of legislation, as required by the 1991 Tellier Memorandum.[965] Once a government member proposes a policy, the Department of Justice assists in transforming it into a legislative proposal. This document details the parameters that must be followed to convert the proposal into a drafted bill.[966] At this phase,

[961] MacIvor, *supra* note 56 at 167; James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*, UBC Press Ed (Vancouver, 2005) at 234; Dawson, *supra* note 724 at 597.
[962] Kelly, *supra* note 961 at 235.
[963] Kelly, *supra* note 58 at 498.
[964] Hiebert, *supra* note 382 at 9.
[965] MacIvor, *supra* note 56 at 167; Kelly, *supra* note 961 at 234; Dawson, *supra* note 724 at 597.
[966] *Schmidt*, *supra* note 26 at para 17.

the main question addressed in relation to Charter review is "whether any legislation should be introduced at all, and if so, what shape it should take."[967]

Two institutions of the Department of Justice are involved in reviewing the Charter compatibility of bills at this stage of the rights vetting: the Legal Services units ("LSUs") and the HRLS.[968] Acting as a bridge between ministers and the Department of Justice, the LSUs sensitize and condition both institutions to the reciprocal policy objectives of the other.[969] They ensure that "a policy exercise reflects both the concerns of the department and that it is consistent with the policy framework imposed by the Charter."[970] The HRLS, for its part, supports the LSUs by providing advanced Charter advice in the presence of possible rights concerns. It also prepares the Charter Checklist used by the LSUs during their legal risk analysis, now available to the public as Charterpedia.[971] This resource provided "legal information about the Charter and contains information about the purpose of each section of the Charter, the analysis or test developed through case law in respect of the section, and any particular considerations related to it."[972]

During the rights vetting process, the assessment conducted by government lawyers focuses on evaluating the potential response of courts in the event of a challenge through judicial review. This evaluation includes considering possible justifications under section 1 of the Charter, which allows for reasonable limitations on Charter rights. Lawyers at the LSUs apply a Legal Risk Management based on the Checklist prepared by the HRLS. As explained in *Schmidt,* this analysis reflects the role of the Department as a "law firm."[973] Indeed, grounded in jurisprudence, the assessment is focused on identifying the "risk of an adverse outcome following a hypothetical court challenge" and the "impact of that negative outcome on government."[974] This analysis emphasizes administrative, reputational, financial and legal impacts. [975] The aim is to anticipate

[967] Slattery, *supra* note 35 at 730.
[968] Macfarlane, Hiebert & Drake, *supra* note 21 at 48.
[969] Kelly, *supra* note 58 at 496.
[970] *Ibid*.
[971] Department of Justice, "Charterpedia - Introduction", (September 2019), online: *Government of Canada*, <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/intro.html>.
[972] *Ibid*.
[973] *Schmidt*, *supra* note 26 at para 19.
[974] *Ibid* at para 20.
[975] *Ibid*.

and address any constitutional concerns that may arise during judicial review.[976] Identified risks are communicated to the sponsoring minister, with options to alleviate them.[977]

The findings of government lawyers who performed rights vetting are included in the Memorandum to Cabinet, submitted to Cabinet for approval.[978] The Memorandum aims to facilitate the policy discussion on the legislative proposal and provide a framework for drafting the bill.[979] This document presents several critical aspects of the proposed policy: the arguments in favour and against it, the legal issues it aims at solving, the legal issues it creates and how they are addressed, along with the monetary requirements that should be implemented.[980] With regard to Charter review, the Memorandum presents risks of a successful Charter challenge, the impact of an adverse decision, and an estimation of the possible litigation costs.[981] The Minister of Justice must sign off on the Memorandum and confirm that the Charter risks have been assessed.[982]

Rights vetting continues after the legislative proposal is approved by the Cabinet and transformed into a workable draft bill by various actors of the Department of Justice. At this point, an extensive Charter review of the proposed legislation has already been executed by the LSUs and HRLS. As part of the Legal Services Branch, the Legislation Section of the Department of Justice is responsible for drafting bills. Their legislative drafters examine bills throughout the drafting process to identify and resolve possible Charter conflicts.[983] Legal Services Branch counsels collaborate with the LSUs and HRLS to adapt the drafting to the evolving discussions and legal advice provided on the bill's compatibility with Charter rights.[984] An internal legislative drafting training program is in place to allow legal counsels to gain a more comprehensive knowledge of the legal requirement of the Charter.[985] They can also turn to numerous tools and guides, in addition to consulting with the public law experts of the Public Law Sector of the Department of Justice. Together, these institutions attempt to reconcile the sponsoring minister's

[976] Macfarlane, Hiebert & Drake, *supra* note 21 at 48.
[977] *Schmidt*, *supra* note 26 at para 20.
[978] Government of Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations* (2001) at 74.
[979] *Ibid* at 12.
[980] *Schmidt*, *supra* note 26 at para 235.
[981] Government of Canada, Privy Council Office, *supra* note 978 at 95.
[982] Kelly, *supra* note 58 at 497.
[983] Macfarlane, Hiebert & Drake, *supra* note 21 at 48; Kelly, *supra* note 58 at 497.
[984] *Schmidt*, *supra* note 26 at para 232.
[985] *Legislative Services Branch Evaluation - Final Report*, by Evaluation Division Office of Strategic Planning and Performance Management (Minister of Justice, 2013) at 40.

policy objectives with the Charter and assess the risk of judicial invalidation throughout the bills' drafting.[986]

Once a draft bill is in its final form, a senior staff of the Legal Services Branch must certify that it has undergone the necessary examination. A drafter of the Legal Services Branch provides a memo containing an analysis of its compatibility with the Charter to the Chief Legislative Counsel.[987] Based on this memo, the Chief Legislative Counsel certifies that the bill was adequately reviewed and verifies that it meets the Cabinet's expectations as specified following the Memorandum to Cabinet.[988] The bill is then forwarded to the Leader of the House of Commons and introduced to Parliament.

*ii. Charter Statements*

The second mechanism of executive rights review is the reporting duty of the Minister of Justice, which materializes through the submission of a Charter statement with every bill introduced by the government for adoption. Charter statements are a form of ministerial statements of compatibility. Though their format varies, ministerial statements of compatibility are found in many Westminster systems, including in the UK, Australia and New Zealand.[989]

In Canada, the introduction of a bill to Parliament triggers the obligation of the Minister of Justice to examine its compatibility with the Charter and provide a report to Parliament. Sections 4.1 and 4.2 of the *Department of Justice Act* outline this requirement, which mandates the Minister of Justice to examine the bill to determine if any of its provisions are inconsistent with the purposes and provisions of the Charter. The examination conducted by the Minister of Justice is similar to the process of rights vetting carried out by government lawyers, but it differs in that it concludes with the submission of a report known as a "Charter statement." This statement presents the Minister's findings and highlights potential inconsistencies between the bill and the Charter. These reports are tabled at Parliament and published on the website of the Department of Justice.[990] The

[986] Kelly, *supra* note 58 at 501–502.
[987] *Schmidt*, *supra* note 26 at para 28.
[988] *Ibid* at 29.
[989] Hiebert, *supra* note 25 at 127.
[990] Department of Justice, "Charter Statements - Canada's System of Justice," (10 February 2017), online: *Government of Canada*, <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html>. In the debates on the adoption of 2019 amendments, then-Liberal deputy Wilson-Raybould specified that these amendments were motivated "by the Minister of Justice's commitment to openness and transparency."

*Department of Justice Act* thus assigns two interconnected responsibilities to the Minister of Justice: examining the Charter compatibility of bills and reporting on the rights considerations identified through a Charter statement.

Since 2019, the inclusion of Charter statements has become mandatory for every bill introduced by the government for adoption, whereas previously they were discretionary. Before the 2019 amendments to the *Department of Justice Act*, ministers of Justice could decide when their obligation to report to Parliament was triggered. As previously explained, under the previous regime, this mechanism of rights review was virtually useless. The standard used in that regard was extremely low, to the point that no report was introduced before 2016.[991] Unless a legislative provision was found to be manifestly unconstitutional – meaning that no reasonable argument could be made in favour of its Charter compatibility –, a bill was introduced for adoption without a report. The 2019 amendments formalized the Minister of Justice's reporting duty by mandating Charter statements for every bill.

This change to the reporting duty significantly improved the potential of this mechanism of rights review to foster rights protection. Indeed, minister statements of compatibility are associated with numerous benefits for rights protection. These statements, Hiebert maintains, support the normative ideal of pre-enactment review, that is:

> (1) to facilitate a more critical focus on rights within the bureaucracy and executive when evaluating legislative objectives and identifying compliant ways to achieve these; (2) to influence how government conceives and pursues its legislative agenda; and (3) to encourage parliament to satisfy itself that legislation is justified from a rights perspective.[992]

Regarding the two first elements, Charter statements raise executive lawmakers' awareness about the implications of legislative initiatives on guaranteed rights.[993] Preparing Charter statements encourages governments to consider Charter considerations in bills and potentially reassess their chosen means to achieve legislative objectives if they conflict with Charter rights.

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[991] The first reports on Charter compatibility were submitted to Parliament by the Liberal government in 2016, which then introduced the amendments to the *Department of Justice* to transform the submission of a Charter statement into a mandatory obligation.
[992] Hiebert, *supra* note 25 at 127. See also Hiebert & Kelly, *supra* note 57 at 4.
[993] Hiebert, *supra* note 25 at 127.

Regarding the third element, later addressed in Chapter 4, Charter statements play a crucial role in supporting parliamentary rights review by providing a greater quantity and, ideally, improved quality of information for parliamentary debates on the Charter compatibility of bills. Section 4.2(2) of the *Department of Justice Act* explicitly states the purpose of Charter statements as to "inform members of the Senate and the House of Commons as well as the public of those potential effects." The federal government refers to them as "transparency measures," revealing the Charter considerations identified by the Minister of Justice. This document is essential in states where the Parliament has limited means to assess the Charter compatibility of proposed legislation, as is currently the case in Canada.[994]

As further explained in the following section, several elements impede the potential of Charter statements to act as instruments of good governance, shaping the nature of the information shared.

## C) A Flawed Institutional Framework to Foster Rights Protection

In this section, I examine the flaws inherent to the two mechanisms comprising the framework for executive rights review and explain how they affect these mechanisms' ability to foster rights protection, individually and as an ensemble. As Hiebert aptly points out, Schmidt's legal action emphasized the vulnerability of executive rights review to uncertainty regarding the thoroughness of the assessment conducted and the lack of political accountability.[995] The predominant role of the Department of Justice in conducting Charter review during executive lawmaking stands as a pivotal factor contributing to these concerns for effective and sustainable rights protection.

### *i. The Department of Justice and Rights Review: Three Limitations*

The centralization of Charter review at the Department of Justice is not without benefits. Kelly suggests that it delivers consistent constitutional advice and allows for early assessment of legislative proposals.[996] Early engagement with rights considerations encourages the fulfillment of

[994] Hiebert, *supra* note 50 at 253.
[995] Hiebert, *supra* note 50 at 11.
[996] Kelly, *supra* note 58 at 99.

legislative objectives that are likely to survive a constitutional challenge, minimizing disruption in obtaining policy goals.[997][998] This multi-layered approach aims to promote accountability and ensure that Charter considerations are taken into account during the lawmaking process. However, the predominant role of the Department of Justice also gives rise to several issues due to its focus on legal risks, its confidential nature and its lack of civil engagement.

**a. A legalistic approach to rights review**

The centrality of judicial rulings in constitutional interpretation emphasizes the integral role of lawyers in executive rights review.[999] The main objective of this process is to prevent potential judicial invalidations rather than thoroughly assessing the impacts of bills on the Charter rights of the population. Mandating the Department of Justice to review the Charter compatibility of bills, in line with the court-centric approach, has contributed to the development of a legalistic approach to Charter review in executive lawmaking.

The mandate of the Minister of Justice is to provide legal advice to the Cabinet, including on how to achieve policy objectives while respecting the Constitution.[1000] To fulfill this role, the Minister of Justice delegates to the Department of Justice. Characterized as "Canada's largest law firm,"[1001] the Department of Justice oversees all matters relating to the administration of justice. It provides legal advice, legislative services and litigation to other federal departments and agencies. The Department of Justice thus plays a crucial role in supporting the Minister of Justice in providing legal advice to the Cabinet.[1002]

Due to the Department of Justice's role as the Cabinet's legal advisor, "Charter compatibility" during executive rights review is equated with "compatibility with jurisprudence". A bill compatible with the Charter is one judged consistent with the Charter as interpreted by

[997] Wayne MacKay, "The Legislature, the Executive and the Courts: The Delicate Balance of Power or Who is Running this Country Anyway?" (2001) 24 Dalhousie LJ 37 at 59.
[998] Hunt, *supra* note 191 at 11; Kelly, *supra* note 58 at 99.
[999] Hunt, *supra* note 191 at 11.
[1000] *Schmidt*, *supra* note 26 at para 16.
[1001] note 379 at 5.
[1002] Department of Justice Government of Canada, "About Us", (2 August 2001), online: <https://www.justice.gc.ca/eng/abt-apd/index.html>.

courts. As a result, rights vetting and Charter statements constitute highly legalistic assessments of the Charter compatibility of bills.

Rights vetting, as previously explained, is performed by governmental lawyers dedicated to determining the possible legal risks of proposed legislation for the government. From the earliest stage of the drafting, the LSUs proceed to risk analysis of bills and provide legal advice on resolving identified Charter issues.[1003] With the collaboration of the HRLS, they ascertain the risk and impact of a possible negative outcome for the government following a constitutional challenge.[1004] Marfarlane, Hiebert and Drake conducted interviews with government lawyers responsible for rights vetting, who disclosed that this process involves case-driven, risk-based assessments of the potential for successful litigation regarding legislative initiatives. They also consider the policy and fiscal implications of potential judicial invalidation and propose modifications to minimize the risk of such invalidation.[1005] This court-centric rights vetting thus emphasizes conformity with judicial decisions and the potential response of the judiciary to proposed legislation.[1006]

Given the mandate of the Minister of Justice, Charter statements are also framed from a legalistic perspective. Charter considerations are primarily discussed in terms of compliance with judicial interpretations of the rights. Though these statements are not formulated in a "highly legalistic" tone, they still constitute legal information largely based on jurisprudence. The preamble of Charter statements contains an Explanatory note stating that the statement "is intended to provide legal information to the public and Parliament on a bill's potential effects on rights and freedoms." Until now, Charter statements have not delved into diverse aspects related to rights beyond mere conformity with legal precedents. For example, they do not present alternative legislative options and their implications on guaranteed rights, why the chosen option is preferable over less restrictive ones, what justifies the Minister of Justice's judgment on Charter compatibility of bills, or how they can be upheld under section 1.[1007] Macfarlane, Hiebert and Drake support that Charter statements cannot engage in a comprehensive proportionality analysis from a policy

[1003] *Schmidt*, *supra* note 26 at para 232. Kelly, *supra* note 58.
[1004] *Schmidt*, *supra* note 26 at paras 20–22.
[1005] Macfarlane, Hiebert & Drake, *supra* note 21 at 45.
[1006] Matthew A Hennigar, "Expanding the 'Dialogue' Debate: Canadian Federal Government Responses to Lower Court Charter Decisions" (2004) 37:1 Canadian Journal of Political Science 3 at 16–17.
[1007] Macfarlane, Hiebert & Drake, *supra* note 21 at 163.

analytical perspective if they are carried out in a legalistic manner or are designed to try to predict judicial reactions.[1008] As a result, Charter statements provide a limited assessment of the Charter compatibility of bills, one that is limited to compatibility with jurisprudence.

The Charter statement for Bill C-28, *An Act to amend the Criminal Code (self-induced extreme intoxication)* is a relevant example of this phenomenon. The Charter Statement states the bill's purpose: "Bill C-28 would amend s. 33.1 of the *Criminal Code* to provide that persons who engage in violent acts while in a state of self-induced extreme intoxication can be found criminally responsible for such acts if they consumed intoxicants in a criminally negligent manner".[1009] This amendment followed the decision *R. v. Brown.*[1010] In this decision, a unanimous Supreme Court concluded that section 33.1 infringed sections 7 and 11(d) of the Charter and were not justified under section 1. To close the gap left by *Brown*, the government introduced the proposed amendments reinstating the provision on extreme intoxication defence in a way respectful of the Supreme Court's prescriptions. More specifically, the amendments state that this defence could not apply to an individual who harms another person while in a state of extreme intoxication if they "depart markedly from the standard of care of a reasonable person in voluntarily ingesting intoxicants and there is a foreseeable risk of violent loss of control."[1011]

The Charter Statement on Bill C-28 is almost exclusively devoted to explaining how the amendments respond to the Supreme Court's prescriptions in *Brown*. This situation is hardly surprising: the amendments to section 33.1 were triggered by the Supreme Court's decision. However, this context does not prevent the government from evaluating the compatibility of the proposed amendments with the Charter beyond just considering legal precedents. This is particularly important considering their potential effects on the rights of victims of violent crimes. Indeed, largely absent from the Charter Statement is a discussion on the impacts of these amendments on groups at higher risk of violence, including women, children, and individuals living in poverty. Their vulnerability to violence is largely documented.[1012] In fact, discussing Bill

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[1008] *Ibid* at 168. The authors propose reforming Charter statements to include "a more comprehensive proportionality analysis from a policy analytical perspective to justify potential limits on rights."
[1009] Department of Justice, "Charter Statement - Bill C-28: An Act to amend the Criminal Code (self-induced extreme intoxication)", (22 June 2020), online: *Government of Canada*, <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c28_1.html>.
[1010] *Brown*, *supra* note 280. See also *R. v. Sullivan*, *supra* note 340.
[1011] Government of Canada, *supra* note 384.
[1012] See e.g., Kerri A Froc & Elizabeth Sheehy, "Last among Equals: Women's Equality, R v Brown, and the Extreme Intoxication Defence Part III: Comment" (2022) 73 UNBLJ 268–300 at 275; Heidinger, *supra* note 387; Sit &

C-28, Minister for Women and Gender Equality Marci Ien acknowledged that "Indigenous women and girls, racialized people and LGBTQ2+ people experience gender-based violence more than any other segments in our society". [1013] She adds that the self-induced extreme intoxication defence could threaten their equality and safety.[1014] Yet, the only mention of these vulnerable groups in the Charter Statement is that "[t]he objective of the amendments is to seek to protect the public, particularly women and children, from extremely intoxicated violence." [1015] Therefore, despite Bill C-28 raising essential concerns for the rights to security, integrity and life of these groups[1016], the only concerns discussed in the Charter Statement are framed in legalistic terms and in response to *Brown*.

Another compelling illustration emerges from the Charter statement on Bill C-3, *An Act respecting cost of living relief measures related to dental care and rental housing*.[1017] This legislative proposal aims to provide financial assistance to eligible parents whose children lack access to private dental insurance, along with one-time rental housing benefit for qualifying individuals. This bill directly pertains to socio-economic interests as the benefits granted intersects with both housing and healthcare, domains associated with socio-economic rights. The inclusion of these benefits under the Charter has not been specifically addressed in any judicial ruling. This absence of jurisprudential guidance adds an element of scholarly interest to the approach that the Minister of Justice adopts. In the Charter statement, the Minister of Justice presents a limited array of Charter considerations, primarily aligned with a conventional perspective of the Charter's provisions. The statement addresses the matter of limited eligibility based on age under section 15, outlines how offenses established by the bill adhere to the principles of fundamental justice specified in section 7, and ensures that administrative sections comply with section 11 regarding

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Stermac, *supra* note 508; *Call it Feminicide: Understanding sex/gender-related killings of women and girls in Canada, 2018-2022*, by Canadian Femicide Observatory for Justice and Accountability (Observatoire canadian du féminicide pour la justice et la responsabilisation, 2023); note 387.

[1013] Peter Zimonjic, "Liberals introduce bill to eliminate self-induced extreme intoxication as a legal defence | CBC News", (17 June 2022), online: *CBC News* <https://www.cbc.ca/news/politics/self-induced-extreme-intoxication-defence-legislation-1.6492679>.

[1014] *Ibid*.

[1015] Government of Canada, *supra* note 384 at 28.

[1016] Froc & Sheehy, *supra* note 1012 at 281.

[1017] Department of Justice, "Charter Statement - Bill C-31; An Act Respecting Cost of Living Relief Measures related to Dental Care and Rental Housing", (6 October 2022), online: *Government of Canada*, <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c31.html>. The examination of included in Bill C-97, *Budget Implementation Act, 2019*, would have yielded valuable insights bu, during that period, the requirement for charter statements was not obligatory. Consequently, no declaration of compatibility was made publicly available.

fair trial rights. Furthermore, the statement addresses the collection of personal data in relation to section 8, which concerns protection against unreasonable search and seizures. However, absent from this discussion is any reference to a potential entitlement to health or housing enshrined within section 7, even though the denial of crucial dental care or lack of adequate housing could conceivably be interpreted as a breach under section 7. Despite the evident socio-economic nature of Bill C-31, its Charter statement remains confined to a traditional interpretation of the Charter, without delving into the broader implications for socio-economic rights and their intersection with individual well-being.

When fulfilling their duty to examine and report on the Charter compatibility of bills, ministers of Justice are not obligated to assume the correctness of judicial decisions regarding what the Charter requires.[1018] They can disagree with case law and conclude that the Charter requires greater or narrower protection. Still, as mentioned by Grant Huscroft, disagreements are likely situated at the margin of the case law, without rejecting well-settled precedents.[1019]

The involvement of lawyers in executive rights review is far from unique to Canada. Numerous other jurisdictions rely on lawyers to vet bills' rights compatibility, including the UK, Australia and New Zealand. In some jurisdictions, the responsibility of preparing ministerial statements of compatibility falls to the Minister of Justice or the Attorney General, as in Canada and New Zealand.[1020] In others, this task falls to the minister responsible for the bill, like in the UK and Victoria.[1021] In all cases, this statement constitutes a legalistic assessment performed by lawyers.[1022]

This focus on ensuring conformity with jurisprudence likely stems from the court-centric approach to rights protection that dominates in these jurisdictions. As explained in Chapter 1, courts are generally regarded as the primary locus for interpreting and applying guaranteed rights.[1023] Even in states where courts have "weaker" judicial review powers, the political branches generally complies with judicial prescriptions on what the Constitution demands.[1024] In the UK,

[1018] Huscroft, *supra* note 60 at 779.
[1019] *Ibid* at 780.
[1020] *New Zealand Bill of Rights Act 1990*, section 7.
[1021] *Charter of Human Rights and Responsibilities Act 2006*, section 28.
[1022] *Human Rights Act 1998*, section 19.
[1023] Appleby, MacDonnell & Synott, *supra* note 100 at 438.
[1024] Aileen Kavanagh, "What's So Weak about 'Weakform Review'? The case of the UK Human Rights Act 1998" (2015) 13:4 ICON 1008.

for example, while the *Human Rights Act 1998* is not binding per se, judicial interpretations largely determine the scope and meaning of the rights guaranteed by the European Convention on Human Rights ("ECHR").[1025] Indeed, British courts have made an extensive interpretation of their powers under sections 3 and 4 of the *Human Rights Act 1998*.[1026] These sections allow courts to read and give effect to legislation in a way compatible with the ECHR rights and to make a declaration of invalidity if such an interpretation is not possible. In turn, the political branches rarely respond to modify or override judicial interpretations.[1027] As Chintan Chandrachud and Aileen Kavanagh aptly summarize:

> For one thing, there is enormous strength in the interpretative duty as a way of giving (immediate) legal effect of the Convention rights in primary legislation. Moreover, not only are declaration of incompatibility used as a last resort in cases concerning rights, they are complied with in almost every case.[1028]

As a result, during lawmaking, this statement is grounded on information provided by government lawyers.

Discussing the reports of inconsistencies of the Attorney General in New Zealand, Hiebert raises doubts about their ability to provide an unbiased evaluation to the legislature regarding the necessity of proposed legislation, even in cases where such legislation could potentially have detrimental effects on individual rights.[1029] As in Canada, these reports "reflect the legal advice of public servants rather than the political judgement of the executive on the reasons why legislation can or cannot be considered a justifiable restriction on a right."[1030] In her opinion, emphasis on legal opinion can discourage political debates on the rights by "presenting the relevant issue as a technical, legal matter" situated beyond the scope of the political branches. They also limit the nature of the information shared with Parliament. Hiebert explains:

> Moreover, these reports read like dense legal briefs and often fail to provide parliamentarians with adequate information relating to the policy rationale and

[1025] Chintan Chandrachud & Aileen Kavanagh, "Rights-based Constitutional Review in the UK: From Form to Function" in John Bell & Marie-Luce Paris, eds, *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Cheltenham; Northampton: Edward Elgar Publishing, 2016) 63 at 91; Kavanagh, *supra* note 1024 at 1029.
[1026] Kavanagh, *supra* note 1024 at 1016.
[1027] *Ibid* at 1025.
[1028] Chandrachud & Kavanagh, *supra* note 1025 at 91.
[1029] Hiebert, *supra* note 373 at 98.
[1030] Hiebert, *supra* note 50 at 247.

> philosophical considerations that underlie the objective or information about how concern for rights has influenced the choice of legislative means. Yet, this information is highly relevant when determining whether legislation is reasonable and justified from a rights perspective.[1031]

Ministerial statements of compatibility primarily concentrated around judicial interpretations, as in Canada, can result in a limited conception of Charter review detrimental to rights protection. As explained in Chapter 1, judicial decisions provide an incomplete portrait of the scope and meaning of the rights. They represent limited facets of the rights: the facets related to the claims treated through judicial review. These claims are further affected by the claimants' ability to present admissible social science evidence and judicial treatment of such evidence. And, importantly, judicial decisions often reflect a deferential approach with respect to socio-economic interests under the Charter. Judicial interpretations thus provide a limited portrait of the scope and meaning of the rights. The current executive rights review model, centered on legal formalities, fails to adequately prioritize integrating rights concerns into assessing legislative goals and strategies while still respecting guaranteed rights.

My aim in this section is not to criticize the extent or the quality of the assessment done by government lawyers. As the government's legal advisor, the Department of Justice and its entities naturally focus on legal interpretations and potential challenges that may arise based on existing jurisprudence. As MacDonnell mentions, government lawyers are well-placed to evaluate the legal risks associated with the constitutionality of bills.[1032] Moreover, federal government lawyers have often been risk-averse in their approach to the Charter. They are more inclined to declare a bill as violating the Charter than not. Petter explains that government lawyers face greater scrutiny and potential criticism when they incorrectly predict that a law complies with the Charter, as compared to predicting non-compliance. With legislative drafters, they prefer resolving possible conflicts with judicial decisions before a bill reaches the sponsoring minister, who is then responsible for deciding whether it goes forward with the bill as drafted.[1033]

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[1031] *Ibid*.
[1032] Vanessa MacDonnell, "Gender-Based Analysis Plus (GBA+) as Constitutional Implementation" (2018) 96 La Revue du Barreau Canadien 372 at 392; Vanessa MacDonnell, "The Civil Servant's Role in the Implementation of Constitutional Rights" (2015) 13:2 ICON 383.
[1033] Petter, *supra* note 107 at 212. See also Macfarlane, Hiebert & Drake, *supra* note 21 at 48.

The issue lies in the decision to only mandate government lawyers to assess the Charter compatibility of bills. Due to the mandate of the actors involved in executive rights review, non-jurisprudential considerations, such as the broader societal impacts and socio-economic factors, are overshadowed by the predominant focus on legal risks and compliance with existing judicial interpretations.

**b. Confidentiality**

Rights review at the executive stage of lawmaking is mostly performed behind closed doors: communications and documents related to rights vetting and Charter statements are indeed considered protected under various confidentiality requirements.

This lack of transparency is detrimental to good governance. It impedes external actors, such as parliamentarians and the public, to have confidence that Charter considerations have been thoroughly examined. It diminishes their ability to hold the government accountable in cases where Charter rights may have been overlooked or inadequately addressed.[1034] Parliament and the public remain in the dark regarding the information examined during the Charter review and the decisions made based on this information. The obscurity of this process creates good conditions for governments to treat rights considerations as a low priority in the drafting process.

Though Charter statements shed light on certain findings of the Minister of Justice, concerns about confidentiality still influence the content of the information shared. In addition to Cabinet confidentiality and attorney-client privilege, a third concern arises in context of Charter statements: the obligations of the Minister of Justice under Cabinet solidarity.

(i) Cabinet confidentiality

The constitutional principle of Cabinet confidentiality – or Cabinet secrecy – refers to the rules and practices aimed at safeguarding the confidentiality of executive decision-making.[1035] Legal scholar Yan Campagnolo suggests that Cabinet confidentiality is necessary for a

[1034] Hiebert, *supra* note 48 at 174.
[1035] Yan Campagnolo, *Behind Closed Doors: The Law and Politics of Cabinet Secrecy* (Vancouver: UBC Press, 2021) at 7.

Westminster system of responsible government: it allows ministers to "freely propose, debate, and reach a consensus on government policy and action."[1036] Confidentiality is considered essential to maintaining Cabinet solidarity. Internal documents, notably those presenting disagreements between ministers, could be used by political adversaries to mine the government's credibility.[1037] Under the principle of Cabinet confidentiality, members of the Cabinet cannot disclose certain information about executive decision-making, and individuals external to Cabinet cannot access it.

Once a constitutional convention, this principle is now formalized under section 39 of the *Canada Evidence Act.*[1038] Section 39 provides a "broad and robust" statutory scheme granting almost total immunity to Cabinet confidences for twenty years.[1039] Communications and documents considered "Cabinet confidences" are enumerated in its fourth paragraph:

> **(a)** a memorandum the purpose of which is to present proposals or recommendations to Council;
> **(b)** a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
> **(c)** an agendum of Council or a record recording deliberations or decisions of Council;
> **(d)** a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
> **(e)** a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and
> **(f)** draft legislation

Section 39 offers a "near absolute" immunity to Cabinet confidences. These communications and documents cannot be produced in judicial recourse either.[1040] Campagnolo notes that the high level of protection this provision grants to Cabinet confidences is exclusive to Canada; no other Westminster jurisdiction grants them such immunity.[1041]

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[1036] *Ibid*.
[1037] Yan Campagnolo, "Repenser le secret ministériel" (2020) 50:1 Revue générale de droit 5 at 13.
[1038] *Canada Evidence Act*, RSC 1985, c C-5.
[1039] Yan Campagnolo, "Cabinet Immunity in Canada: The Legal Black Hole" (2017) 63:2 McGill Law Journal 315 at 318.
[1040] *Babcock v Canada (Attorney General)*, [2002] 3 SCR 3.
[1041] Campagnolo, *supra* note 1035 at 8.

As is the case for most of the executive stage of lawmaking, communications and documents related to rights vetting are considered protected under section 39. The rules of Cabinet confidentiality encompass the assessment and findings of the LSUs and HRLS regarding the Charter compatibility of bills during the drafting process. The details and conclusions of these assessments and their advice are kept confidential and not publicly disclosed.[1042] Parliament and the public thus cannot be informed on the extent and the nature of the rights vetting performed by government lawyers.

Though Charter statements are said to be instruments of transparency[1043], their content remains affected by Cabinet confidentiality. As a member of the Cabinet, the Minister of Justice and their communications are also targeted by section 39. Information regarding possible impacts of the bill on Charter rights and alternatives identified to reach legislative objectives are thus likely to be protected by Cabinet confidences. In fact, in *Schmidt*, Justice Noel declared that Cabinet confidences could "severely limit" the content of Charter statements because the deliberations on the Charter compliance of bills are protected under section 39 of the *Canada Evidence Act*. Even if the Minister of Justice decided to resign, they would still be bound by Cabinet confidentiality. Resignation would thus not, as noted by Justice Noel, "guarantee that an informed public debate on the inconsistencies will occur as the Minister of Justice will be unable to discuss her resignation."[1044] As a result, Charter statements are unlikely to present the results reached during the assessment of Charter compatibility; they instead provide a "limited window" on the nature and extent of the evaluation performed.[1045]

Despite its increasingly contested status[1046], Cabinet confidence remains a critical limitation to the potential of mechanisms of executive rights review to foster effective and sustainable rights protection. The opaque conditions it creates make it virtually impossible to determine if the decisions taken by the government are reasonable and made in good faith in view of the Charter.[1047]

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[1042] Casey & Kenny, *supra* note 729 at 673.
[1043] Government of Canada, *supra* note 990.
[1044] *Schmidt*, *supra* note 26 at para 223.
[1045] MacDonnell, *supra* note 1032 at 399. See also Macfarlane, Hiebert & Drake, *supra* note 21 at 62.
[1046] See e.g., Campagnolo, *supra* note 1039; Campagnolo, *supra* note 1037.
[1047] In recent publications, Campagnolo questioned the conclusion of the Supreme Court almost twenty years ago, in *Babcock v. Canada (Attorney General)*, *supra* note 1040., that section 39 of the *Canada Evidence Act* was in line with the rule of law requirements. He sustains that the high level of protection this provision grants Cabinet confidence

(ii) Attorney-client privilege

Attorney-client privilege, or client confidentiality, is another obstacle to transparency in executive rights review. Lawyers perform Charter review; their advice is thus considered protected by the solicitor-client privilege and the duty of confidentiality associated with the legal profession.[1048] This duty of confidentiality instills trust between clients and legal professionals, ensuring that clients can rely on the confidentiality of their discussions and advice in the present and future.[1049] As members of the legal profession, the attorney-client privilege applies to both governmental lawyers and the Minister of Justice.[1050] In the context of Charter review, attorney-client privilege positions the government as the client and the lawyers of the Department of Justice – including the Minister of Justice – as the attorneys. Legal opinions on the Charter compatibility of bills are thus considered protected and confidential.[1051]

Governments have on several occasions invoked the attorney-client privilege between the government and the Department of Justice to refuse making available the content of the executive rights review and the conclusions reached following this process.[1052] Macfarlane, Hiebert and Drake note that governments have invoked attorney-client privilege to withhold legal advice from Parliament and to refrain from explaining their conclusions regarding the compatibility of legislation with the Charter, even in cases where these conclusions are strongly challenged.[1053] Although Charter statements provide some information on the government's findings regarding the Charter compatibility of bills labelled as "legal information," their Explanatory notes state that they are not "a legal opinion on the constitutionality of a bill."[1054] As a result, an essential portion of executive rights review is considered protected under the attorney-client privilege.

goes beyond what is conventionally offered to this type of information. He suggests that through the theory of law as justification – put forward by South African scholar Etienne Mureinik and developed into an elaborate theory by David Dyzenhaus – section 39 should be considered in violation of the rule of law and declared unconstitutional: Campagnolo, *supra* note 1039 at 318.

[1048] Andrew Flavelle Martin, "The Attorney General as Lawyer (?): Confidentiality Upon Resignation from Cabinet" (2015) 38:1 Dalhousie LJ 147 at 149.

[1049] John Mark Keyes, "Loyalty, Legality and Public Sector Lawyers" (2019) 97 Canadian Bar Review 129 at 134.

[1050] Martin, *supra* note 1048 at 149.

[1051] Macfarlane, Hiebert & Drake, *supra* note 21 at 85.

[1052] Feldman, *supra* note 369 at 80.

[1053] Macfarlane, Hiebert & Drake, *supra* note 21 at 85.

[1054] See e.g., Government of Canada, *supra* note 385.

Due to their status as public servants, several scholars dispute the application of attorney-client privilege to government lawyers and the Minister of Justice.[1055] Adam Dodek, for example, argues that their professional duty should be weakened when the dignity and vulnerability of individuals are at stake.[1056] Macfarlane, Hiebert and Drake also claim that attorney-client privilege is inconsistent with the protection of public interest. They contrast this practice to that of New Zealand, where the legal advice is published alongside the ministerial statement of compatibility.[1057] These concerns arise from the unique nature of the government's role and the importance of transparency and accountability in democratic governance.

The attorney-client privilege could be waived by releasing a portion or the entirety of the legal advice provided by government lawyers. Macfarlane, Hiebert and Drake propose waiving the privilege on constitutional advice received during executive rights review through a "standing policy of waiving privilege vis-à-vis constitutional advice."[1058] They argue that publicizing this advice would enhance transparency, accountability and better inform Parliament about constitutional questions related to government bills. Accordingly, governments should be prepared to defend Charter compatibility of questionable legislation rather than concealing concerns.[1059]

Recently, the SNC Lavalin affair provided an opportunity to clarify the boundaries of the attorney-client privilege and Cabinet confidentiality. After Prime Minister Justin Trudeau was accused of unduly trying to influence former Attorney General Jody Wilson-Raybould to intervene in a criminal case involving SNC-Lavalin, the opposition required Wilson-Raybould to testify before Parliament.[1060] The inquiry centered on defining the scope within which an Attorney General is bound by Cabinet confidentiality and attorney-client privilege, and the conditions under which they can be exempted from these commitments.[1061] In that case, both Wilson-Raybould and

[1055] See e.g., Andrew Flavelle Martin, "Folk Hero or Legal Pariah? A Comment on the Legal Ethics of Edgar Schmidt and Schmidt v Canada (Attorney General)" (2020) 43:2 Manitoba Law Journal 198 at 208; Dodek, *supra* note 59 at 45; Allan C Hutchinson, "In the Public Interest: The Responsibilities and Rights of Government Lawyers" (2008) 46:1 Osgoode Hall Law Journal 105 at 125; Roach, *supra* note 24 at 630.
[1056] Dodek, *supra* note 59 at 26. See also Hutchinson, *supra* note 1055 at 126.
[1057] Macfarlane, Hiebert & Drake, *supra* note 21 at 85.
[1058] *Ibid* at 166.
[1059] *Ibid*. See also Adam M Dodek, "Reconceiving Solicitor-Client Privilege" (2008) 35 Queen's Law Journal 493.
[1060] Alex Marland, "The SNC-Lavalin Affair: Justin Trudeau, Ministerial Resignations and Party Discipline" (2020) 89 Canadian Studies 151 at 162.
[1061] Kate Bezanson, "Constitutional or Political Crisis: Prosecutorial Independence, the Public Interest, and Gender in the SNC-Lavalin Affair" (2019) 52:3 UBC Law Review 761 at 765.

the government claimed that an order-in-council was necessary for her to testify.[1062] Trudeau ultimately approved a limited waiver of Cabinet confidence and attorney-client privilege[1063], though this permission was subjected to numerous restrictions.[1064]

(iii) Cabinet solidarity

Another limitation to transparency arises for Charter statements due to the principle of Cabinet solidarity. This principle demands that ministers publicly endorse the decisions made by the government.[1065] As Campagnolo explains, Cabinet solidarity and confidentiality are "two faces of the same coin": confidential deliberations allow ministers to stand together, while solidarity allows the government to maintain the confidence of the House of Commons [1066] Regardless of their personal stance, ministers are required to present a united front and speak in agreement with the decisions made by the government.

In the context of Charter statements, this principle prevents the Minister of Justice from openly disagreeing with governmental decisions, including on the constitutionality of the bills introduced for adoption. Once the rights vetting is completed and a bill is ready for adoption, it is fair to assume that the Cabinet has determined that it has discharged its constitutional obligations by tabling to Parliament a bill exempt from unjustified violations – or, at least, that it is the position it intends to defend. For the Minister of Justice to then adopt a different position in the Charter statement would be contrary to the Cabinet solidarity. Reporting to Parliament on possible Charter incompatibilities in bills would require violating Cabinet solidarity by providing a negative assessment of legislation already agreed to by the Cabinet.[1067] Therefore, though ministers of Justice can disagree with the government's take on the Charter conformity of a bill, they cannot publicly reveal it.

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[1062] Marland, *supra* note 1060 at 162.
[1063] *Ibid*.
[1064] "The order in council (supra note 25) restricted discussion to matters related to the exercise of the authority of the Attorney General under the DPP Act in relation to SNC-Lavalin, excluded Cabinet confidences, was limited to the timeframe in which Jody Wilson-Raybould served as Attorney General and Minister of Justice, and was additionally subject to the sub judice rule such that matters before the court could not be discussed.": Bezanson, *supra* note 1061 n 83.
[1065] Yan Campagnolo, *Le secret ministériel: Théorie et pratique* (Québec: Presses de l'Université Laval, 2020) at 37.
[1066] *Ibid*.
[1067] Kelly, *supra* note 58 at 91.

In virtue of the principle of Cabinet solidarity, the Minister of Justice must align with the government no matter how their legal advice is addressed or the government's reasoning. The conclusions of the Minister of Justice regarding the Charter compatibility of bills do not bind the government. Hiebert explains that the government can justify rejecting their legal advice for various reasons. For one thing, predicting the implications of earlier Charter cases for new issues might be challenging. But governmental conclusions can also be grounded on strategic calculations, notably "whether to reduce Charter problems or gamble on whether failure or minimal responses to address these will result in litigation."[1068] Governments can balance the risks of a constitutional challenge versus the benefits of advancing their political agenda. Regardless of the reasons for rejecting the Minister of Justice's advice, they must publicly support the government's decision.

A final observation arises from this reflection on Cabinet solidarity: an apparent tension exists between the roles of Minister of Justice and Attorney General, which the same person holds. In Canada, the Minister of Justice is indeed *ex officio* Attorney General, i.e. the "highest independent legal officer of the Crown."[1069] These two roles relate to distinct functions of the Department of Justice with regard to rights protection:

> First, the Department of Justice provides legal advice to client departments regarding the constitutionality of policy proposals and whether the legislative objectives are consistent with the *Charter*. Second, through the attorney general's branch, the Department of Justice is responsible for all constitutional and civil litigation involving the Canadian government.[1070]

Consequently, as a Cabinet minister with dual portfolios, the Attorney general lacks the necessary independence to distinguish between government scrutiny of rights and the government's political goals.[1071] A conflict can arise between these two roles because the Attorney General acts as the government's lawyer during recourses in judicial review.[1072] A Charter statement declaring a bill inconsistent with the Charter could negatively affect the government's defence before the courts. The likelihood of persuading a court to consider defending legislation as a reasonable limit under

[1068] Hiebert, *supra* note 12 at 98.
[1069] Kelly, *supra* note 58 at 91.
[1070] *Ibid* at 89.
[1071] Macfarlane, Hiebert & Drake, *supra* note 21 at 162.
[1072] *Ibid* at 42.

section 1 becomes increasingly challenging when the Attorney General, responsible for such arguments, has already acknowledged the legislation's incompatibility with the Charter through a Charter statement.[1073]

The difficulty reconciling the roles of Minister of Justice and Attorney General could partially explain why no report on incompatibilities had previously been submitted to Parliament.[1074] Various scholars, including Macfarlane, Hiebert, and Drake,[1075] have contemplated the division of these roles, drawing parallels with the UK and New Zealand systems.[1076] Their exploration underscores the potential of separating these two roles for fostering enhanced and more rigorous legislative scrutiny in accordance with Charter principles and the section 4.1 obligation.

Cabinet confidentiality, Cabinet solidarity and attorney-client privilege thus limit transparency in executive rights review by keeping certain information unavailable to external stakeholders – that is, to Parliament and the public. They cannot know what considerations arose from this assessment and how they were dealt with, notably: Was a conflict identified between the legislative objectives and one or more guaranteed rights? Or between the means to achieve these objectives and the rights? If a conflict was identified, could the violation be "demonstrably justified in a free and democratic society"? What possible alternative means were explored to minimize the impact on the rights? And, equally important, on what information did the lawmaking institutions base their decisions and conclusions on those matters? As a result, members of Parliament and the public cannot be assured of the weight given to rights considerations. The confidentiality of these mechanisms of rights review weakens their deterrent effects as mechanisms of Charter review and, ultimately, as instruments of rights protection.[1077]

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[1073] *Ibid*.
[1074] Kelly, *supra* note 58 at 91.
[1075] Macfarlane, Hiebert & Drake, *supra* note 21 at 165.
[1076] See e.g., *Ibid* at 162; Adam M Dodek, "The impossible position: Canada's attorney-general cannot be our justice minister", *The Globe and Mail* (22 February 2019), online: <https://www.theglobeandmail.com/opinion/article-the-impossible-position-canadas-attorney-general-cannot-be-our/>.
[1077] Catherine Rodgers, "A Comparative Analysis of Rights Scrutiny of Bills in New Zealand, Australia and the United Kingdom: Is New Zealand Lagging behind its Peers?" (2012) 27:1 Australasian Parliamentary Review 4 at 8.

**c. Limited civil engagement**

The current format of executive rights review lacks inclusivity and fails to adequately consider the perspectives and interests of marginalized groups. As a result, there is a high risk that the Charter review overlooks or disregards the needs and concerns of these groups, either intentionally or inadvertently.

Charter review primarily falls on a limited group of legal professionals, resulting in a lack of diversity and representation among those involved in assessing the Charter compatibility of legislation.[1078] The exclusive emphasis on lawyers collaborating with sponsoring ministers leads to a restricted spectrum of viewpoints and specialized knowledge, exacerbating the issue of inadequate representativeness in the Charter review process.

Furthermore, participation processes are rarely organized to engage civil society in the lawmaking process and executive rights review. As discussed in Chapter 2, participation is fundamental to good governance. The concept of public participation has evolved beyond recognizing citizens' right to participate: it now embraces the notion of the "wisdom of crowds" and acknowledges that ordinary citizens can contribute valuable information and knowledge to policymaking, extending beyond mere validation.[1079] People come from various backgrounds and have different experiences; they include "doctors, nurses, parents, entrepreneurs, police officers, social workers, victims of crime, teachers, and elders".[1080] As a result, extensive knowledge and expertise reside in civil society, bringing valuable public policy input.[1081]

The broad conception of Charter compatibility defended in this thesis requires expanding the relevant information on which to base Charter review beyond judicial rulings. The availability and quality of this information are central to conducting Charter review in line with the lived experience of civil society and enacting responsive legislation.

In that regard, public participation constitutes one of the most effective ways governments can gather information and knowledge relevant to Charter review. Opening this process to the groups affected by proposed legislation could ensure that "different views are heard and special

[1078] Connor, *supra* note 64.
[1079] Landemore, *supra* note 811 at 181.
[1080] Coleman & Gøtze, *supra* note 809 at 12.
[1081] *Mapping the Links: Citizen Involvement in Policy Processes*, by Susan D Phillips & Michael Orsini, No-F-21 (Ottawa, Canada: Canadian Policy Research Networks Inc., 2002) at 18.

needs are understood."[1082] To quote Colleen Sheppard:

> Persons using wheelchairs know more about wheelchair accessibility into a building than those who need not notice whether they climbed a step or steps in entering a building. Parents of children with disabilities know more about educational services and special needs education than parents whose children do not have mental or physical disabilities.[1083]

Civil engagement could ensure that the perspectives and interests of those affected by proposed legislation are included or at least known by those responsible for passing judgment on their Charter compatibility. Grounding policies in the population's inputs makes the decision-making process more credible, more legitimate, and more in line with the genuine lived experience of the population.

Despite the increasing number of public consultations in recent years,[1084] their actual impact on Charter review remains ambiguous. Public consultations are held at the government's discretion, which decides when and how to consult the population. In recent years, the Liberal government held several consultations aimed at obtaining information on the concrete experiences lived by minorities or marginalized groups. Examples of consultations in areas related to Charter review include the National Anti-Racism Engagement, the National Housing Strategy and the consultations on the prostitution law. However, these occurrences remain few and dispersed. Moreover, due to the confidentiality of executive lawmaking, it is not easy to evaluate if the testimonies received through public consultations genuinely impacted the content of legislation. Nancy Bouchard notably raised some concerns regarding the impacts of the consultations on prostitution law. In her opinion, the public consultation said to have informed the drafting of Bill C-36 "occurred *after* the policy formulation stage, was *not representative*, provided *unbalanced* and *biased* information, and *lacked transparency.*"[1085] Despite the growing utilization of public consultations, robust civil society's engagement in executive lawmaking, including executive rights review, remains limited.

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[1082] Littlejohns et al, *supra* note 810 at 21.
[1083] Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montréal: MQUP, 2010) at 67.
[1084] According to the federal government's portal Consulting with Canadians, the number of annual public consultation held by the federal government went from 11 in 2019 to 497 in 2022: Secretariat, *supra* note 830.
[1085] Bouchard, *supra* note 817 at 526–527.

The lack of perspectives involved in Charter review, combined with the legalistic nature and the confidentiality of executive rights review, creates conditions favourable for the government to neglect Charter concerns while drafting bills.

### *ii. The Outcome: A Weak Incentive to Take Rights Concerns Seriously in Executive Lawmaking*

As is the case for all mechanisms of rights review, the effectiveness of rights vetting and Charter statements in fostering rights protection relies on how the government interprets and fulfills its associated responsibilities and obligations. The lack of reports submitted to Parliament on Charter inconsistencies from 1985 to 2016, when the Minister of Justice had the authority to make such decisions, supports this claim: the reporting mechanism was essentially useless until transmitting a Charter statement became mandatory for every bill. The institutional framework for executive rights review has a tangible impact on its ability to promote effective and sustainable rights protection by influencing the attention given to Charter concerns during the drafting process.

Executive rights review currently creates adequate conditions for the government to neglect its obligations under the Charter or to do the bare minimum as judicially prescribed. Its framework results in an account of Charter review that fails to deter the government from enacting legislation that might negatively impact constitutional interests. In other words, executive rights review falls short of meeting the normative aspirations of pre-enactment review, which involve prioritizing rights considerations in determining legislative objectives and strategies and facilitating robust parliamentary discussions on the Charter compatibility of bills.[1086] No matter the conclusions reached on the Charter compatibility of bills during the executive rights review, ministers are ultimately responsible for deciding whether to proceed with the bill as drafted.[1087] As explained in Chapter 1, governments often exhibit high tolerance for constitutional risks, proposing to adopt legislation with knowledge of its possible – or even probable – contravention with the Charter. This observation raises concerns about the potential of executive rights review, as currently performed, to prevent the enactment of legislation infringing the Charter.

[1086] Hiebert, *supra* note 25 at 127.
[1087] Petter, *supra* note 107 at 35.

**a. Rights vetting**

Currently, there is limited evidence to suggest that rights vetting effectively encourage the government to adequately address Charter concerns while drafting bills.[1088] On the contrary, the interviews and declarations of diverse actors involved in various facets of executive rights review highlight the weak deterrent effect of this internal practice. Hiebert interviewed government lawyers involved in rights vetting throughout the years, who confirmed the low priority of Charter concerns in executive lawmaking. The interviews she conducted from 1999 to 2015 unveiled that "[i]t is not clear that government prioritizes Charter compliance when pursuing its legislative agenda, at least not as much as some assume and certainly not as much as implied by the metaphor of Charter proofing."[1089] Furthermore, in anonymous statements, senior members of the Department of Justice under the Harper government revealed how frivolously the government was approaching rights vetting and the minister of Justice's reporting duty. The government viewed these mechanisms as a procedural hurdle rather than a severe constraint on the government's legislative objectives: "[t]he prevailing attitude was: We'll sign the certification saying that thus is Charter-proof – and let the judiciary fix it later… There is a real fix-it-later attitude".[1090]

Similarly, noting that Schmidt's allegations before the Federal Court that the government is willing to enact bills clearly infringing the Charter have "yet to be proved," public policy scholar Pearl Eliadis concedes that "there is something to the allegations."[1091] Her experience working in federal government entities highlighted that:

> public servants often see human rights and the Charter as constraints or obstacles to be circumvented, not as legal tools that empower citizens, let alone as legal tools that should be encouraged and developed. The result has been that medium-term policy development is rarely driven or even informed by human rights considerations.[1092]

Rights vetting is thus conceived as a hurdle and a formality rather than a process aiming to improve rights protection in lawmaking.

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[1088] Hiebert, *supra* note 25 at 137–138.
[1089] Hiebert, *supra* note 57 at 735.
[1090] Kelly & Hennigar, *supra* note 58 at 53.
[1091] Pearl Eliadis, *Speaking Out on Human Rights: Debating Canada's Human Rights System* (Montréal: McGill-Queen's University Press, 2014) at 243.
[1092] *Ibid*.

Moreover, the government's decision to act on the legal advice of government lawyers commonly depends on its tolerance toward the risk of enacting legislation that may not survive a constitutional challenge.[1093] With Macfarlane and Drake, Hiebert recently conducted additional interviews with government lawyers. As did the ones interviewed from 1999 to 2015[1094], these lawyers confirmed that the relevant department or minister is responsible for deciding whether to follow their legal advice[1095]; their legal advice is only advisory.[1096] Based on their assessments of the Charter compatibility of bills, government lawyers characterize bills along a range from very low to manifestly unconstitutional. Several individuals interviewed also mention that in instances where alternative, less restrictive methods for achieving an objective are suggested, a department or minister might still endorse alterations that embody a high level of risk, leaving them susceptible to judicial nullification.[1097] Even when a high level of constitutional risk is identified, the department is responsible for deciding to proceed with the drafted bills in all but exceptional cases.[1098]

Inspired by Schmidt's claim before the Federal Court, Thomas L. McMahon came forward in 2021 with his personal experience treating Charter issues and Indigenous peoples at the Department of Justice. As a former governmental lawyer from 1992 to 2016, he highlights significant deficiencies in the actions of the Department of Justice and various ministers of Justice in upholding rights protection and ensuring the Charter compatibility of public acts and legislation. He accused the federal government's legal services of being "arranged against rights protection."[1099] He revealed that concerns regarding rights protection are often neglected when evaluating the Charter compatibility of bills. Instead, governments approach rights vetting strategically, prioritizing advancing their agenda at the expense of safeguarding Charter rights.

MacMahon's discussion on the discrimination against Indigenous women and children arising from some provisions of the *Indian Act*[1100] offers a relevant illustration of this stance. He claims that from the introduction of Bill C-31 in 1985, the Department of Justice maintained

[1093] Macfarlane, Hiebert & Drake, *supra* note 21 at 50.
[1094] Hiebert, *supra* note 57 at 735.
[1095] Macfarlane, Hiebert & Drake, *supra* note 21 at 48.
[1096] *Ibid* at 50.
[1097] *Ibid*.
[1098] *Ibid* at 48.
[1099] "J'Accuse: Justice Canada Minimizes Human Rights Every Single Day" Thomas McMahon, (12 March 2021) at 14.
[1100] *Indian Act*, RSC 1985, c I-5.

evident discriminatory provisions "in order to save the Government from having to deal with the issue."[1101] For instance, he was told in 1991 that his job as a Department of Justice lawyer was not to provide an objective assessment of whether there was continuing discrimination contrary to section 15 of the Charter in the *Indian Act*: the focus was on finding any arguments that would justify the continued discrimination against Indigenous women and their children, instead of upholding their rights as protected by the Charter.[1102] Any argument, he suggests, meant "any argument that was not too embarrassing to the government."[1103] Rather than addressing the issues of discrimination found in Bill C-31, the government preferred to:

> [l]et the Justice Canada lawyers litigate the case and oppose indigenous women and children for as long as possible until a court forced a government to act at some distant time. (…) We could all see how the Indian Act continued to discriminate against indigenous women and children and we expected a court would eventually say so. But our job was to drag the case out so that the government would not have to proactively amend the Indian Act. Our job was to get the courts to remedy the discrimination in the most limited way possible, so that the fewest number of women and children would gain new status.[1104]

In essence, McMahon argues that rather than conducting a thorough Charter assessment of bills, governments have frequently utilized mechanisms of rights review to serve their own interests and advance their agendas.

Governments have sometimes publicly defended the Charter compatibility of highly controversial bills, suggesting that they had assessed their constitutionality and were content with the results. For instance, as discussed in Chapter 1, the Harper government submitted for adoption multiple bills that blatantly conflicted with existing jurisprudence, all the while declaring that they had been subjected to rights vetting and were judged compatible with the Charter.[1105] Several major laws enacted as part of the Conservative's "tough on crime" reform of the criminal justice

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[1101] McMahon, *supra* note 1099 at 19.
[1102] *Ibid* at 15.
[1103] *Ibid*.
[1104] *Ibid* at 16. The discriminatory provisions regarding the Indian status were ultimately removed from the *Indian Act* after being found unconstitutional by both the Quebec Superior Court in 2015 (*Descheneaux* c *Canada (Procureur Général)*, 2015 QCCS 3555) and the Quebec Court of Appeal in 2017 (*Procureure générale du Canada* c. *Descheneaux*, 2017 QCCA 1238).
[1105] See e.g., *R v St-Onge Lamoureux*, [2012] 3 SCR 187 (reverse onus concerning the police use of breathalyzers); *R. v. Lloyd*, *supra* note 246; *R. v. Nur*, *supra* note 246 (mandatory minimum sentences); *Canada (Attorney General) v. Whaling*, *supra* note 247 (retrospective abolition of early parole).

system were notoriously controversial per their Charter compatibility. These measures prompted substantial worries about their alignment with the Charter's legal rights, along with their possible systemic repercussions, such as the increased incarceration rates of Indigenous and Black populations in Canada.[1106] Moreover, legal scholars and opposition members raised the alarm about their vulnerability to judicial invalidation.[1107] Despite these concerns, the minister of Justice refused to justify his position for considering that legislation was exempt from unjustified infringements to the Charter, nor to explain how bills were assessed to determine their impact on its rights.[1108] For example, the Conservative government insisted on the constitutionality of Bill C-31, *Protecting Canada's Immigration System Act.*[1109] This bill was widely criticized for creating a distinct regime dealing with "irregular arrivals," seemingly against the protection again arbitrary detention guaranteed by the Charter as interpreted by the Supreme Court.[1110] Many of these laws were judicially contested and found incompatible with the Charter, resulting in a distinctively negative record before the Supreme Court compared to previous governments.[1111]

So, why do governments appear so comfortable publicly defending the Charter conformity of "constitutionally ambiguous" – and at times blatantly unconstitutional – legislation? What can justify this high level of tolerance to constitutional risks? A possible explanation is the considerable discretion section 1 offers to determine if legislation respects the Charter. This section allows governments to limit Charter rights, provided that they can establish that a possible violation is justified in a free and democratic society. The *Oakes* test and its four criteria are broad enough to allow them to comfortably declare that a bill is compatible with Charter rights due to its justifiable and proportional purpose. For instance, in 2008, Parliament passed Bill C-2, *Tackling Violent Crime Act*. This bill proposed several changes to criminal law, including a reversed onus

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[1106] Macfarlane, Hiebert & Drake, *supra* note 21 at 68.
[1107] *Ibid* at 69. See e.g., Emmett Macfarlane, "'You Can't Always Get What You Want': Regime Politics, the Supreme Court of Canada, and the Harper Government" (2018) 51:1 Canadian Journal of Political Science 1; Kent Roach, "The Charter versus the Government's Crime Agenda" (2012) 58 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conferences 58.
[1108] Macfarlane, Hiebert & Drake, *supra* note 21 at 69.
[1109] Kwak, *supra* note 897 at 461. It was notably noted during the committee hearings on this bill that "the minister has said he is confident that Bill C-31 is charter compliant": Evidence - CIMM (41-1) - No. 32 - House of Commons of Canada at 1130.
[1110] *Charkaoui v. Canada (Citizenship and Immigration)*, *supra* note 280. Bill C-31 was also seemingly incompatible with *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848. and *Singh v. Minister of Employment and Immigration*, *supra* note 309.
[1111] Macfarlane, *supra* note 245 at 2. See also Matthew A Hennigar, "Unreasonable Disagreement? Judicial-Executive Exchanges about Charter Reasonableness in the Harper Era" (2017) 54:5 Osgoode Hall Law Journal 1245 at 1262.

of proof for individuals convicted for a third time for a primary designated offence and several new mandatory sentences of imprisonment. Despite the highly controversial nature of Bill C-2 as per its compatibility with Charter jurisprudence, no report was submitted to Parliament under section 4.1 of the *Department of Justice Act*. During parliamentary committee deliberation, then Minister of Justice Rob Nicholson assented that the bill complied with the Charter, a claim challenged by several witnesses who testified before the committee.[1112] Despite the efforts of opposition members, the Conservative government ultimately refused to provide additional information to support its position on its constitutionality.[1113] Still, Kelly and Hennigar maintain that the government's conclusions regarding its Charter compatibility had to be decided by section 1.[1114] Public declarations of constitutionality are often based on compliance with the reasonable limitations in section 1 rather than on the absence of a violation of the guaranteed rights.[1115]

Other jurisdictions with similar frameworks for executive rights review also show high tolerance to constitutional risk. In 2018, investigating the UK's legislative rights review, Hiebert notes that British governments have pursued "high-risk bills" on several occasions.[1116] While the minister of Justice is tasked with evaluating the Charter compatibility of bills in Canada, the lawyers who performed rights vetting in the UK are responsible for advising the minister in charge of reporting to Parliament on the conclusions of the ministerial statement of compatibility. She found that lawyers advised ministers to declare bills compatible with the *HRA* "if there is a stronger than 50 percent chance that the government would lose if legislation were litigated".[1117] Some lawyers admitted that their advice was sometimes merely a presentation of arguments on either side of the case for compatibility. They noted that this approach could "enable a minister to choose his or her preferred answer even when this constitutes a higher-risk decision."[1118] As a result, nearly all bills introduced had a positive compatibility report, despite the possibility of high constitutional risks.[1119]

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[1112] Macfarlane, Hiebert & Drake, *supra* note 21 at 74.
[1113] *Ibid*.
[1114] Kelly & Hennigar, *supra* note 58 at 53.
[1115] *Ibid*.
[1116] Hiebert, *supra* note 25 at 132.
[1117] *Ibid* at 131.
[1118] *Ibid*.
[1119] *Ibid*. Hiebert summarizes her findings as such: "(1) governments are prepared to approve legislative bills despite having been forewarned that bills deviate significantly from judicial norms and therefore are vulnerable to judicial censure; (2) governments have approved a relatively low threshold for claiming that a bill is compatible with

**b. Charter statements**

The 2019 amendments rendering Charter statements mandatory held promise to strengthen executive rights review. Charter statements serve the several aims: fostering a heightened focus on rights within the bureaucracy and executive during legislative goal evaluation and method selection, shaping governmental legislative agenda strategies, and encouraging parliament to ensure rights-based justification for legislation.[1120] However, to date, Charter statements have failed to reach their potential as an effective mechanism of rights review.

First, though a statement must accompany every bill introduced by the government for adoption, these documents do not present an extensive analysis of the Charter compatibility of legislation. In numerous cases, the minister of Justice limits their discussion to stating that after examining the bill for any inconsistencies with the Charter, they have not identified any potential effects on Charter rights and freedoms. While some of these bills do not raise Charter concerns[1121], the lack of discussion on others appears worrisome. The Charter statement for Bill C-35, *An Act respecting early learning and child care in Canada*, for instance, does not provide any discussion on the Charter consideration that could ensue from this bill. Yet, the preamble of this bill recognized "the impact of early learning and child care on child development, on the well-being of children and of families, on gender equality, on the rights of women and their economic participation and prosperity and on Canada's economy and social infrastructure." Hence, though submitting a Charter statement is now mandatory, presenting an analysis of the Charter considerations of bills is not.

When Charter considerations are discussed in Charter statements, this discussion does not support the potential of this mechanism of rights review as an instrument of rights protection. Several scholars reviewed the quality of Charter statements submitted to date. In 2018, MacDonnell characterized the statements released at this point as "part dispassionate assessment

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Convention rights for statutory reporting purposes; and (3) governments have not interpreted this statutory reporting obligation as requiring disclosure of the seriousness or nature of compatibility concerns or reasons and assumptions for why compatibility should be affirmed, despite knowing of a serious risk that the judiciary will disagree": *Ibid* at 132.

[1120] Hiebert, *supra* note 25 at 127.

[1121] See e.g., Department of Justice, "Bill C-25: An Act for granting to Her Majesty certain sums of money for the federal public administration for the fiscal year ending March 31, 2023", (8 June 2022), online: *Government of Canada*, <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c25_1.html>; Department of Justice, "An Act to amend the Federal-Provincial Fiscal Arrangements Act and the Income Tax Act", (17 April 2023), online: *Government of Canada*, <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c46_1.html>.

of a proposed law's constitutional implications and part advocacy document, designed to make the best case for the government's chosen policy."[1122] In their recent book *Legislating under the Charter*, Macfarlane, Hiebert and Drake criticized Charter statements for providing a "scattergun approach" to the reporting duty. They characterize these documents as "a shopping list of the reasons the government believes the legislative objective in the bill is warranted, and a list of rights that are engaged but is devoid of a proportionality-based analysis of why a bill should be considered valid."[1123] In their opinion, current Charter statements do not reflect a reasonable interpretation of the Minister of Justice's obligation under section 4.1.[1124] An effective statement, would instead include the Minister of Justice's reasons for considering that a bill is compatible with the Charter or to justify introducing a bill that might be vulnerable to judicial invalidation.[1125] They identified several features absent from current Charter statements that could enhance their ability to inform Parliament on how a bill adversely implicates Charter rights:

> Is the legislative objective important enough in light of the deleterious nature of the rights infringement? How serious is the rights infringement? Is the bill likely to accomplish its legislative objective? Was there an obvious, effective, and less restrictive way of accomplishing the legislative objective? Does Parliament believe the legislation is justified even if it departs from judicial norms and thus is vulnerable to invalidation? If so, does the nature of this conflict justify invoking the notwithstanding clause?[1126]

At this point, Charter statements thus do not offer the required background for Parliament to ensure legislation's compatibility with the Charter or to compel the government to clarify its reasons for pursuing high-risk legislation.[1127]

These findings on Charter statements echo the conclusions of several scholars regarding the quality of ministerial statements of compatibility in Australia.[1128] Nicholas Bulbeck, in

[1122] MacDonnell, *supra* note 1032 at 399.
[1123] Macfarlane, Hiebert & Drake, *supra* note 21 at 62.
[1124] *Ibid* at 61.
[1125] *Ibid* at 61.
[1126] *Ibid* at 62.
[1127] *Ibid* at 65.
[1128] See e.g., Nicholas Bulbeck, "Governing in Troubled Times: Exploring Australia's Commitment to Human Rights Through Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)" (2023) 35:1 Bond Law Review 37; Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne: Melbourne University Publishing, 2018); Shawn Rajanayagam, "Does Parliament do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act" (2015) 38:3

particular, investigated recent Australian statements of compatibility and found that these documents have become "accepted yet formulaic and marginal element of the legislative development process."[1129] Assessing how forty-six statements of compatibility introduced in 2019 measured against a set of criteria[1130], he found that:

> the SOCs generally did a good job identifying relevant human rights but frequently performed poorly in relation to being selfcontained, their conclusions on compatibility, and the quality of their human rights argumentation. Thirdly, while there were some good examples of human rights analysis, these instances were the exception.[1131]

As a whole, the quality of ministerial statements in Australia was more often than not "relatively poor."[1132] Adam Fletcher observes that while the quality of these statements has improved in its first years, they stalled in 2015.[1133] Bulbeck and Fletcher propose that the absence of enhancements in the caliber of compatibility statements indicates a continued absence of determination and enthusiasm for the Parliamentary Scrutiny regime among successive Australian governments.[1134]

The example of ministerial statements of compatibility in Australia raises questions about the potential for improvement in the quality of Charter statements without political will. Considering the interviews and declarations regarding the federal government's approach to executive rights review, it is reasonable to question whether the Minister of Justice would be motivated to disclose that a bill may be incompatible with the Charter.

To summarize, centralized at the Department of Justice, the institutional framework for executive rights review creates an environment where the government can freely neglect its obligations under the Charter with minimal answerability. The two current mechanisms of rights review – rights vetting and Charter statement – merely increase the emphasis on rights when deciding on legislative objectives and how to achieve them best, nor does it encourage

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UNSW Law Journal 1046; George Williams & Lisa Burton, "Australia's Exclusive Parliamentary Model of Rights Protection" (2013) 34:1 Statute Law Review 58.

[1129] Bulbeck, *supra* note 1128 at 40.

[1130] "1. Is the SOC a stand-alone document? 2. Does it identify relevant human rights? 3. Does it come to a reasonable conclusion on human rights compatibility? 4. Does it appropriately analyse human rights limitations?": *Ibid* at 46.

[1131] *Ibid* at 73.

[1132] *Ibid* at 40.

[1133] Fletcher, *supra* note 1128 at 116.

[1134] Bulbeck, *supra* note 1128 at 75; Fletcher, *supra* note 1128 at 113.

parliamentary debates on the Charter compatibility of bills.[1135] At best, executive rights review has led to a higher probability that proposed legislation aligns with the Charter as interpreted by the courts, meeting the minimum requirements of judicial precedents. As a result, the institutional framework for executive rights review needs to be strengthened to ensure that Charter concerns are sufficiently considered while drafting bills, thereby fostering effective and sustainable rights protection in federal lawmaking.

### 3.1.2 – The Federal Government's Commitment to GBA+

The lawmaking process provides governments with an additional opportunity to reflect on the Charter considerations of the bills they propose for adoption: the Gender-based Analysis Plus ("GBA+"). GBA+ is a form of policy analysis bringing an intersectional perspective to policymaking.[1136] Women and Gender Equality Canada describes this process as "an analytical process that provides a rigorous method for the assessment of systemic inequalities, as well as a means to assess how diverse groups of women, men, and gender diverse people may experience policies, programs and initiatives."[1137] This process is considered a key effort by the federal government to mainstream intersectionality in federal policymaking.[1138] The primary goal of GBA+ is to facilitate the inclusion of diverse groups of women and men in policy, program, and legislation development, with a focus on considering differential impacts on these groups.[1139] In other words, GBA+ aims to provide policymakers with information and knowledge on the impacts of policies on diverse social groups.[1140]

At first glance, this process seems to serve as a valuable complement to the legal risk assessment conducted by the Department of Justice, expanding the scope of executive rights review beyond the minimum requirements set by jurisprudence. GBA+ indeed constitutes a kind of analysis akin to the type required to identify the broader societal impacts of legislation, or policy

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[1135] Hiebert, *supra* note 25 at 127.
[1136] Francesca Scala & Stephanie Paterson, "Gendering Public Policy or Rationalizing Gender? Strategies Interventions and GBA+ Practice in Canada" (2017) 50:2 Canadian Journal of Political Science 427 at 435.
[1137] Canada, *supra* note 946.
[1138] Susan M Manning & Leah Levac, "The Canadian Impact Assessment Act and Intersectional Analysis: Exaggerated Tensions, Fierce Resistance, Little Understanding" (2022) 65 Canadian Public Administration 242 at 245.
[1139] Department of Justice, "Policy on Gender-Based Analysis Plus", (16 November 2018), *online*: Government of Canada, <https://www.justice.gc.ca/eng/abt-apd/pgbap-pacsp.html>.
[1140] Scala & Paterson, *supra* note 1136 at 435.

of any kind. This process is grounded on the premise that policies have varying effects on different individuals and that these differential impacts must be considered.[1141] It aims to determine how proposed policies might impact equality-seeking groups.[1142]

While the nature of GBA+ makes it a suitable approach to evaluate the non-jurisprudential impacts of bills, including their socio-economic effects, the current format of GBA+ is inadequate to effectively complement the Charter review conducted by the Department of Justice. First, while this mechanism can be seen as a "mechanism of constitutional implementation," as defended by MacDonnell[1143], it does not constitute a mechanism of rights review. Furthermore, it seems that the Policy on GBA+ implemented by the Department of Justice did not expand the scope of the legalistic Charter review to encompass broader social impacts.

### A) Canada's Engagement toward GBA+: A Slow Evolution

Gender-based Analysis ("GBA") was introduced in federal governance in the mid-1990s. Following the 1995 UN's Fourth World Conference, Canada and 187 other jurisdictions pledged to adopt a gender-based approach to policymaking. To follow up on its commitment, the government adopted the Federal Plan for Gender Equality the same year. The primary intent of the Federal Plan was to implement a Gender-based Analysis as a "systematic process to inform and guide future legislation and policies at the federal level by assessing any potential differential impact on women and men."[1144] The responsibility of implementing and supervising this process was attributed to Status of Women Canada, known as Woman and Gender Canada since 2018.

In 2009, the Auditor General published its first of three reports assessing the state of the implementation of GBA among the federal government, noting considerable variation among departments in implementing the GBA framework.[1145] This report served as a catalyst "for

[1141] *Gender-based Analysis Plus (GBA+) and Intersectionality: Overview, an Enhanced Framework, and a British Columbia Case Study*, by Anna Cameron & Lindsay M Tedds (2020) at 3.
[1142] MacDonnell, *supra* note 1032 at 379.
[1143] MacDonnell, *supra* note 1032.
[1144] Status of Women Canada, "Setting the Stage for the Next Century: The Federal Plan for Gender Equality" (1995), online: <https://publications.gc.ca/collections/Collection/SW21-15-1995E.pdf>.
[1145] *Report of the Auditor General of Canada to the House of Commons - Chapter 1: Gender-Based Analysis*, by Office of the Auditor General of Canada, No. FA1-2009/2-1E (Ottawa: Government of Canada, 2009) at 2.

building capacity and mobilizing support for GBA among senior and middle-managers," notably leading to more employee training.[1146]

In 2011, the GBA process was rebranded GBA+. This reform, MacDonnell submits, highlighted the government's commitment to a more fluid approach to gender grounded on a commitment to intersectionality.[1147] Women and Gender Equality Canada defines the process of GBA+ as "a process for examining how various intersecting identity factors impact the effectiveness of government initiatives."[1148] This analysis includes multiple intersecting identity factors, including age, culture, ability, geography, and education.[1149] Through GBA+, gender analysts consider the interaction between these factors and their influence on how members from diverse groups experience government policies and initiatives.[1150]

In 2016, the government renewed its commitment to GBA+ in its *Action Plan on Gender-based Analysis (2016-2020)*. [1151] The Action Plan was implemented in response to the 2015 Auditor General's report. Recognizing the increased supervisory role of Status of Women in GBA+ implementation, the report still noted that only 25 of 110 departments and agencies had formally committed to implementing the Departmental Action Plan.[1152] The 2016 Action Plan also aimed to respond to the Commons Standing Committee on the Status of Women's 2016 report *Implementing Gender-based Analysis Plus in the Government of Canada.*[1153] Through this Action Plan, the government declared wanting to support the complete implementation of GBA+ throughout federal departments and agencies.[1154]

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[1146] Scala & Paterson, *supra* note 1136 at 436.
[1147] MacDonnell, *supra* note 1032 at 379. For an interesting discussion on the shift from GBA to GBA+, see Olena Hankivsky & Linda Mussell, "Gender-Based Analysis Plus in Canada: Problems and Possibilities of Integrating Intersectionality" (2018) 44:4 Canadian Public Policy 303.
[1148] Canada, *supra* note 946. See also *Implementing Gender-based Analysis Plus in the Government of Canada*, by Standing Committee on the Status of Women (House of Commons, 2016) at 5.
[1149] Canada, *supra* note 946.
[1150] *Ibid*.
[1151] Women and Gender Equality Canada, "Action Plan on Gender-based Analysis (2016-2020)", (31 March 2021), online: <https://women-gender-equality.canada.ca/en/gender-based-analysis-plus/resources/action-plan-2016-2020.html>.
[1152] *Report of the Auditor General of Canada - Report 1: Implementing Gender-Based Analysis*, by Office of the Auditor General of Canada (Ottawa: Government of Canada, 2015) at para 1.24.
[1153] *Implementing Gender-Based Analysis Plus in the Government of Canada*, by Marilyn Gladu (Standing Committee on the Status of Women, 2016).
[1154] Canada, *supra* note 1151.

In 2017, Francesca Scala and Stephanie Peterson interviewed several gender analysts responsible for conducting GBA+ in federal lawmaking, providing an interesting insider view of this process. They specifically explored "the strategies employed by gender analysts in the Canadian bureaucracy to make gender matter in policy work."[1155] Gender analysts who were interviewed have criticized the current application of GBA+, describing it as primarily seen as a template checklist for the Memorandum to Cabinet.[1156] They argue that the process is more of a bureaucratic exercise of "box-ticking" rather than an integral element of policy analysis. [1157] In their words, "GBA+ no longer plays a role in the development of strategic policy in their organizations"; it is being "relegated to the planning stage, concerned with guidelines and procedures rather than substantive policy analysis."[1158] They noted that only a small number of those conducting GBA+ can provide evidence that shows these analyses are effectively utilized in the design of public policies.[1159] Gender analysts are not included in strategic policymaking; they are instead involved at the end of the policy process.[1160]

A 2020 internal survey by then-Status of Women Canada revealed that around half of federal departments and agencies have an implementation plan, and around half have mandatory training. These numbers, if they are still low, reflect a notable improvement in the situation in 2019.[1161]

In its third report and most recent inquiry into the GBA+ process, the Auditor General acknowledged the improvements made by the government since its 2015 report but noted that a lot was still to be done to integrate GBA+ into governmental policymaking processes. Despite the new mandatory obligation to include a GBA+ assessment in the Memorandum to Cabinet, the implementation of GBA+ remains weak among departments.[1162]

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[1155] Scala & Paterson, *supra* note 1136 at 431.
[1156] *Ibid* at 436.
[1157] *Ibid*.
[1158] *Ibid*.
[1159] *Ibid* at 436.
[1160] *Ibid* at 436.
[1161] Women and Gender Equality Canada, "Gender-based Analysis Plus implementation survey results 2019-2020", (2 May 2023), online: <https://women-gender-equality.canada.ca/en/gender-based-analysis-plus/resources/implementation-survey-results-2019-2020.html>.
[1162] *Report of the Auditor General of Canada - Report 3 - Follow-up on Gender-Based Analysis Plus*, by Auditor General of Canada (Office of the Auditor General of Canada, 2022) at 25.

Hence, since the federal government first committed to implementing a GBA approach in 1995, this process has slowly but surely evolved. The evolving features of GBA+ show progress in recognizing differential policy impacts on diverse civil society groups. However, as further explained below, the current state of GBA+ is still insufficient to serve as an efficient mechanism for rights review, notably for complementing the Charter review conducted by the Department of Justice.

### B) Is GBA+ a Mechanism of Rights Review?

While GBA+ is not explicitly designed as a mechanism of rights review, its objectives closely align with the values outlined in the Charter. Particularly, since section 15 enshrines gender equality, the goals of GBA+ follow the principles set forth in the Charter.[1163]

Several studies documented the potential of GBA+ to ensure that the interests of marginalized groups are considered during policymaking.[1164] GBA+ can be particularly helpful with regard to socio-economic rights given the intersectional character of poverty, which predominantly affected marginalized groups.[1165] The questions inquired in GBA+ are also akin to questions explored in the conception of Charter review privileged in this thesis, including: What additional systemic issues and inequities exist in relation to the problem? Does the presumed neutrality of institutions and policies obscure bias or discrimination? Do different groups have diverse experiences?[1166]

Still, in its current state, GBA+ falls short of acting as a mechanism of rights review, or at least one fostering effective and sustainable rights protection. It does not serve as a separate process for scrutinizing rights, nor does it significantly alter the existing legalistic rights review mechanisms.

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[1163] Canada, *supra* note 946.
[1164] See e.g., Anna Cameron & Lindsay M Tedds, "Canada's GBA+ Framework in a (post)Pandemic World: Issues, Tensions, and Paths Forward" (2023) 66:1 Canadian Public Administration 7; Ashlee Christoffersen & Olena Hankivsky, "Responding to Inequalities in Public Policy: Is GBA+ the Rights Way to Operationalise Intersectionality?" (2021) 64:3 Canadian Public Administration 524.
[1165] Cameron & Tedds, *supra* note 1141 at 15.
[1166] *Ibid* at 12.

*i. GBA+ as a Mechanism of Rights Vetting*

At first sight, GBA+ could appear to constitute a mechanism of rights vetting complementing the Charter review at the Department of Justice. The two processes share certain resemblances. Inspired by similar commitments to Charter rights[1167], they constitute proactive mechanisms of constitutional implementation aiming at preventing adverse impacts of bills on the rights before they occur.[1168] Moreover, both are part of the internal practices of the government in lawmaking rather than legal obligations.[1169] Further, minimal overlap exists between these two mechanisms[1170]: while rights vetting constitutes a legal risk analysis performed by government lawyers, GBA+ involves structured policy analysis mandating evidence gathering, consultation, analysis and recommendations.[1171] Rather than focusing on jurisprudential concerns in the proposed legislation, the latter emphasizes equality impacts through a "more policy-oriented process."[1172] These factors might give the impression that GBA+ and rights vetting together could form a comprehensive approach to executive rights review.

However, while GBA+ can serve as a tool for implementing the government's constitutional obligations under the Charter, its primary focus is not directly assessing the compatibility of policies or legislation with the Charter itself. As described by Women and Gender Equality Canada, GBA+ intends to assess "how diverse groups of women, men, and gender diverse people may experience policies, programs and initiatives."[1173] Such an assessment constitutes an essential facet of Charter review, especially under a broader conception of rights review such as the one defended in this thesis: GBA+ holds the potential to provide an encompassing portrait of civil society, encompassing the diverse needs and interests of its various groups, particularly those that are marginalized. However, a robust Charter review entails more than this limited assessment: it requires taking a stance on the scope and meaning of Charter rights and evaluating how they relate to the specific bill under consideration. Only when these elements are addressed can a mechanism be considered supporting lawmakers' ability to assess the Charter compatibility of bills before their adoption.

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[1167] MacDonnell, *supra* note 1032 at 385.
[1168] *Ibid* at 387 and 396.
[1169] *Ibid* at 374.
[1170] *Ibid* at 385.
[1171] *Ibid* at 400.
[1172] *Ibid* at 387.
[1173] Canada, *supra* note 946.

Secondly, GBA+ operates within the realm of executive internal practice and is thus considered confidential. The extent and quality of the assessment conducted, or if GBA+ was conducted at all, remains largely unknown. While some GBA+ reports have been published[1174], this process is largely exempt from parliamentary and public scrutiny, thereby limiting opportunities to hold the government accountable for going forward with the enactment of legislation infringing Charter rights.

Another element affecting the relevance of GBA+ as a mechanism of rights vetting is the absence of a legal requirement to conduct GBA+. In 2015, the Auditor General highlighted the lack of a statutory obligation for GBA+ implementation, insufficient training, and weak oversight as contributing factors to the minimal engagement of departments in conducting GBA+.[1175] In 2016, the government made including GBA+ in the Memorandum to Cabinet mandatory. Yet, in 2022, the Auditor General noted that almost half of departments and agencies still had not implemented a GBA+ framework.[1176] As a result, the effective implementation of GBA+ remains highly contingent on political will.

One could point out that rights vetting by governmental lawyers is not a statutory obligation either, yet the latter is seemingly taken a lot more seriously than GBA+ by executive lawmakers. While the impact of governmental lawyers' advice on the content of bills is subject to the government's discretion[1177], rights vetting is typically carried out through a formalized and structured process. The LSUs and HRLS were created for that specific purpose[1178], and the *Schmidt* case revealed extensive internal protocols implemented to evaluate the legal risks of proposed legislation. Yet, contrarily to rights vetting, GBA+ is "plagued by sporadic and often half-hearted efforts at compliance."[1179]

One reasonable explanation for the differential treatment between the two processes is the cost of defending the constitutionality of contested legislation in court. Consequences for

[1174] *Subject matter of Bill C-7, An Act to amend the Criminal Code (medical assistance in dying)*, by Standing Senate Committee on & Standing Senate Committee on Legal and Constitutional Affairs (Senate of Canada, 2021) app Annex III.
[1175] MacDonnell, *supra* note 1032 at 377.
[1176] Auditor General of Canada, *supra* note 1162 at 12.
[1177] Macfarlane, Hiebert & Drake, *supra* note 21 at 50.
[1178] Hiebert, *supra* note 373 at 70. Kelly, *supra* note 58 at 494.
[1179] MacDonnell, *supra* note 1032 at 391.

noncompliance to judicial precedents include political, financial and reputational risks.[1180] Furthermore, the discoveries from early rights vetting are incorporated into the Memorandum to Cabinet, fostering a thorough review process. Having to inform the Cabinet of the possible risks and costs of a Charter challenge promotes the conduct of a diligent review process, a step that GBA+ has yet to achieve. The potential for judicial review and subsequent invalidations can explain why rights vetting is carried out even without a legal requirement, in contrast to GBA+.

### *ii. GBA+ at the Department of Justice*

The Department of Justice is among the government departments that have adopted guidelines to ensure their actions align with the government's commitment to GBA+. Their Policy on GBA+ reads:

> officials in all parts of the Department, whether working on legal services, litigation, law reform, policy and program development, international agreements or programs, research, communications, evaluation, management or other areas, are to apply GBA Plus and ensure that their work considers and reflects the diverse needs of different groups of people. To enable this, GBA Plus training is mandatory for all Justice Canada officials.[1181]

As officials of the Department of Justice, government lawyers and the Minister of Justice are subjected to this Policy. They are required to apply GBA+ in the context of their functions, including when assessing the Charter compatibility of bills during rights vetting and in Charter statements.

Still, at this point, nothing suggests that rights vetting nor Charter statements have been infused with concerns for equality and intersectionality outside of jurisprudential concerns. The previously discussed example of Bill C-28, *An Act to amend the Criminal Code (self-induced extreme intoxication)* provides a relevant example of the lack of concern for equality-seeking groups in Charter statements. The Bill's preamble explicitly acknowledges the implications of the self-induced extreme intoxication defence for vulnerable groups, particularly women and

[1180] These decisions include *Schachter v. Canada*, *supra* note 309; *Oakes*, *supra* note 309; *Singh v. Minister of Employment and Immigration*, *supra* note 309: Hiebert, *supra* note 12 at 92.
[1181] Department of Justice, "Policy on Gender-Based Analysis Plus," (16 November 2018), *online*: Government of Canada, <https://www.justice.gc.ca/eng/abt-apd/pgbap-pacsp.html>.

children.[1182] Yet, the Charter statement only focused on the jurisprudential considerations of the bill, failing to provide an intersectional understanding of the differential and disproportionate impacts of this defence on these groups.[1183] It merely acknowledges that the amendments aim to shield the public, especially women and children, from violence stemming from extreme intoxication. The jurisprudential framework employed to address Charter considerations within Bill C-28 highlights a constrained integration of the GBA+ approach within Charter statements. It is reasonable to hypothesize that if these implications were not deemed pertinent enough to be included within the Charter statement, they likely were not examined thoroughly during rights vetting by governmental lawyers.

In summary, although GBA+ has the potential to promote rights protection by assisting executive lawmakers in evaluating the impact of bills on the Charter rights of diverse groups, it requires improvements to effectively function as a mechanism of rights review. At first glance, GBA+ appears to complement the rights review conducted by the Department of Justice by expanding the scope of executive rights review. However, the inconsistent implementation of GBA+, particularly within the Department of Justice, hampers its potential as an effective mechanism of rights review.

Though the GBA+ offers an additional opportunity for the government to ponder on the various intersecting identity factors that might impact the effectiveness of bills[1184], in its current format, this process is inadequate to complement the Charter review performed at the Department of Justice in a way fostering rights protection.

In this section, I conducted a critical evaluation of the executive rights review and concluded that its institutional framework does not adequately support good governance in federal lawmaking. As a result, it falls short of fostering effective and sustainable rights protection. The two mechanisms for rights review, namely rights vetting and Charter statements, both carried out

[1182] The Preamble to Bill C-72, *An Act to amend the Criminal Code (self-induced intoxication),* reads in part: "WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantaging impact on the equal participation of women and children in society and on the rights of women and children to security of the person and the equal protection and benefit of the law as guaranteed by ss. 7, 15 and 28 of the Canadian Charter of Rights and Freedoms."
[1183] Government of Canada, *supra* note 384.
[1184] Canada, *supra* note 946.

by the Department of Justice, contribute to conditions that may lead the government to overlook Charter concerns during the bill drafting process. Although they provide opportunities for the government to assess the potential Charter impacts of bills, the nature and scope of the Charter review undertaken are influenced by the Department of Justice's role as a governmental entity tasked with offering legal advice. These assessments tend to adopt a highly legalistic perspective on Charter review, are conducted behind closed doors and lack civil engagement. While GBA+ offers an additional avenue for the government to consider various intersecting identity factors that could affect Charter rights[1185], its current format is insufficient to complement the Department of Justice's Charter review in a manner conducive to fostering rights protection.

Considering the limitations of the current executive rights review, an additional mechanism of rights review is imperative to complement the evaluations conducted by the Department of Justice. While rights vetting and Charter statements would remain focused on legal risks and the jurisprudential aspects of bills, an additional assessment from a human rights perspective would provide invaluable insights into their broader socioeconomic implications.[1186]

This observation begs a fundamental question: who should be responsible for conducting an assessment that effectively assists executive legislators in identifying the broader socio-economic impacts of proposed legislation that could be covered under the Charter? To ensure effective and sustainable rights protection, this assessment cannot be entrusted solely to legal experts or conducted by the Department of Justice. Consequently, establishing a dedicated human rights institution emerges as the most suitable approach to conducting such a review.

## 3.2 – An Advisory Human Rights Institution to Broaden the Scope of Executive Rights Review

Given the limitations of the current executive rights review, an additional mechanism of rights review should be implemented to complement the assessments carried out by the

[1185] *Ibid*.
[1186] MacDonnell, *supra* note 1032 at 392.

Department of Justice. This mechanism would work towards highlighting potential Charter implications of bills that fall outside the scope of the existing executive rights review.[1187]

If evaluating the jurisprudential considerations of bills falls within the jurisdiction of the Department of Justice, assessing their socio-economic impacts does not. Expecting governmental lawyers to undertake such a comprehensive review would be impractical and unrealistic. They can undoubtedly address non-jurisprudential considerations in the context of their assessment, for example, if GBA+ infuses the rights vetting and Charter statements. However, the mandate and expertise of governmental lawyers do not align with the broader approach to Charter review advocated in this thesis, which includes the assessment of both jurisprudential and broader socio-economic impacts of proposed legislation. As MacDonnell aptly states, "it is not necessarily desirable to see yet another aspect of the policy process taken over by lawyers, particularly when lawyers are already required to be attentive to possible equality rights violations as part of the Charter vetting process."[1188] Entrusting the Department of Justice with such a mandate of Charter review could result in a legalistic approach akin to that seen in rights vetting and Charter statements, potentially shifting the assessment's focus.[1189]

In this context, I contend that a human rights institution would be the most appropriate entity to undertake this responsibility during the drafting of bills. As legal scholar Raj Kumar writes, "[h]uman rights issues need to be directly and seriously confronted by a body that is exclusively mandated to perform such a task".[1190] NHRIs are unique institutions in that their primary responsibility is human rights and protection.[1191] They can possess various functions, including advising and monitoring rights compliance, encouraging the ratification of international treaties, and promoting rights protection through research and teaching. Despite their distinct

[1187] Macfarlane, Hiebert and Drake provide another interesting proposition to enhance executive rights review, focusing for their part on the existing Charter statements. They suggest reforming these statements to incorporate "a more comprehensive proportionality analysis from a policy analytical perspective" for the purpose of justifying potential limitations on rights: Macfarlane, Hiebert & Drake, *supra* note 21 at 168.
[1188] MacDonnell, *supra* note 1032 at 392.
[1189] *Ibid*.
[1190] C Raj Kumar, "Developing a Human Rights Culture in Hong Kong: Creating a Framework for Establishing an Independent Human Rights Commission" (2004) 11 Tulsa J Comp & Int'l L 407 at 427.
[1191] Eliadis, *supra* note 1091 at 26.

functions, all human rights institutions share one characteristic: "a directive to collect and disseminate information about state human rights practices."[1192]

At the federal level, the CHRC constitutes the primary human rights institution entrusted with protecting and promoting human rights. Established in 1977, this institution is tasked with giving effect to the protections provided by the *Canadian Human Rights Act* within federal jurisdiction. The CHRC receives discrimination complaints under this bill of rights and renders individual reparations. While the CHRC's contribution and dedication to rights protection are evident[1193], its capacity to enhance rights protection in the realm of executive lawmaking remains limited. Besides being limited to the *Canadian Human Rights Act* and federally-regulated organizations, this institution does not have explicit advisory functions in lawmaking.

A meaningful commitment to rights protection in executive lawmaking requires a broader mandate and a more involved role in determining the Charter impacts of bills. For that reason, I recommend creating a new and distinct NHRI mandated with advising the government on the impacts of proposed legislation on Charter rights.[1194] To effectively contribute to rights protection, the proposed institution's structure and conduct must align with principles of good governance.[1195]

This section does not advocate for a specific model of human rights institutions. As political scientists Ryan M. Welch, Jacqueline H.R. DeMeritt and Courtenay R. Conrad recently noted, "the systematic study of NHRIs is in its infancy."[1196] Few studies have evaluated the characteristics allowing NHRIs to foster effective and sustainable rights protection.[1197] Instead,

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[1192] Ryan M Welch, Jacqueline H R DeMeritt & Courtenay R Conrad, "Conceptualizing and Measuring Institutional Variation in National Human Rights Institutions (NHRIs)" (2021) 65:5 Journal of Conflict Resolution 1010.

[1193] The commission is notably linked to recognizing sexual orientation in the *Canadian Human Rights Act*. It indeed "mobilized all available channels", for instance, promoting its inclusion in its annual reports to Parliament and its comments to media, and accepting sexual orientation complaints before it was recognized as a prohibited ground in the *Canadian Human Rights Act*: Annette Nierobisz, Mark Searl & Charles Théroux, "Human Rights Commissions and Public Policy: The Role of the Canadian Human Rights Commission in Advancing Sexual Orientation Equality Rights in Canada" (2008) 51:2 Canadian Public Administration 239 at 258.

[1194] Though this thesis focuses on the Charter, the NHRI could also advise the government on other instruments, including statutory bills of rights.

[1195] C Raj Kumar, "National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights" (2003) 19 Am U Int'l L Rev 259 at 287.

[1196] Welch, DeMeritt & Conrad, *supra* note 1192 at 1011.

[1197] See e. g., Hinako Takata, "How are the Paris Principles on NHRIs Interpreter? Toward a Clear, Transparent, and Consistent Interpretative Framework" (2022) 40:2 Nordic Journal of Human Rights 285; Welch, DeMeritt & Conrad, *supra* note 1192; Julie Mertus, "Evaluating NHRIs: Considering Structure, Mandate, and Impact" in Ryan Goodman & Thomas Pegram, eds, *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge: Cambridge University Press, 2012).

this section provides an overview of the key functional and structural characteristics of these institutions and how they can impact their capacity for foster effective and sustainable rights protection.

The *Principles Relating to the Status of National Human Rights Institutions* ("Paris Principles") offer a pertinent guide to reflect on the institutional characteristics of a NHRI that aligns with principles of good governance. These Principles, adopted by the international community in 1991, are viewed as the benchmarks against which to assess the effectiveness of human rights institutions. In this section, I explore the implementation of the Paris Principles within established NHRIs and consider how the associated institutional characteristics can affect rights protection within these jurisdictions.

This discussion relies on several NHRIs, including the CHRC, the Ontario Human Rights Commission ("OHRC"), the Quebec Commission des droits de la personne et des droits de la jeunesse ("CDPDJ"), the UK Equality and Human Rights Commission ("EHRC"), France's Commission nationale consultative sur les droits humains ("CNCDH"), and the South Africa Human Rights Commission ("SAHRC"). All these NHRIs hold an A-Status under the Paris Principles, indicating full compliance. Their successes and failures in enhancing rights protection within their respective jurisdictions can provide guidance to design a human rights institution tasked with advising the federal government on the socioeconomic considerations of bills that could involve the Charter during their drafting.

This section is organized into two parts. Firstly, I explore the potential of NHRIs as channels for promoting good governance, discussing their role in enhancing rights protection by incorporating diverse perspectives and fostering transparency and accountability within the realm of executive lawmaking. In the second part, I explore the essential institutional attributes that a human rights institution should possess to effectively assess the broader socioeconomic impacts of bills, thus complementing the existing executive rights review. This analysis encompasses investigating the functional and structural characteristics that could enhance the institution's capacity to fulfill this role.

### 3.2.1 – Human Rights Institutions as Channels of Good Governance

NHRIs have a vital role to play in the institutionalization of good governance.[1198] As noted by Eliadis, human rights institutions provide "a wide diversity of voices in a multicultural society" and "a check on majority-ruled legislatures."[1199] In this sense, NHRIs offer two primary contributions to the promotion of good governance: they diversify the perspectives and sources of information considered during bill drafting, and they increase transparency and accountability in lawmaking.

A) Diversifying the Perspectives Considered during the Drafting of Bills

Access to a diverse array of information stands as a crucial factor in conducting a robust Charter review. An evaluation built upon a comprehensive understanding of the impacts of bills holds the potential to strengthen political equality and enhance participation in the lawmaking process, ultimately resulting in more responsive and inclusive legislation. Particularly important is the imperative for governments to actively engage with marginalized groups, who often find themselves underrepresented within lawmaking institutions.[1200] These groups face an elevated risk of having their needs and interests overlooked. The availability of this information becomes indispensable for executive lawmakers, ensuring their full awareness of the potential indirect consequences associated with proposed legislation. Without this information, executive lawmakers may remain unaware of certain unintended detrimental effects that bills impose on segments of civil society. To contribute to good governance, Charter review must be grounded on complete information on the needs and interests of civil society.

At the crossroads between government and civil society, NHRIs provide a "practical link between the governing and the governed."[1201] This privileged position allows these institutions to gather empirical and experiential data on the lived experience of civil society, notably on marginalized groups.[1202] As legal scholar Olivier De Schutter maintains, rights review conducted by NHRIs plays a vital role in ensuring that the impacts of proposed legislation are thoroughly

[1198] Kumar, *supra* note 1195 at 284.
[1199] Eliadis, *supra* note 1091 at 277.
[1200] Bell, *supra* note 859 at 207.
[1201] Coleman & Gøtze, *supra* note 809 at 12.
[1202] Mario Gomez, "Chapter 16: Advancing economic and social rights through national human rights institutions" in (Cheltenham, UK: Edward Elgar Publishing, 2020) at 335.

considered, taking into account a wide range of interests.[1203] Accordingly, they can inform the government about the concrete effects of proposed legislation on guaranteed rights. The result is better and completer information in the hand of executive lawmakers when drafting legislation, allowing the government to be more responsive to the preferences and needs of the population.

To fulfill their potential as institutions of rights review, NHRIs must have the ability to gather the information relevant to their reviewing functions. As further detailed in the next section, two main avenues can allow NHRIs to find and collect this information: research and public participation. Participation processes, in particular, strengthen the voice of marginalized groups in policymaking. Intimately related to the principle of political equality,[1204] participation processes can benefit less powerful groups whose rights might not be fully acknowledged or respected in traditional modes of representative democracy by allowing them to express their preferences.[1205] The information collected through these methods can form a strong basis for conducting thorough assessments of the impacts of bills on the Charter, particularly when scrutinizing their broader socioeconomic implications, which require access to reliable information about civil society's lived experiences.

### B) Greater Transparency and Accountability in Lawmaking

As institutions exclusively devoted to protecting and promoting human rights, NHRIs can lead to greater transparency and accountability in lawmaking.[1206]

One of the core ways in which NHRIs can contribute to good governance is by publicizing their advice and recommendations. Without requiring it, the Paris Principles precise that the institution "may decide to publicize" its "opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights."[1207] Their advice can be

[1203] *The role of national human rights institutions in human rights proofing of legislation*, CRIDHO Working Paper 2006/05, by Olivier de Schutter, CRIDHO Working Paper 2006/05 (Louvain: Cellule de recherche interdisciplinaire en droits de l'homme, 2005) at 12.
[1204] Pateman, *supra* note 790 at 14.
[1205] Fischer, *supra* note 789 at 461.
[1206] Kumar, *supra* note 942 at 768.
[1207] *Principles Relating to the Status of National Human Rights Institutions*, GA Res 48/134, UN Doc A/RES/48/134 (1993) at 3(a).

publicized on the institution's website, on various media and through relevant organizations in direct contact with civil society.

The publication of the institution's findings and recommendations increases transparency by shedding light on a portion of the information detained by executive lawmakers to guide the drafting of bills. Although some of this information is subject to confidentiality, particularly advice from government lawyers and deliberations within the Cabinet, actors external to this process would be informed of the NHRI'S conclusions regarding the Charter compatibility of bills. Welch and al argue that the effectiveness of an institution relies heavily on its capacity to publicly disclose the state's practices with regard to human rights; it plays a crucial role in ensuring its overall impact and effectiveness.[1208] Through their reporting, NHRIs increase information for three principal audiences, all of whom play crucial roles in holding governmental actions accountable: legislatures, civil society and the international community.[1209]

As further discussed later, the imperative of maintaining confidentiality within the realm of executive lawmaking can present complexities for NHRIs when it comes to publicizing their advice. In federal lawmaking, documents and communications related to the drafting of bills are generally subject to confidentiality restrictions[1210], which could hinder the ability of a human rights institution to openly and transparently publicize its findings and recommendations. This, in turn, may hinder its effectiveness in promoting human rights and ensuring accountability in federal lawmaking.

Further, as horizontal institutions of accountability, NHRIs provide checks and balances on governmental conduct.[1211] If they generally do not have the power to constrain the government, they can have a range of "soft powers," including giving advice and recommendations.[1212] The increased transparency in lawmaking ensuing from the publication of their report also supports greater governmental accountability.[1213] Prospects of accountability remain elusive in the absence of access to pertinent information. Publicizing their advice can also pressure governments to

[1208] Welch, DeMeritt & Conrad, *supra* note 1192 at 1018.
[1209] *Ibid*.
[1210] *Canada Evidence Act*, *supra* note 1038, s 39.
[1211] Linda C Reif, "The Shifting Boundaries of NRHI Definition in the International System" in Ryan Goodman & Thomas Pegram, eds, *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge: Cambridge University Press, 2012) 52 at 52.
[1212] *Ibid*.
[1213] Meijer, *supra* note 763 at 512.

respect guaranteed rights; they could otherwise ignore them.[1214] In other words, while they cannot directly sanction governments for infringing the Charter, NRHIs can raise the cost of non-compliance.[1215]

### 3.2.2 – Designing a Human Rights Institution Fostering Rights Protection

This section delves into the fundamental characteristics of a human rights institution intended to complement the Charter review performed by the Department of Justice and promote good governance within executive lawmaking. The institution's effectiveness in carrying out its functions is contingent on a range of factors, including its implementation, subsequent treatment, and the broader socioeconomic context within which it operates.[1216] However, certain functional and structural characteristics can support its capacity to foster effective and sustainable rights protection. By identifying these attributes, the section underscores the pivotal role of NHRIs in conducting a comprehensive assessment of Charter compatibility and its possible socioeconomic facets. Drawing inspiration from the Paris Principles, I identify the essential functional and structural characteristics required to empower the proposed human rights institution in fulfilling its roles in accordance with the principles of good governance.

#### A) The Paris Principles: A Foundation for Designing NHRIs

The Paris Principles constitute the primary normative source of standards for designing and assessing NHRIs.[1217] They outline their fundamental criteria, including their core competencies, responsibilities, composition, and operational methods. The adoption of these Principles led to a sharp increase in the number of NHRIs worldwide,[1218] marking the

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[1214] Gauthier de Beco & Rachel Murray, *A Commentary on the Paris Principles on National Human Rights Institutions* (Cambridge: Cambridge University Press, 2014) at 49.
[1215] Sonia Cardenas, "Emerging Global Actors: The United Nations and National Human Rights Institution" (2003) 9:1 Global Governance 23 at 45.
[1216] Rachel Murray, "National Human Rights Institutions: Criteria and Factors for Assessing the Effectiveness" (2007) 25:2 Netherland Quarterly of Human Rights 189 at 220.
[1217] Ryan Goodman & Thomas Pegram, eds, "Introduction" in *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge: Cambridge University Press, 2012) at 7. See also de Beco & Murray, *supra* note 1214 at 6; Adam Smith, "The Unique Position of National Human Rights Institutions: A Mixed Blessing?" (2006) 28:4 Human Rights Quarterly 904 at 912.
[1218] Katerina Linos & Tom Pegram, "Architects of Their Own Making: National Human Rights Institutions and the United Nations" (2016) 38 Human Rights Quarterly 1109 at 1114–15.

standardization of such institutions.[1219] The drafting of the Paris Principles was grounded in the belief that NHRIs can serve as a vital bridge between the government and civil society, and between national and international human rights regimes.[1220] They play a crucial role in facilitating dialogue, cooperation, and collaboration to enhance human rights promotion and protection at various levels.[1221]

Despite not being legally binding, the Paris Principles hold significance as a guiding framework for NHRIs.[1222] These Principles do not fall into traditional sources of international law: they are not considered a treaty, customary international law, or general principle of law. The Paris Principles derive their legitimacy and value from being formulated by NHRIs themselves.[1223] These Principles were indeed adopted at the 1991 First International Workshop on National Institutions for the Promotion and Protection of Human Rights, an event organized by the French CNCDH.[1224] The international community subsequently endorsed them.[1225]

According to the Paris Principles, NHRIs should have the authority to promote and protect human rights, with a mandate clearly defined in constitutional or legislative texts. They should function independently from the government, with a diverse and representative membership. Their varied roles include advising the government, conducting research, receiving complaints, facilitating human rights treaty implementation, and engaging in international human rights initiatives. These features enable NHRIs to effectively fulfill their functions of promoting and protecting human rights.

The Global Alliance of National Human Rights Institutions ("GANHRI"), comprising NHRIs from across the globe, is tasked with supporting establishing and maintaining NHRIs that

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[1219] *Assessing the Effectiveness of National Human Rights Institutions*, by International Council on Human Rights Policy (Versoix, Switzerland: Office of the United Nations High Commissioner for Human Rights, 2005) at 6.
[1220] "Paris Principles: 20 years guiding the work of National Human Rights Institutions", online: *OHCHR* <https://www.ohchr.org/en/stories/2013/05/paris-principles-20-years-guiding-work-national-human-rights-institutions>.
[1221] Takata, *supra* note 1197 at 292.
[1222] *Ibid* at 286.
[1223] de Beco & Murray, *supra* note 1214 at 3.
[1224] *Ibid*.
[1225] The Commission on Human Rights and the UN General Assembly endorsed these Principles in 1992 and 1993, respectively. In 1993, the World Conference on Human Rights in Vienna acknowledged the "important and constructive role" of NHRIs for rights protection in its Declaration and Programme of Action, further encouraging establishing such institutions in states. *Vienna Declaration and Programme of Action*, by World Conference on Human Rights (Vienna, 1993).

adhere to the Paris Principles. The GANHRI is notably responsible for the process of accreditation of NRHIs. The criteria set out in the Paris Principles are those these institutions must meet to receive UN accreditation.[1226] NHRIs can be accredited under three categories according to their level of compliance.[1227] Further, the GANHRI also has the authority to interpret the scope and meaning of these Principles.[1228] In that regard, this international institution published General Observations providing guidance on the essential requirements of the Paris Principles and practices promoting their compliance. The GANHRI thus plays a vital role in assisting the establishment and sustainability of NHRIs that adhere to the Paris Principles.

In the context of this thesis, the Paris Principles assume a pertinent role to reflect on the characteristics of an advisory human rights institution supporting good governance within federal lawmaking. Notably, both good governance and the Paris Principles underscore the significance of transparency. The Paris Principles highlight the imperative of independence, a pivotal criterion for the institution's capacity to promote good governance. Furthermore, both recognize the value of civil engagement. However, the Paris Principles do not explicitly address the importance of accountability, an element essential for enabling NHRIs to adeptly carry out their roles.

Despite their relevance to this day, human rights scholars acknowledge the limitations of the Paris Principles to design institutions supporting effective and sustainable rights protection. Apart from the omission of accountability,[1229] the primary criticism lies in the emphasis of the Principles on establishing NHRIs rather than evaluating their performance or effectiveness.[1230] Murray, for example, argues that while reflecting on the design of NHRIs is a valid starting point, the Principles overemphasise on factors related to their establishment rather than their subsequent performance and perception by others.[1231] Likewise, human rights scholar Julie Mertus contends that this focus on composition and operation is inadequate when it comes to designing efficient NHRIs.[1232] While not perfect, the Paris Principles still serve as valuable benchmarks for assessing

[1226] Katherine Tonkiss, "Contesting Human Rights Through Institutional Reform: The Case of the UK Equality and Human Rights Commission" (2016) 20:4 The International Journal of Human Rights 491 at 491.
[1227] *Ibid* at 493. An "A" Status means full compliance with the Paris Principles, while a "B" status indicates that an NHRI is not fully compliant, while a "C" status refers to institutions that do not comply with the Paris Principles.
[1228] Takata, *supra* note 1197 at 288.
[1229] de Beco & Murray, *supra* note 1214 at 20.
[1230] *Ibid*.
[1231] Murray, *supra* note 1216 at 190.
[1232] Mertus, *supra* note 1197 at 80.

the effectiveness and legitimacy of NHRIs.[1233] They provide a framework for evaluating the functional and structural characteristics necessary for the proper functioning of these institutions.[1234] In other words, the Paris Principles constitute a "concrete – if imperfect – template" for designing NHRIs.[1235]

### B) Functional Requirements: A Mandate to Advise and Report

The Paris Principles state that the mandate of an NHRI should be clearly defined in its founding legislation and be as broad as possible.[1236] A clearly defined jurisdiction enables the institution to effectively perform its functions by staying focused on its central purpose and avoiding less critical tasks.[1237] A broad mandate allows the NHRI to acquire and synthesize information more efficiently. The institution can develop well-informed opinions on human rights matters and effectively transmit them to those who have the power to bring about significant change.[1238] A broad and clearly defined mandate is thus essential for an NHRI to operate effectively.

To complement the existing executive rights review, the proposed human rights institution should have a dual mandate. Firstly, it should advise the government on the Charter compatibility of bills during drafting. Additionally, it should be empowered to engage in human rights research and inquiries, gathering pertinent empirical and experiential data to support its assessments.

#### *i. A Diversity of Mandates*

The Paris Principles grant NHRIs the wide competence to "promote and protect human rights."[1239] Promoting human rights refers to the "proactive powers to undertake public education, develop policy, review legislation, provide advice to government, speak out publicly about human

[1233] Eliadis, *supra* note 1091 at 33.
[1234] *Ibid*.
[1235] Linos & Pegram, *supra* note 1218 at 1112.
[1236] *Paris Principles*, *supra* note 1207, s 2.
[1237] *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, by Centre for Human Rights, HR/P/PT/4 (Geneva; New York: United Nations, 1995) at 12.
[1238] *Ibid* at 23.
[1239] *Paris Principles*, *supra* note 1207, s 1.

rights issues, and cooperate with other human rights institutions."[1240] Protecting human rights, for its part, includes "includes receiving, investigating, settling, and mediating complaints."[1241]

The broad competence advocated by the Paris Principles encompasses a wide range of functions that often combine elements of both protection and promotion of human rights.[1242] The Paris Principles state that the functions of NHRIs include advising the government on proposed or existing legislation, conducting research and inquiries, educating the public and addressing complaints.

One potential role that NHRIs can undertake is an advisory function. NHRIs are frequently mandated to examine policies, including legislation, and advise governments on their possible impacts on guaranteed rights. In doing so, they assist lawmakers in protecting and promoting human rights.[1243] This advisory function can cover proposed legislation[1244], existing legislation[1245] or both.[1246] Beco and Murray maintain that this function is arguably one of the most critical responsibilities of NHRIs.[1247] In Canada, no human rights commission has a specific mandate to advise the government during lawmaking. However, they can provide advice as part of their broader mandate to promote and protect human rights.[1248]

Conducting research, studies, and inquiries constitutes another essential function that NHRIs perform. A report is generally published exposing the institution's findings. Most NHRIs are vested with research functions: all the institutions discussed in this Chapter are well-known for their publications, which cover a vast range of topics related to human rights matters. The UK EHRC, especially, has an extensive library of publications tackling discrimination and equality issues. In Canada, the CHRC conducts inquiries and research on four marginalized groups: Aboriginal people, women, people with disabilities and visible minorities. It notably developed

[1240] Eliadis, *supra* note 1091 at 38.
[1241] *Ibid* at 35.
[1242] Gomez, *supra* note 1202 at 335; Eliadis, *supra* note 1091 at 38.
[1243] Centre for Human Rights, *supra* note 1237 at 23.
[1244] For instance, the South African Human Rights Commission and the New Zealand Human Rights Commission: *South African Human Rights Commission Act, 2013*, Act No 40 of 2013, s 13(2)(b); *Human Rights Act 1993* (NZ), s 5(2)(ka).
[1245] For instance, the Quebec Commission des droits et libertés de la personne: *Charter of Human Rights and Freedoms*, *supra* note 498, s 71(6).
[1246] For instance, the Australia Human Rights Commission: *Australian Human Rights Commission Act 1986*, 11, s 8(1)(e).
[1247] de Beco & Murray, *supra* note 1214 at 48.
[1248] Eliadis, *supra* note 1091 at 35.

the *Framework for Documenting Equality Rights*.[1249] This Framework provides "reliable and policy-relevant data on equality rights in Canada, by examining the social and economic well-being of groups protected under the Canadian Human Rights Act, and provincial and territorial human rights legislation".[1250] The CHRC's *2013 Report on the Equality Rights of Aboriginal People* is notably based on this Framework.[1251] The research function of NHRIs is pivotal as it forms the basis for their other roles, notably their advisory function. Research equips NHRIs with valuable data and insights that inform their advice and recommendations on human rights matters.

Another critical function of NHRIs is to educate on rights issues. These institutions contribute to protecting and promoting rights by raising awareness among civil society, including by informing individuals on their rights, civil engagement opportunities and existing mechanisms of rights protection.[1252] They can also collect, produce and disseminate information on human rights issues, organize events and encourage community initiatives.[1253] An additional facet of their education function is to work directly with relevant organizations to support compliance with human rights legislation. The CHRC, for instance, assists federally regulated organizations to comply with the *Accessible Canada Act*[1254], the *Employment Equity Act*[1255], the *National Housing Strategy Act*[1256], and the *Pay Equity Act.*[1257]

An additional commonly assigned function to NHRIs is handling complaints and providing individual remedies. Human rights commissions, human rights tribunals and specialized tribunals often provide complaint processes.[1258] They are deemed a "more accessible and cost-effective forum," notably for those who cannot afford the legal costs of recourses to courts.[1259] In Canada, complaint procedures exist at the federal level and in all provinces and territories, primarily to address cases of discrimination based on protected grounds.[1260] These procedures allow

[1249] *Framework for Documenting Equality Rights*, by Canadian Human Rights Commission (Canadian Human Rights Commission, 2010).
[1250] *Ibid* at 4.
[1251] *Report on Equality Rights of Aboriginal People*, by Canadian Human Rights Commission (Canadian Human Rights Commission, 2013) at 4.
[1252] de Beco & Murray, *supra* note 1214 at 64.
[1253] *Ibid*.
[1254] *Accessible Canada Act*, SC 2019, c 10.
[1255] *Employment Equity Act*, SC 1995, c 44.
[1256] *National Housing Strategy Act*, SC 2019, c 29.
[1257] *Pay Equity Act*, SC 2018, c 27.
[1258] Eliadis, *supra* note 1091 at 36.
[1259] Nierobisz, Searl & Théroux, *supra* note 1193 at 242.
[1260] In Ontario, complaints are heard by the Ontario Human Rights Tribunal rather than the OHRC.

individuals to file complaints regarding human rights violations and seek resolutions or remedies for the alleged discrimination they have experienced.

As part of all these functions, NHRIs are increasingly called upon to deal with the socio-economic aspects of rights protection.[1261] The Committee on Economic, Social and Cultural Rights explicitly mentions that NHRIs have "a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights."[1262] In Canada and other jurisdictions, these institutions have demonstrated their willingness and capacity to address the socio-economic impacts of policies.

The SAHRC and Quebec's CDPDJ are distinct as the only discussed NHRIs responsible for promoting and protecting socio-economic rights. In South Africa, the Constitution explicitly guarantees several socio-economic rights, including adequate housing, education and healthcare. Accordingly, the SAHRC made several submissions discussing the socio-economic impacts of bills and proposing amendments to align them with these rights. The institution's *Submission on Older Persons Bill*, for example, recommends clarifying the notion of "care" so that "material assistance" is defined as including "the rights to adequate food, water, shelter, clothing and healthcare through the provision of income, as well as access to financial support or other income-generating opportunities to 'promote and maintain' their comfort and autonomy."[1263] Some NHRIs are thus explicitly called upon to engage with socio-economic rights.

Even in jurisdictions where bills of rights do not explicitly guarantee socio-economic rights, NHRIs often encompass fields linked to the socio-economic interests of civil society. They are commonly responsible for dealing with matters involving "social assistance, social origin, or social condition"[1264], including with regard to employment, housing and the provision of services. Firstly, in the context of their complaint processes, NHRIs have ensured rights protection in areas that courts have yet to recognize. Regarding housing, notably, many of the complaints received by the CHRC and provincial human rights institutions "raise broad systemic issues about human rights

[1261] Gomez, *supra* note 1202 at 327; de Beco & Murray, *supra* note 1214 at 44.
[1262] *General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights (1998)*, by Committee on Economic, Social and Cultural Rights, E/1999/22 (1998) at para 3.
[1263] *Older Persons Amendment Bill - Submission to the Department of Social Development* by South African Human Rights Commission (South African Human Rights Commission, 2017) at 3.
[1264] Eliadis, *supra* note 1091 at 142.

and housing."[1265] These issues encompass discriminatory rental practices that disproportionately affect women, young people and individuals receiving public assistance.[1266] NHRIs have also contributed to protecting and promoting socio-economic interests as part of their research and advisory functions. For instance, the UK EHRC developed a *Measurement Framework for Equality and Human Rights* comprising twenty-five human rights indicators in education, work, living standards, health, justice and personal security, and participation.[1267] These indicators aim to support the government, Parliament and other external stakeholders to monitor the advancements toward equality and rights protection. Also, in July 2022, the OHRC initiated a provincewide engagement on poverty. As part of this engagement, the OHRC conducted extensive consultations with various stakeholders, including service providers, Indigenous organizations and advocates. The goal was to identify key issues hindering individuals from exercising their rights to housing, mental health, and addiction care, which perpetuates and deepens poverty.[1268] Recently, the CHRC provided a written brief to Parliament to inform committee debates on Bill C-22*, The Canada Disability Benefits Act*.[1269] This Bill intends to reduce poverty and support the financial security of working-age persons with disabilities. In this submission, the federal institution notably advocated for explicitly recognizing the intersectional impacts of different social and economic challenges faced by persons with disabilities and their families. NHRIs have thus shown promise in engaging with the socio-economic aspects of rights protection, even when socio-economic rights are not explicitly guaranteed in their respective bill of rights.

While all the functions discussed are crucial for an NHRI to protect and promote rights protection, this thesis focuses explicitly on the advisory functions of NHRIs in the context of executive lawmaking.

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[1265] *Ibid* at 144.
[1266] *Ibid*.
[1267] *Measurement Framework for Equality and Human Rights*, by Equality and Human Rights Commission (2017).
[1268] "Poverty POV – What we are hearing | Ontario Human Rights Commission", online: https://www.ohrc.on.ca/en/poverty-pov-%E2%80%93-what-we-are-hearing [Ontario Human Rights Commission].
[1269] "Submission to Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities", online: <https://www.chrc-ccdp.gc.ca/en/publications/submission-standing-committee-human-resources-skills-and-social-development-and-the>.

*ii. Advisory Role: Examining and Reporting on Proposed Legislation*

NHRIs are frequently mandated with advising governmental and legislative institutions on human rights issues.[1270] In that regard, the Paris Principles state that human rights institutions can:

> Submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotions and protection of human rights;[1271]

The recommended human rights institution should be responsible for providing advice and submitting reports to the government concerning the potential impacts of bills on the Charter during their drafting.

**a. A broad and clear advisory mandate**

The institution's advisory mandate should be explicitly articulated in its founding legislation. All the NHRIs discussed in this thesis have the authority to comment on bills during their drafting. For some, this power is implicit, an integral aspect of their broader functions of protecting and promoting the rights guaranteed within their respective jurisdictions.[1272] Others, like the OHRC, provide this power explicitly.[1273] An explicit reference that the mandate encompasses the drafting of legislation would be more desirable.

Given the prevailing court-centric approach to rights protection, there is a potential for the institution's assessment to become overly dominated by legal factors at the expense of its broader socioeconomic considerations. If its members were to disproportionately focus on the jurisprudential aspects of bills, which are already under the purview of the Department of Justice, the assessment would fail to achieve its intended objective of expanding the breadth of executive rights review in a way fostering good governance and promoting rights protection. To mitigate this potential risk, the institution's founding legislation should explicitly outline its conception of

[1270] Centre for Human Rights, *supra* note 1237 at 23.
[1271] *Paris Principles*, *supra* note 1207, s 3(a).
[1272] See e.g., *The Constitution of the Republic of South Africa, 1996*, No 108 of 1996, s 184.
[1273] *Human Rights Code*, RSO 1990, Chapter H19 at 29(d). See also *Charter of Human Rights and Freedoms*, *supra* note 498, s 71(6).

"Charter compatibility" and how it applies in the context of its Charter review. This inclusion is pivotal for sustaining an assessment that, over time, continues to prioritize the evaluation of broader societal impacts rather than primarily, or solely, concentrating on legal aspects.

Aligning with the Paris Principles, the institution's founding legislation should thus explicitly outline its subject-matter and authority to review bills during their drafting.[1274] This mandate entails the evaluation of bills' Charter compatibility, including their broader socioeconomic implications, and providing advice to the government to support executive rights review. Their advice may include amendments to bring bills in line with the Charter.[1275]

**b. Authority to report on bills through self-referral**

The proposed institution should possess the authority to determine which bills warrant a Charter review. The entity tasked with deciding which bills fall within the purview of the institution's advisory mandate plays a pivotal role in shaping the reach and effectiveness of its contribution to fostering rights protection. In that regard, the Paris Principles state that the institution should be able to "[f]reely consider any questions falling within its competence (…) on the proposal of its members or of any petitioner".[1276]

When the institution possesses the authority to independently initiate Charter review, its ability to promote good governance and rights protection is substantially enhanced. This stands in contrast to a scenario where the institution's authority is triggered solely upon request of the government; it provides the institution with considerably greater influence over the rights review process.[1277] The CNCDH, for instance, can inquire about proposed legislation on its initiative or at the government's request. The French institution rendered some of its most well-known Avis on self-referral, including its Avis related to other NHRIs, prostitution and hate speech.[1278] The

[1274] Centre for Human Rights, *supra* note 1237 at 12.
[1275] Global Alliance of National Human Rights Institutions, *General Observations of the Sub-Committee on Accreditation* (2018) at 17.
[1276] *Paris Principles*, *supra* note 1207 at 3(a).
[1277] Rachel Myers, "Models of Pre-Promulgation Review of Legislation" (2020) 6:1 Indiana Journal of Constitutional Design 1 at 2.
[1278] Élise Bourdier, "La Commission nationale consultative des droits de l'homme critique sur la proposition de loi renforçant la lutte contre le système prostitutionnel" (2014) Actualités Droits-Libertés La Revue des droits de l'homme 1; Catherine Teitgen-Colly, "La Commission Nationale Consultative des Droits de l'Homme et la création du Défenseur des droits" (2011) 3:139 Revue française d'administration publique 409.

institution's advisory powers should thus not depend on the request of the government or Parliament; it should be able to act without a higher referral.

In this regard, an internal process should be established to identify which bills trigger the advisory functions of the institution, explicitly focusing on bills with human rights implications. If the institution determines that a particular bill does not raise any Charter concerns, a document should be prepared to state that the institution has examined the proposed legislation and concluded that it does not raise any issues under the Charter. This approach would be similar to the one favoured for Charter statements. An internal process would thus help to ensure that the institution's efforts are directed toward reviewing and providing advice on bills that have the potential to impact Charter rights.

**c. Timeliness of its involvement in bill drafting**

Another factor that can affect the institution's ability to effectively influence lawmaking is the timing of its involvement. The institution's advisory functions should occur early in the development of bills, although not necessarily at its initial stage.

The human rights institution should be engaged early enough to ensure that its recommendations can inform the drafting process effectively. Assessing the impacts of bills on Charter rights is a time-consuming process. For a human rights institution, it entails gathering information and data, potentially through public participation processes, and analyzing them in the context of Charter rights. Once this assessment is completed, the government must consider the institution's findings to make informed decisions about the merits of its legislative objectives and how to best achieve them while considering the impacts on rights.[1279] In the words of Apple and Olijnyk, "[t]he earlier constitutional validity is considered in the design of a policy, the more likely constitutionality will inform that design, and policy-makers will be more open to the consideration of possible alternatives that reduce legal and social risks."[1280] Without an early sight in the lawmaking process, an advisory institution might struggle to have its recommendations heard by the government.

[1279] Hiebert, *supra* note 12 at 88.
[1280] Appleby & Olijnyk, *supra* note 52 at 10.

On the other hand, to ensure the relevance of the institution's advice, the bill must be sufficiently developed to identify its impact on Charter rights. If the institution becomes involved too early, when the means to achieve the legislative objective are still being debated, its advice may not be applicable to the final version of the bill.

The proposed institution should engage with bills at an appropriate stage in the executive lawmaking process, neither too early nor too late, to offer timely and relevant advice.

**d. Publication of its reports and recommendations**

The publication of the institution's report and recommendations can strongly enhance its ability to promote and protect Charter rights. The General Observations of the GANHRI specify that the recommendations of the institution should be widely publicized.[1281] As their advice is not legally binding on governments, the contribution of NHRIs to the constitutionality of legislation largely depends on the government's willingness to take their conclusions seriously. In practice, governments have frequently ignored recommendations put forth by NHRIs. A lack of political will in lawmaking is often invoked to explain this reluctance.[1282] By publicizing the institution's advice and recommendations, there is a potential to exert pressure on the government to act in accordance with the guaranteed rights.

When it comes to reporting, NHRIs involved in the executive phase of lawmaking may encounter confidentiality-related challenges. Many jurisdictions, including Canada, have confidentiality requirements during this stage of lawmaking, as outlined in the *Canada Evidence Act*.[1283] These requirements can limit the institution's ability to share its advice, even if it has a governmental status and access to draft bills. As a result, if the lack of transparency in executive lawmaking extends to the human rights institution, it hampers public awareness and scrutiny of critical human rights considerations.

To address this challenge, the proposed institution could explore alternative methods to enhance transparency in executive lawmaking while upholding confidentiality requirements. An option to consider is publishing the report upon the bill's introduction to Parliament. This report

[1281] Global Alliance of National Human Rights Institutions, *supra* note 1275 at 17.
[1282] Centre for Human Rights, *supra* note 1237 at 25.
[1283] *Canada Evidence Act*, *supra* note 1038, s 39.

could outline the institution's advice, omitting confidential information. This way, the institution could contribute to public and parliamentary awareness of the proposed legislation's impact on Charter rights while honouring required confidentiality obligations.

### *iii. Gathering Data Supporting Charter Review*

The proposed institution should have the capacity to collect its own data to supplement existing evidence. Access to relevant evidence is fundamental to its advising functions. In MacDonnell's words, "[g]ood evidence is crucial to assessing Charter impacts."[1284] The presence of accessible and high-quality information is paramount to guarantee that the assessment genuinely encompasses the experiences of civil society and its diverse groups and communities. The available evidence shapes the Charter review process's nature and, thereby, its capacity to foster rights protection.

If jurisprudence is the most relevant data informing Charter review at the Department of Justice, empirical and experiential knowledge are central to the advisory functions of NHRIs.[1285] In addition to consulting existing data from external sources, the proposed institution should be able to gather its own data and evidence. Research and public participation are relevant means that should be available to an advising institution like the one proposed in this thesis.

#### **a. Research and inquiries**

Engaging in research and inquiries can elevate the calibre of the Charter review carried out by the proposed institution: it fosters a more in-depth understanding of human rights issues.[1286] On one hand, the knowledge gathered through research would aid the institution in identifying how bills could impact Charter rights. On the other, it would assist in devising strategies to neutralize or minimize the identified infringements. This research function encompasses studies conducted as part of Charter review as well as general inquiries on human rights matters in Canada. With a

[1284] MacDonnell, *supra* note 1032 at 400.
[1285] Phillips & Orsini, *supra* note 1081 at 18.
[1286] Gomez, *supra* note 1202 at 340.

research and inquiry mandate, the institution would be well-positioned to comment on Charter inadequacies in bills.[1287]

When conducting research and inquiries, NHRIs can draw upon numerous external sources of evidence to inform their research functions and provide robust analyses of human rights issues. First, human rights institutions can consult existing statistical and empirical data. In the *Report on Equality Rights of Women*, for example, the CHRC consolidated data collected by Statistics Canada "from an equality rights perspective," presenting "data on the equality rights of all adult women compared to all adult men in Canada."[1288] The institution notably consulted the 2006 and 2011 Censuses of Population, General Social surveys on social networks and victimization, as well as Canadian Vital statistics on birth and stillbirth.[1289] The UK EHRC reports "How Fair is Britain"[1290] and "Is Britain Fairer?"[1291], also, are supported by empirical data regarding education, health, justice, living standards, participation and work.[1292] Another important source of knowledge is the data produced by international human rights organizations. The Office of the High Commissioner for Human Rights ("OHCHR"), in particular, provides extensive resources to assist member states in following up on their international human rights obligations. These resources include databases and a comprehensive range of publications on topics related to human rights. The General Comments of the international treaty bodies can assist human rights institutions in interpreting the substantial meaning of Charter rights as well. The OHCHR's Human Rights Indicators constitute an additional helpful tool to assist NHRIs in determining the impacts of bills on guaranteed rights. These Indicators intend to make rights review "more objective and transparent and provide a concrete follow-up methodology."[1293] Additionally, the proposed institution could rely on the reports and findings of other Canadian human rights institutions,

[1287] Centre for Human Rights, *supra* note 1237 at 24.
[1288] *Report on Equality Rights of Women*, by Canadian Human Rights Commission, HR4-26/2015E (2014) at 2.
[1289] *Ibid* at 5.
[1290] Equality and Human Rights Commission, "How Fair is Britain? Equality, Human Rights and Good Relations in 2010 - The First Triennial Review" (2010).
[1291] *Is Britain Fairer? The State of Equality and Human Rights 2018*, by Equality and Human Rights Commission (2019).
[1292] "Is Britain Fairer? 2018: supporting data | Equality and Human Rights Commission", online: <https://www.equalityhumanrights.com/en/britain-fairer/britain-fairer-2018-supporting-data>; Equality and Human Rights Commission, *supra* note 1290 at 721 ss.
[1293] *Human Rights Indicators: A Guide to Measurement and Implementation*, by Office of the United Nations High Commissioner for Human Rights, HR/PUB/12/5 (United Nations, 2012) at 4.

federal or provincial. These institutions offer extensive knowledge of human rights issues, which could support their research functions.

The institution can also collect its own evidence. One important means available to the institution is public participation, discussed in the next section.

**b. Civil engagement and public participation**

The institution should engage with civil society through participation processes to enhance its advising and research functions. These processes would allow lawmakers to gather diverse perspectives, insights and feedbacks, ensuring a more comprehensive Charter review. Members of civil society can provide experiential knowledge to lawmakers aligned with their lived experience.[1294] Involving affected groups in Charter review ensures that different viewpoints are heard, and special needs are understood.[1295] The International Council on Human Rights Policy emphasizes that participation processes brings to light impacts that may not be apparent from within an institution.[1296] Civil society's input thus provides the government with essential information, data, statistics, knowledge, and expertise necessary for effective policymaking.[1297] As discussed in Chapter 2, there is a direct and mutually reinforcing relationship between public participation and rational, effective and sustainable policies.[1298] In that sense, public participation is essential to enacting responsive legislation.

Public participation is particularly vital in supplying essential insights into the lived experiences of vulnerable and marginalized groups. These groups often find themselves underrepresented within political institutions, resulting in their perspectives and voices having limited visibility. Lawmakers run the risk of disregarding the needs and interests of these groups, whether intentionally or inadvertently. By actively involving them in participation processes, the proposed human rights institution could gather insights and experiences that may otherwise be excluded from policy consideration. Discussing the lack of involvement of sex workers in the development of prostitution policies, Belinda Brooks-Gordon, Max Morris and Teela Sanders

[1294] Schneider, *supra* note 667 at 533; Malena, *supra* note 801 at 13; Syma Czapanskiy & Manjoo, *supra* note 800 at 39.
[1295] Littlejohns et al, *supra* note 810 at 21.
[1296] International Council on Human Rights Policy, *supra* note 1219 at 26.
[1297] Obradovic, Alonso Vizcaino & Pleines, *supra* note 806 at 22; Coleman & Gøtze, *supra* note 809 at 12.
[1298] Schmalz-Bruns, *supra* note 93 at 18.

point out that these policies promote the view of sex workers as victims unable to make informed decisions.[1299] Participation processes can empower marginalized groups by providing them with opportunities to actively engage and have a meaningful say in policies that affect them. Intimately related to the principle of political equality[1300], participation can benefit less powerful groups whose rights might not be fully acknowledged in traditional modes of representative democracy; it provides them with opportunities to voice their needs and preferences.[1301]

Three avenues could support the proposed institution's capacity to gather data through public participation: testimonies from stakeholders and witnesses, national public consultations, and cooperation with NGOs.

First and foremost, the institution should possess the authority to receive testimonies from stakeholders and to compel the attendance of witnesses.[1302] Members of civil society constitute the primary source of experiential data, whether as individuals or through interest groups. Civil engagement can occur via various means, including written and video submissions, surveys, public hearings and roundtables. As part of their research functions, NHRIs have often turned to public participation to receive inputs from members of civil society, NGOs and experts. While some NHRIs are explicitly granted the power to consult in the context of their functions, like the UK EHRC[1303], most proceed as part of their broad competence to promote and protect human rights. For instance, in its research on access to justice and human rights justice for Indigenous women, the CHRC held roundtables with Indigenous people and their representative organizations to deepen its understanding of Indigenous women's challenges within the human rights system. The CHRC's *Anti-Racism Plan* also incorporates the feedback of various relevant stakeholders, including employees, unions and consultants.[1304] In the context of its racism in media inquiry, the SAHRC held public hearings and subpoenaed over thirty media organizations to explain their handling of race issues.[1305] The OHRC also commonly holds consultation processes to support its research. In a recent initiative focused on poverty, the commission conducted a survey, received

[1299] Belinda Brooks-Gordon, Max Morris & Teela Sanders, "Harm Reduction and Decriminalization of Sex Work: Introduction to the Special Section" (2021) 18:4 Sex Rex Social Policy 809 at 812.
[1300] Pateman, *supra* note 790 at 14.
[1301] Fischer, *supra* note 789 at 461.
[1302] International Council on Human Rights Policy, *supra* note 1219 at 18.
[1303] *Equality Act 2006*, sections 5 and 12(2).
[1304] *Anti-Racism Action Plan*, at 3.
[1305] Daryl Glaser, "The Media Inquiry Reports of the South African Human Rights Commission: A Critique" (2000) 99 African Affairs 373 at 373.

written submissions and held meetings with key stakeholders to gather inputs from various actors involved in poverty reduction or who have firsthand experience of poverty.[1306] Various means are thus available to the institution to engage with civil society in the context of its advisory and research functions.

National public participation processes are another means available for the institution to gather empirical and experiential evidence. The government is responsible for organizing these processes, deciding whether and how they occur. As draft bills are treated with strict confidence before their introduction to Parliament, the Cabinet's approval is necessary to hold participation processes.[1307]

Though the government would remain responsible for sponsoring national participation processes, an NHRI could oversee these consultations to ensure that they are held in a way propitious to supporting robust Charter review. The proposed institution could not compel the government to engage with the population, but it could assist in coordinating participation processes intended to gather inputs relevant to lawmaking from the viewpoints of all affected parties.[1308] As discussed in Chapter 2, these processes must be thoughtfully designed in order to reach and include members from a maximum of affected parties. Otherwise, the information collected could provide an incomplete portrait of the needs and interests of civil society, potentially prioritizing the viewpoints of already influential groups within the lawmaking process. Various barriers can affect individuals' ability and willingness to engage in such processes, including social standing, poverty, disabilities, familial status, and language barriers. Ensuring inclusive and meaningful participation for all requires addressing these challenges.[1309] The proposed institution's involvement in designing participation processes encompassing a wide range of affected groups could greatly enhance the quality of information available for its Charter review, ultimately contributing to a more robust and informed lawmaking process.

Further, by utilizing this information to evaluate the Charter compatibility of bills, the institution could heighten the influence of the collected inputs, thereby bolstering its capacity to

[1306] Ontario Human Rights Commission, *supra* note 1268.
[1307] Government of Canada, Privy Council Office, *supra* note 978.
[1308] For an interesting criticism of participation processes in Canada in the context of the consultations on prostitution law, see Bouchard, *supra* note 817.
[1309] Sheedy, *supra* note 913 at 14.

shape legislation. The institution would thereby enhance the prospects for participants to significantly affect policies and decisions that directly affect their lives.

Finally, it is imperative for the institution to collaborate with non-governmental organizations ("NGOs").[1310] These entities play a pivotal role in rights protection by serving as intermediaries connecting NHRIs with marginalized communities.[1311] They can enhance NHRIs' capacity to undertake robust Charter review grounded on the lived experiences of groups who might be harder to reach through participation processes. In this context, NGOs emerge as indispensable sources of information for conducting robust Charter review.

In summary, diverse forms of civil engagement could bolster the proposed institution's advisory and research functions by aiding in collecting relevant empirical and experiential data on the groups and communities affected by bills.[1312] This information is essential to identifying the impacts that might be guaranteed under the Charter, notably their socio-economic impacts.

C) The Structural Characteristics of NHRIs and Rights Protection

This section delves into the fundamental structural characteristics of NHRIs and how they can impact these institutions' capacity to advance good governance in executive lawmaking and, incidentally, rights protection. It underscores how these attributes, encompassing factors like independence guarantees, accountability mechanisms, composition, and potential specialized entities, shape the institutions' efficacy and influence within the lawmaking process.

*i. Guarantees of Independence and Accountability*

To effectively hold the government accountable, the proposed institution must be independent from governmental influence.[1313] The institution's independence is crucial for providing objective and unbiased advice on the Charter compatibility of bills. Human rights literature emphasizes that the efficacy of NHRIs is closely tied to their independence in

[1310] Baek Buhm-Suk, "RHRIs, NHRIs and Human Rights NGOs" (2012) 24:2 Florida Journal of International Law 235 at 268.
[1311] International Council on Human Rights Policy, *supra* note 1219 at 8.
[1312] Schneider, *supra* note 667 at 533; Malena, *supra* note 801 at 13; Syma Czapanskiy & Manjoo, *supra* note 800 at 39.
[1313] Smith, *supra* note 1217 at 909. See also Centre for Human Rights, *supra* note 1237 at 10.

functioning.[1314] According to Eliadis, NHRIs ought to have the freedom to engage with any human rights matter falling within their expertise. [1315] Roach points out the contrasting probability of an independent institution prioritizing rights and maximizing the government's self-interest during rights review, in comparison to the Department of Justice.[1316] Without independence, there is a significant risk of hindering the institution's ability to offer impartial assessments free from external influences.

Governments and other influential stakeholders frequently seek to exert influence over NHRIs in pursuit of their own agendas. Hence, the establishment of robust safeguards becomes essential, facilitating the institution's independent execution of its mandate and insulating it from external interference. This, in turn, empowers NHRIs to effectively foster rights protection, especially for marginalized communities.[1317]

The first element associated with the independence of an NHRI is its status. A constitutional[1318] or legislative status[1319] would ensure the NHRI's long-term viability and ability to adapt to changing situations, like shifts in social and political environments.[1320] Given the challenges and requirements involved with amending the Charter, the constitutional institutionalization of a human rights institution is unlikely to occur in the foreseeable future. A legislative status would remain advantageous, clarifying the institution's mandate and the legal framework within which it operates. As further explained below, this status would ensure transparency and accountability by establishing clear guidelines for the institution's functions and responsibilities. If a legislative status means that the human rights institution could be abolished by simple legislation, it would still be less likely to be repealed and less vulnerable to governmental

[1314] See e.g., Corina Lacatus, "Explaining Institutional Strength: The Case of National Human Rights Institutions in Europe and its Neighbourhood" (2019) 26:11 Journal of European Public Policy 1657 at 1665; Linos & Pegram, *supra* note 1218 at 13; Murray, *supra* note 1216 at 211.
[1315] Eliadis, *supra* note 1091 at 264.
[1316] Roach, *supra* note 130 at 296.
[1317] Ontario Human Rights Commission, *Reviewing Ontario's Human Rights System - Discussion paper* at 21.
[1318] The SAHRC is constitutionalized by section 184 of Chapter 9 of the South African Constitution.
[1319] Apart from the SAHRC, all the NHRIs discussed in this Chapter have a legislative status, as do the human rights institutions in Canada. The Québec CDPDJ, for example, is created by the *Charter of Human Rights and Freedoms*, *supra* note 498. See also *Human Rights Code*, *supra* note 1273, s 27 ss.; *The Saskatchewan Human Rights Code, 2018*, Chapter S-242, s 21 ss.
[1320] Steven Levitsky & María Victoria Murillo, "Variation in Institutional Strength" (2009) 12:1 Annu Rev Polit Sci 115 at 117.

influence than if established by executive order.[1321] A legislative status could thus, to a certain extent, safeguard the institution's independence.[1322]

Another essential element of a human rights institution's independence is funding. As mentioned in the Paris Principles, adequate funding is primordial to the independence and smooth conduct of NHRIs' activities.[1323] On that matter, the Paris Principles reads:

> The national institution shall have an infrastructure suited to the smooth conduct of its activities, particularly adequate funding. The purpose of this funding should be to enable it to have its own staff and premises in order to be independent of the Government and not be subject to financial control which might affect its independence.[1324]

The Paris Principles, therefore, require the availability of sufficient resources to enable the institution to carry out its mandate and the freedom to allocate this funding as it deems fitting.[1325] Without the government's financial support and the freedom to decide on its allocation, the institution would likely struggle to perform its advising functions in a way fostering rights protection.[1326] Such circumstances could notably jeopardize its operational independence, which refers to the institution's ability to function without undue external influence or constraints on its decision-making processes.[1327] A relevant illustration of this impact is the publication of the results of the EHRC's inquiry on the human rights of older people receiving in-home care. Due to limitations on expenditures, the government proposed to publish the report online only, which would have limited the outreach of the report to its targeted audience – older individuals – in contrast with publishing in print as well.[1328] Insufficient allocation of funding and resources by the government can thus hinder the ability of the institution to carry out its mandate effectively.

While independence from the government is crucial, the proposed institution should still have a governmental status due to the requirements of confidentiality imposed by section 39 of the

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[1321] Smith, *supra* note 1217 at 913.
[1322] Global Alliance of National Human Rights Institutions, *supra* note 1275 at 5. See also Gomez, *supra* note 1202 at 336.
[1323] Gomez, *supra* note 1202 at 347; Eliadis, *supra* note 1091 at 197.
[1324] *Paris Principles*, *supra* note 1207, s 2.
[1325] Murray, *supra* note 1216 at 197.
[1326] Lacatus, *supra* note 1314 at 1665.
[1327] Tonkiss, *supra* note 1226 at 501.
[1328] *Ibid*.

*Canada Evidence Act*. This provision oversees the confidentiality of documents and communications in the executive lawmaking process. Restricted access to the draft bill would impede the human rights institution's in-depth understanding of the bill's content and context, thus constraining its capacity to offer informed advice. Establishing the institution as a governmental entity could grant certain privileges and responsibilities, including the authorization to access confidential information relevant to executive lawmaking.

It is important to precise that independence does not imply immunity from checks and balances. As is the case for any policymaking institution, accountability is essential to safeguard the ability of an NHRI to perform its functions in a way fostering rights protection.[1329] Implementing accountability mechanisms could require the institution to justify its actions and demonstrate how it has fulfilled its responsibilities.[1330]

The primary accountability relationship enhancing the effectiveness of a human rights institution is to Parliament. Scholarship highlights a preference for accountability to legislatures over accountability to the government.[1331] Being accountable to legislatures can uphold NHRIs' operational[1332] and structural independence[1333], enabling their autonomy from the policy agendas of specific governments.[1334] A legislative status, in particular, would mean that Parliament can oversee that the NHRI fulfills its mandate in alignment with its founding legislation.[1335] This accountability relationship mainly materializes through the submission of reports to legislatures. These reports should include an account of the activities undertaken by the NHRIs to further their mandate, as well as their opinions and recommendations regarding governmental action.[1336] Numerous NHRIs are established by law and accountable to legislatures. The SAHRC, for example, is "answerable and accountable" to the National Assembly, to which it must report at

[1329] Eliadis, *supra* note 1091 at 56–57.
[1330] Smith, *supra* note 1217 at 905.
[1331] See e.g., Kathleen Vella, "A Comparative Study of Existing Human Rights Bodies: An Examination of the South African, French, Scottish and English Bodies for Equality and Human Rights" (2019) 1 Mediterranean Human Rights Review 86 at 68; Eliadis, *supra* note 1091 at 265; Sarah Spencer & Colin Harvey, "Context, Institution or Accountability? Exploring the Factors that Shape the Performance of National Human Rights and Equality Bodies" (2014) 42:1 Policy & Politics 89 at 100.
[1332] Tonkiss, *supra* note 1226 at 504.
[1333] *Ibid*.
[1334] *Ibid*.
[1335] de Beco & Murray, *supra* note 1214 at 142.
[1336] Global Alliance of National Human Rights Institutions, *supra* note 1275 at 31.

least once annually.[1337] Similarly, the UK EHRC is established as an independent statutory body accountable to Parliament. All federal, provincial and territorial human rights commissions in Canada are accountable to legislatures. The CHRC must report to Parliament annually. Accountability to Parliament, including through annual reports, could safeguard the proposed institution's ability to perform its advisory and research functions in a way fostering rights protection.[1338]

Due to their use of public funds, NHRIs remain accountable to the government.[1339] Tomkiss rightly underscores the challenging nature of accountability relationships with government. She notes that while one of the critical roles of NHRIs is to hold governments accountable for human rights violations, the same governments also hold NHRIs accountable for the effective and efficient use of public funds.[1340] Eliadis also shares her concern regarding the trickiness of the balance between accountability and independence. She writes:

> Human rights systems are routinely required to handle cases where their paymaster, the government, is a respondent to complaints. Commissions frequently take policy positions aimed at changing legislation and government practices. They make public statements that may be unpopular with those in power. [1341]

In that regard, she asserts that NHRIs should exclusively follow the government's accountability standards, particularly those related to administrative and financial matters in public administration. Any departure from this approach, she contends, would undermine the independence outlined by the Paris Principles.[1342]

Finally, accountability is also due to the public, including victims of human rights violations.[1343] By publicly releasing the results of the institution's assessment of bills, including its findings and recommendations regarding their Charter compatibility, transparency in its operations is significantly improved. This practice empowers the public to evaluate the institution's independence and impartiality more comprehensively.[1344]

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[1337] Vella, *supra* note 1331 at 67.
[1338] Eliadis, *supra* note 1091 at 56–57.
[1339] Tonkiss, *supra* note 1226 at 493.
[1340] *Ibid* at 491.
[1341] Eliadis, *supra* note 1091 at 58.
[1342] *Ibid* at 264.
[1343] Smith, *supra* note 1217 at 938.
[1344] *Ibid* at 917.

A lack of independence can damage the institution's credibility in the eyes of the public. To illustrate, in February 2022, major LBGTQ+ organizations requested a review of the UK EHRC's "A" status under the Paris Principles. They accused the institution of being financially dependent on the government and susceptible to governmental interference. They raised concerns about the institution's independence due to statements made about trans rights, in particular concerning gender recognition reform in Scotland and the conversion therapy ban in England and Wales. Accusing the EHRC of falling short of international standards required under these Principles, these organizations notably cited:

> a 'complete absence' of financial autonomy from the UK Government, and cites 'excessive' governmental interference – including 'politically motivated' appointments to the Chair and Board, many of whom have repeatedly and publicly demonstrated their opposition to the expansion of human rights, and whose appointments have drawn widespread criticism from NGOs.[1345]

Such accusations undermine NHRIs' ability to uphold human rights standards and can lead to concerns about their effectiveness in protecting the rights of marginalized communities, such as the LGBTQ+ community, in that case.

In addition to the guarantees of independence discussed above, each of the other characteristics discussed in the following section can help strengthen the independent status of the proposed institution.

### *ii. A Pluralist and Diverse Composition*

The composition of the institution's membership should be both pluralistic and diverse, and achieved through an appropriate method of appointment.

The Paris Principles emphasize the importance of pluralism and diversity in the membership of NHRIs. Pluralism acknowledges that a jurisdiction is composed of diverse and numerous active groups with varied perspectives and interests.[1346] NHRIs must recognize and accommodate these differences, including "different cultures, languages, education, religion, and so on."[1347] The

[1345] "Major LGBTQ+ organisations spark international review of the EHRC", (10 February 2022), online: *Stonewall* <https://www.stonewall.org.uk/about-us/news/major-lgbtq-organisations-spark-international-review-ehrc>.
[1346] Smith, *supra* note 1217 at 928.
[1347] *Ibid*; Centre for Human Rights, *supra* note 1237.

institution should reflect the society in which it operates.[1348] For its part, diversity of membership encourages the institution's success by allowing members to tap into a wide range of knowledge and expertise. It can increase the confidence among the public that a NHRI understands and is responsive to the specific needs of its communities.[1349] Pluralistic and diverse membership enhances NHRIs' human rights protection and promotion, while also improving good governance in executive lawmaking.

The Paris Principles state that NHRIs should develop procedures to ensure the representation of all relevant social forces within its members[1350], including:

> (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
> (b) Trends in philosophical or religious thought;
> (c) Universities and qualified experts;
> (d) Parliament;
> (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).[1351]

As an illustration, the CNCDH is known for its pluralist and diverse membership.[1352] The French institution is composed of sixty-four members from various expertise and backgrounds, reflecting France's diverse opinions regarding human rights issues.[1353] Its members include representatives of NGOs, trade unions and various schools of thought and religion, in addition to scholars, judges, lawyers, and individuals recognized as experts in their fields.[1354] According to the French institution, this variety guarantees the pluralism of convictions and opinions of the institution and allows it to fulfill its mission.[1355]

While the Paris Principles advocate for a pluralist and diverse membership in NHRIs, representativeness should not overshadow other qualities in its members that are necessary for its

[1348] Centre for Human Rights, *supra* note 1237 at 12.
[1349] Global Alliance of National Human Rights Institutions, *supra* note 1275 at 21.
[1350] Centre for Human Rights, *supra* note 1237 at 12.
[1351] *Paris Principles*, *supra* note 1207, s 1.
[1352] Vella, *supra* note 1331 at 67.
[1353] "Organisation | CNCDH", online: https://www.cncdh.fr/presentation/organisation [CNCDH].
[1354] Loi n° 2007-292 du 5 mars 2007 relative à la Commission nationale consultative des droits de l'homme, article 1.
[1355] CNCDH, *supra* note 1353.

effective functioning; the individual attributes and capabilities of the people appointed to these positions should also be considered. Otherwise, there is a risk of tokenism.[1356] Further, representation can also be achieved through other practical means, such as advisory boards, citizen advisory committees or consultations, which can assist in fulfilling requirements of pluralism and diversity. Citizens advisory groups, discussed below, can notably serve this purpose. Representativeness should thus not necessarily be the central determinant in membership above all else.

In certain NRHIs, member selection focuses on their expertise and dedication to human rights rather than primarily on representativeness. For instance, the eight commissioners of the SAHRC are citizens with "a record of commitment to the promotion of respect for human rights and a culture of human rights" and "applicable knowledge or experience with regard to matters connected with the objects of the Commission."[1357] The UK EHRC relies on similar criteria for appointing its members.[1358] While the *Canadian Human Rights Act* does not outline specific nomination criteria for commissioners of the CHRC, their backgrounds are notably varied, encompassing fields like the legal profession and social work. This diversity contributes a rich array of expertise and perspectives to the institution. A shared commitment to human rights and marginalized groups unites all commissioners. In the same vein, at the Quebec CDPDJ, five members are selected based on their ability to make a significant contribution to the examination and resolution of human rights and freedoms issues, while an additional five members are chosen to focus on the protection of the rights of young individuals.[1359] Knowledge and expertise are thus relevant criteria for choosing commissioners, alternatively or in addition to representativeness.[1360]

The method for appointing the NHRIs members can impact its legitimacy and independence from the government.[1361] The recent criticisms of the UK EHRC, discussed above, illustrate how "politically motivated appointments" can diminish the institution's legitimacy and independence, or at least impact how it is perceived. The Paris Principles do not explicitly require a particular mode of appointment[1362]; they rather require that the mode of appointment, "whether

[1356] Murray, *supra* note 1216 at 205.
[1357] *South African Human Rights Commission Act*, Act 40 of 2013, Article 5.
[1358] *Equality Act 2006 (UK)*, c3 2006, Schedule 1, Part 1, Section 2(1).
[1359] *Charter of Human Rights and Freedoms*, *supra* note 498, s 58.1.
[1360] Vella, *supra* note 1331 at 67.
[1361] Murray, *supra* note 1216 at 196.
[1362] *Ibid* at 195.

by means of an election or otherwise," affords all necessary guarantees to ensure a pluralist representation.[1363] However, the General Observations of the GANHRI precise that to ensure the institution's independence, there should be a "clear, transparent, merit-based and participatory selection and appointment process."[1364] Murray supports this approach, expressing that the appointment process should be transparent and involve Parliament and civil society.[1365] Establishing a transparent and inclusive mode of appointment would thus be essential for upholding the independence and legitimacy of the proposed human rights institution.

Regardless of the mode of appointment and the composition of the institution's membership, it is imperative that its members are well-versed in human rights and equipped to deal with sensitive matters outside of their experience.[1366] Eliadis recommends that NHRIs work with academic and training centers to develop a curriculum as professionals working in human rights institutions.[1367] This training should include "ongoing professional training and continuing legal education for both commissioners and staff."[1368]

*iii. Specialized Entities: Sub-Committees and Citizen Advisory Groups*

Including specialized entities with expertise in particular human rights areas within the institution would improve its ability to effectively tackle various human rights issues by obtaining specialized knowledge beneficial for Charter review.

One possibility would be to segment the institution's responsibilities among multiple committees, each with a distinct mandate. The France CNCDH, for example, is divided into five sub-commissions with mandates related to specific aspects of rights protection in the state. This allows each committee to concentrate entirely on its respective domain, thus developing and

[1363] *Paris Principles*, *supra* note 1207, s 1.
[1364] Global Alliance of National Human Rights Institutions, *supra* note 1275 at 22.
[1365] Murray, *supra* note 1216 at 195. "There should be wide advertisement of the posts, the criteria on which staff and commissioners are appointed should be made public, equal opportunities provisions should apply, those who may be reticent or suspicious of such a body are encouraged to apply, there is a public nomination process, interviews are held in public, positions that become free should be filled quickly, and that commissioners are appointed for a sufficient length of time": *Ibid* at 196.
[1366] International Council on Human Rights Policy, *supra* note 1219 at 15.
[1367] Eliadis, *supra* note 1091 at 270.
[1368] *Ibid* at 269.

providing expert advice.[1369] Specialized committees could deal with Charter issues associated with specific rights, topics or marginalized groups.

A citizen advisory group could also be established to assist the human rights institution in fulfilling its functions. These groups comprise small, representative assemblies that aim to reflect the perspectives of diverse groups and communities. Their purpose is to examine proposals, issues or sets of issues, and to provide input and recommendations from various viewpoints.[1370] Citizen advisory groups allow the government to deal with a smaller group of citizens[1371], involving a higher level of interaction between interested citizens and government representatives than with other forms of citizen engagement.[1372] Citizen advisory groups are thus important channels of communication between policymakers and civil society.[1373]

These groups offer several benefits for a human rights institution advising the government on the Charter compatibility of bills during their drafting. First, they serve as a valuable source of experiential knowledge. They can provide lawmakers with insights into attitudes, needs, and desires that may be challenging to gather through other means.[1374] They can also improve public support toward the decisions and bills proposed by the government.[1375] Additionally, as noted earlier, incorporating a citizen advisory group can enhance representativeness within an NHRI, especially when the institution's composition does not encompass all segments of civil society; this situation may arise if members are chosen primarily for their expertise or contribution to rights protection in the jurisdiction. Finally, given their regular meetings, these groups provide consistency and ample opportunities for citizens to voice their viewpoints compared to other forms

[1369] Vella, *supra* note 1331 at 95. These five sub-commissions are: Sub-commission A: "Society, Ethics, and Human Rights Education"; Sub-commission B: "Racism, Discrimination, and Intolerance"; Sub-commission C: "Rule of Law and Liberties"; Sub-commission D: "International and European Issues - International Humanitarian Law"; Sub-commission E: "Emergencies".
[1370] Frances M Lynn & George J Busenberg, "Citizen Advisory Committees and Environment Policy: What we Do, What's Left to Discover" (1995) 15:3 Risk Analysis 147 at 148.
[1371] *Ibid*.
[1372] *Ibid*.
[1373] Lyle E Schaller, "Is the Citizen Advisory Committee a Threat to Representative Government?" (1964) 24:3 Public Administration Review 175 at 176.
[1374] *Ibid*.
[1375] Lynn & Busenberg, *supra* note 1370 at 148.

of civil engagement.[1376] In this sense, the presence of a citizen advisory group can be a valuable asset for an advisory human rights institution.

Citizen advisory groups have been employed in various contexts in Canada, particularly at the provincial and municipal levels.[1377] In the realm of federal jurisdiction, the Correctional Service of Canada includes citizen advisory groups to provide a "public presence" within federal corrections, building stronger links between offenders and communities.[1378] In the specific context of NHRIs, the OHRC can create citizen advisory groups to advise about the elimination of discriminatory practices infringing on the rights guaranteed under the *Human Rights Code*.[1379] In that regard, a Community Advisory Group ("CAG") was established to assist the OHRC in meeting its objectives. Its purpose is to encourage "ongoing, meaningful conversation" between the OHRC and communities in a collaborative and mutually supportive way.[1380] The CAG offers input and guidance on various human rights aspects, including promoting rights through reconciliation, ensuring rights in the criminal justice system, addressing poverty's impact on rights, and promoting a rights-focused culture through education. Its input contributes to the OHRC's efforts in these areas. The members of this CAG reflect a wide cross-section of Ontario communities, including:

> Persons with lived experience, across *Code* grounds; Persons who have worked in organizations providing services to the community or representing community members in their area of related expertise; Persons with diverse geographic representation; Persons with academic or policy expertise; First Nations, Métis, and/or Inuit peoples; Representation from the Human Rights Legal Support Centre (HRLSC); Representation from the Canadian Human Rights Commission (CHRC).[1381]

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[1376] Kathe Callahan, "The Utilization and Effectiveness of Citizen Advisory Committees in the Budget Process of Local Government" (2002) 14:2 Journal of Public Budgeting, Accounting & Financial Management 295 at 300.
[1377] Citizens advisory groups notably exist in health care regulation in Ontario. They also exist in various Québec municipalities to offer advice and recommendations, notably in urban planning and land use.
[1378] Citizen Advisory Committees, "Citizen Advisory Committees", (17 August 2017), online: <https://www.csc-scc.gc.ca/cac/003002-index-en.shtml>.
[1379] *Human Rights Code*, *supra* note 1273, s 31.5.
[1380] "Community Advisory Group | Ontario Human Rights Commission", online: <https://www.ohrc.on.ca/en/about-commission/community-advisory-group>.
[1381] *Ibid*.

The Ontarian Commission regularly contacts the CAG to seek input or involve its members in its activities.[1382]

In summary, the discussed structural characteristics of NHRIs can influence their ability to provide valuable insights when advising the government on the Charter compatibility of bills; these include its guarantees of independence and accountability, its composition, and the presence of specialized entities.

In this section, I suggested creating a human rights institution mandated with advising the government on the Charter compatibility of bills. By examining the potential impacts of bills that could be covered under the Charter, particularly their broader socioeconomic implications, this institution would assist in drafting bills that uphold Charter rights. The proposed institution's advice and recommendations would improve the quantity and quality of information available to the government during bill drafting. This assessment would complement the legalistic Charter review carried out by the Department of Justice, resulting in a more thorough executive rights review.

While advocating for a specific institutional model is beyond the purview of this thesis, this section underscores the importance of exploring various design options when establishing a human rights institution supporting executive rights review. These considerations play a crucial role in ensuring the institution's effectiveness and its role in fostering effective and sustainable rights protection.

**Conclusion**

As institutions solely dedicated to protecting and promoting human rights, NHRIs can contribute to the enactment of legislation that minimally infringes upon Charter rights. Their distinct contribution is providing the government with information on the possible impacts of bills on Charter rights that are not covered by the Department of Justice's assessments. As a result, they can assist lawmakers in identifying a broader range of possible infringements to the Charter, in

[1382] *Together as One: 2018 Community Advisory Group Engagement Report*, by Ontario Human Rights Commission (Ontario Human Rights Commission, 2019) at 2.

addition to less infringing alternative means to reach their objectives. The involvement of such an institution is crucial in raising awareness regarding any possible Charter implications that may arise from proposed legislation during the drafting process.

In addition to extending the scope of executive rights review, the proposed human rights institution could promote good governance within executive lawmaking. Making some or all of its advice public would enhance transparency and accountability in executive lawmaking by revealing to Parliament and civil society some of the information held by the government during bill drafting. The involvement of an NHRI could also multiply the perspectives considered during lawmaking; they can provide the executive lawmakers with empirical and experiential data on civil society's lived experience. As a result, the government would detain better and completer information to develop and draft legislation. An adequately designed advisory NHRI could thereby foster effective and sustainable rights protection in a way propitious to preventing the enactment of legislation infringing the Charter.

The ability of a human rights institution to effectively support executive rights review is highly influenced by its functional and structural characteristics. The Paris Principles provide widely accepted benchmarks for designing effective NHRIs. Murray rightly points out that none of the factors mentioned in the Paris Principles can render an NHRI effective: effectiveness results from combining these factors.[1383]

The broad advisory mandate defended in this Chapter, along with the relevant structural characteristics, would empower the proposed institution to address a broad range of human rights issues, particularly socioeconomic ones, by recognizing their comprehensive and systemic nature.[1384] As Gauthier de Beco and Murray indicate,

> [t]he fact that NHRIs have broad powers enabling them to gather information on human rights issues, to inquire into sensitive questions and to report to the government on general problems places them in an excellent position to promote and protect economic, social and cultural rights.[1385]

[1383] Murray, *supra* note 1216 at 220.
[1384] David Barrett, "The Regulatory Space of Equality and Human Rights in Britain: The role of the Equality and Human Rights Commission" (2019) 39 Legal Studies 247 at 257.
[1385] de Beco & Murray, *supra* note 1214 at 44.

Due to the parallel nature of the advisory mandate of the proposed institution and the legalistic assessments conducted by the Department of Justice, these institutions could come to different, or even conflicting, conclusions on the Charter compatibility of a bill. As Olivier de Schutter puts it, "the Executive may be tempted to 'forum shop,' and choose the procedure which it considers the least potentially damaging to its proposal."[1386] Still, he rightfully adds that "in most cases the advantages of multiplying procedures will by far compensate for any potential handicap such multiplication might imply"; this is especially the case if both institutions collaborate.[1387] The multiplication of institutions of rights review can thus benefit rights holders, though the government retains the ability to select the advice that aligns with its agenda the most.

While the presence of an NHRI during the drafting of bills could significantly strengthen pre-enactment review, the process of Charter review continues to hold utmost importance as bills progress from the government to Parliament. Executive and parliamentary rights review complement each other, upholding the principles enshrined in the Charter. In the subsequent Chapter, I explore the essential role of parliamentary rights review, further fortifying the institutional framework for pre-enactment review and, more broadly, the federal lawmaking process.

[1386] de Schutter, *supra* note 1203 at 12.
[1387] *Ibid* at 12–13.

# Chapter 4 – Parliamentary Rights Review: Strengthening Parliament's Engagement with Rights Protection

In this Chapter, I argue in favour of more active engagement of Parliament in rights review during federal lawmaking. Though long overlooked as a human rights protector, the central role of Parliament in improving rights protection and the quality of lawmaking in parliamentary democracies is increasingly getting the recognition it deserves.[1388] A consensus appears to be emerging among scholars[1389] and international organizations[1390] on the importance of legislatures to protect and promote human rights. In the words of James B. Kelly, "rights are not only the responsibility of courts or the Cabinet"; parliamentary responsibility in that regard needs to be taken seriously.[1391]

Yet, at this point, Parliament has failed to achieve its potential as a protector of human rights. This institution plays a pivotal role in examining the compatibility of bills to the Charter and deciding how legislation should deal with rights issues.[1392] In addition to constituting an additional safeguard to prevent the enactment of unconstitutional legislation, Charter review at Parliament provides opportunities to oversee government action and to engage with civil society. However, the existing framework for parliamentary rights review prevents Parliament from assessing the Charter compatibility of bills in a way that fosters effective and sustainable rights protection. The extent and quality of the Charter review performed in Parliament are currently at the discretion of the involved parliamentarians; they are responsible for deciding when and how to conduct this assessment.

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[1388] Roberts Lyer, *supra* note 742 at 195.
[1389] See e.g., Evren Elverdi, "National Parliamentary Human Rights Committees as Human Rights Actors: The Committee on Human Rights Inquiry" (2020) 41 Yasama Dergisi 317 at 320; Connor, *supra* note 64; Roberts Lyer, *supra* note 742; Webber, Yowell, & Ekins, *supra* note 89; Hunt, Hooper, & Yowell, *supra* note 89; Appleby & Webster, *supra* note 47; Hiebert, *supra* note 12.
[1390] In 2018, to encourage greater parliamentary involvement to protect rights, the United Nations published the *Draft Principles on Parliaments and Human Rights*. See also *Contribution of Parliaments to the Work of the Human Rights Council and its Universal Periodic Review*, by Human Rights Council, A/HRC/38/25 (Office of the United Nations High Commissioner for Human Rights, 2018).
[1391] Kelly, *supra* note 58 at 102.
[1392] Smith, *supra* note 926 at 25.

Over the last decades, the federal executive has continuously strengthened its policymaking capacity.[1393] Governmental dominance of parliamentary processes and strong party discipline, in particular, discourage elected representatives from the government from introducing amendments that do not align with the government's agenda.[1394] Governments insist on a fast adoption process, dismissing the opposition's arguments rather than looking at Parliament as an arena to test and improve proposed legislation.[1395] To this day, bills continue to be a "fait accompli" when introduced into Parliament: concrete re-evaluation rarely occurs, despite possible rights concerns being raised by the opposition.[1396] These factors have led to the "decline of Parliament as an effective policy forum."[1397] The limited engagement of Parliament in Charter review – and, more generally, in lawmaking – is common within parliamentary systems. The dynamics between the governing party and the opposition in such systems render elusive prospects of robust rights review in legislatures.[1398] Once conceptualized as a space for deliberation and accountability, legislatures and parliamentary debates are now viewed as "essentially a theatre."[1399]

Having seemingly accepted the marginal role of legislatures in lawmaking, several scholars have explored "possible indirect, nondecisional roles of Parliament," including on questions of compatibility with human rights.[1400] Likewise, national, regional and international organizations gradually recognize the added value of greater involvement of Parliament as an avenue for rights review.[1401] The present Chapter falls within this current of thought. As political scientist Paul G. Thomas notes, "Parliament's role is not to govern, but rather to act as a check of Executive power. It exists to provide oversight of the exercise of Executive power as a basis for enforcing democratic accountability".[1402] In other words, the role of Parliament is not only to amend or reject bills:

[1393] James B Kelly, "Bureaucratic Activism and the Charter of Rights and Freedoms: the Department of Justice and its Entry into the Centre of Government" (1999) 42:4 Can Public Adm 476 at 482.
[1394] Macfarlane, Hiebert & Drake, *supra* note 21 at 6.
[1395] *Ibid* at 6; Thomas, *supra* note 741 at 191.
[1396] Andrej Lang, "Non-judicial Rights Review of Counterterrorism Policies: The Role of Fundamental Rights in the Making of the Counterterrorism Database and the Data Retention Legislation in Germany" (2021) ICON 634 at 30.
[1397] James B Kelly, "Bureaucratic Activism and the Charter of Rights and Freedoms: the Department of Justice and its Entry into the Centre of Government" (1999) 42:4 Can Public Adm 476 at 482.
[1398] See e.g., Hiebert, *supra* note 25 at 138; Lang, *supra* note 1396 at 28.
[1399] Leydet, *supra* note 739 at 200.
[1400] See e.g., Sarah Moulds, "Democratic and Judicial Review of Enacted Laws in Australia: A Case Study of the Rights Scrutiny Work of Australian Parliamentary Committees" (2021) 51 Revue générale de droit 47; Connor, *supra* note 64 at 39; Glenn, *supra* note 89 at 211.
[1401] Roberts Lyer & Webb, *supra* note 742 at 33.
[1402] Thomas, *supra* note 741 at 197.

parliamentarians also contribute to lawmaking by supporting, legitimizing, criticizing and influencing the bills introduced by governments.[1403]

In the specific context of Charter review, this position recognizes that the distinctive contribution of Parliament to rights protection goes beyond the mere presence of an additional opportunity to identify and neutralize infringements to the Charter in bills. As discussed in Chapter 2, the contributions of the executive and legislative branches to rights review are distinct and complementary. Given their particular institutional characteristics and roles in lawmaking, government and legislatures approach rights concerns differently. The government brings specialized technical and operational expertise to assess questions of constitutionality, whereas legislatures are associated with greater transparency, accountability, deliberation, and diverse representation.[1404] I agree with constitutionalist Casey Connor's concerns that if the responsibility for assessing constitutionality is solely entrusted to executive lawyers in a closed and detached process removed from political engagement, the valuable democratic voice provided by parliamentary input could be stifled.[1405]

Parliamentary rights review can foster effective and sustainable rights protection by reinforcing good governance within federal lawmaking. Even in the presence of an advisory human rights institution such as the one discussed in Chapter 3, Parliament's distinct role in the lawmaking process necessitates its active engagement in Charter review through formal mechanisms of rights review. An institution "devoted precisely to lawmaking," Parliament is a key forum for debating complex questions like those involved in rights review, including how to protect and balance competing rights.[1406] Debates and scrutiny in committee and chamber can shed light not only on the Charter concerns emanating from bills, but also on the justifications behind the government's conclusions regarding their compatibility with the Charter.[1407] Through public hearings, this institution also provides opportunities for lawmakers to engage with civil society, enhancing their ability to respond to the priorities and needs of marginalized communities. Therefore, the involvement of Parliament in Charter review extends beyond the mere amendment

[1403] *Ibid*.
[1404] Appleby & Olijnyk, *supra* note 52 at 11.
[1405] Connor, *supra* note 64 at 44; Hiebert, *supra* note 382 at 15.
[1406] Pratt, *supra* note 457 at 97.
[1407] Mulgan, *supra* note 560 at 59.

or rejection of bills: it plays a crucial role in promoting rights protection by infusing the lawmaking process with principles and standards associated with good governance

This Chapter examines how the distinctive role of Parliament in Charter review can be institutionalized within parliamentary processes. Beyond formalizing and structuring Charter review within Parliament, these mechanisms of rights review should be designed to enhance the institution's capacity to advance rights protection and promote good governance in federal lawmaking.

To this end, I explore the potential of parliamentary committees as institutions of rights review. Committee inquiries constitute a vital aspect of parliamentary scrutiny. In small groups, committee members proceed with an in-depth analysis of bills, report their conclusions to Parliament and make recommendations. Their inquiries can allow Parliament to perform its own assessment of the bill's compatibility, supporting or challenging the government's conclusions in that regard. Parliamentary committees thus have the potential to conduct effective Charter review, one that would foster rights protection in federal lawmaking.

In light of this perspective, I contend that a joint committee should be entrusted with assessing the Charter compatibility of bills in Parliament. The proposed joint committee would have a broad and explicit mandate of Charter review. Through a structured process, it would systematically assess if and how the bills introduced for adoption engage the Charter and report to Parliament. This Charter review inquiry would occur in parallel with the general clause-by-clause inquiry performed by other parliamentary committees.

In addition to creating a formal opportunity to conduct a Charter review, a joint committee of rights review could combine the strengths of both chambers of Parliament. As several scholars have observed, the recent reforms of the Senate provide an interesting opportunity to investigate the potential of this institution in lawmaking.[1408] These reforms have notably led to the emergence of a high number of independent senators. The present proposal, therefore, aims at contributing to this scholarship by invigorating the role of the Senate in rights protection, more precisely in Charter

[1408] See e.g., Robert VandenBeukel, Cochrane & Godbout, *supra* note 97 at 831; Cardinal & Grammond, *supra* note 97 at 87 ss.

review.[1409] To quote the Honorable V. Peter Harder, "we have a Senate, so let's make it work."[1410] The House of Commons and the Senate make distinct contributions to lawmaking and Charter review: while the lower house provides legitimacy, the upper house can offer independence and expertise to this complex assessment. Senate committees have traditionally performed more robust rights assessments than House of Commons committees during their general inquiries of bills.[1411] Further, the latter institution's inquiries are prone to be tainted by strong partisanship. A committee of rights review combining members from both chambers could thus promote the conduct of robust Charter review unconstrained by executive dominance.

While other scholars have mentioned the relevance of creating a joint committee of human rights in federal lawmaking[1412], this thesis presents the first in-depth study of the institutional characteristics of such committee in the context of federal lawmaking. It explores the possible impacts of these features on rights protection, thereby contributing to a better understanding of the rights-enhancing properties of parliamentary committees, in particular joint committees. Hence, the present Chapter constitutes an original contribution to the role of Parliament in Charter review.

The key argument defended in this Chapter is that if well-designed, a joint committee of rights review could foster rights protection in federal lawmaking. The proposed institutional reform is grounded on academic literature investigating two joint committees of rights review found in Westminster systems: the UK's Joint Committee on Human Rights ("JCHR") and Australia's Joint Parliamentary Committee on Human Rights ("JPCHR"). Respectively created in 2001 and 2012, these committees are the object of increasing academic interest.[1413] Both joint committees were implemented with the specific purpose of increasing the role of Parliament in

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[1409] See e.g., Robert VandenBeukel, Cochrane & Godbout, *supra* note 97 at 831; Cardinal & Grammond, *supra* note 97 at 87 ss.
[1410] Harder, *supra* note 752 at 230.
[1411] O'Brien, *supra* note 756; Hiebert, *supra* note 50 at 250.
[1412] See e.g., Macfarlane, Hiebert & Drake, *supra* note 21 at 169; Charlie Feldman, "Legislative Vehicles and Formalized Charter Review" (2016) 25:3 Forum Constitutionnel 79. Although not explicitly mentioning a joint committee, Brian Slattery suggested the establishment of a "special committee with the mandate to consider how proposed legislation may affect basic rights and to propose suitable amendments.": Slattery, *supra* note 35 at 714.
[1413] See e.g., Moulds, *supra* note 371; Elverdi, *supra* note 1389; Hutchinson, *supra* note 741; George Williams & Daniel Reynolds, "The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights" (2015) 41:2 Monash University Law Review 469; Tom Campbell & Stephen Morris, "Human Rights for Democracies: A Provisional Assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011" (2015) 34:1 University of Queensland Law Journal 7; Michael C Tolley, "Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights" (2009) 44:1 Australian Journal of Political Science 41; Janet L Hiebert, "Parliament and the Human Rights Act: Can the JCHR Helps Facilitate a Culture of Rights?" (2006) 4:1 Int'l J Con Law 1.

rights review. To advocate for the establishment of a joint committee for rights review in federal lawmaking, I explore the functional and structural characteristics of these two committees, exploring how these characteristics have contributed to their successes and shortcomings in promoting rights protection. In addition to this scholarship, numerous international documents sustaining the importance of Parliament and parliamentary committees in lawmaking have been published in recent years.[1414] In particular, the United Nations published its *Draft Principles on Parliaments and Human Rights*[1415]in 2018 ("*2018 UN Draft Principles*"). According to their preamble, these Principles aim to guide legislatures in setting up parliamentary human rights committees and ensuring their effective functioning. The comparative examples of the UK and Australia, combined with the *2018 UN Draft Principles*, serve as the foundations to discuss the fundamental functional and structural characteristics the proposed joint committee should possess to effectively and legitimately contribute to rights protection.

In this Chapter's first section, I critically examine the institutional framework for parliamentary rights review. Noting the lack of formal and institutionalized Charter review, I maintain that where opportunities for Charter review exist, they are hindered by the political dynamics inherent to Westminster systems. In the second section, I explain why and how a joint committee of rights review could strengthen the quality and extent of Charter review at Parliament, supporting this institution's ability to promote rights protection by infusing federal lawmaking with standards associated with principles of good governance.

## 4.1 – Charter Review at Parliament: An Informal, Unstructured Assessment Shaped by Political Dynamics

The current format for parliamentary rights review is not conducive to robust assessments of the Charter compatibility of bills. Indeed, parliamentarians have significant discretion in determining the quality and extent of the rights review they conduct, if any. Robust Charter review in Parliament, therefore, remains a rare occurrence, especially in the House of Commons.

[1414] See e.g., *Resolution adopted by the Human Rights Council 35/29 - Contribution of Parliament to the work of the Human Rights Council and its Universal Periodic Review*, by Human Rights Council, A/HRC/RES/35/29 (2017).
[1415] *Draft Principles on Parliament and Human Rights - Annex I*, by Office of the United Nations High Commissioner for Human Rights, A/HRC/38/25 (United Nations, 2018).

In this section, after summarizing the federal parliamentary process and discussing how parliamentarians approach Charter review in committee inquiries and chamber debates, I present the two issues hindering the potential of parliamentary rights review to support such assessments: the absence of an institutionalized mechanism of Charter review and the political dynamics inherent to parliamentary systems. To illustrate how these issues affect the Charter review performed within Parliament, I provide concrete examples of the treatment of Charter review during the committee debates of several bills that clearly raised Charter concerns.

### 4.1.1 – Charter Review in the Federal Parliamentary Process

Though the vast majority of the bills introduced to Parliament are government bills, bills can originate from multiple sources: they can be public or private and can be developed by the government, a member of the House of Commons, or a member of the Senate. Each type of bill goes through a distinct adoption process and is subject to varied mechanisms to assess its compliance with the Charter.[1416]

Irrespective of their provenance, bills traverse the same process once introduced in Parliament. To become law, they must go through three readings in which they are examined, analyzed and debated in the House of Commons and the Senate. When introduced for adoption – generally in the House of Commons[1417] – a bill is read by the members of the chamber, who decide if they want to go forward with its adoption. If so, the bill is formally put on the Order paper, denoting that the chamber approves its principles.[1418] Then commences the "second reading,"

[1416] For example, Private Member bills at the Commons are subjected to a particular mechanism of rights review, which seeks to establish that a bill "must not clearly violate" the Charter. This criterion, in Feldman's opinion, leaves open "the possibility of significant infringement." For a discussion on the formalized mechanism for Charter review of Private Members' Bills at the Common, see Feldman, *supra* note 1412.

[1417] A bill introduced at the House of Commons starts by C, while a bill introduced at the Senate starts by S. If a bill involves the spending of public fund or relate to taxation, it must mandatorily be introduced in the House of Commons: *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 53; *Standing Orders of the House of Commons of Canada*, s 80(1).

[1418] Since 1994, the sponsoring minister can, at this stage, propose a motion to refer the bill to a standing or a legislative committee, thus before the second reading. Through a process subjected to the same rules and procedures as the considerations done at the second reading – described in the next section – committee members proceed to a clause-by-clause examination of the bill and report, with or without amendments. By contrast, in the examination done during the second reading, the scope for amendments is wider: they can pertain to the bill's principle, which was not voted on by the chamber at this point. Debates follow the submission of the report, and the bill can go directly to the third reading if it passes the vote. See *Standing Orders of the House of Commons of Canada*, *supra* note 1417, s 73(1).

centred on debating the general principles and ideas of the bill. It involves an in-depth analysis of its provisions, first by a parliamentary committee and subsequently by the chamber as a whole.

### A) Committee-based Scrutiny

Most Charter review occurs during the second reading, predominantly during the committees' inquiries. Parliament "outsources" most of its scrutiny functions to parliamentary committees.[1419] Remarkably absent from the Constitution[1420], committees came to be regarded as a "vital part of a modern Parliament."[1421] There are three types of committees: standing, legislative and joint. While standing committees are permanent, legislative committees are created *ad hoc* to review specific legislation.[1422] For their part, joint committees include members from both the House of Commons and the Senate; they can have permanent or temporary status.[1423] In all cases, their main functions are to perform in-depth inquiries of bills and to report to their respective chamber on possible amendments.[1424]

The House of Commons and the Senate comprise standing committees with diverse subject matters, including committees dealing with human rights. The House of Commons contains twenty-six standing committees.[1425] Created by Standing Orders, most Commons committees are composed of twelve members.[1426] Their composition proportionally reflects that of the chamber, representing all recognized parties. Each committee is empowered to "examine and enquire into

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[1419] Moulds, *supra* note 371 at 44.
[1420] Committees can notably be created through the parliamentary privilege guaranteed under section 18 of the *Constitution Act, 1867.*
[1421] Hamish McQueen, "Parliamentary Business: A Critical Review of Parliament's Role in New Zealand's Law-Making Process" (2010) 16:1 Auckland UL 1 at 7.
[1422] The Legislative Committee on Bill C-2 was notably created to inquire Bill C-2, *Tackling Violent Crime Act* in 2008.
[M]arc Bosc & André Gagnon, eds, "House of Commons Procedure and Practice" in *Types of Committees and Mandates - Committees*, 3rd ed (ProceduralInfo, 2017).
[1424] Thomas, *supra* note 741 at 217.
[1425] Aboriginal Affairs and Northern Development; Access to Information, Privacy and Ethics; Agriculture and Agri-Food; Canadian Heritage; Citizenship and Immigration; Electoral Reform; Environment and Sustainable Development; Finance; Fisheries and Oceans; Foreign Affairs and International Development; Government Operations and Estimates; Health; Human Resources, Social Development and the Status of Persons with Disabilities; Industry, Science and Technology; International Trade; Justice and Human Rights; Liaison Committee; National Defence; Natural Resources; Official Languages; Procedure and House Affairs; Public Accounts; Public Safety and National Security; Status of Women; Transport, Infrastructure and Communities; Veterans Affairs.
[1426] *Standing Orders of the House of Commons of Canada*, *supra* note 1417, s 104(2). The Standing Committee on Access to Information, Privacy and Ethics, the Standing Committee on Government Operations and Estimates, the Standing Committee on Public Accounts and the Standing Committee on the Status of Women consist of 11 members.

all such matters as may be referred to them by the House."[1427] At the Senate, seventeen standing committees exist[1428], comprising five to fifteen members.[1429] Both chambers include standing committees on human rights: the Commons Standing Committee on Justice and Human Rights, as well as the Senate Standing Committee on Human Rights and the Senate Standing Committee on Legal and Constitutional Affairs. In addition to these human rights committees, both chambers possess specialized standing committees dealing with subject-specific aspects of human rights, including Indigenous and language rights.

Ministers are responsible for deciding which committee is tasked with inquiring about a bill.[1430] They refer bills to the committee with the mandate that most closely corresponds to the bill's subject matter. With few exceptions[1431], only one committee is mandated to inquire about each bill.

The committee responsible for examining a bill decides how to conduct its inquiry. Committee inquiries include a general debate on the bill followed by a clause-by-clause examination of its provisions and, finally, a vote on every provision with or without amendments. Except for certain time limitations[1432], the committee decides how much time is devoted to each stage.[1433]

Numerous means are available to parliamentary committees to support their inquiry functions. In the case of government bills, the committee traditionally starts by hearing from the sponsoring minister. The Minister of the Parliamentary Secretary then explains the bill's

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[1427] *Ibid*, s 108(1)a).
[1428] Aboriginal Peoples; Agriculture and Forestry; Banking, Trade, and Commerce; Conflict of Interest for Senators; Energy, the Environment and Natural Resources; Fisheries and Oceans; Foreign Affairs and International Trade; Human Rights; Internal Economy, Budgets, and Administration; Legal and Constitutional Affairs; National Finance; National Security and Defence; Official Languages; Rules, Procedure and the Rights of Parliament; Selection Committee; Social Affairs, Science and Technology; Transport and Communication.
[1429] *Rules of the Senate of Canada*, SOR/2017-107, ss 12–3(1) and (2).
[1430] *Standing Orders of the House of Commons of Canada*, *supra* note 1417, s 73(1); *Rules of the Senate of Canada*, *supra* note 1429, ss 10-11(1).
[1431] Rule 10-11(1) of the *Rules of the Senate* provide that two committees can examine a bill. For example, in 2021, Bill C-3, *An Act to amend the Criminal Code and the Canada Labour Code* was examined by the Senate Committee on Legal and Constitutional Affairs and the Standing Senate Committee on Social Affairs, Science and Technology.
[1432] "The period of time devoted to the consideration of the bill is determined by the committee, but it can be circumscribed or restricted by various factors, such as the obligation to report the bill within a prescribed time pursuant to a special order of the House or to a time allocation motion, or due to limits the committee has placed upon itself by adopting motions to that effect": Marc Bosc & André Gagnon, eds, "Studies Conducted by Committees - Committees" in *House of Commons Procedure and Practice*, 3rd ed (ProceduralInfo, 2017).
[1433] *Ibid*.

provisions.[1434] Committee members can question and demand additional information from government officials, including the Minister of Justice. Written questions for the government are placed on the Order Paper, which must receive an answer within 45 days.[1435] Committee members can hear witnesses from civil society as well. Through written briefs and public hearings, they receive testimonies from citizens, NGOs and experts.[1436] Additionally, they have access to several resources and staff, including legal counsels and legislative counsels from the Offices of the Law Clerks of the Senate and the House of Commons, specialized analysts from the Library of Parliament, as well as legislative drafting services. Committees can also order the production of documents and records.[1437] These powers and resources all support parliamentary committees in their inquiry of bills.

As further explained in section 4.1.2, Charter review is part of the committees' general inquiry functions. No formal mechanism of rights review nor structured criteria guide their assessment of the bills' compatibility with the Charter. When Charter considerations are discussed during committee work, they are traditionally addressed as a question of compliance with Supreme Court decisions, as is the case during executive rights review. The focus is on deciding if a bill complies with judicial interpretations of rights, particularly with the decisions of the Supreme Court.[1438] For instance, the 2014 committee deliberations on Bill C-36, *Protection of Communities and Exploited Persons Act,* were "undoubtedly influenced" by the Supreme Court judgment in *Bedford*[1439]: the arguments presented while discussing the reform of prostitution law were in line with the ones presented in court.[1440] Moreover, during the debates on medical aid for dying in Commons and Senate committees, compatibility with the Charter was primarily addressed in relation to the criteria set in *Carter*[1441] and *Truchon*[1442], the two principal judicial decisions

[1434] *Ibid*.
[1435] *Standing Orders of the House of Commons of Canada*, *supra* note 1417, s 39(1) and (5)a.
[1436] Docherty, *supra* note 111 at 20.
[1437] Marc Bosc & André Gagnon, eds, "Committee Powers - Committees" in *House of Commons Procedure and Practice*, 3rd ed (ProceduralInfo, 2017).
[1438] At the Senate, rights issues are considered "essentially legal issues": Gary O'Brien, "Legislative Scrutiny and the Charter of Rights: A Review of Senate Practices and Procedures" (2005) Canadian Parliamentary Review 40 at 42.
[1439] *Canada (Attorney General) v. Bedford*, *supra* note 116.
[1440] "Many members of the organizations that appeared as interveners in Bedford reappeared as witnesses at the Standing Committees. These organizations would have had years to sharpen their arguments and reasoning and likely brought the same rhetoric to the Standing Committees as they did to the courts. It can therefore be proposed that the level of uniformity in the debates over Bill C-36 had their basis in Bedford-both sides learning which arguments to cede in order to strengthen their points of view.": Goodall, *supra* note 389 at 258.
[1441] *Carter*, *supra* note 3.
[1442] *Truchon c Procureur général du Canada*, [2019] QCCS 3792 [*Truchon*].

regarding medical aid for dying. This reliance on judicial decisions is consistent with Canada's court-centric approach to rights protection. This approach, discussed in Chapter 1, positions courts as the ultimate guardians of Charter rights, responsible for interpreting and applying the Charter through judicial review. The political branches, in contrast, have a marginal role in determining what this instrument entails. Therefore, Parliament commonly likened Charter compatibility with compatibility to jurisprudence.

Once the committee has concluded its inquiry, its members vote on each bill provision. If amendments are proposed, they vote on the provisions as amended.[1443] Committee members then vote to report the bill to Parliament for the Report stage, with the proposed amendments, if there are any.[1444] A majority is required for these motions to go forward.[1445]

The amendments proposed by committees can include changes to bring a bill in line with the Charter. Amendments are attempts to "modify the text of the clause under consideration so that it will be more acceptable, or to propose an alternate text to the committee."[1446] Committee amendments tend to cover technical aspects of the bills.[1447] Their amendments cannot modify the bill's objectives, which were already debated at the commencement of the second readings. Charter-related amendments could notably aim at finding less intrusive means to achieve the legislative objectives of the government.

The committee presents its amendments in a report submitted to the relevant chamber, which accompanies the committee meetings' Minutes of Proceedings. Members of Parliament also have access to the evidence provided by witnesses. The reports and evidence are published on each committee's website; the public can thus consult them.

While reporting on bills constitute a crucial part of the functions of parliamentary committees, their reports tend to be brief. Commons committees' reports, especially, only contain the amendments proposed by the committee, if any. They cannot include remarks or recommendations.[1448] They thus do not explain any findings or conclusions on the Charter

[1443] Bosc & Gagnon, *supra* note 1432.
[1444] *Ibid*. *Rules of the Senate of Canada*, *supra* note 1429, ss 12–22.
[1445] André Bosc & André Gagnon, eds, "Committee Proceedings - Committees" in *House of Commons Procedure and Practice*, 3rd ed (ProceduralInfo, 2017).
[1446] Bosc & Gagnon, *supra* note 1432.
[1447] Marguerite Marlin, "Groupes d'intérêt et comités parlementaires : comment égaliser les chances" (2016) Revue parlementaire canadienne 24 at 25.
[1448] Bosc & Gagnon, *supra* note 1432.

compatibility of bills. For their part, Senate reports sometimes include observations in addition to the proposed amendments, notably regarding the evidence and testimonies received.[1449] In any case, committees' reports provide limited information on the content of their inquiry.

B) Debates in Chambers

After receiving the committee's report, the chamber as a whole debates and votes on the proposed amendments, a process known as the "report stage" of the second reading. At this stage, all parliamentarians can propose amendments. Debates cover every admissible amendment, namely the committee's and any additional amendments. Though the chamber needs to debate the committee's amendments, it is not bound by its recommendations, nor does it have to respond to it in any way.[1450]

During debates in the chamber, parliamentarians can question the government on any aspect of the bill, including the nature of the executive rights review performed and the findings of the Minister of Justice. The Question period provides an opportunity for the opposition to query the government orally; a period of 45 minutes, or 30 minutes at the Senate, is dedicated to questions for ministers each sitting day.[1451] Questions can also be placed on the Order Paper, requiring the minister's oral or written response.[1452] Oral and written questions allow the opposition to request further information on the Charter compatibility of debated bills from the government.

As for committee scrutiny, parliamentary deliberations on Charter compatibility are traditionally addressed in terms of compliance with jurisprudence. Decisions of the Supreme Court, in particular, are often mentioned to support or rebuff a bill.

Chamber debates conclude with the third reading and a vote. Parliamentarians decide if the

[1449] For example, in its report on Bill C-10, *Safe Streets and Communities Act,* the Senate Committee on Legal and Constitutional Affairs included additional Observation emphasizing, among others, some of the concerns invoked by the witnesses heard during committee hearings. *Report of the Committee - Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, by Standing Senate Committee on Legal and Constitutional Affairs, 41st Parliament, 1st Session (Senate of Canada, 2012).
[1450] Marlin, *supra* note 1447 at 27.
[1451] *Rules of the Senate of Canada*, *supra* note 1429, ss 4–7.
[1452] *Standing Orders of the House of Commons of Canada*, *supra* note 1417 art 39(1); *Rules of the Senate of Canada*, *supra* note 1429, ss 4–10.

bill should be adopted in its final version. Though amendments and debates can still occur at this stage – especially in the case of controversial bills – the third reading is mainly viewed as a formality.[1453] The chamber ultimately votes on the bill as a whole. The chamber considers the bill adopted if it obtains the required majority.

As the lawmaking process traditionally starts in the House of Commons, the bill then moves to the Senate, which follows a similar process both in committee and chamber. The Senate can decide to adopt the bill without amendments, thus, in line with the House of Commons. The upper house can also propose amendments, which must then be debated and accepted by the House of Commons. As further discussed in the next section, the Senate tends to defer to the House of Commons if disagreements occur between the two chambers.

Charter review can occur throughout the parliamentary process: the committees and chamber, both at the House of Commons and the Senate, can consider the impacts of bills on the Charter at any point during the parliamentary process. However, as will now be explained, the parliamentary process is not designed in a way propitious to encouraging parliamentarians to conduct a robust Charter review of bills, one that fosters effective and sustainable rights protection in federal lawmaking.

### 4.1.2 – A Flawed Institutional Framework to Foster Rights Protection

As discussed in Chapter 2, Charter review at Parliament plays a crucial role in fostering effective and sustainable rights protection. To support its ability to foster good governance in federal lawmaking, Parliament must have opportunities to seriously engage with the Charter and what it entails. For that purpose, Parliament must assess whether the bills introduced for adoption are compatible with Charter rights or, at the very least, whether any possible infringements reasonably limit these rights.[1454]

Within this section, I posit that the existing framework of parliamentary rights review presents significant obstacles to Parliament's capacity to fully realize its potential as an institution of rights protection. To demonstrate the inadequacies of the current framework for Charter review

[1453] Bosc & André Gagnon, eds, "Stages in the Legislative Process - The Legislative Process" in *House of Commons Procedure and Practice*, 3rd ed (ProceduralInfo, 2017).
[1454] Kelly, *supra* note 58 at 96.

to foster rights protection, I conclude by exploring the parliamentary debates of numerous bills raising evident Charter concerns.

### A) Exploring Flaws in the Current Framework for Parliamentary Rights Review

Under its current institutional framework, parliamentary rights review fails to ensure that the Charter concerns arising from bills receive sufficient consideration in parliamentary debates. Two explanations support this conclusion: the parliamentary stage of lawmaking does not provide for any formal mechanism of rights review, and the political dynamics inherent to Westminster systems affect the nature and extent of the review performed in both the House of Commons and the Senate.

#### *i. The Absence of Formal Mechanisms of Rights Review*

One of the central premises underlying the normative framework defended in this thesis is that rights protection requires an active role of Parliament in Charter review. This engagement materializes through mechanisms of rights review within parliamentary processes. A robust mechanism of rights review allows Parliament to identify infringements to Charter rights and neutralize or, at the very least, minimize them.

Currently, Charter review at Parliament is, at best, underdeveloped. Given the dominant court-centric approach to rights protection presented in Chapter 1, the political branches are viewed as having a limited responsibility in that regard. Several institutional adjustments were still made to the lawmaking process to ensure that Charter concerns receive sufficient consideration.[1455] However, most of these changes pertained to the government's development and drafting of legislation. As a result, while the executive stage of lawmaking provides several formal opportunities for the government to assess the Charter compatibility of bills, no mechanism of rights review exists in parliamentary lawmaking.

The parliamentary process does provide numerous informal means for Parliament to consider the Charter compatibility of bills. These means include the questions period, public hearings in committees, as well as written questions on the Order paper. These processes oblige

[1455] Miriam Smith, "The Impact of the Charter: Untangling the Effects of Institutional Change" (2007) 36 International "Journal of Canadian Studies 17 at 19.

the government to respond in some way. Nevertheless, parliamentarians are not required to employ any of these means to contemplate Charter issues during lawmaking.[1456]

The following section examines the absence of institutionalized Charter review in Parliament, specifically in parliamentary committees. Committees perform most of the scrutiny functions in Parliament.[1457] They constitute the "core place" for assessing the compatibility of bills with Charter rights.[1458] Yet, no formal mechanism of rights review obliges or structures Charter review during committee work and they have limited resources to support such assessments.

**a. The lack of structured Charter review in parliamentary committees**

Parliamentary committees are not obliged to perform Charter review or any assessment of the impacts of bills on Charter rights. Neither the *Standing Orders* of the House of Commons nor the *Rules of the Senate* provide for such an obligation. Further, no parliamentary committee is explicitly mandated to assess the Charter compatibility of bills. As a rule, bills are referred to a committee with a jurisdiction close to its subject matter.[1459] The committee mandated with inquiring about a bill is responsible for assessing its compatibility with Charter rights. The responsibility of performing Charter review is thus dispersed among all parliamentary committees.

Though both chambers of Parliament possess human rights committees, these committees are not technically committees of Charter review. Their mandate is similar to other parliamentary committees: to perform an in-depth examination of bills and report to Parliament. They are commonly referred bills dealing with human rights legislation and mechanisms[1460] – for example, Charter statements[1461] –, as well as bills with proven or probable impacts on the Charter[1462],

[1456] Feldman, *supra* note 1412 at 80.
[1457] Moulds, *supra* note 371 at 44.
[1458] *Ibid* at 13.
[1459] *Standing orders of the House of Commons*: 108(1)(a): Standing committees shall be severally empowered to examine and enquire into all such matters as may be referred to them by the House. *Rules of the Senate*, section 12-8(1): "Any bill, message, petition, inquiry, paper or other matter may be referred to any committee as the Senate may order".
[1460] See e.g., Bill C-16, *An Act to amend the Canadian Human Rights Act and the Criminal Code*.
[1461] Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act.*
[1462] These committees notably inquired Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*; Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*; Bill C-6, *An Act to amend the Criminal Code (conversion therapy)*; Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other*

including legislative sequels enacted in response to judicial invalidations of the Supreme Court.[1463] In the House of Commons, the mandate of the Standing Committee on Justice and Human Rights covers multiple pieces of legislation,[1464] but its mandate does not include the Charter or constitutional rights. This committee reviews policies related to the Department of Justice and other federal entities.[1465] It also examines bills pertaining to certain aspects of criminal law, family law, human rights law, and the administration of justice. At the Senate, the Standing Committee on Human Rights and the Standing Committee on Legal and Constitutional Affairs can study bills relating to human rights. The primary goals of the Standing Committee on Human Rights, as described by former Senator Andreychuk Raynell, are:

> to ensure that federal legislation and policy adhere to the Canadian Charter of Rights and Freedoms; to encourage and manage dialogue to ensure a proper balance between security and other human rights concerns in a post September 11th world; to educate and ensure proper application of, and adherence to, international human rights principles; and to identify and ensure the equal treatment of minorities.[1466]

For its part, the Senate Committee on Legal and Constitutional Affairs is one of the busiest Senate committees. With a general mandate regarding constitutional questions – including federal-provincial relations, the administration of justice and human rights issues – this committee can be seized of bills with possible Charter implications.[1467] Existing human rights committees are, therefore, not mandated with performing Charter review; they are regular committees examining bills related to human rights matters, among others.

Because every committee can inquire about any bill, human rights committees are not necessarily the ones reviewing bills with probable or possible Charter impacts. These bills are, in

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*Acts*; Bill S-217, *An Act to amend the Criminal Code (detention in custody)*; Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act.*

[1463] These committees were responsible for inquiring, among others, the legislative sequels to the decisions *Bedford* on prostitution law (Bill C-36, *Protection of Communities and Exploited Persons Act*) and *Carter* on medical aid in dying (Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying*).

[1464] Criminal Code; Youth Criminal Justice Act; Divorce Act; Civil Marriage Act; Canadian Human Rights Act; Judges Act; Courts Administration Service Act; Supreme Court Act.

[1465] Canadian Human Rights Commission; Office of the Commissioner for Federal Judicial Affairs Canada; Supreme Court of Canada; Courts Administration Service; Administrative Tribunals Support Service of Canada; Public Prosecution Service of Canada.

[1466] Senator Andreychuk Raynell, "The Work of the Standing Senate Committee on Human Rights: An Overview of Children: The Silenced Citizens," (2008) 71:1 Saskatchewan Law Review 23.

[1467] O'Brien, *supra* note 1438 at 42.

fact, often reviewed by other standing committees, refered to as "non-human rights committees". For instance, the Commons and Senate Standing committees on public safety and national defence inquired about numerous bills with clear Charter implications. For example, they recently examined bills on gun control[1468] and about record suspensions for simple possession of cannabis.[1469] Non-human rights committees also studied several bills raising socio-economic concerns that might be guaranteed under the Charter. As an illustration, the Standing Commons Committee on Health inquired about the *Cost of Living Relief Act, No. 2*, a law providing dental care to children and rental housing benefits. This committee also examined the *Cannabis Act*, which clearly impacts vulnerable groups, including economic impacts on people with disabilities.[1470] This bill also raises concerns for racialized minorities and Indigenous groups, who were and still suffer disproportionately from the socio-economic impacts of the criminalization of cannabis, especially given the presence of systemic racism in policing and the criminal justice system.[1471] At the Senate, these bills were respectively referred to the Standing Committee on National Finance and the Standing Committee on Social Affairs, Science and Technology. The latter Senate committee also recently inquired about Bill C-12, *An Act to amend the Old Age Security Act (Guaranteed Income Supplement*), a law aiming at supporting low-income seniors. Inquiries in human rights committees thus account for a minimal part of parliamentary committee work; most bills are inquired by other committees, which are incidentally responsible for assessing their Charter compatibility.

Both in human rights and non-human rights committees, rights review is not guided by any

[1468] See e.g., Bill C-71, *An Act to amend certain Acts and Regulations in relation to firearms* and Bill C-21, *An Act to amend certain Acts and to make certain consequential amendments (firearms)*. The latter bill is still under consideration at the Commons committee.

[1469] The Commons Committee on Public Safety and National Security was tasked with inquiring Bill C-93, *An Act to provide no-cost, expedited record suspensions for simple possession of cannabis*, as well as Bill C-66, *Expungement of Historically Unjust Convictions Act*.

[1470] Rachel Rohr notably argues that subjecting recreational and medical marijuana to the same taxation scheme, the Medical Cannabis Regime created under the *New Cannabis Act*, 2018 can be viewed as taxing medicine, thus taxing people with disabilities: Rachel Rohr, "Taxing Disability: A Critical Look into the Medical Cannabis Regime under the New Cannabis Act, 2018" (2021) 55:2 Journal of Canadian Studies 436.

[1471] See e.g., Jenna Valleriani, Jennifer Lavalley & Ryan McNeil, "A Missed Opportunities? Cannabis legalization and reparations in Canada" (2018) 109 Canadian Journal of Public Health 745; Institute for Research On Public Policy, *supra* note 20; Mohy-Dean Tabbara, "Dismantling vicious cycle of poverty and systemic racism should guide criminal justice reform", online: *Policy Options* <https://policyoptions.irpp.org/magazines/july-2020/dismantling-vicious-cycle-of-poverty-and-systemic-racism-should-guide-criminal-justice-reform/>; Mary Eberts et al, "RCMP must acknowledge the force's racist underpinnings", online: *Policy Options* <https://policyoptions.irpp.org/magazines/july-2020/rcmp-must-acknowledge-the-forces-racist-underpinnings/>.

analytical framework, nor does an explicit obligation to assess Charter compatibility exists. While human rights committees in other countries have established some criteria to evaluate if bills infringe on human rights[1472], no such framework exists in the federal lawmaking process. Each committee is responsible for deciding "how and when it will study each bill that it receives," including as per rights review.[1473]

**b. Limited resources to support rights review**

If committee members can examine rights concerns without a formal mechanism of rights review, they lack the resources to perform a robust Charter review of the bills introduced for adoption. In the case of non-human rights committees, particularly, rights review constitutes a limited part of their mandate and of the resources available for their inquiries.

Committees can access several resources and staff to support their lawmaking functions. Twenty legal counsels and twelve legislative counsels from the Offices of the Law Clerks of the Senate and the House of Commons are available to committees, providing legal and legislative services. They also assist in drafting legislation and amendments. In addition to this legal staff, committees can consult the analysts of the Library of Parliament. These highly skilled and specialized researchers prepare legislative summaries of the bills tabled for adoption.[1474] They can also provide committee members with additional information to support their inquiries.[1475] Furthermore, the Auditor General delivers performance audits of government programs that notably address how these programs are administered and performed in terms of economy, efficiency, and environmental impact.[1476] In the latter case, however, their role pertains to the quality of legislation in general, and not Charter compatibility. These resources assist committees

[1472] The Australian PJCHR, for example, adopts the following analytical framework to determine if bills are consistent with Australia's obligation on human rights: "In general, any measure that limits a human right must comply with the following criteria (the limitation criteria): be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to its stated objective; and be a proportionate way to achieve that objective": Parliamentary Joint Committee on Human Rights, *Chapter 2 - The Committee's Mode of Operation* (Parliament of Australia).

[1473] "Amending Bills at Committee and Report Stages - House of Commons," online: <https://www.ourcommons.ca/About/Guides/AmendingBills-e.html#3>.

[1474] Keyes, *supra* note 84 at 206.

[1475] "They are the resource persons for any substantive questions that the Chair and committee members may have. They provide briefing material and other background material to committee members. They may identify potential witnesses for the committee and suggest possible lines of questioning during committee hearings. They play an important role in the drafting of substantive reports": Marc Bosc & André Gagnon, eds, "Committee Membership, Leadership and Staff" in *House of Commons Procedure and Practice*, 3rd ed (ProceduralInfo, 2017).

[1476] Keyes, *supra* note 84 at 208.

in their inquiry and reporting functions.

These numbers drastically contrast with the resources available to the government to assess the Charter compatibility of proposed legislation during their development and drafting. Indeed, the government benefits from the advice of around 2 500 legal and 125 legislative counsels.[1477] The number of supporting staff is thus remarkably low in Parliament compared to the staff available to the government.

The notable imbalance between the resources available to the government and Parliament can impact the ability of Parliament to concur or challenge the government's conclusions expressed in Charter statements. If greater resources do not necessarily equate with better advice, fewer resources can impact the nature and the quality of the assessment. The committee members interviewed by Janet Hiebert expressed lacking "adequate time and information to make informed judgments about the extent and nature of Charter concerns."[1478] She notes that limited resources can make it difficult for parliamentary committees to fully appreciate the Charter compatibility of bills and oversee governmental action.[1479] As she puts it, parliamentary rights review creates the expectation that government "should explain assumptions about why bills are warranted and justified in light of their consistency with the Charter," reducing the government's political monopoly on Charter judgments.[1480] For that purpose, effective Charter review requires that Parliament confirms that the bills introduced by the government are justified and responsible in light of the guaranteed rights.[1481] Limited resources, however, can constrain Parliament's potential to hold the government publicly accountable for introducing for adoption legislation that might infringe on Charter rights.

In 2012, a bill proposing to implement a mechanism of rights review during the parliamentary stage of lawmaking was introduced to Parliament.[1482] This private bill, advanced by former Liberal MP Irwin Cotler, recommended mandating the Law Clerk and Parliamentary Counsel of the House to determine "whether any of the provisions of the bill is likely to be inconsistent with the purposes and provisions" of the Charter and the *Canadian Bill of Rights*. If

[1477] *Ibid* at 218.
[1478] Hiebert, *supra* note 12 at 100.
[1479] Hiebert, *supra* note 57 at 1972.
[1480] Hiebert, *supra* note 12 at 102.
[1481] Hiebert, *supra* note 48 at 175.
[1482] Private Member's Bill C-537, *supra* note 218.

an inconsistency was identified, a summary of the reasons for the determination would be submitted to the Speaker of the relevant chamber. In this case, a legal actor would have performed the review which, accordingly, would have likely been centered on jurisprudential considerations. This bill, however, did not advance past the first reading.[1483]

The lack of institutionalized Charter review in committee work means that committee members are neither obligated nor expected to assess the Charter compatibility of the bills they inquire.

### *ii. The Political Dynamics Affecting Charter Review in Parliament*

As a bicameral legislature, Parliament in Canada includes a lower and an upper house, that is, the House of Commons and the Senate. The Constitution grants equal powers in lawmaking to both chambers: to become law, they must both approve bills after going through a similar process of three readings.

Still, in practice, their roles in lawmaking are shaped by the political dynamics inherent to Westminster systems. In the House of Commons, deliberations and voting occur along party lines, resulting in partisan conflicts generally resolved in favour of the governing party. As for the Senate, the unelected institution's perceived lack of legitimacy has traditionally prompted senators to concede before the House of Commons in case of conflicts, notably regarding the Charter compatibility of bills. This section clarifies how the political dynamics play a crucial role in shaping the nature and quality of the Charter review conducted by each chamber.

#### **a. The House of Commons: Partisanship and party discipline**

A strong tradition of party discipline exists in the House of Commons[1484], where MPs and committee members traditionally support the policies agreed on by their political party.[1485] Political scientist Alex Marland defines party discipline as "a system of norms, rules, and consequences designed to ensure the public alignment of group members, especially in legislative

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[1483] *Ibid*.
[1484] See e.g., Donald J Savoie, *Democracy in Canada: The Disintegration of Our Institutions* (Montréal: McGill-Queen's University Press, 2019) at 184.
[1485] Provincial legislatures also rarely deviate from the party line: Marland, *supra* note 85 at 8. See also Thomas & Lewis, *supra* note 84.

voting," a "mechanism to hold together a diverse coalition of political interests."[1486] Canada is reputed for having one of the strictest applications of this principle of any liberal democracy.[1487] In his recent book on Canadian party politics, *Lost in Division*, Jean-François Godbout explores the evolution of party discipline in Canada, confirming its heightened level in today's Parliament.[1488]

A strict application of party discipline in Parliament means that governments with a majority of seats in Parliament are virtually assured of passing legislation with the support of all their members. [1489] Hiebert states that:

> Cohesive party voting, reinforced by the political convention of responsible government (meaning that government will fall if it loses the confidence of parliament) continues to discourage members of the government party from rebelling and/or is not forceful enough to undermine their party leaders' ability to pass their preferred legislative agenda. [1490]

If minority governments do not benefit from the same assurance of support as majority governments, they still tend to control Parliament. To quote J.M. Keyes, "the Executive still controls the parliamentary agenda and can be overridden only by votes to the contrary, which often risks a dissolution of Parliament and an election."[1491] In a recent study of minority governments in twenty-one parliamentary democracies, Maria Thürk found that a minority status did not prevent governments from advancing their political agenda.[1492] Furthermore, minority governments can form alliances or coalitions with other parties to obtain the majority required to pass their bills.[1493] While a minority government may require more negotiations with other parties,[1494] government dominance can persist regardless of whether the government holds a majority or minority status.

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[1486] Marland, *supra* note 85 at 6.
[1487] de Clercy & Marland, *supra* note 85 at 16.
[1488] Godbout, *supra* note 85.
[1489] As explained below, free voting is increasingly used in Canadian political parties.
[1490] Hiebert, *supra* note 25 at 138.
[1491] Keyes, *supra* note 84 at 222.
[1492] Thürk, *supra* note 84.
[1493] For instance, the current minority Liberal government concluded a three-year agreement with the opposition NPD to work together on key policy areas, including health care, affordable housing, climate change and reconciliation with Indigenous peoples: "Delivering for Canadians Now | Prime Minister of Canada," online: <https://pm.gc.ca/en/news/news-releases/2022/03/22/delivering-canadians-now>.
[1494] Peter H Russell, *Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy* (Toronto: Emond Montgomery Publications, 2008) at 97.

This strict application of party discipline reinforces the centralization of powers in the hand of the government.[1495] On the one hand, it supports the government's capacity to carry out its political agenda without fruitful opposition from the other parties. On the other, it impedes Parliament's capacity to influence legislation development.[1496] As a result, governments tend to dominate the lawmaking process. Common in Westminster models of government[1497], including in Australia[1498] and the UK[1499], governmental dominance denies legislatures the opportunity to perform their legitimate role in lawmaking.[1500]

The executive centralization of powers resulting from this strict application of party discipline concretely impacts the ability and willingness of Parliament to perform robust Charter review. In their 2015 comparative study of bills of rights in parliamentary systems, Hiebert and James B. Kelly found that:

> lower houses of parliament do not seem to be an effective venue for elected members to engage in independent, moral judgements about the scope of rights, or how rights-based or compatibility-based considerations should guide or constrain legislation. Instead, debate and voting in these parliamentary venues is heavily constrained by government domination, norms of party cohesion and an 'us vs. them' focus that emphasizes criticism of the government's legislative agenda rather than seeking the best way to ensure legislation is compliant with protected rights.[1501]

Legal scholars Daniel Reynold and George Williams support this view, stating that it is "not realistic in such a system [of executive dominance] to expect that a parliamentary scrutiny regime will overcome the power imbalance between the Executive and Parliament."[1502] Charter review in Parliament is thus unlikely to lead to a robust assessment of the Charter compatibility of bills. In

[1495] Penasa, *supra* note 84 at 683.
[1496] Kelly, *supra* note 559 at 104; Thomas & Lewis, *supra* note 84 at 366.
[1497] Rayment & McCallion, *supra* note 11 at 4; Russell, *supra* note 1494 at 101.
[1498] Julie Debeljak & Laura Grenfell, "Future Direction for Engaging in Law-Making: Is a Culture of Justification Emerging Across Australian Jurisdictions?" in Julie Debeljak & Laura Grenfell, eds, *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* para (Sydney: Thomson Reuters, 2020) 789 at 792; Campbell & Morris, *supra* note 1413 at 15.
[1499] Instances of votes against the party line are higher in the UK: Jessie Blackbourn & Fergal F Davis, "Party Discipline and the Parliamentary Process" (2016) 69 Parliamentary Affairs 211.
[1500] Franks, *supra* note 757 at 171.
[1501] Hiebert & Kelly, *supra* note 57 at 411.
[1502] Williams & Reynolds, *supra* note 1413 at 507.

particular, it is unlikely to lead to adopting the amendments required to bring bills in line with the Charter.

In Commons committees, deliberations are conducted in a highly partisan manner.[1503] Marland states, "[i]deally, these multi-partisan groups of private members engage in arm's-length scrutiny of the government, and they hold authorities responsible for promises and responsibilities."[1504] In practice, committee members from the leading party are reluctant to challenge the government's position on the consistency of bills to the Charter.[1505] Due to intense partisanship and government domination, Hiebert prompts, "government encounters weak pressure from parliament to justify legislation in terms of its consistency with the Charter."[1506] Majority governments often insist on swift committee deliberations, urging members to support the party's agenda. [1507] As a result, members from the opposition perform most of the rights review during committee deliberations.[1508] In the case of a minority government, the government is increasingly obliged to collaborate with the opposition during committee work.[1509] Still, if the opposition can raise the alarm regarding the Charter compatibility of a debated bill, their concerns and proposed amendments can ultimately be put aside.

Voting in committees also occurs along party lines, furthering the effects of party discipline. To illustrate, in February 2013, NPD MP Françoise Boivin introduced a motion to conduct a study on the application of the Minister of Justice's reporting process under section 4.1 of the *Department of Justice Act* at the Standing Committee on Justice and Human Rights. Supported by the five committee opposition members, this motion was quickly rejected by the six members from the Conservative majority following a vote.[1510] The Conservative government is said to have pressed its members to defeat the opposition motion.[1511] Similarly, a majority of

[1503] Andrew Defty, "From Committees of Parliamentarians to Parliamentary Committees: Comparing Intelligence Oversight Reform in Australia, Canada, New Zealand and the UK" (2020) 35:3 Intelligence and National Security 367 at 375; Marland, *supra* note 85 at 262.
[1504] Marland, *supra* note 85 at 235.
[1505] Kelly, *supra* note 58 at 94.
[1506] Hiebert, *supra* note 25 at 131.
[1507] In the case of Bill C-10, for example, the newly elected majority Conservative government equated their victory with a mandate to pass Bill C-10 quickly, which included imposing "tight time constraints on parliamentary deliberation and limited opportunities for non-parliamentary witnesses to prepare and present their assessments": Macfarlane, Hiebert & Drake, *supra* note 21 at 79.
[1508] Lang, *supra* note 1396 at 30.
[1509] Marland, *supra* note 85 at 235. See also Glenn, *supra* note 89 at 227.
[1510] *Evidence - JUST (41-1) - No. 59 - House of Commons of Canada* at 1700.
[1511] Macfarlane, Hiebert & Drake, *supra* note 21 at 7.

Conservative members defeated a motion to obtain a written assurance from the Minister of Justice that Bill C-2, *Tackling Violent Crime Act* complied with the Charter, a motion supported by all but one opposition member.[1512] Partisanship in parliamentary committees thus impact how members vote on motions and possible amendments.

Partisanship and party discipline also affect deliberations and voting in the chamber. Charter compliance is mainly framed in binary terms during the second and third readings – "for or against the government" – if addressed at all. [1513] As voting follows the line of each party, majority governments can settle debates in their favour and adopt bills despite the recommendations of committees. Though a minority status does not automatically affect a government's ability to advance its political agenda[1514], a majority status ensures the enactment of legislation without effective opposition.

While these occurrences are scarce and rarely resolve major problems in bills, opposition parties have been able to pass amendments on some occasions. In the 2016 debates leading to the enactment of Bill C-14 on medical assistance in dying, CPC MP Garnett Genuis noted:

> He might remember that I proposed a mere one dozen amendments, or thereabouts, and I actually got three amendments passed. They were not substantive enough to address the major problems that remain in the bill, but I figure that is not a bad record for a member of the opposition in a majority Parliament.[1515]

The increasing use of free votes, also known as "conscience votes", could loosen the requirements of party discipline, at least to a certain extent.[1516] Free voting means that members of a political party are not required to vote along party lines on a particular bill.[1517] Traditionally, it has occurred on contentious issues where disagreements tend to cross party lines, such as medical aid in dying[1518] and LGBTQ+ rights.[1519] Free voting could become more frequent in federal

[1512] *Ibid* at 74–5.
[1513] *Ibid* at 7.
[1514] Thürk, *supra* note 84.
[1515] *Debates (Hansard) No. 74 - June 16, 2016 (42-1) - House of Commons of Canada* at 1255.
[1516] Savoie, *supra* note 1484 at 184.
[1517] Marc Bosc & André Gagnon, eds, "The Process of Debate" in *House of Commons Procedure and Practice*, 3rd ed (ProceduralInfo, 2017).
[1518] The Liberal and Conservative parties allowed free voting on Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*.
[1519] The Conservative party allowed free voting on Bill C-4, *An Act to amend the Criminal Code (conversion therapy)* and Bill C-16, *An Act to amend the Canadian Human Rights Act and the Criminal Code*.

parliamentary processes, as the two main political parties in Parliament – the Liberal and the Conservative parties – now explicitly allow free voting for their members under certain circumstances. Rather than being confined to following the party line, when permitted, members of these parties could vote as they see fit, without fear of reprimand.

Still, at this point, the potential of free votes to soften party discipline remains limited, especially with regard to Charter concerns. Free voting is not a rule of the House of Commons: it is part of the directives of the relevant political parties.[1520] Hence, its influence on Charter review would vary depending on their specific rules. At the moment, the Liberal party does tolerate that caucus members vote without following the party line, but with several exceptions. An important exception is matters "that address our shared values and the protections guaranteed by the Charter of Rights and Freedoms."[1521] In contrast, while the Conservative party excludes free voting on "budget, main estimates, and core government initiatives," it explicitly recognizes the right of its members to vote freely on "issues of moral conscience, such as abortion, the definition of marriage, and euthanasia."[1522] Moreover, Cristine de Clercy and Marland found that MPs are predominantly motivated to follow party discipline for loyalty to the party caucus rather than because of rules in party constitutions or platforms.[1523] These conclusions, based on the personal interviews of former MPs administered by the Samara Centre for Democracy, suggest that an authorization to vote according to their conscience might not deter partisan voting. The genuine influence of free voting on party discipline on legislation involving Charter concerns remains to unclear.

**b. The Senate: An involved but uninfluential actor in Charter review**

Upper houses, such as the Senate, tend to reflect upon the impacts of bills on guaranteed rights more frequently than lower houses. They are traditionally more willing to engage with rights concerns, including with the reports of human rights committees.[1524] This observation aligns with the complementary role of the Senate recognized by the Supreme Court in the 2014 *Reference re*

[1520] Bosc & Gagnon, *supra* note 1517.
[1521] Liberal Party of Canada, *A New Plan for a Strong Middle Class* (2015) at 30. Interestingly, free vote was still permitted for voting on the 2016 bill on medical aid in dying, despite this bill following the decision *Carter* and raising important Charter questions. It was also allowed in the 2021 vote on the age to vote.
[1522] Conservative Party, *Policy Declaration* (2018) at 4.
[1523] de Clercy & Marland, *supra* note 85.
[1524] Hiebert, *supra* note 25 at 133.

*Senate Reform.*[1525] This chamber intends to bring independence, expert knowledge and representation of historically disadvantaged groups in legislative scrutiny.[1526] Upper houses often play "a greater role in the constitutional assessment of legislation, whereas the lower house focuses on political and legislative policy issues."[1527]

Accordingly, despite the absence of a formal obligation or structured process, the Senate has historically handled Charter considerations with more caution than the House of Commons. Already in 2001, the Senate Standing Committee on Legal and Constitutional Affairs heavily focused its analysis of anti-terrorism legislation on the rights dimensions of the bill. It notably assessed the impacts of increased emphasis on security to the possible detriment of liberty.[1528] More recently, this committee undertook an extensive analysis of the medical assistance in dying legislation and raised numerous Charter concerns in its report.[1529] The Senate, especially its committees, has been willing to consider how bills could affect Charter rights in the context of its lawmaking functions.

The main issue regarding Charter review at the Senate ensues from its "strong tradition of deference" toward the House of Commons.[1530] While the Constitution grants equal status and plenary legislative powers to both chambers of Parliament, in the presence of an impasse on proposed amendments, the Senate traditionally defers to the House of Commons.[1531] The vast majority of legislation thus reflects the final version voted by the lower chamber.

This deferential attitude is attributed to the perceived lack of legitimacy of the Senate. Contrarily to the House of Commons, which is composed of representatives elected by the population, members of the Senate are appointed by the general governor on the Prime minister's advice.[1532] The Canadian founders created the Senate to oversee the Cabinet and House of

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[1525] *Reference re Senate Reform*, [2014] 1 SCR 704 at para 52.
[1526] Harder, *supra* note 752 at 232–3.
[1527] Myers, *supra* note 1277 at 11.
[1528] Hiebert, *supra* note 50 at 250.
[1529] Senate of Canada, "Reports #89384 - Standing Senate Committee on Legal and Constitutional Affairs (43rd Parliament, 2nd Session)", online: *SenCanada* <https://sencanada.ca/en/committees/lcjc/>.
[1530] Bridgman, *supra* note 755 at 1010.
[1531] See e.g., Emmett Macfarlane, "The Perils and Paranoia of Senate Reform: Does Senate Independence Threaten Canadian Democracy" in Elizabeth Goodyear-Grant & Kyle Hanniman, eds, *Canada at 150: Federalism and Democratic Renewal* (Montréal; Kingdom: McGill-Queen's University Press, 2019) 97 at 23; McCallion, *supra* note 755 at 586; Bridgman, *supra* note 755 at 1010.
[1532] McAndrews et al, *supra* note 867 at 970.

Commons excesses.[1533] Constitutionalist C.E.S. Franks explains that at the Confederation, the Senate was created as "a minor legislative body, with a role of revising legislation emanating from the House of Commons and of restraining and delaying its more dangerous impulses."[1534] The possibility of an appointed institution rejecting bills passed by the elected House of Commons appears anti-democratic.[1535] Discussing the parliamentary process leading to the adoption of Bill C-14 on medical aid in dying, Emmett Macfarlane differentiates the Senate performing its complementary role versus "engaging in obstructionism."[1536] In that case, the Senate had acceded to the wishes of the House of Commons after it refused to pass the Senate's proposed amendments:

> If the Senate had refused to relent after the House had rejected its amendments and instead engaged in a tennis match with the House over Bill C-14, it would be acting inappropriately—indeed, it would be acting as a competitive, rather than complementary body. Although the proposed amendments temporarily delayed the enactment of the bill into law, the Senate's conduct here was hardly troubling or out-of-step with its sober second thought role.[1537]

Still, perceived as lacking the legitimacy to do so, the Senate rarely insists on amendments conflicting with the position favoured by the House of Commons.

The Senate's deference toward the House of Commons obstructs its capacity to contribute to effective and sustainable rights protection. Despite potentially coming to different conclusions than the lower house about the Charter compatibility of a bill, the Senate conventionally refrains from asserting the amendments its members deem necessary to bring bills in line with the Charter. Its deferential attitude hinders the upper house's ability to prevent the enactment of legislation infringing the Charter.

Even if commonly invoked to delegitimatize the Senate, the appointment of senators partially explains why this institution frequently engages with rights concerns. Indeed, this selection mode entails several benefits for the Senate, especially as an institution of rights review.[1538] Senate members are said to operate outside the confines of party lines and party

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[1533] Ajzenstat, *supra* note 870 at 25.
[1534] Franks, *supra* note 757 at 187.
[1535] Albert & Pal, *supra* note 934 at 9; Craig Scott, *Soutenir la démocratie élue de la Chambre des communes et à la fois la conscience de vote des sénateurs non élus* (Université du Québec à Montréal, 2019) at 2.
[1536] Macfarlane, *supra* note 1531 at 106.
[1537] *Ibid*.
[1538] Murray, *supra* note 864 at 139.

discipline characterizing the House of Commons, including during committee work;[1539] appointment would alleviate re-election concerns.[1540] Though the validity of this position remains disputed,[1541] especially during specific periods,[1542] the Senate has generally acted in a less partisan manner than the House of Commons.[1543] These benefits would likely not survive if Senators were elected.[1544]

Several scholars maintain that the recent reforms to the Senate have contributed to furthering independence and non-partisanship among its members.[1545] After financial scandals hit the Senate from 2012 to 2015, multiple reforms were implemented to foster non-partisanship among its members. In 2015, a new mode of appointment[1546] and the ejection of senators from the Liberal caucus led to the emergence of independent senators and parliamentary groups.[1547] To quote the Honorable V. Peter Harder:

> By contrast with its predecessor, the current Government's approach to the Senate (both in terms of appointments and working relationships) is primarily designed to re-establish and safeguard the Senate's institutional independence as a non-biased, less partisan, and more effective place of sober second thought; an institution that brings accountability, transparency and maturity of sober review and scrutiny to the Government's legislative initiatives.[1548]

Numerous senators have since decided to leave their partisan groups to sit as independents.[1549] Political scientist Andrew Heard, among others, states that: "[t]his rapid influx of a large number of non-partisan senators fundamentally recast the traditional dynamics in the Senate."[1550] Gary

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[1539] Franks, *supra* note 757 at 178.
[1540] *Ibid*. See also Rayment & McCallion, *supra* note 11 at 4.
[1541] See e.g., Bridgman, *supra* note 755 at 1009; Godbout, *supra* note 85 at 213. For an interesting discussion on the changes in partisanship at the Senate throughout the years, see Heard, *supra* note 755.
[1542] Andrew Heard, for example, notes that "Stephen Harper's government drew fire for the fact that only one Commons bill was amended by the Senate in the 2011-15 Parliament": Heard, *supra* note 755 at 77. Jean-François Godbout also proposes an analysis of the evolution of partisanship in the Senate: Godbout, *supra* note 85 at 213 ss.
[1543] McCallion, *supra* note 755 at 585.
[1544] Harder, *supra* note 752; Murray, *supra* note 864 at 139.
[1545] See e.g., Heard, *supra* note 755; McCallion, *supra* note 755; Bridgman, *supra* note 755; Robert VandenBeukel, Cochrane & Godbout, *supra* note 97.
[1546] Senators are now selected from a list of five candidates identified by an Independent Advisory Board for Senate Appointments.
[1547] Heard, *supra* note 755. A motion to make the Senate more independent was initially proposed by the NDP and rejected by the House of Commons in 2013: Scott, *supra* note 1535 at 1.
[1548] Harder, *supra* note 752 at 232.
[1549] Heard, *supra* note 755 at 78.
[1550] *Ibid* at 78.

O'Brien also supports that the 2015 reforms revealed "the government's desire that the Senate should act as a singular complementary chamber of sober second thought."[1551] In this sense, the emergence of independent senators empowers the Senate in lawmaking.[1552]

The impacts of these reforms on the Senate's engagement in lawmaking are already noticeable. Since the 42nd Parliament, this institution has proposed a remarkably higher number of amendments. Robert VanderBeukel, Christopher Cochrane and Jean-François Godbout found that the Senate is increasingly disposed to propose amendments to bills accepted by the House of Commons.[1553] Senate committees, especially, have become more active; they propose most of the amendments put forward by the Senate.[1554] In recent interviews, political scientist Elizabeth McCallion found that all the senators interviewed considered overseeing government legislation as their primary function.[1555] Most believe proposing amendments constitute an integral part of this function.[1556] Furthermore, these amendments are increasingly accepted by the House of Commons.[1557] The government notably accepted the amendments proposed by the Senate in recent disability and accessibility legislation.[1558] Consequently, the upper house has been "dramatically more active" since the 2015 reforms.[1559] This "rapid influx" of independent Senators recasts the traditional dynamics in the Senate and within Parliament.[1560]

If the emergence of independent senators is likely to lead to a "relaxing of party-based considerations" in Parliament – as is the case for the emergence of free votes –[1561], their impact on Charter review remains uncertain. First, this increased engagement in lawmaking does not necessarily mean that the Senate now acts outside of partisanship. In their study of the treatment

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[1551] O'Brien, *supra* note 756 at 552.
[1552] Bridgman, *supra* note 755.
[1553] They observed that "[u]nder the Martin and Harper governments (the 38th–41st Parliaments), the rate of Senate amendments had slipped into the mid to low single digits. In the 42nd Parliament, conversely, the Senate amended fully one-fifth of the House bills that came before it, a rate that exceeded that of any other Parliament for the last century.": Robert VandenBeukel, Cochrane & Godbout, *supra* note 97 at 845.
[1554] Heard, *supra* note 755 at 90; David E Smith, "The Challenge of Modernizing an Upper Chamber of a Federal Parliament in a Constitutional Monarchy: The Senate of Canada in the Twenty-First Century" in Elizabeth Goodyear-Grant & Kyle Hanniman, eds, *Canada at 150: Federalism and Democratic Renewal* (Montréal; Kingdom: McGill-Queen's University Press, 2019) 85 at 93.
[1555] McCallion, *supra* note 755 at 595.
[1556] *Ibid*.
[1557] Robert VandenBeukel, Cochrane & Godbout, *supra* note 97 at 845.
[1558] The House of Commons concurred the eleven amendments proposed by the Senate on Bill C-81, *Accessible Canada Act*: *Debates (Hansard) No. 422 - May 29, 2019 (42-1) - House of Commons of Canada* at 1925.
[1559] Heard, *supra* note 755 at 92.
[1560] *Ibid* at 78.
[1561] Bridgman, *supra* note 755 at 1014.

of women's issues among ex-Liberal and Conservative senators post-2014, Michelle Caplan, Christopher Alcantara and Mathieu Turgeon found that the end of party discipline among Liberal senators did not lead to a reduction in party unity and partisanship in the Senate.[1562] Similarly, VandenBeukel et al. underline that even though senators across various political factions demonstrating less adherence to a strict party line, the independent senators appointed by the Trudeau government are the most likely to support the party's agenda.[1563] Political dynamics thus still seemingly continue to shape the conduct of independent Senators.

Further, while this increasing number of proposed and accepted amendments hints at a more empowered role for the Senate in lawmaking, the upper house continues to defer to the House of Commons when its amendments are rejected. The House of Commons notably rejected the Senate's proposed amendments on bills reflecting major government priorities, including cannabis legalization and the regulation of assisted dying.[1564] Heard observes that "the higher rate of amending activity was not accompanied by a more intransigent attitude in insisting that MPs accept those amendments."[1565] The interviews of senators conducted by McCallion support Heard's observation.[1566] She writes:

> Despite the concerns of some political pundits, the new senators do not assert any right to overrule the government (consistent with bicameral bargaining). An ISG senator said: "We should do our job, which is study, try to amend it and push for debates or for revisions and reviews, and that's it…. We have to go with what the democratically elected government decides." All of the senators I interviewed agreed that it is not their place to stand in the way of legislation the democratically elected government put forward in the normal course of legislative oversight.[1567]

In other words, while recognizing their role in scrutinizing the bills introduced by the government, independent Senators do not consider that their oversight functions extend to precluding their adoption in case of a disagreement with the House of Commons.

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[1562] Michelle Caplan, Christopher Alcantara & Mathieu Turgeon, "Institutional change and partisanship in the Canadian Senate" (2023) The Journal of Legislative Studies 1.
[1563] Robert VandenBeukel, Cochrane & Godbout, *supra* note 97 at 845.
[1564] *Ibid*.
[1565] Heard, *supra* note 755 at 88. He notes, "Senators acquiesced in short order to MPs' judgment on Senate amendments in 28 of the 29 Commons government bills altered by the Senate." See also Robert VandenBeukel, Cochrane & Godbout, *supra* note 97 at 845.
[1566] McCallion, *supra* note 755 at 596.
[1567] *Ibid*.

Finally, the presence of independent members in the Senate is not assured to persist in time. The new appointment process does not bind future governments. As Macfarlane specifies, "[i]n order to be bound by the new process, future prime ministers will have to establish, on their own volition, a similar advisory committee."[1568] A government could thus decide to come back to the previous mode of appointment, notably rejecting to appoint senators deemed independents.

As is the case for free vote, the question remains regarding the significance of independent senators for Charter review in the Senate. The recently reformed Senate appears "more willing to exercise its powers in the wake of the Trudeau reforms."[1569] Still, the trends identified in the aforementioned studies do not exhibit a significant departure from the historically observed patterns of deference and partisanship.

### B) The Outcome: A Weak Review Shaped by Political Dynamics

Given the foregoing, Charter review at Parliament has significantly varied from one bill to another. In the absence of a formal obligation or structured criteria, the extent and quality of the assessment performed largely depend on the willingness of parliamentarians to effectively assess the Charter compatibility of the bills before them.

In this section, I explore how Parliament tackled Charter concerns during the deliberations of several bills raising evident Charter concerns. These examples reflect the variable yet limited treatment of rights review by parliamentarians. Because one of the key claims of this Chapter is that a parliamentary committee constitutes the best institution to conduct rights review in Canada in Parliament, I focused my study on Charter review in parliamentary committees.

An analysis of parliamentary debates in committees revealed two main tendencies regarding the treatment of Charter concerns in bills. First, the Charter compatibility of bills often constitutes a marginal, if not inexistent, portion of committees' inquiries. Another tendency is for committee members to frame Charter concerns in a way supporting their party's political agenda. These tendencies are all the more apparent in Commons committees.

[1568] Macfarlane, *supra* note 1531 at 100.
[1569] Robert VandenBeukel, Cochrane & Godbout, *supra* note 97 at 845.

*i. Weak or Inexistent Charter Review*

In most instances, Charter review in committee inquiries consists of superficial references to the guaranteed rights without analyzing their meaning and scope. Even when a bill had well-documented impacts on certain groups, these impacts were often largely ignored by committee members.

A relevant example highlighting the absence of rights review on a bill with clear Charter implications is observed in the Standing Committee on Public Safety and National Security deliberations on Bill C-71, *An Act to amend certain Acts and Regulations in relation to firearms*. This legislation pertains to the transfer of non-restricted firearms. During these deliberations, several witnesses discussed the threats to women's integrity and life.[1570] Still, despite the disproportionate impact of gun violence on women and marginalized communities,[1571] the committee members did not explore how these impacts can affect the Charter rights of women. Similarly, the Commons Standing Committee on Human Rights largely ignored Indigenous women's documented challenges and disadvantages in prostitution and their overrepresentation in street prostitution[1572] when debating Bill C-36, *Protection of Communities and Exploited Persons Act*. Here too, several witnesses emphasized these challenges and the impacts of Bill C-36 on their rights.[1573] Nonetheless, the issues faced by Indigenous women received little consideration from committee members, and the final legislation did not reflect their particular challenges.[1574] The debates on the *Cost of Living Relief Act, No. 2* provides a relevant illustration pertaining to the socio-economic impacts of bills. When inquiring about this bill, which deals with relief measures for dental care and rental housing, the Commons Standing Committee on Health did not address the Charter beyond briefly mentioning that it is a "fundamental right in Canada to have access to appropriate health care."[1575] Yet, during these debates, the Minister of Housing and Diversity and Inclusion Hon. Ahmed Hussen had declared that this bill reflected the "human rights-based

[1570] *Evidence - SECU (42-1) - No. 114 - House of Commons of Canada* at 1115.
[1571] Canadian Femicide Observatory for Justice and Accountability, *supra* note 1012 at 85. The committee did discuss the impact of the proposed bill on first nation's hunting rights: *Evidence - SECU (42-1) - No. 117 - House of Commons of Canada* at 1225.
[1572] Goodall, *supra* note 389 at 238.
[1573] For instance, legal scholar Janine Benedet stated that "[t]he number of women on the street in street prostitution in cities like Christchurch has not changed since the legislation was passed, and it's the women on the street who are disproportionately the aboriginal women, the indigenous women.": *Evidence - JUST (41-2) - No. 33 - House of Commons of Canada* at 1454.
[1574] Goodall, *supra* note 389 at 264.
[1575] *Evidence - HESA (44-1) - No. 37 - House of Commons of Canada* at 1650.

approach to housing" adopted by the government.[1576] Before the Senate, though the committee did discuss the human rights aspects of housing, these references were few. Mentions of the Charter thus often remain few and are not part of any structured rights review, even when bills raise evident rights concerns.

The committee hearings on the bills proposed by the Conservative government as part of its "tough on crime" approach to criminal law provide another interesting illustration of the treatment of Charter review in committees. From 2009 to 2013, the Commons Committee on Justice and Human Rights and the Senate Committee on Legal and Constitutional Affairs examined a series of Conservative bills pertaining to the justice system, many of which were deemed to contravene Supreme Court rulings.[1577] These debates are of particular interest because of the controversial declarations of the Conservative government that these bills complied with the Charter, even if they appeared unconstitutional given existing jurisprudence. The government confirmed that it had evaluated the contentious bills and found them to be in accordance with the Charter.[1578] Due to the concerns raised about the government's conclusions, the committees' examination of the bills' compatibility with the Charter was all the more important. Despite the controversial nature of these bills, the Commons Committee on Justice and Human Rights failed to assess, or sometimes even acknowledge, the possible impacts on the Charter review. When the Charter was mentioned, it was merely through statements about the bills' constitutionality – or unconstitutionality – without an explanation or analysis.

The committee hearings of Bill C-10, *Safe Streets and Communities Act,* illustrate the limited Charter review of controversial "tough-on-crime" legislation in committees. Despite being considered highly contentious per its Charter compatibility, committee members largely

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[1576] *Ibid* at 1640.

[1577] The Conservative "tough-on-crime" approach includes Bill C-10, *Safe Streets and Communities Act*, Bill C-2, *Tackling Violent Crime Act*; Bill C-31, *Protecting Canada's Immigration System Act*, Bill C-59, *Abolition of Early Parole Act*.

[1578] For example, discussing Bill C-2, Macfarlane, Hiebert and Drake note that: "Despite this important discrepancy between the minister of justice's views of Charter consistency and the testimony of non-governmental legal experts that the legislation was extremely vulnerable to a successful Charter challenge, Conservative committee members revealed considerable trust in the legal opinions of the minister and Department of Justice.": Macfarlane, Hiebert & Drake, *supra* note 21 at 76. Additionally, during the committee hearings on the highly controversial Bill C-31, *Protecting Canada's Immigration System Act,* that "the minister has said he is confident that Bill C-31 is charter compliant": note 1109 at 1130.

overlooked these concerns.[1579] Passed on March 12, 2012, Bill C-10 is an omnibus bill reforming several aspects of Canada's criminal justice system, including mandatory minimum sentences and record suspensions. The Charter compatibility of the proposed minimum mandatory sentences was especially contentious, as the Supreme Court had already struck down such sentences for violating section 12.[1580] Bill C-10 also raised concerns regarding its possible impacts on the rights of vulnerable and marginalized groups.[1581] The proposed measures are especially at risk of affecting people living with low income, those experiencing drug dependence and Indigenous peoples.[1582] These concerns were well apparent in the written briefs received by the committee.[1583] Several witnesses also explained how the debated bill could affect Charter rights during the committee hearings.[1584] The government still insisted on swiftly passing Bill C-10, imposing tight time constraints, notably for committee deliberation.[1585] Committee members largely ignored the concerns raised by the witnesses. Before the committee, then Minister of Justice Rob Nicholson did not explain his conclusions on the Charter compatibility of Bill C-10 nor why the bill did not require a report under section 4.1 of the *Department of Justice Act*.[1586] One opposition member attempted to get information on the Charter review performed by the government during the drafting of Bill C-10, without success.[1587] During these debates, Liberal MP Irwin Cotler expressed the importance of ensuring that bills are assessed against the Charter:

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[1579] Don Stuart, "The Charter Balance against Unscrupulous Law and Order Politics" (2012) 57 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 57 at 71.
[1580] *R. v. Smith (Edward Dewey)*, *supra* note 248. The Supreme Court agreed with some of these criticisms, invalidating the mandatory minimum sentence provision provided by *Controlled Drugs and Substances Act: R. v. Lloyd*, *supra* note 246. Macfarlane, Hiebert & Drake, *supra* note 21 at 80.
[1581] These rights are respectively guaranteed by sections 7, 15 and 12 of the Charter.
[1582] See e.g Ryan Newell, "Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration" (2013) 51:1 Osgoode Hall Law Journal 199; Scott Bernstein, "Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences", (2013), online: *Pivot Legal Society* <https://www.pivotlegal.org/throwing_away_the_keys_the_human_and>.
[1583] See e.g., *Submission on Bill C-10: Safe Streets and Communities Act*, by Canadian Bar Association (2011); *Submission: Bill C-10 Safe Streets and Communities Act*, by Assembly of First Nations (2011); *Submission to the House of Commons Committee on Justice and Human Rights: Safe Streets and Communities Act*, by The John Howard Society of Canada (2011); West Coast Leaf, "Submissions on Bill C-10: The Safe Streets and Communities Act" (2012), online: <https://www.westcoastleaf.org/wp-content/uploads/2014/11/2012-02-27-SUBMISSION-Bill-C-10-The-Safe-Schools-Communities-Act.pdf>.
[1584] Catherine Latimer, executive director at the John Howard Society of Canada and Michael Jackson of the Canadian Bar Association, among others, highlighted that the debated bill raised Charter concerns, notably with regard to the rights of imprisoned individuals: *Evidence - JUST (41-1) - No. 5 - House of Commons of Canada*; *Evidence - JUST (41-1) - No. 10 - House of Commons of Canada* at 900.
[1585] Macfarlane, Hiebert & Drake, *supra* note 21 at 79.
[1586] *Ibid* at 80. At this time, the submission of a report was discretionary.
[1587] Evidence - JUST (41-1) - No. 4 - House of Commons of Canada, *supra* note 250 at 0925.

> Surely the members opposite would want to ensure that legislation they are proposing comports with the Canadian Charter of Rights and Freedoms. Surely they would want to ensure that we as parliamentarians discharge our constitutional responsibility for the oversight of that legislation to ensure that it comports with the Canadian Charter of Rights and Freedoms. Mr. Chairman, I don't want to find myself going into report stage saying, hey, wait a minute, what about all those provisions with regard to the Canadian Charter of Rights and Freedoms that we should have discussed, that we should have debated, and for which we should have been able to put amendments forth? [1588]

Yet, neither MP Cotler nor any other committee member evaluated the possible impacts of the *Safe Streets and Communities Act* on the Charter for the remainder of the debates. The deliberations on Bill C-2, *Tackling Violent Crime Act* are also telling of the Conservative government's approach toward Charter review during committee inquiries. Despite nine expert witnesses raising concerns about the bill's constitutionality and pressure from the opposition members,[1589] the Minister of Justice refused to reveal his reasons for concluding that the bill was compatible with the Charter.[1590] Further, the government insisted on quick adoption of the bill, hindering the committee's ability to conduct a robust Charter review.[1591] The treatment of Charter concerns in the committee hearings of other bills part of the Conservative "tough-of-crime" approach echoes these of the *Safe Streets and Communities Act* and *Tackling Violent Crime Act*: Charter mentions are few and, more often than not, emanate from witnesses rather than committee members.

Senate committees commonly conduct Charter review with more seriousness. To continue with the example precited, the Senate Committee on Constitutional and Legal Affairs was tasked with reviewing Bill C-10, *Safe Streets and Communities Act.* Though discussion on Charter compatibility remains limited and unstructured, as was the case during the Commons committee's debates, several senators framed their interventions in a manner approaching Charter review. There was notably discussion on "the least restrictive measure" and proportionality under the *Oakes* test.[1592] Committee members also mentioned discrimination against Aboriginal people in the

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[1588] *Evidence - JUST (41-1) - No. 12 - House of Commons of Canada* at 924–925.
[1589] Opposition members submitted a motion to obtain a written assurance from the minister of Justice that the bill was reviewed and considered constitutional. The Conservative majority and one Liberal member defeated this motion: Macfarlane, Hiebert & Drake, *supra* note 21 at 75.
[1590] *Ibid* at 73.
[1591] *Ibid* at 73.
[1592] Senate of Canada, "Standing Senate Committee on Legal and Constitutional Affairs (41st Parliament, 1st Session)", online: *SenCanada* <https://sencanada.ca/en/committees/lcjc/>.

justice system.[1593] They also questioned human rights expert witnesses about the Charter concerns they identified. By way of illustrating, Senator Jaffer inquired Catherine Latimer, executive director at the John Howard Society of Canada, on "[w]hy would there be Charter challenges and how can we fix it so there will not be Charter challenges?".[1594] Though these mentions are more frequent in the Senate than the House of Commons, they remain far from robust Charter review.

### *ii. Instrumentalization of Charter Concerns*

The second tendency observed in committee debates is the instrumentalization of Charter concerns. In these instances, the elected representatives invoke the Charter to push their agenda rather than subject bills to robust scrutiny.

The debates leading to the adoption of Bill C-16, *An Act to Amend the Canadian Human Rights Code and the Criminal Code* provide a noteworthy illustration of this phenomenon. Bill C-16, introduced in Parliament in 2016, aimed to protect the trans and non-binary community from discrimination, hate propaganda and hate crime in the federal sphere. This bill added gender identity or expression as grounds for discrimination in the *Canadian Human Rights Act* and hate crimes and propaganda in the *Criminal Code*. This example is all the more interesting as there was no decision of the Supreme Court explicitly dealing with this issue; parliamentarians had the opportunity to develop their own understanding of Charter rights in that context.

The rights discourse during the parliamentary debates changed drastically throughout the three readings. At the House of Commons and during the first reading at Senate, the debates reproduced earlier discourses on trans rights, focusing on "the threat to women within sex-segregated spaces, alongside references to the vagueness of the terms, the redundancy of the protections, and the freedom of religion of those who oppose trans rights."[1595] However, once the bill reached the second reading at Senate, the debate took a sharp turn and became centred on concerns about freedom of expression.

This shift is associated with the extensive media coverage of the concerns expressed by

[1593] Senate of Canada, "Standing Senate Committee on Legal and Constitutional Affairs (41st Parliament, 1st Session)", (24 February 2012), online: *SenCanada* <https://sencanada.ca/en/committees/lcjc/>.
[1594] *Standing Senate Committee on Legal and Constitutional Affairs (41st Parliament, 1st Session)* (2012).
[1595] Brenda Cossman, "Gender Identity, Gender Pronouns, and Freedom of Expression: Bill C-16 and the Traction of Specious Legal Claims" (2018) 68:1 University of Toronto Law Journal 37 at 45.

Jordan Peterson, clinical psychologist and professor emeritus at the University of Toronto. Peterson claimed that Bill C-16 would criminalize free speech by associating the misuse of pronouns to hate speech. Despite being essentially groundless in Canadian law and jurisprudence,[1596] Peterson's claims were picked up by bill opponents, who "quickly jumped on the freedom-of-expression bandwagon."[1597] This concern became a focal point during the Senate Committee on Legal and Constitutional Affairs inquiry, especially for those opposing the bill.[1598] Before Peterson's controversy, the potential impact of Bill C-16 on freedom of expression was not discussed, notwithstanding the growing public interest in his claims and, more importantly, despite being mentioned as a potential impact on Charter rights in the Minister of Justice's Charter statement.[1599] No witness supporting or opposing Bill C-16 on freedom of expression grounds was heard during the two days hearings. Only one superficial mention related to the matter during deliberations of the Commons Standing Committee on Justice and Human Rights:[1600] Conservative MP Ted Falk stated that "[t]here has been much discussion in the media lately concerning the matter of free speech and the state of free speech here in Canada. Do we really know if this bill will have an impact on free speech? No, we don't."[1601] Despite this bill ultimately being adopted without amendments, legal scholar Brenda Cossman notes that Peterson's intervention was "game-changing" and highly influenced the debates on the compatibility of Bill C-16 with the Charter.[1602] Multiple witnesses exclusively addressed the freedom of expression issue during the Senate Committee on Legal and Constitutional Affairs inquiry.[1603] After ignoring freedom of expression concerns for most of the parliamentary process, opponents to the bill framed their assessment of the constitutionality of Bill C-16 on the oppositional discourse put forward by Peterson, despite the absence of a legitimate legal basis for his claims.[1604]

Another illustration of parliamentarians instrumentalizing rights concerns arises from the

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[1596] Brenda Cossman told the Torontoist that "I don't think there's any legal expert that would say that [this] would meet the threshold for hate speech in Canada": Torontoist, "Are Jordan Peterson's Claims About Bill C-16 Correct?", (19 December 2016), online: *Torontoist* <https://torontoist.com/2016/12/are-jordan-petersons-claims-about-bill-c-16-correct/>. See also Tyler Stacy, "Canada's Bill C-16, Gender and Post-Truth" in *Far-Right Revisionism and the End of History*, 1st ed (London: Routledge, 2020) 13 at 34; Cossman, *supra* note 1595 at 46.
[1597] Cossman, *supra* note 1595 at 57.
[1598] *Ibid*.
[1599] Government of Canada, *supra* note 385.
[1600] Cossman, *supra* note 1595 at 59.
[1601] *Evidence - JUST (42-1) - No. 33 - House of Commons of Canada* at 1103.
[1602] Cossman, *supra* note 1595 at 45.
[1603] *Ibid* at 59.
[1604] *Ibid* at 79.

2011 and 2012 Commons debates on Bills C-4 and C-31 on the mandatory detention of migrant children. Rachel Kronick and Céline Rousseau provide an interesting analysis of the strategies used by the members of the governing party and the opposition in rights discourse. They note that parliamentarians frequently invoked the rights of refugees and children during committee work and chamber debates. Yet, they found that discussions on the rights of migrants children, in addition to being superficial, simultaneously served as legitimizing and delegitimizing their detention:

> Strikingly, there is a consensus from all parties on the need to protect vulnerable children, and both use discourses of rights and compassion as legitimizing tropes. Our data suggest that, simultaneous to these arguments, which act as confirmations of the benevolence of the host society, there is a reversal in the logic of both compassion and human rights. With this inversion, the state has rights that need protecting. And it is us (the majority) who are abused (by the systems, by 'bogus' refugees).[1605]

In a nutshell, they note that discussions about rights concerns fluctuated from protecting the rights of migrant children to protecting the rights of Canadians from asylum seekers.

To summarise, in the absence of a formal obligation to perform a Charter review, the extent and quality of the parliamentary rights review have been inconsistent and unpredictable. When addressed, Charter concerns tend to be framed to support the party's political agenda or even instrumentalized for political gain, especially in the House of Commons. This situation calls for a reform of parliamentary rights review.

## 4.2 – A Joint Committee on Human Rights to Strengthen Charter Review at Parliament

In this section, I explore a specific institutional reform that could improve the extent and quality of the Charter review performed at Parliament: creating a joint parliamentary committee mandated with systematically assessing the Charter compatibility of the bills introduced for adoption.

[1605] Rachel Kronick & Céline Rousseau, "Rights, Compassion and Invisible Children: A Critical Discourse Analysis of the Parliamentary Debates on the Mandatory Detention of Migrant Children in Canada" (2015) 28:4 Journal of Refugee Studies 544 at 564.

A parliamentary committee constitutes the most suitable institution to conduct Charter review in Parliament. Through their inquiries, committees can tackle rights concerns in a structured manner, improving the quality of the deliberations on Charter rights at Parliament.[1606] They can enhance rights protection by improving the quality of the debate and analysis of bills in the lawmaking process.

A joint committee of rights review, in particular, could, in all likelihood, perform Charter review in a way fostering effective and sustainable rights protection in federal lawmaking. Joint committees include members from both the House of Commons and the Senate. The emergence of independent senators in recent years brings new life to the potential of the Senate, a "complementary chamber of sober second thought"[1607] to contribute to lawmaking and rights protection.[1608] As previously explained, this institution and its committees have often engaged with Charter concerns during lawmaking, despite lacking the influence to pass their proposed amendments. The Senate's generally positive record in a context where no mechanisms of rights review exist begs to reflect on avenues to involve this institution as part of a formal mechanism of Charter review.

My position is that if designed adequately, a joint parliamentary committee of rights review would constitute the most fitting institution to conduct robust Charter review at Parliament. After exploring the potential of joint parliamentary committees of rights review as institutions of Charter review fostering good governance in lawmaking, I present two joint committees of rights review as comparative examples: the UK's JCHR and the Australian PJHRC. Both committees were created to strengthen Parliament's role in lawmaking and rights review.

### 4.2.1 – Joint Parliamentary Committees as Channels of Good Governance

A joint parliamentary committee on human rights would constitute the most appropriate institution to conduct Charter review in Parliament. As a vehicle of good governance, such a

[1606] Roberts Lyer & Webb, *supra* note 742 at 34.
[1607] *Reference re Senate Reform*, *supra* note 1525 at para 56.
[1608] See e.g., Robert VandenBeukel, Cochrane & Godbout, *supra* note 97 at 831; Cardinal & Grammond, *supra* note 97 at 87 ss.

committee could promote parliamentary engagement with Charter review in a way fostering effective and sustainable rights protection.

### A) A Joint Committee of Rights Review: Three Constitutive Features

In this section, I look into the three constitutive features of the proposed institutional reform, that is: 1) why a parliamentary committee; (2) why a committee specialized in rights review; and (3) why a joint committee.

#### *i. A Parliamentary Committee*

At the parliamentary stage of lawmaking, committees are the "core place" for assessing the compatibility of bills with Charter rights.[1609] Remarkably absent from the Constitution,[1610] committees came to be regarded as a "vital part of a modern Parliament." Indeed, Parliament "outsources" most of its scrutiny functions to parliamentary committees.[1611]

An increasing body of literature acknowledges the potential of parliamentary committees to support rights protection.[1612] Mounting evidence suggests that a robust parliamentary committee can exercise "significant influence on government policy."[1613] Their importance, Docherty argues, stems from their ability to perform an "often tedious, but always necessary" clause-by-clause debate of bills, during which they can receive submissions and hold public hearings before proposing amendments if necessary.[1614]

Parliamentary committees can contribute to good governance in two main ways: they can provide a better understanding of the relevant Charter impacts arising from bills, and they can assist in informing members of Parliament and the public about these impacts.

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[1609] Moulds, *supra* note 371 at 13.
[1610] Committees can notably be created through the parliamentary privilege guaranteed under section 18 of the *Constitution Act, 1867.*
[1611] Moulds, *supra* note 371 at 44.
[1612] See e.g., Roberts Lyer, *supra* note 742; Elverdi, *supra* note 1389; Hutchinson, *supra* note 741; Griffith, *supra* note 371; Meghan Benton & Meg Russell, "Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons" (2013) 66:4 Parliamentary Affairs 772.
[1613] Roberts Lyer, *supra* note 742 at 213.
[1614] Docherty, *supra* note 111 at 20.

**a. Developing a better understanding of the impacts of bills on the Charter**

As parliamentary oversight entities, committees can enhance rights protection by improving the quality of the debate and analysis of bills in Parliament. During committee work, members proceed with a clause-by-clause examination of bills. They can question various witnesses through public hearings, obtaining wide-ranging perspectives on the bill.[1615] They notably provide a platform for relevant minorities to express their views before Parliament.[1616] As legal scholar Sarah Moulds suggests, committee inquiries can illustrate a legislature's capacity "to gather and disperse information, or bring new voices into the public debate."[1617] She submits that committee work indicates "the time allocated for debate, whether alternative policy options were considered, and whether the law's impact on individual rights was discussed."[1618] In that sense, committees contribute to more informed parliamentary debates.[1619]

The setting of parliamentary committees is propitious to performing in-depth analysis of bills and robust Charter review.[1620] The chamber as a whole can struggle to consider the rights issues that arise from bills, notably due to strict debating timetables, the complexity of legislative provisions, and their own lack of expertise.[1621] Committees, in contrast, assemble smaller groups of individuals who proceed with a detailed examination of the bill related to its particular subject matter. The "intimate environment" associated with committee work is also said to encourage consensus rather than partisanship.[1622] Whereas a look at Commons committee indicates that this is not always the case, legal scholar Lara Pratt opines that their diverse composition allows committees not to be overly impacted by "unpopular interpretations of rights, or of support for rights-infringing legislation."[1623] Committees thus provide space for a more focused consideration of bills and their impacts on Charter rights than can occur on the floor of Parliament.[1624]

[1615] O'Brien, *supra* note 1438 at 42. See e.g., Keyes, *supra* note 84 at 206.
[1616] O'Brien, *supra* note 1438 at 42.
[1617] Moulds, *supra* note 371 at 186. See also Shaw, *supra* note 371; Griffith, *supra* note 371.
[1618] Moulds, *supra* note 371 at 186.
[1619] Tolley, *supra* note 1413 at 51.
[1620] Hutchinson, *supra* note 741 at 77.
[1621] McQueen, *supra* note 1421 at 17.
[1622] *Ibid* at 7.
[1623] Pratt, *supra* note 457 at 119.
[1624] Hutchinson, *supra* note 741 at 77.

Concerning Charter review, parliamentary committees offer a practical forum for considering bills' purpose, content and rights impacts.[1625] They can provide a structure for Parliament to formally and autonomously consider rights considerations in bills.[1626] Committee-based scrutiny can lead to discovering "unintended or unjustified rights implications" arising from a bill that the government might not have identified, or that are absent from Charter statements.[1627] If committee members identify a potential violation, they can help generate legislative options to minimize rights infringements, in respect of the criteria developed in *Oakes*.[1628] They can then provide concrete recommendations to Parliament to improve rights compliance.[1629] In this respect, Pratt contrasts committee-based rights review with the scrutiny leading to Charter statements: while the first seeks to increase the likelihood of a bill's compatibility with the Charter, the latter intends to convince that a bill is compatible with the guaranteed rights.[1630] Committee findings can therefore assist in discovering and weighing different policy options to enhance the rights compatibility of bills.[1631]

**b. Informing Parliament and public on Charter concerns in bills**

Parliamentary committees increase transparency in the lawmaking process.[1632] Their reports expand the information available to Parliament and the public on debated bills, including on their impacts on Charter rights. These reports include the transcripts of the committee's deliberations, as well as the submissions and testimonies received.

Parliament can consult the committee's report during parliamentary debates to inform its discussion on bills, including their rights compatibility.[1633] As further explained below, the UK and Australia's joint committees of rights review have contributed to parliamentary debates in their respective jurisdiction. In the UK, the JCHR reports have been used by both Houses of Parliament members to "further their understanding of human rights issues so they can have a more

[1625] Moulds, *supra* note 371 at 13.
[1626] Roberts Lyer & Webb, *supra* note 742 at 34.l.
[1627] Moulds, *supra* note 371 at 186.
[1628] *Oakes*, *supra* note 309.
[1629] Moulds, *supra* note 371 at 13.
[1630] Pratt, *supra* note 457 at 93.
[1631] Moulds, *supra* note 371 at 186.
[1632] Fletcher, *supra* note 1128 at 163.
[1633] Hutchinson, *supra* note 741 at 91.

informed debate on bills."[1634] Similarly, the PJCHR's reports have informed Parliament deliberations, especially when "determining the meaning and weight to be given to specific and often competing human rights considerations."[1635] References to these committee's reports in parliamentary debates suggest that these debates can benefit from the committee's findings and the information they gather.

Parliamentary committees are pivotal in allowing Parliament and the public to hold the government accountable. They engage directly with the government to demand explanations and justifications for its actions. During their inquiries, they can challenge the government on the considerations identified during executive rights review, notably regarding balancing rights.[1636] The public nature of their inquiries and reports alert Parliament and the public of governmental actions that might unduly interfere with the Charter. [1637] Their reports are publicly disseminated and undergo parliamentary scrutiny.[1638] In essence, parliamentary committees play a crucial role in facilitating government accountability by actively engaging with the government to seek explanations and justifications for its actions, which are then communicated to the public through public reports and parliamentary scrutiny.

Even if a committee concludes that a bill is seemingly compatible with guaranteed rights, "it is still likely to provide increased transparency and potentially an improved explanation of the measure."[1639] This increased transparency in lawmaking is beneficial to good governance and rights protection.

### *ii. A Committee Specialized in Rights Review*[1640]

There are two main models for committee-based scrutiny: specialized and generalist. Both models affect how parliamentary committees address human rights in the context of their

[1634] Joanne Sweeny, "Breaking Through Gridlock to Protect Human Rights: The Case for a Congressional Human Rights Committee" (2017) 54 San Diego Law Review 25 at 35.
[1635] Campbell & Morris, *supra* note 1413 at 10.
[1636] Pratt, *supra* note 457 at 93.
[1637] Moulds, *supra* note 371 at 45.
[1638] Aileen Kavanagh, "The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog" in Murray Hunt, Hayley J Hooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing: Portland, 2015) 115 at 125.
[1639] Hutchinson, *supra* note 741 at 104.
[1640] Though the mandate of this committee could – and should – include assessing the impacts of bills on the Aboriginal rights guaranteed by section 35 *Constitution Act, 1982*, the reform proposed in this Chapter only covers Charter rights.

functions. Choosing one model or the other is thus susceptible to affecting how Charter review is conducted during committee inquiries.

A specialized model involves the existence of a committee devoted explicitly to rights review. This model prevails in the UK and Australia, where a joint committee on human rights systematically assesses the compatibility of bills with guaranteed rights. In addition to sending a strong message on the importance of rights protection,[1641], the specialized model promotes expert and specific human rights knowledge within parliament, independent from governmental expertise.[1642] Indeed, members from specialized committees build the capacity and knowledge required to perform robust rights scrutiny.[1643]

In contrast, under the generalist model, the responsibility of performing rights reviews is dispersed among existing parliamentary committees. All committees perform rights reviews as part of their general inquiries of bills, as is the case in Canada. In that sense, Elverdi notes, "each parliamentary committee is considered a "human rights committee" in its own specialized area."[1644] The generalist model, he adds, produces "broader knowledge and consideration of rights across parliament."[1645]

The present thesis proposes to break away from the generalist approach currently prevailing in Canada in favour of a specialized model. More precisely, I advise establishing a committee specialized in rights review that would systematically assess the Charter compatibility of all bills in parallel with the inquiry performed by other committees. First of all, a subject-matter mandate limited to Charter review would allow the committee to devote a maximum of its resources and time to resolving Charter concerns in bills.[1646] Discussing foreign affairs committees, Andreja Pegan and Wessel Vermeulen found that "topic- and policy-specific bodies" serve as better avenues for parliamentary oversight than with more generalist committees.[1647] Moreover, mainstreaming human rights might have a limited impact on rights protection.

[1641] Elverdi, *supra* note 1389 at 321–322.
[1642] *Ibid* at 321–322.
[1643] *Ibid*.
[1644] *Ibid*.
[1645] *Ibid*.
[1646] *Ibid* at 326.
[1647] Andreja Pegan & Wessel Vermeulen, "Parliament in Gross Human Rights Violations: The Case of Darfur" (2017) 53:3 Acta Politica 448 at 463.

Standards for Charter review differ from one committee to the other.[1648] As explained before, the resulting assessment is weak, unfocused and runs the risk of thin commitment to give effect to the Charter, especially due to the tradition of strong party discipline characterizing the Canadian Parliament.[1649] A specialized committee is more suited to fostering rights protection through robust Charter review.

*iii. A Joint Committee*

Two possible reforms could potentially strengthen parliamentary engagement in Charter review. First, a standing committee could be implemented in each chamber with the exclusive mandate of reviewing and reporting on rights considerations in bills. A second possible reform would be to create a joint committee of rights review, including members from both the Commons and the Senate, as allowed by the *Standing Orders of the House of Commons* and the *Rules of the Senate*.

A joint committee would be better equipped than a regular parliamentary committee to perform Charter review in a way fostering effective and sustainable rights protection. In particular, a joint committee would answer the requirements of effectiveness stated in the *2018 UN Draft Principles*, discussed below. Section 4 emphasizes the importance of pluralism and non-partisanship in the composition of parliamentary committees to ensure that they perform their functions effectively and legitimately.[1650]

First, joint committees are inherently more pluralist than regular committees as they comprise members from both chambers of Parliament. A joint parliamentary committee could combine the forces of both chambers of Parliament, which have distinct contributions to lawmaking, in general, and to Charter review. Members from the House of Commons are elected representatives from federal political parties. They are subjected to high turnover rates: they sit in committees for the four years between elections and therefore tend to change assignments frequently.[1651] In contrast, senators are often appointed in their fifties or sixties and stay in until

[1648] Elverdi, *supra* note 1389 at 322.
[1649] *Ibid*.
[1650] Office of the United Nations High Commissioner for Human Rights, *supra* note 1415, s 4.
[1651] Thomas, *supra* note 741 at 218.

they reach the retirement age of seventy-five.[1652] They frequently have a distinguished record of public service and interest in important policy issues behind them at their appointment.[1653] The longevity of their mandate allows senators to devote more time to acquiring expertise on human rights issues.[1654] Senators often have greater familiarity with the issues involved in bills; some have followed and evaluated these issues over the years.[1655] Their debates and deliberations, including in committees, are infused with greater parliamentary experience than in the Commons.[1656] This longer tenure, combined with their acquired knowledge and experience, "allows the Senate to operate as a specialized and professional body of legislative review."[1657] Furthermore, the Senate provides better representation for minorities and regional interests. To quote the Honorable V. Peter Harder,

> It is by virtue of the appointive principle that it has been possible to provide a direct voice in Parliament for Indigenous, ethnic, cultural and linguistic groups that have been historically underrepresented in the House of Commons, and to provide a greater gender balance than in the House of Commons. Through appointment, it has been possible for Prime Ministers to provide representation in the Parliament of Canada to groups that — while numerous — have otherwise been too spread out over different ridings to be able to land a seat in the House of Commons.[1658]

Appointments at the Senate thus reinforce the voices of smaller regions and minority interests at Parliament, notably in committees.[1659] Discussing the Australian PJCHR, Moulds found that "diversity of attributes, roles, membership and functions" has been a vital strength of the Australian parliamentary committee system."[1660] Combining members from the House of Commons and the Senate would promote pluralism among its members.

Second, joint committees tend to be less partisan than regular committees. As previously discussed, Charter review in regular committees tends to be tainted by the political dynamics inherent to Westminster systems, hindering their ability to effectively participate in parliamentary rights review. Given their proportional composition, a new Commons standing committee of rights

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[1652] Franks, *supra* note 757 at 177.
[1653] *Ibid*.
[1654] Harder, *supra* note 752 at 232. See also Heard, *supra* note 755 at 77; Murray, *supra* note 864 at 139.
[1655] Murray, *supra* note 864 at 139.
[1656] Harder, *supra* note 752 at 232; Murray, *supra* note 864 at 139.
[1657] Harder, *supra* note 752 at 232.
[1658] *Ibid*.
[1659] McAndrews et al, *supra* note 867 at 970; Smith, *supra* note 867 at 83; Harder, *supra* note 752 at 232.
[1660] Moulds, *supra* note 371 at 231. See also Harder, *supra* note 752 at 230.

review, in particular, would be subjected to the same pattern of partisanship affecting existing committees. The presence of Senate members in a joint committee could limit the likeliness of governmental dominance: fewer members of the House of Commons mean fewer seats for government members. If senators can also act in a partisan manner, this possibility is reduced by the increasing number of independent senators and by the weakened partisanship in the Senate. As further explained in the next section, membership in a fifty-fifty proportion would lessen partisanship among the institution, thereby decreasing partisanship among this institution. A joint committee could thus strengthen rights protection by mitigating issues of partisanship arising from the review typically associated with Commons committees.

A joint committee would not be a novelty in federal lawmaking. Created by orders of both chambers, four standing joint committees currently exist in Canada: the Standing Joint Committee for the Scrutiny of Regulations, the Standing Joint Committee on the Library of Parliament, the Special Joint Committee on Medical Assistance in Dying, and the Special Joint Committee on the Declaration of Emergency. These committees comprise around fifteen members, a third from the Senate.

Temporary joint committees have also been established to deal with issues of great public importance. One of the best-known is the Special Joint Committee on the Constitution of Canada, in place in 1980 and 1981. This committee comprised fifteen members of the Commons and ten senators, reflecting the composition of each chamber as per party division.[1661] The committee received more than 1 200 written briefs and heard around a hundred oral presentations from groups and individuals.[1662] Despite being created to deal with the process of the Constitution's patriation and the Charter's entrenchment, the focus quickly became limited to the Charter.[1663] The committee's work generated strong public interest due to its extensive television coverage and prolonged timeline.[1664] Based on the testimonies, the committee published its report on February 13, 1981. Its recommendations included changes to the wording of section 1, including property

[1661] Peter W Hogg & Annika Wang, "The Special Joint Committee on the Constitution of Canada, 1980-81" (2017) 81 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 3 at 7.
[1662] *Ibid*.
[1663] *Ibid* at 8.
[1664] *Ibid* at 9.

rights in section 7, and an open-ended list of prohibited grounds of discrimination under section 15.[1665]

Despite the strong political motivation behind the creation of this Joint Committee[1666], constitutionalist Peter W. Hogg and lawyer Annika Wang note that the lack of partisanship displayed by members of this committee was striking, especially since "the debate in the House of Commons had been ludicrously partisan."[1667] Though the voting went accordingly to the party line, they note that "political gamesmanship was noticeably absent."[1668] The committee's work significantly contributed to adopting the Charter, Hogg and Wang noting that "[t]he draft recommended by the Committee in its report would be largely adopted into the final draft of the Charter unchanged."[1669]

### B) The Rights-Enhancing Potential of a Joint Committee of Rights Review

This section considers the rights-enhancing impacts of joint committees of rights review, exploring how such committees can contribute to effective and sustainable rights protection in federal lawmaking. This discussion is grounded on the literature on two existing joint committees of rights review, namely the Australia's PJCHR and the UK's JCHR.

#### *i. Comparative Examples: Two Joint Committees of Rights Review*

To justify the creation of a joint committee of rights review in Canadian lawmaking, I examine two such committees existing in similar Westminster systems: the Australia's PJCHR and the UK's JCHR. The British and Australian human rights regimes are often compared with

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[1665] *Ibid* at 10 ss.

[1666] "The Special Joint Committee on the Constitution of Canada, 1980-81 was conceived as a Liberal strategy to shield the party from criticism from its political opponents: the hope was that a bipartisan committee would expedite the process. The Conservatives initially hoped that they could use the Committee to obstruct the process in an attempt to shame the Liberals into delaying their plans and negotiating with their opponents.": *Ibid* at 3.

[1667] *Ibid* at 19.

[1668] *Ibid* at 20–21. He suggests that this lack of partisanship could ensue for several reasons: "First, the monumental importance of the Constitution seemed to imbue members with a sense of duty and solemnity. Many members acknowledged that this was no run-of-the-mill debate, but rather, an historic moment for Canada and a humbling experience for those involved in its making. […] Second, the structure of the Committee itself, with its focus on the substance of the Resolution rather than the procedure, seems to have distinguished it from debates in the House. […] Third, the influence of television cannot be underestimated. Senator Austin would later reflect that the public scrutiny created by television forced the Committee members to be more thoughtful and reasoned policymakers, rather than the shallow showmen that the Liberals had initially feared".

[1669] *Ibid* at 22.

Canada's, given the similarities of their democratic parliamentary system.[1670] Their joint committees of rights review are particularly relevant to this discussion as they were implemented to increase the role of Parliament in rights review. My position is that the successes and failures of these committees in fostering rights protection in their jurisdiction are relevant to reflect on the functional and structural characteristics of a joint committee of rights review in Canada.

**a. Australia's Parliamentary Joint Committee on Human Rights**

In March 2012, Australia established the Parliamentary Joint Committee on Human Rights ("PJCHR") through the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011*. [1671] This Act introduced a robust framework for the review of parliamentary rights, consisting of the joint parliamentary committee for rights review and a statement of compatibility, both of which are explored in Chapter 3.

Australia lacks a bill of rights, setting it apart as a unique characteristic.[1672] The PJCHR's mandate is centered on evaluating the compatibility of bills with Australia's ratified core international human rights treaties, which encompass seven treaties including the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[1673] This committee aims to enhance parliamentary rights scrutiny of bills and "encourage early and ongoing consideration of human rights issues in policy and legislative development."[1674] Section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* states that this committee's mandate is to:

a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights and to report to both Houses of the Parliament on that issue;
b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
c) to inquire into any matter relating to human rights referred to by the Attorney-General, and to report to both Houses of the Parliament on that matter.

[1670] The preamble to the *Constitution Act, 1867* refers to a "constitution similar in Principles to that of the United Kingdom". These principles include judicial independence, democracy, federalism, constitutionalism and the rule of law, as well as the protection of minorities: *Reference re Secession of Quebec*, *supra* note 311.
[1671] *Human Rights (Parliamentary Scrutiny) Act 2011*, No 186, 2011.
[1672] Daniel Reynolds, Winsome Hall & George Williams, "Australia's Human Rights Scrutiny Regime" (2020) 46 Monash University Law Review 256 at 256.
[1673] Hutchinson, *supra* note 741 at 72.
[1674] *Ibid* at 74.

Examining and reporting on bills are thus the institution's primary functions. In its *2015 Guide to Human Rights*, the PJCHR described its scrutiny function as a "technical inquiry," which relates to the state's international human rights obligations without considering the broader policy merit of the legislation.[1675] Noting the large volume of legislation examined by the committee and the detailed analysis in its reports, Hutchinson suggests that reporting on legislation is the institution's "primary ongoing contribution, both to the parliament and more broadly."[1676]

A particular feature of the Australian committee is that contrarily to the UK and Canada, senators in Australia are elected rather than appointed. This characteristic can enhance the senators' independence as they are also accountable to the population and not only to the political party that appointed them. Party discipline can still influence the actions and decisions of elected senators in Australia, including on human rights matters.

The PJCHR publishes several human rights scrutiny reports annually, presenting its ongoing and concluded inquiries. The reports comprise two main parts. In the first, the committee exposes its preliminary comments on "new and continuing" bills, seeking a response from the government.[1677] The second part details its concluding comments on bills based on the responses previously received from the government. In both cases, the committee provides a background for the bill, its international human rights legal advice, and its comments on the diverse provisions of the bills.

The PJCHR's reports are known to contain extensive analysis of the rights impacts of bills.[1678] Human rights scholar Adam Fletcher describes these reports as "detailed, comprehensive and, at times, surprisingly forthright in their assessment of controversial legislation."[1679] In 2014, constitutionalist Dan Meagher noted that the reports produced in its first two years provided meaningful rights review of bills and relevant legislative instruments.[1680] He added that the committee undertakes a proportionality analysis that is typically informative and easily

[1675] *2015 Guide to Human Rights*, by Parliamentary Joint Committee on Human Rights (Commonwealth of Australia, 2015) at ii.
[1676] Hutchinson, *supra* note 741 at 86.
[1677] Human rights scrutiny reports are available online: Parliamentary Joint Committee on Human Rights, "Scrutiny reports", online: *Parliament of Canada* <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.
[1678] Fletcher, *supra* note 1128 at 128.
[1679] *Ibid* at 151.
[1680] Dan Meagher, "The Human Rights (Parliamentary Scrutiny) Act 2011 (CTH) and the Courts" (2014) 42:1 Federal Law Review 1 at 14.

understandable when it identifies a violation of the guaranteed rights.[1681] The PJCHR's reports rarely propose direct amendments; they instead indicate matters for Parliament to consider or items requiring more information from the government.[1682] The committee's reports have significantly contributed to informed debate on human rights in Parliament. [1683] Indeed, these reports support Parliament's ability to make the "difficult moral choices" associated with "determining the meaning and weight to be given to specific and often competing human rights considerations."[1684] In a nutshell, the Australian committee's human rights scrutiny reports provide valuable information to Parliament on the rights compatibility of the bills it studies.

Despite the quality of the advice provided by the PJCHR, several scholars have found that it had a minimal impact on improving the content of the proposed legislation.[1685] In 2015, Williams and Reynolds put forward that the committee had yet to fulfill its potential as an institution of rights review: it failed to improve legislation quality and engage parliamentarians on human rights issues.[1686] In a 2020 follow-up article, they concluded that "there remains little evidence that the human rights scrutiny regime is having a real impact in protecting and enhancing human rights."[1687] Similarly, Sarah Moulds alleges that the PJCHR generally lacks "direct legislative and public impact," even more than most other Australian parliamentary committees.[1688] The UN Committee on the Elimination of Racial Discrimination expressed similar concerns in its recent concluding observations on Australia's compliance with the international treaty, noting its concerns "that recommendations of the Joint Committee are often not given due consideration by legislator."[1689] Thus, the committee had limited influence on the final version of bills adopted by the Australian legislature at this point.

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[1681] *Ibid*.
[1682] Moulds, *supra* note 371 at 124.
[1683] Campbell & Morris, *supra* note 1413 at 10.
[1684] *Ibid*.
[1685] Moulds, *supra* note 371 at 16. See also *Human Rights Scrutiny in the Australian Parliament: Are new Commonwealth laws meeting Australia's International Human Rights Obligations?*, by Adam Fletcher (Human Rights Law Centre, 2022) at 4; Reynolds, Hall & Williams, *supra* note 1672; Fletcher, *supra* note 1128; Williams & Reynolds, *supra* note 1413; Williams & Burton, *supra* note 1128.
[1686] Williams & Reynolds, *supra* note 1413 at 258.
[1687] Reynolds, Hall & Williams, *supra* note 1672 at 297.
[1688] Moulds, *supra* note 371 at 268. In 2018, she compared the impact of the PJCHR and the Parliamentary Joint Committee on Intelligence and Security, both of which were tasked with inquiring the Citizenship Bill. She notes, "while the PJCHR raised concerns with similar provisions of the Citizenship Bill as the Scrutiny of Bills Committee and the PJCIS, its legislative impact is harder to trace."
[1689] *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, by Committee on the Elimination of Racial Discrimination, CERD/C/AUS/CO/18-20 (United Nations) at para 5.

Numerous factors can explain the Australian committee's struggle to lead to important amendments in legislation. Moulds, for instance, advances that the relative newness of the institution, created in 2012, can partially explain its struggle to advance its recommendations.[1690] This observation finds support in the timeline of the UK's committee of rights review, which indicates that it took a few years after its establishment for the British Parliament to significantly elevate its references to the committee's reports and engage more substantively with the content of these reports.[1691] Moulds adds that this situation is exacerbated by its complex mandate and the "confusion that appears to exist about the true goal or purpose of the committee." [1692] Human Rights scholars Julie Debeljak and Laura Grenfell, for their part, support that Australia's rights review mechanisms have largely been designed by executive-dominated Parliament "so as to wield minimal influence."[1693] Another possible explanation for the Australian committee's struggle to influence legislation is that this committee is not part of a "wide-reaching system of domestic human rights protection."[1694] Contrarily to Canada and the UK, no constitutional or legislative bill of rights exists in Australia.[1695] Incidentally, though courts can review the constitutionality of legislation, this process does not extend to assessing their compatibility with human rights.[1696] The absence of judicial enforcement can thus encourage the government to take more risks when passing bills that might adversely impact human rights.[1697] As a result, Hutchinson explains, "it would be ill-conceived to view the PJCHR as a fix-all for human rights considerations in the Australian context or even the parliamentary context."[1698]

If the contribution of the PJHRC to legislation is unclear at this point, this committee is still associated with amelioration in the treatment of rights concerns by the government; in its 2014-15 Annual Report, the committee claimed to notice an improvement in the quality of ministerial statements of compatibility.[1699] Its successes and failures to foster rights protection

[1690] Moulds, *supra* note 30 at 268.
[1691] Paul Yowell, "The Impact of the Joint Committee on Human Rights on Legislative Deliberation" in Murray Hunt, Hayley J Hooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing: Portland, 2015) 141 at 162.
[1692] Moulds, *supra* note 371 at 268.
[1693] Debeljak & Grenfell, *supra* note 1498 at 818.
[1694] Hutchinson, *supra* note 741 at 106.
[1695] The PJCHR does not assess the compatibility of proposed legislation with constitutional or legislative rights; it rather assesses their compatibility with the international human rights treaties ratified by Australia.
[1696] Moulds, *supra* note 1400 at 56.
[1697] Fletcher, *supra* note 1128 at 181. See also Campbell & Morris, *supra* note 1413 at 15.
[1698] Hutchinson, *supra* note 741 at 106.
[1699] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2014-2015*, at 28.

support my reflection on the functional and structural characteristics of an effective joint committee on human rights in Canada.

**b. The UK's Joint Committee on Human Rights**

Created in 2001, the UK's JCHR has extensive powers for assessing the compatibility of bills with the rights guaranteed by the *Human Rights Act* ("HRA"). This joint committee earned a strong reputation for robust rights scrutiny in the UK.[1700] This committee is considered "very active."[1701]; it published many "detailed and of an impressive quality" reports.[1702] The creation of the JCHR and ministerial statements of compatibility, discussed in Chapter 3, are the main institutional changes implemented to promote the respect of the HRA.

The example of the UK's JCHR is interesting to my proposed reform for several reasons. First, this committee was created to strengthen parliamentary engagement in rights review. Hiebert and Kelly stated that it was conceived "politically, as a way to improve parliamentary rights-based scrutiny of legislative."[1703] More precisely, the UK joint committee was created "to help overcome the limitations of a nontransparent process for evaluating whether and how bills implicate rights that would otherwise rely predominantly upon government checking itself."[1704] Furthermore, the *Human Rights Act* is the product of a conscious attempt to conceive an instrument embodying a "less court-centred approach for protecting rights than is normally associated with a bill of rights."[1705] The aim was to bring human rights closer to the public and the democratic process rather than being the preserve of courts.[1706] The justifications underlying the creation of the JCHR are thus in line with the position defended in this thesis regarding the need for a more active role of Parliament in rights review, as defended in Chapter 2.

The mandate of the JCHR is to consider "matters relating to human rights in the United Kingdom" and to report to Parliament on "whether a draft order in the same terms as the proposals

[1700] Hiebert, *supra* note 12 at 104.
[1701] Tolley, *supra* note 1413 at 45.
[1702] Meagher, *supra* note 1680 at 14. See also Kavanagh, *supra* note 1638 at 117.
[1703] Hiebert & Kelly, *supra* note 57 at 251.
[1704] *Ibid* at 291.
[1705] *Ibid* at 250.
[1706] F. Klug, submission to the JCHR, Twenty-Second Report, Session 2001–2002, HC 160/ HL 1142, appendix 18, para 5, cited in *Ibid* at 251. See also Tolley, *supra* note 1413 at 44.

should be laid before the House."[1707] As is the case in Canada, the conclusions of this parliamentary committee are not binding on Parliament.[1708] The committee quickly decided to focus primary attention on scrutinizing the compatibility of bills with ECHR rights.[1709] These inquiries can be conducted *d'office* or at the request of the government.[1710] The JCHR then publishes a report presenting its findings and proposing amendments to bring the bill in line with the guaranteed rights, if necessary.[1711] The committee's reports are known for being detailed and providing extensive analysis of the bill it studies.[1712]

In addition to assessing bills introduced for adoption, the JHCR can also scrutinize bills before their introduction to Parliament, that is, during the executive stage of lawmaking. The committee's *Working Practices* refer to this process as "pre-legislative scrutiny."[1713] Contrarily to the scrutiny occurring during the parliamentary process, the committee does not proceed to an in-depth clause-by-clause examination; rather, it takes evidence on the merits of the bill and reports to the government.[1714]

To this day, the genuine impact of the JCHR on legislation remains variable, if not ambiguous. In 2012, Hiebert and Kelly stated that despite frequently disagreeing with ministerial claims of compatibility, the committee's reports have yet to lead to important amendments in bills.[1715] However, legal scholar Joanne Sweeny found that since 2012, references to JCHR's reports in chamber debates have significantly augmented, especially within the House of Lords.[1716] Moreover, these references were often used to support parliamentary scrutiny; in the House of Lords, "significant references are over twice as likely as insignificant ones."[1717] Amendments

[1707] *Standing Orders of the House of Commons - Public Business 2002*, 2002, s 152B.
[1708] Tolley, *supra* note 1413 at 45.
[1709] Hiebert & Kelly, *supra* note 57 at 292.
[1710] "Pre-legislative scrutiny of draft bills - Erskine May - UK Parliament", online: <https://erskinemay.parliament.uk/section/4988/prelegislative-scrutiny-of-draft-bills/>.
[1711] Jacqueline Mowbray, "Gender Audits and Legislative Scrutiny: Do Parliamentary Human Rights Bodies have a Role to Play?" in Ramona Vijeyarasa, ed, *International Women's Rights Law and Gender Equality: Making the Law Work for Women* (London; New York: Routledge, 2021) 201 at 202.
[1712] Meagher, *supra* note 1680 at 14.
[1713] The JCHR defines pre-legislative scrutiny as "the examination of the human rights implications of Government policy before it is set out in the text of primary legislation, as well as examination of policy under development which may not need to be implemented by primary legislation": *The Committee's Future Working Practices*, by Joint Committee on Human Rights, Twenty-third Report of Session 2005-06 (House of Lords; House of Commons, 2006) at 19.
[1714] note 1710.
[1715] Hiebert & Kelly, *supra* note 57 at 282.
[1716] Sweeny, *supra* note 1634 at 37.
[1717] *Ibid* at 41.

proposed by the JCHR also had a slightly higher chance of being accepted by the government than non-JCHR efforts.[1718] In her opinion, the committee influenced lawmaking by focusing on parliamentary debates and convincing the executive to create or amend legislation.[1719]

The recent introduction of the UK's proposed Bill of Rights Bill exemplifies the potential influence wielded by the British committee on lawmaking. The JCHR strongly opposed the replacement of the *Human Rights Act* through this new legislation. On January 17, 2023, the committee issued a comprehensive 187-page scrutiny report concerning the proposed legislation. The JCHR's analysis indicated that the Bill of Rights could compromise rights protection by curbing access to courts and judicial remedies – a stance echoed by numerous stakeholders.[1720] The committee offered various recommendations for amendments in its report. Of significance, the JCHR underscored that the proposed Bill of Rights failed to incorporate any of the previously suggested human rights enforcement enhancements, proposed by the committee itself or by the JCHR in prior parliamentary sessions.[1721] In a response issued on March 23, the government openly disagreed with the JCHR's suggestions. [1722] Despite this, the government eventually abandoned the Bill after its first reading. While multiple factors could have contributed to this outcome, particularly considering the substantial criticisms levied against the Bill, it is conceivable that the committee's detailed report may have played a role in influencing the legislative direction.

Even if its influence remains questionable, the JCHR has been able to influence the lawmaking process more than its Australian counterpart. One of the main reasons to explain this

[1718] Sweeny found that: "Specifically, the JCHR has an average of a 28% success rate in convincing the executive to make at least one change to a proposed bill. In contrast, non-JCHR or ambiguous efforts were a little over half as effective at 16%.": *Ibid* at 53.
[1719] *Ibid* at 33.
[1720] See e.g., *The "Modern" Bill of Rights Bill: Substituting 'common sense' with Contradictory Constitutionalism*, by Joanna George (The Constitution Society, 2023); "Joint UK Civil Society Briefing on the Bill of Rights Bill", (7 September 2022), online: *Human Rights Watch* <https://www.hrw.org/news/2022/09/07/joint-uk-civil-society-briefing-bill-rights-bill>; "UK: Amnesty and Liberty stunt calls for dangerous bill of 'rights' to be scrapped," online: <https://www.amnesty.org.uk/press-releases/uk-amnesty-and-liberty-stunt-calls-dangerous-bill-rights-be-scrapped>; "Dominic Raab's Bill of Rights would see more cases go to Strasbourg and should be scrapped, inquiry finds | The Independent," online: <https://www.independent.co.uk/news/uk/home-news/bill-rights-raab-inquiry-strasbourg-b2268321.html>.
[1721] *Legislative Scrutiny: Bill of Rights Bill - Ninth Report of Session 2022-23*, by Joint Committee on Human Rights (House of Lords; House of Commons, 2023) at 106.
[1722] "Government response to the Joint Committee on Human Rights: 'Legislative Scrutiny: Bill of Rights Bill'", online: *GOVUK* <https://www.gov.uk/government/publications/response-to-the-jchrs-bill-of-rights-bill-report/government-response-to-the-joint-committee-on-human-rights-legislative-scrutiny-bill-of-rights-bill>.

difference is that contrary to the PJCHR, the British committee is part of an integrated human rights regime. Fletcher contrasts the Australian and the British human rights regime:

> The UK JCHR's work is effectively reinforced by the ever-present threat of litigation in the Supreme Court, and where that fails, appeals to the ECtHR. Although this is still technically 'weak form' judicial review, since legislation cannot be invalidated, the cost and inconvenience of such litigation provide further incentives to strive for human rights compliance at the policy development stage.[1723]

Thus, the government encounters more risks from enacting bills that might adversely impact human rights. This view is consistent with Sweeny's observation that "court disapproval is a constant background threat."[1724]

As further discussed in section 4.2.2, the JHRC has built a strong reputation as a human rights institution.[1725] Its reports are detailed and provide extensive analysis of the bills inquired.[1726] The committee also demonstrated that it can act free from governmental influence and partisanship.[1727] Its practice of persistently questioning government officials is notably associated with reinforcing rights review at the executive level, including improvements to the explanations supporting ministerial statements under section 19 of the HRA.[1728] In a nutshell, its functional and structural characteristics can thus inform the design of my proposed committee.

#### *ii. The Contribution of Existing Joint Parliamentary Committees of Rights Review to Lawmaking*

Since committee recommendations are not binding on Parliament, it is legitimate to question their potential to contribute to effective and sustainable rights protection. Committees can directly impact lawmaking when their reports lead to changes in legislation. Several scholars put forward that changes in legislation are not the only relevant indicators to determine the impact of committees on lawmaking. Hutchinson, among others[1729], urges not to attribute too much value to whether their report led to amendments in the legislative proposal when debating committee

[1723] Fletcher, *supra* note 1128 at 181.
[1724] Sweeny, *supra* note 1634 at 61.
[1725] Hiebert, *supra* note 12 at 104; Meagher, *supra* note 1680 at 14.
[1726] Meagher, *supra* note 1680 at 14.
[1727] Hiebert, *supra* note 25 at 132.
[1728] Hiebert & Kelly, *supra* note 57 at 296.
[1729] See e.g., Fletcher, *supra* note 1128 at 163; Campbell & Morris, *supra* note 1413 at 21.

effectiveness.[1730] They rightfully propose that this determination should thus not focus only on the differences between what was proposed by the government and what was adopted.

In addition to enhancing the lawmaking process by facilitating amendments through their recommendations, committees' reports can serve as points of reference during parliamentary debates, thereby increasing awareness of rights within the Parliament. Additionally, committees can have indirect effects, such as influencing the formulation of bills during the executive phase of lawmaking. As elaborated in this section, both types of impact, whether through amendments or other means, contribute to the advancement of effective and sustainable rights protection.

**a. Direct impact in lawmaking: Changes in legislation and references in parliamentary debates**

Changes in legislation and references in chamber debates constitute parliamentary committees' two most apparent contributions to lawmaking. In the first case, parliamentary committee reports lead to amendments during the second or third readings. This impact is perceptible if references to a report in the chamber lead to amendments in line with the committee's recommendations. One example of direct influence is the amendments to the Norfolk Island Legislation Amendment Bill 2015 in Australia:

> The PJCHR's report noted that the measure engaged and limited the right to equality and non-discrimination and the right to social security. In his response, the Assistant Minister for Infrastructure and Regional Development noted the committee's concerns and agreed to amend the bill to ensure that New Zealand citizens living on Norfolk Island would enjoy the same access to social security benefits as New Zealand citizens living on the Australian mainland. [1731]

In that case, the amendments appear directly related to the work and recommendations of the Australian committee.

But in numerous instances, the causality between the committee's recommendations and the amendments of bills can be challenging to ascertain. Political scientists Meghan Benton and Meg Russell maintain that "it is impossible to determine accurately whether a committee was causally responsible for recommendations being implemented or whether the wider policy community

[1730] Hutchinson, *supra* note 741 at 98.
[1731] *Ibid* at 100.

influenced the government."[1732] Hutchinson shares their view, alleging that many reasons can lead members of Parliament to vote against a bill.[1733] A causal relationship between a particular committee report and legislative changes can thus be difficult to identify.[1734]

As previously explained, amendments to bills directly associated with committees' reports remain few and dispersed[1735]; both the Australian and UK's joint committees have yet to explicitly lead to major amendments in bills.[1736] Discussing the Australian PJHRC, Hutchinson reveals that while the committee has seemingly influenced the development and refinement of legislation in many occurrences, it rarely led to legislative amendments. One notable example of amendments if the Norfolk Island Legislation Amendment Bill 2015, previously discussed.[1737] Regarding the JCHR, Sweeny observes that the amendments proposed by this committee had a slightly higher chance of being accepted by the government in contrast with non-JCHR efforts – 28% versus 16%.[1738] This rate of accepted amendments remains relatively low.

One justification for these committees' general lack of influence on the final version of bills is that they are involved in a later stage of the lawmaking process. This late involvement hinders their ability to influence legislation because much work has been done when a bill reaches the committee. Parliamentarians might prefer to avoid reopening party discussions or internal divisions or highlight weaknesses within the government.[1739] Moreover, in Canada, the proposed amendments must align with the purpose and intent of the bill voted during the first reading. If concerns arise from this purpose or intent during committee inquiries, their members cannot address Charter concerns.[1740] For instance, several amendments proposed by the committee during the deliberations on Bill C-2, *Tackling Violent Crime Act* were ruled out of order by the committee

[1732] Benton & Russell, *supra* note 1612 at 786.
[1733] Hutchinson, *supra* note 741 at 99.
[1734] *Ibid*.
[1735] Moulds, *supra* note 1400 at 58; David Feldman, "Democracy, Law and Human Rights: Politics as Challenge and Opportunity" in Murray Hunt, Hayley J Hooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing: Portland, 2015) 95.
[1736] Regarding the direct impact of the Australian PJCHR, see e.g., Fletcher, *supra* note 1128 at 176; Williams & Reynolds, *supra* note 1413; Hutchinson, *supra* note 741. Regarding the direct impact of the UK's JCHR, see e.g., Hutchinson, *supra* note 741; Tolley, *supra* note 1413.
[1737] Hutchinson, *supra* note 741 at 100.
[1738] Sweeny, *supra* note 1634 at 53.
[1739] Hiebert, *supra* note 23 at 52.
[1740] Macfarlane, Hiebert & Drake, *supra* note 21 at 76.

chair because they altered the bill's purpose.[1741] In a nutshell, it is harder to push for amendments to an already-developed bill.

Given its role in informing parliamentary debates on rights matters, references to a committee's reports during chamber debates are another relevant indicator of its impact on lawmaking.[1742] While the government's disregard for the committee's report is a "possible concern," the committee's capabilities and the extent to which it allows parliament to address human rights matters are significant indicators of its effectiveness.[1743] Political scientist Michael C. Tolley supports that the impact of a committee on lawmaking is not merely apparent from its ability to "prevents government from passing the legislation it wants without making the concessions for rights"[1744]: this impact is also noticeable from the extent to which a committee "contributes to more informed parliamentary debate."[1745] For example, discussing the JCHR, Sweeny observed that references to the committee's reports in chamber debates have significantly augmented since 2012, especially within the House of Lords.[1746] These references are increasingly used to support parliamentary scrutiny; in the House of Lords, she adds, "significant references are over twice as likely as insignificant ones."[1747] In this sense, the JHCR contributed to lawmaking by focusing on parliamentary debates.[1748] A committee can thus influence lawmaking when its reports are mentioned during chamber debates.

Reports of joint committees of rights review can provide a representation for minorities and marginalized groups during the parliamentary process. Paul Yowell notes that approximately 60 percent of the references to the JHCR's report involve speaking on behalf of these groups,[1749] notably in the fields of welfare and equality.[1750] These references highlight the significant role these committees play in amplifying the voices and concerns of those often underrepresented. By

[1741] *Ibid*. These amendments included "attempts to reintroduce judicial discretion on mandatory minimums; remove the reverse onus dimension for determining a dangerous offender; and remove some of the less serious crimes from the list of those that would be considered for mandatory minimum sentences". The bill was ultimately reported without amendments.
[1742] Moulds, *supra* note 371 at 185.
[1743] Hutchinson, *supra* note 741 at 98.
[1744] Tolley, *supra* note 1413 at 47.
[1745] *Ibid*.
[1746] Sweeny, *supra* note 1634 at 37. See also Yowell, *supra* note 1691 at 158.
[1747] Sweeny, *supra* note 1634 at 41.
[1748] *Ibid* at 33.
[1749] Yowell, *supra* note 1691 at 149.
[1750] *Ibid* at 163.

actively engaging with the committees' findings, parliamentarians can better advocate for the rights of minorities and marginalized individuals, ensuring that their perspectives are integrated into the lawmaking process. This enhanced representation not only strengthens the committees' effectiveness but also contributes to a more robust and responsive lawmaking process.

**b. Incidental impacts on legislation: Changes to executive lawmaking**

The possible impacts of parliamentary committees on lawmaking go beyond amendments in bills and references in debates. The JHCR and PJHRC are associated with two incidental impacts in lawmaking: influencing the government to consider rights concerns when developing bills and improving the quality of ministerial statements of compatibility.

For one thing, a parliamentary committee with a good reputation can influence the content of bills even before they are introduced to Parliament.[1751] Discussing the JCHR, Hiebert and Kelly note that the record and reputation of the institution inquiries "encourage department officials to anticipate JCHR queries about how proposed policy objectives might implicate rights prior to these being formalized as legislative bills."[1752] Indeed, the JCHR had a firmly established practice of continuously questioning departments and ministers and following up if unanswered. This practice compels public servants and ministers to find ways to minimize the extent to which they will be called to explain and justify decisions to the committee.[1753]

Committee-based rights scrutiny can also impact the quality of the content of ministerial statements of compatibility, such as Charter statements. The work of the JCHR is associated with improvements in the explanations supporting ministerial statements under section 19 of the HRA.[1754] The establishment of this committee significantly empowered the effectiveness of section 19.[1755] According to Hiebert and Kelly, the UK committee actively aimed to enhance the government's decision-making accountability and transparency.[1756] For example, the committee led to changes to Cabinet guidelines, in addition to requiring more detailed information on rights issues, notably on the "quality of the arguments and explanations provided to support positive

[1751] Hiebert & Kelly, *supra* note 57 at 296.
[1752] *Ibid*.
[1753] *Ibid*.
[1754] *Ibid* at 294.
[1755] Kavanagh, *supra* note 1638 at 116.
[1756] Hiebert & Kelly, *supra* note 57 at 294.

claims of compatibility."[1757] This conclusion is reinforced by the changes made in the Cabinet guidelines and the interviews conducted by the two authors with governmental legal advisors.[1758] Ministerial statements of compatibility might have remained inconsequential if the JCHR had not used them to make the executive more accountable.[1759]

Similarly, in Australia, the scrutiny done by the PJCHR is associated with an improvement in the quality of ministerial statements of compatibility. In its 2014-15 Annual Report, the committee declared having noticed that the quality of the statements submitted had improved.[1760] Constitutionalist Dan Meagher suggests that the PJCHR has been willing to hold the government to account when statements of compatibility did not correctly assess compatibility with the guaranteed rights. [1761] The committee notably developed many resources to assist in preparing these statements, including their *Guidance Note 1 - Expectations for statements of compatibility*.[1762] As a result, the quality of ministerial statements of compatibility in Australia will likely continue to improve.[1763]

The impacts of parliamentary committees on lawmaking are thus not limited to bill amendments and references in debates.[1764] They can influence various governmental actors during the development and drafting of bills, prompting them to examine the compatibility of the bills they develop to the rights. Both direct and indirect impacts contribute to good governance and, incidentally, to fostering effective and sustainable rights protection.

### 4.2.2 – Designing a Joint Committee of Rights Review Fostering Rights Protection

This section examines the functional and structural characteristics that could allow a joint committee of rights review to fulfill its scrutiny functions in a way fostering rights protection in

[1757] *Ibid*.
[1758] *Ibid* at 302.
[1759] Sweeny, *supra* note 1634 at 49.
[1760] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2014-2015*, at 28.
[1761] Dan Meagher, "The Human Rights (Parliamentary Scrutiny) Act 2011 (CTH) and the Courts" (2014) 42:1 Federal Law Review 1 at 11.
[1762] *Guidance Note 1 - Expectations for statements of compatibility*, by Parliamentary Joint Committee on Human Rights.
[1763] Dan Meagher, "The Human Rights (Parliamentary Scrutiny) Act 2011 (CTH) and the Courts" (2014) 42:1 Federal Law Review 1 at 11.
[1764] Moulds, *supra* note 371 at 185.

Canada. In light of parliamentary privileges, Parliament is responsible for deciding its committees' powers, privileges and functions.[1765] Joint committees such as the one proposed in this Chapter are established by *Standing Orders* of the House of Commons and the *Rules of the Senate*. Establishing a parliamentary committee of rights review requires reflecting on the most appropriate characteristics to allow its members to perform a robust assessment of the Charter compatibility of bills.

Two main sources inspire the proposed characteristics: the *2018 Draft Principles* and scholarship on parliamentary committees, particularly on the UK and Australian joint committees of rights review. The *2018 Draft Principles* aim to guide the establishment of parliamentary human rights committees and to ensure their effective functioning. To complete these Principles, I turn to the findings of human rights scholars, who have identified two conditions for a committee of rights review to foster rights protection: effectiveness and legitimacy. First, the committee should be effective: it should contribute positively to rights protection. In the words of Kirsten Roberts Lyer and Philippa Webb, "[w]ithout a focus on effectiveness, parliamentary engagement risks being a tick-box exercise or being undermined by a partisan political process."[1766] An ineffective committee, one whose recommendations are ignored by the government, wastes public resources.[1767] Committees must thus be designed to allow their members to fulfill their inquiry functions effectively.[1768] Legitimacy is also vital to the committee's ability to foster rights protection. A legitimate committee is formally established within the parliamentary process. But legitimacy also requires that the committee makes "reliable and impartial assessments on human rights matters using a process that is accountable, transparent and inclusive and that takes into account the inputs of its stakeholders (even where the final assessment differs from these inputs)".[1769] A committee lacking overall legitimacy and political authority risks being rendered "ineffectual and uninfluential."[1770] Both the electorate and parliamentarians must see the institution as legitimate.[1771] To support Parliament's engagement in rights protection, a

[1765] Committees can notably be created through the parliamentary privilege guaranteed under section 18 of the *Constitution Act, 1867.* Section 18 states that Parliament is responsible for defining "the privileges, immunities, and powers to be held, enjoyed, and exercised" by House of Commons and Senate members.
[1766] Roberts Lyer & Webb, *supra* note 742 at 35.
[1767] Marlin, *supra* note 1447 at 27.
[1768] Elverdi, *supra* note 1389 at 325.
[1769] Roberts Lyer & Webb, *supra* note 742 at 48.
[1770] Moulds, *supra* note 371 at 115.
[1771] McQueen, *supra* note 1421 at 8. Roberts Lyer, *supra* note 742 at 214.

parliamentary committee must be designed to perform its Charter review functions effectively and legitimately.

The purpose of this section is not to propose a specific design for such a committee; it is rather to explore several functional and structural characteristics that could allow a parliamentary committee of rights review to perform its functions effectively and legitimately. After presenting the *2018 UN Draft Principles* as a guide to designing human rights parliamentary committees, I examine the functional and structural characteristics that could impact the ability of a joint committee of rights review to perform this assessment in a way fostering rights protection.

### A) The 2018 United Nations Draft Principles on Parliaments and Human Rights: A Foundation for Designing Parliamentary Committees on Human Rights

Recognizing the crucial role of legislatures in rights protection and to ensure the government's compliance with human rights, the United Nations recently adopted the *2018 UN Draft Principle*s. These Principles aim to guide legislatures in setting up effective parliamentary committees specialized in human rights.[1772] More precisely, they support the establishment of a permanent internal committee dedicated to leading and coordinating the promotion and protection of human rights in a given jurisdiction. Through its nine articles, the *2018 UN Draft Principles* tackle numerous functional and structural characteristics required for human rights committees' effective operations. These requirements pertain to its mandate, responsibilities and functions, compositions, as well as its working methods.

The *2018 UN Draft Principles* are all the more relevant to guide the proposed institutional reform because they align with the normative framework grounding this thesis. They recognize the distinct role of Parliament in rights protection, which materialize through effective institutions promoting and protecting rights.[1773] Their preamble emphasizes the role of Parliament in holding the government accountable under its human rights obligations. Further, the *2018 UN Draft Principles* enunciate features of human rights parliamentary committees that support this role, several of which overlap with principles of good governance. For example, they state that an effective committee should have the power to engage with external stakeholders, including civil

[1772] Office of the United Nations High Commissioner for Human Rights, *supra* note 1415.
[1773] *Ibid*, preamble.

society and NGOs.[1774] The *2018 UN Draft Principles* also emphasize the need for transparency in its operations, working methods and decisionmaking.[1775] As a result, these Principles, endorsed by the international community, constitute a relevant starting point to reflect on a joint committee of rights review that fosters effective and sustainable rights protection.

Several limitations are associated with using the *2018 UN Draft Principles* to design effective human rights committees. As is the case for the *Paris Principles* discussed in Chapter 3, the *2018 UN Draft Principles* constitute a "universal set of guidelines expected to apply irrespective of the national system"; complexity and variations among parliamentary processes, Kirsten Robert Lyer reminds, are not taken into account.[1776] An important omission in the *2018 UN Draft Principles* is that they do not discuss features pertaining to holding governments accountable for human rights violations, an essential part of good governance. This absence positions parliamentary committees "in a weaker position to challenge non-human rights respecting actions of the government."[1777] She proposes that this omission might have purposed to make these principles appear less threatening to governments.[1778] Still, the *2018 UN Draft Principles* remain a relevant starting point to reflect on a joint committee of rights review that could foster rights protection in federal lawmaking. With a few exceptions, the functional and structural requirements examined in the following sections are inspired by these international principles.

### B) Functional Requirements: A Mandate of Charter Review[1779]

This section discusses the functional requirements of the proposed committee, that is, those related to its mandate and functions. In the specific context of lawmaking, section 2 states that these responsibilities include:

> (b) To introduce and review bills and existing legislation to ensure compatibility with international human rights obligations and propose amendments when necessary;

[1774] *Ibid*, s 2(h) and (j).
[1775] *Ibid*, ss 5 and 6.
[1776] Roberts Lyer, *supra* note 742 at 210.
[1777] *Ibid* at 210.
[1778] *Ibid*.
[1779] Though the present thesis is limited to Charter rights, this mandate could and should cover all constitutional human rights, including Aboriginal rights.

> (c) To lead the parliamentary oversight of the work of the Government in fulfilling its human rights obligations, as well as political commitments made in international and regional human rights mechanisms;
> (d) To provide human rights related information to members of parliament during debates on legislation, policy or government actions;

Reviewing the compatibility of bills to human rights obligations, reporting to legislatures and informing parliamentary debates constitute the primary functions of committees of rights review in lawmaking.

The committee's founding legislation should clearly state its purposes and goals.[1780] Discussing the PJHRC, Moulds found that there seems to be confusion surrounding the Australian committee's "proper" role and purpose, which affects its perceived legitimacy.[1781] As a result, external actors tend to view the committee as moderately legitimate but largely irrelevant.[1782]

Three elements of the proposed committee's reviewing mandate and functions are examined in this section: the bills falling under its jurisdictions, its analytical framework for rights review, and its powers to engage with external stakeholders, notably with governmental actors and members of civil society.

### *i. Criteria for Identifying Bills Subjected to Charter Review*

To contribute to lawmaking in a way that fosters effective and sustainable rights protection, the committee's internal structures must allow this institution to perform its functions *ex officio*. It must be able to monitor the executive's performance regularly and systematically. [1783] Such a level of monitoring requires that the committee decide which bills are subjected to Charter review.

Given the time and resources associated with such assessment, criteria should be developed to identify which bills require robust Charter review. Only a portion of the bills introduced to Parliament will likely pose Charter risks. As illustrations, legislation on safety standards or consumer law are unlikely to affect Charter rights. Thus, not all bills require or are even suited for Charter review. These bills are those with identified impacts that can trigger Charter protection,

[1780] Office of the United Nations High Commissioner for Human Rights, *supra* note 1415.
[1781] Moulds, *supra* note 371 at 111.
[1782] *Ibid* at 105.
[1783] Elverdi, *supra* note 1389 at 325.

that is, impacts that could be guaranteed under the Charter. Otherwise, an extensive workload could limit the time and resources available to the committee to examine bills genuinely engaging the Charter. For that purpose, the UK's JCHR and the Australian PJHRC have developed criteria to determine which bills require an inquiry. These criteria help to reflect on the approach allowing the proposed Canadian joint committee to determine which bills to review.

In the UK, the JCHR does not report on every bill introduced by the government for adoption: it focuses on key bills.[1784] It only reports on bills that raise "significant" human rights implications. A full-time adviser reviews all bills after their introduction and provides a note to the committee if they determine that a bill engages the guaranteed rights.[1785] This note presents possible concerns about rights compatibility and suggests questions for ministers and departments. The JCHR is ultimately responsible for deciding if a detailed inquiry is needed.[1786] Five criteria determine if a bill raises "significant" human rights implications: "how important is the right affected? how serious is the interference? how strong is the justification for the interference? how many people are likely to be affected by it? how vulnerable are the affected people?"[1787] This examination covers two specific facets: "whether its provisions themselves constitute a risk of violating human rights and whether the bill leaves any gaps so that inadequate safeguards for rights exist on the face of the bill."[1788] In the UK, whether a detailed inquiry into a bill is conducted thus depends on whether the bill raises human rights issues.[1789]

An interesting aspect of the JCHR's process is that it considers the vulnerability of the groups affected by the proposed legislation as a relevant indicator of the significance of the human rights implications. These implications are heightened the more the groups affected are considered vulnerable or marginalized.

The preliminary assessment of bills' Charter compatibility should involve trying to identify the groups affected by a bill, that is, the groups whose rights are at risk of being infringed. Identifying the possible impacts of bills requires identifying whom these bills can affect. This determination is not final, as the committee's inquiry might lead to discovering other affected

[1784] Mowbray, *supra* note 1711 at 202.
[1785] Hiebert, *supra* note 1413 at 19.
[1786] Mowbray, *supra* note 1711 at 202.
[1787] Joint Committee on Human Rights, *supra* note 1713 at 14.
[1788] Sweeny, *supra* note 1634 at 47.
[1789] Mowbray, *supra* note 1711 at 202.

groups, especially if the effects are indirect or less manifest. As further explained in the next section, this step is paramount to identify the groups to invite to appear before the committee during its public hearings. The committee's procedure must thus provide an opportunity to identify the groups affected.

Though its approach differs from the JCHR, the Australian PJCHR has also established a procedure to decide which bills require an in-depth inquiry. The PJCHR reports on every bill tabled before Parliament but reserves most of its resources and analysis for bills raising human rights concerns.[1790] The assessment developed by the institution to determine if a bill raises such concerns is two-fold: (1) identifying whether human rights are engaged, thus it may be limited or promoted by the bill; and (2) assessing whether any limitation is justifiable as a matter of international human rights law.[1791] After inquiring about a bill, the committee makes one of three choices: providing no comments, providing advice-only comments, or providing a comment requiring a response from the legislation proponent. Every year, the committee publishes an Index of bills and legislative instruments, which lists the bills examined, accompanied by the committee's response.[1792] The PJCHR developed strategies to prioritize the scrutiny of bills depending on the significance of the human rights issues they raise to improve the tabling of reports in time.[1793]

As is the case for the JCHR and the PJHCR, the proposed committee should decide which bills require the best assessment against Charter rights. A procedure should allow the committee to determine which bills are likely to engage the Charter, including identifying the groups that could be affected.

### *ii. An Analytical Framework for Rights Review*

To increase the likeliness of robust and consistent Charter review, the proposed committee should rely on an analytical framework for assessing the Charter compatibility of bills. This framework would guide its analysis to determine if the bill contains any unjustifiable limitation to

[1790] Hutchinson, *supra* note 741 at 94.
[1791] *Ibid* at 95.
[1792] Parliament of Australia, "Indexes of Bills and Legislative Instruments", online: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments>.
[1793] Moulds, *supra* note 371 at 57. See also *Annual Report 2013-14*, by Parliamentary Joint Committee on Human Rights (Commonwealth of Australia, 2016), s 2.15-2.17.

Charter rights. Such an analysis would involve assessing the bill's impact on civil society, particularly how marginalized communities are affected. It would also involve determining whether these impacts align with a broad interpretation of the Charter's scope. By employing this framework, the committee can thoroughly evaluate the bill's potential implications and ascertain its adherence to the principles enshrined in the Charter.

If establishing a specific analytical framework falls beyond the scope of this thesis, the approach used by the British and the Australian joint committees provides an interesting start to this reflection. According to the Australian committee's *Guide to Human Rights*, a measure limiting a human right must comply with several criteria: 1) be prescribed by law; 2) be in pursuit of a legitimate objective; 3) be rationally connected to its stated objective; and 4) be a proportionate way to achieve that objective.[1794] For its part, the JCHR employs a "judicial style of assessing compatibility of bills," mirroring the approach of British and European courts.[1795] This involves a three-part process: evaluating if measures target a legitimate objective, assessing the logical link between measures and objectives, and gauging proportionality.[1796] This method helps determine potential encroachments on Convention rights. The committee also reviews reasons provided by the Minister, applying principles of legal certainty and proportionality.[1797] This framework emphasizes broad bill compatibility with human rights, drawing from established judicial practices. To quote Campbell and Morris, "a narrowly legal test is neither feasible nor desirable, given the essentially moral nature of the issues involved."[1798]

In any case, the analytical framework should allow the committee to make its own determination on the bills' Charter compatibility. The committee must not merely try to determine the likely judicial response in case of a constitutional challenge in courts: it should assess bills' concrete impacts on the rights rather than trying to determine their compatibility with jurisprudence. The effectiveness of parliamentary rights protection can be compromised when lawmakers view the definition of rights purely as a legal matter, relying solely on the courts to provide the definitive interpretation of the rights they must follow. [1799] This approach can limit

[1794] Parliamentary Joint Committee on Human Rights, *supra* note 1675 at ii.
[1795] Sweeny, *supra* note 1634 at 47.
[1796] Campbell & Morris, *supra* note 1413 at 17.
[1797] Anthony Lester, "Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998" (2002) 33 Victoria University of Wellington Law Review 1 at 8.
[1798] Campbell & Morris, *supra* note 1413 at 17.
[1799] Young, *supra* note 103 at 43.

meaningful parliamentary engagement in rights protection and hinder the proactive development of legislation that upholds and promotes human rights. For instance, despite the similarity between the proportionality framework employed by the JCHR and those developed by courts, the views expressed in the reports are "the Committee's own conclusions on compatibility, rather than second-guessing the views which courts might take in future cases."[1800] The British committee has, on occasion, openly disagreed with judicial interpretations. In such instances, the committee provides explanations for adopting a divergent stance.[1801] Though compatibility with jurisprudence is an integral part of the rights review, it should not be the focus of the parliamentary rights review.

### *iii. Engagement with Stakeholders*

Performing robust scrutiny of bills requires detaining relevant evidence to assist in identifying and minimizing rights infringements in bills. In addition to supporting the inquiry of the proposed committee, this evidence helps challenge the government's assessment of the Charter compatibility of bills presented in the Charter statement. Two main sources of information related to their functional characteristics provide such evidence to parliamentary committees: exchanges with governmental actors and engagement with civil society.

#### a. Exchanges with governmental actors

In the context of its Charter review of bills, the proposed committee must have the power to exchange with governmental actors. This exchange process between committees and the government creates space for dialogue and deliberation valuable for rights protection.[1802]

Exchanging with the government serves two purposes when it comes to Charter review. First, it increases the amount of information available to the committee. In the words of Hutchinson, "it allows for substantive exploration of issues but also for different sources of information to be provided as to matters of human rights compatibility."[1803] Second, it supports

[1800] Meagher, *supra* note 1680 at 14.
[1801] Kavanagh, *supra* note 1638 at 127.
[1802] Hutchinson, *supra* note 741 at 93.
[1803] *Ibid*.

Parliament's role of overseeing governmental action. Through its inquiry functions, the proposed committee should be able to question the government's assumptions about the rights compatibility of bills and, where warranted, form conclusions diverging from the one expressed by the government.[1804] Being informed on the deliberation undertaken by the government can inform and deepen Parliament's deliberations.[1805] The committee must, therefore, have the power to seek explanations, clarifications, or additional information from governmental actors.

Exchanges with the government can occur at two stages: during the committee inquiry or after the submission of its report.

Questioning sponsoring ministers is a traditional means for committees to exchange with the government during their inquiry. In the federal parliamentary process, committee members can orally question ministers during their hearings or ask written questions on the Order paper.[1806] Written answers from ministers are published on Hansard, while oral answers are usually provided during Question periods. The proposed committee would also detain these powers as do existing parliamentary committees.[1807]

Another option to exchange with the government is for the committee to require a government response to its report. Existing committees at both the House of Commons and the Senate can request a response from the government.[1808] In such cases, the government has respectively 120 or 150 days to respond.[1809] The Government's *Guidelines for Preparing Government Responses to Parliamentary Committee Reports* provides that the government is responsible for deciding "the nature and form of its response."[1810]

However, governments have often failed to follow up on committees' requests for a

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[1804] *Ibid*.
[1805] Appleby & Olijnyk, *supra* note 52 at 11.
[1806] *Standing Orders of the House of Commons of Canada*, *supra* note 1417, s 39; *Rules of the Senate of Canada*, *supra* note 1429, ss 4–10.
[1807] "The Committee regularly questions the rational connection between the evidence given and the proportionality of the measures to the objective, and more than once (with the cooperation of the relevant minister) received sensitive information on a confidential basis to allow it to effectively carry out its scrutiny tasks": Campbell & Morris, *supra* note 1413 at 17.
[1808] *Standing Orders of the House of Commons of Canada*, *supra* note 1417, s 109; *Rules of the Senate of Canada*, *supra* note 1429 ss 12–24.
[1809] *Ibid*.
[1810] Privy Council Office, "Guidelines for Preparing Government Responses to Parliamentary Committee Reports," (13 December 2017), online: <https://www.canada.ca/en/privy-council/services/publications/guidelines-preparing-government-responses-parliamentary-committee-reports.html>.

response. No sanction awaits the government who fails to comply at the House of Commons.[1811] At the Senate, after 150 days, the report is referred to the relevant committee but does not provide any sanction.[1812] Though the *Guidelines* note that "[t]he consequences for the Government of missing the deadlines set by the House and Senate are serious (i.e., a possible charge of contempt of Parliament)," no such sentence has even been laid on the government for failing to respond to a committee report. These requests have, in fact, often been ignored.[1813] Marlin notes that this issue is far more novel. In 1979, a study highlighted the repeated absence of a response from the government to committees' reports.[1814] At this time, 70% of the interviewed deputies expressed the view that the government should respond to substantial recommendations.[1815]

In that regard, one solution to increase a committee's political influence is an obvious one: if a committee requests a response from the government, responding should be mandatory rather than facultative.[1816] Canada could follow the Australian two-phase reporting process, which allows the committee to request information from the government before publishing its concluding recommendations. The first report of the human rights committee presents its preliminary comments on the bill. This report's submission prompts the government's obligation to respond within the delay the committee decides – commonly 15 days. As further explained in the following section, the Australian government has often failed to respond by the specified deadline, though this issue has improved in the last few years.[1817] The responses that are due, late and received are now indicated on the committee's website.[1818] After receiving and considering the response from the government, the committee publishes its concluding recommendations, accompanied by the

[1811] "Committees - Reports to the House", online: <https://www.ourcommons.ca/marleaumontpetit/DocumentViewer.aspx?DocId=1001&Sec=Ch20&Seq=13&Language=E#fnB560>.
[1812] *Rules of the Senate of Canada*, *supra* note 1429 ss 12–24.
[1813] Marguerite Marlin, for example, invokes the lack of response from the government to the 2010 report of the Standing Committee on Indigenous and Northern Affairs (then the Standing Committee on Aboriginal Affairs and Northern Development), which followed a two-year study, including hearings sixty-nine witnesses: Marlin, *supra* note 1447 at 27. See *Northerners' Perspectives for Prosperity*, by Standing Committee on Aboriginal Affairs and Northern Development, 40th Parliament, 3rd Session (House of Commons, 2010) at 153.
[1814] Michael Rush, "Committees in the Canadian House of Commons" in John D Lees & Malcolm Shaw, eds, *Committees in Legislatures: A Comparative Analysis* (Durham: Duke University Press, 1979) 191.
[1815] *Ibid*.
[1816] Marlin, *supra* note 1447 at 27.
[1817] Hutchinson, *supra* note 741 at 87.
[1818] Parliamentary Joint Committee on Human Rights, "Ministerial Responses", online: *Parliament of Australia* <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Ministerial_responses>.

government's response. The information obtained in the government response thus allows the committee to further its inquiry and ground its concluding recommendations.

Whether requested during its inquiry or after a preliminary report, government responses provide relevant opportunities for the government to justify further its conclusions on the compatibility of bills with the guaranteed rights. In fact, the PJCHR regularly concludes that measures are likely compatible with human rights after obtaining further information from sponsoring ministers.[1819] A relevant example is the PJCHR's scrutiny of the legislation on access for newly arrived migrants to social security payments.[1820] This bill engaged the right to social security and an adequate standard of living, as was acknowledged in the statement of compatibility. However, the information provided did not allow the committee to determine if the measure constituted a proportionate limitation on human rights, notably with regard to the safeguards enabling the affected families to access necessities.[1821] The minister's response included details on the availability of Special Benefit payments and the level of income support offered in cases of financial hardship.[1822] Upon receiving the additional information, the committee reached the conclusion that the measure was likely compatible with human rights. They took note of the presence of the "Special Benefit," which appeared to serve as a safeguard, ensuring that individuals in financial hardship could meet their basic needs and maintain a satisfactory standard of living.[1823] Government responses support the committee's ability to challenge – or support – the government's conclusions regarding how a bill fairs against the guaranteed rights.

In addition to these exchanges, the committee could also access several documents and communication from governmental sources. The committee would firstly have access to the Charter statements of the Minister of Justice. While these statements predominantly offer a limited and legalistic account of Charter considerations within bills, they can serve as a valuable starting point for identifying potential areas of concern. Section 4.2(2) of the *Department of Justice Act* explicitly states that these documents notably purpose at informing Parliament on such concerns. Moreover, if the Charter statements begin to incorporate a broader and intersectional perspective by integrating GBA+, they would become even more valuable in supporting parliamentary rights

[1819] Hutchinson, *supra* note 741 at 92.
[1820] *Ibid*.
[1821] *Ibid*.
[1822] *Ibid*.
[1823] *Ibid* at 92.

review. The report of gender analysts in charge of performing GBA+ could also support the committee's assessment. These reports commonly include statistics and empirical evidence related to the differential impacts of bills on diverse groups. These sources of information from government actors can support the ability of the committee to conduct a robust Charter review.

Moreover, establishing a human rights institution, as outlined in Chapter 3, can provide Parliament with valuable insights into the extensive repercussions of proposed legislation, particularly those involving socio-economic disparities. In this context, the proposed parliamentary committee could actively interact with this proposed human rights institution, as encouraged under section 2(h) of the *2018 UN Draft Principles*. A parliamentary committee's effectiveness in presenting a strong standpoint can be heightened by seeking input from an NHRI.[1824] This collaborative approach aligns with the principles elucidated in the *Belgrade Principles*, underscoring the recommendation that Parliament should receive and meticulously assess reports from NHRIs.[1825] An additional avenue for interaction with NHRIs involves the participation of the human rights institution members in parliamentary committees, where they can provide testimonies during public hearings. This engagement strategy is notably illustrated by the participation of members of the CHRC before federal committees in Canada. In 2019, for example, CHRC representatives advocated for disability inclusion within the framework of Bill C-81, *Accessible Canada Act* and defended the rights of transgender and non-binary prisoners during their appearance before the Senate Standing Committee on Human Rights.[1826] This practice underscores the pivotal role of NHRIs in contributing their expertise and perspectives to parliamentary discussions on critical human rights matters. Such engagement between these two institutions of rights review can enhance the quality of lawmaking and reinforces the commitment to a comprehensive human rights regime.

**b. Engagement with civil society**

An effective committee of rights review supports citizen engagement within its inquiries.

[1824] de Schutter, *supra* note 1203 at 13.
[1825] *Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments*, 2012, s D-16.
[1826] Canadian Human Rights Commission, "Advising Parliament", online: *Canadian Human Rights Commission* <https://2019.chrcreport.ca/advising-parliament.php>.

The committee's procedures must facilitate the conduct of participation processes propitious to gathering evidence supporting robust Charter review. These procedures are critical to its ability to function as a link between the state and civil society.[1827]

Existing federal parliamentary committees possess two principal means to engage with civil society: written briefs and public hearings.[1828] Anyone can submit a written brief presenting their opinions, observations and recommendations on a bill. However, an invitation from the committee is required to participate in public hearings. Witnesses in public hearings are selected among those who submit a written brief or are invited by committee members without a written brief. Individuals can also request to appear before a committee by contacting the committee's clerk. During their appearance, witnesses share their views on the bill and answer questions from committee members. Written briefs and public hearings are traditional ways for parliamentary committees to engage with civil society. They exist in committees across jurisdictions,[1829] including the UK and Australian joint committees on human rights.[1830] These two means of citizen engagement allow members of civil society to support committee inquiries by voicing their concerns or support toward proposed legislation. [1831]

This section explains why citizen engagement is crucial to Charter review in Parliament, before expanding on specific considerations that can affect the nature and quality of the input gathered by parliamentary committees.

(i) Citizen engagement before a committee of rights review

The *2018 UN Draft Principles* recognize that citizen engagement is essential to the effective functioning of human rights parliamentary committees. Section 9 states that the committee "should conduct its work in such a way as to provide opportunities for meaningful civil society participation." In that regard, the committee should be able to hold public hearings as well

[1827] Helene Helboe Pederson, Darren Halpin & Anne Rasmussen, "Who Gives Evidence to Parliamentary Committees? A Comparative Investigation of Parliamentary Committees and their Constituencies" (2015) 21:3 The Journal of Legislative Studies 408 at 424.
[1828] Existing federal committee have the power to hear witnesses under their general power to decide how to conduct their inquiries: Bosc & Gagnon, *supra* note 1432.
[1829] Roberts Lyer, *supra* note 742 at 208.
[1830] *Ibid*.
[1831] Fuji Johnson & Howsam, *supra* note 863 at 260.

as summon and hear witnesses.[1832] An effective committee must invite individuals, nongovernmental bodies, and experts with knowledge of the matters arising from a bill to participate in its inquiry.

As discussed in Chapter 2, participation processes provide lawmakers – in that case, committee members – with valuable experiential and empirical evidence to base their assessment. Conducting robust Charter review requires hearing from a vast array of knowledgeable stakeholders on the impacts of bills on rights holders. Testimonies from individuals affected by a bill are insightful to identify and minimize Charter concerns. Civil engagement is especially instrumental in providing lawmakers with information on the lived experience of vulnerable and marginalized groups. Often underrepresented in political institutions, these groups are at higher risk of seeing their interests and needs disregarded by lawmakers. Legislation regulating sex work, for instance, often fails to consider firsthand knowledge from sex workers on how to improve their conditions.[1833] By gathering inputs from individuals from various civil society groups, the committee can obtain a more accurate portrait of the population's lived experience on which to base their recommendations to Parliament.

Because these inputs guide the development of legislation, they must represent the views found in the population, especially those of the predominantly affected groups. A participation process that fails to reach the groups affected by a policy provides a narrow, limited portrait of civil society's needs and interests. This portrait would not reflect the inputs of civil society as a whole but rather those of individuals who took part in them. If committee members then rely on this portrait to assess a bill's compatibility with the Charter, their findings and recommendations will not reflect civil society's concrete needs and interests.

Furthermore, grounding legislation on this inaccurate portrait amplifies existing inequalities and power imbalances in society and political institutions. Indeed, the groups taking part in participation processes are often those already present and influential in political institutions – white, middle-class individuals with higher education levels and living in urban areas.[1834] These groups are composed of citizens who feel "more confident, articulate, engaged and politically

[1832] Office of the United Nations High Commissioner for Human Rights, *supra* note 1415, s 2 (f).
[1833] Cecilia Benoit et al, "Centering Sex Workers' Voices in Law and Social Policy" (2021) 18 Sexuality Research and Social Policy 897 at 899. See also Bouchard, *supra* note 817.
[1834] See e.g., Boudreau & Caron, *supra* note 912 at 164–5.

motivated."[1835] In contrast, members from marginalized and vulnerable groups tend to be systematically underrepresented in participation processes.[1836] For example, during the public hearings on Bill C-36, the Commons Standing Committee on Human Rights did not hear from Indigenous women currently involved in sex work despite their well-documented current challenges; they only heard from women who had exited the industry.[1837] Relying on these inputs during Charter review – and lawmaking in general – amplifies their already dominant voice during policymaking processes, to the detriment of uninfluential groups. The testimonies received by committee members must thus represent the perspectives of a maximum of affected groups.

(ii) Institutional considerations related to participation in committees of rights review

The procedures of a parliamentary committee dealing with civil engagement can impact who participates and what they share.[1838] Though Parliament cannot be compelled to consult the population[1839], the rules of the proposed parliamentary committee can provide for means to engage with civil society – as is the case currently. These rules should promote citizen engagement in a way favourable to gathering relevant inputs to base robust Charter review. In that regard, this section discusses four considerations of participation processes that can influence the quality of the evidence committee members collect. The three first relates to the civil society's access to the committee: designing an adequate selection process, using online participation, and diversifying the types of submissions accepted. The last consideration is the distribution of pro and con witnesses heard by the committee.

Opening access to a participation process does not automatically lead to hearing all voices present in society.[1840] As previously mentioned, some individuals are more likely to share their input than others, especially members from groups already influential in policymaking processes.[1841] Numerous practical barriers can prevent individuals from engaging in participation processes. These barriers mainly relate to ongoing economic, health and social imbalances.

[1835] Coleman & Gøtze, *supra* note 809 at 15.
[1836] Sheedy, *supra* note 913.
[1837] *Evidence - JUST (41-2) - No. 34 - House of Commons of Canada* at 1700.
[1838] Pederson, Halpin & Rasmussen, *supra* note 1827 at 424.
[1839] *Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018] 2 SCR 765.
[1840] Victor Armony, "Quand toutes les voix ne sont pas pareilles : le défi particulier que posent les consultations sur le racisme et la discrimination systémique" (2020) 22:1 Éthique publique 1 at 3.
[1841] Coleman & Gøtze, *supra* note 809 at 15.

Poverty, disabilities, familial status, and language barriers, among others, can impact individuals' ability and willingness to take part in participation processes.[1842] These findings on participation processes echo those on public hearings in parliamentary committees. The inputs received during public hearings depend on witnesses' availability and interest in participating. When prospective participants can submit voluntarily, interest groups tend to be overrepresented during public hearings.[1843] Hence, open access to a participation process is insufficient to ensure representativeness among its participants.

The invitation process ensures that varied perspectives are represented during public hearings. A committee cannot compel anyone to participate but can invite underrepresented groups to share their views. In their comparative study of participants in public hearings, Helene Helboe Pederson, Darren Halpin and Anne Rasmussen found that committees tend to hear from a broader diversity of actors when participants are invited to give evidence.[1844] The committee should develop a selection process increasing the likelihood that it obtains perspectives from a maximum of relevant sources.

In particular, the proposed committee must invite members representing the diverse groups that the debated bill might affect. As argued when discussing the analytical framework that should guide Charter review, the committee must identify the groups whose rights are potentially affected by a bill as part of their inquiry. When preparing its list of suggested witnesses, the committee should carefully extend invitations to members from the identified groups. As is currently the case, the committee clerk would then contact them to invite them to appear before the committee.[1845] Committee members would remain responsible for deciding how to deal with witnesses: they choose whom they invite and what questions they ask.[1846] The main difference with the current selection of potential witnesses is that greater attention would be devoted to identifying and inviting the groups affected by the bill.

This process should particularly aim to reach members from marginalized and vulnerable groups, commonly overlooked in participation processes.[1847] The conception of Charter review

[1842] Sheedy, *supra* note 913 at 14.
[1843] Pederson, Halpin & Rasmussen, *supra* note 1827 at 424.
[1844] *Ibid* at 424.
[1845] Guide for Witnesses Appearing Before House of Commons Committees, *supra* note 919.
[1846] Fuji Johnson & Howsam, *supra* note 863 at 260.
[1847] Sheedy, *supra* note 913 at 15–16.

defended in this thesis involves assessing the socio-economic impacts of bills, an exercise that might lead to identifying detrimental effects on marginalized and vulnerable groups. As previously mentioned, numerous practical barriers affect the ability or willingness of these groups to take part in participation processes. Thus, special efforts must be made to reach marginalized and vulnerable groups and facilitate their engagement in public hearings.[1848]

Online modes of participation are one means to encourage participation in public hearings. First and foremost, as public hearings are held at Parliament in Ottawa, the location and the expenses incurred to join can prevent individuals from participating. Though travel expenses can be reimbursed, travelling to Ottawa to share their view on a bill remains unavailable to several prospective witnesses. Participation by videoconference, as is currently allowed, can encourage certain who would otherwise be deterred from travelling to Ottawa. Additionally, online modes of participation are known to be more inclusive than in-person consultations.[1849] They diversify the sources of input in participation processes, going beyond the "usual suspects."[1850] For that reason, online participation is all the more relevant when it comes to Charter review.

As explained in Chapter 2, inequalities in access to technologies and digital skills mitigate the inclusive nature of online participation. This well-documented phenomenon of "digital divide" leads to excluding certain groups from participating in online participation processes, especially people with low income, older people, people with disabilities and those living in rural areas.[1851] To facilitate broader participation, individuals can be provided with the necessary technological resources, such as computers and reliable broadband connections or assistive tools for those with disabilities, in exchange for their input. [1852] Access to computers in public libraries is one potential avenue for offering such resources. This approach ensures that technological barriers do not hinder individuals from contributing to the process.

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[1848] For an interesting discussion on organizing modes of consultations that fosters the inclusion of individuals that might traditionally be overlooked and excluded, see Sheedy, *supra* note 913.
[1849] See e.g., Boudreau & Caron, *supra* note 912 at 166; McNutt, *supra* note 915 at 27.
[1850] Peters & Abud, *supra* note 916 at 2.
[1851] See e.g., C Kim & J Fast, "Digital Divide: Understanding Differences in ICT Literacy in the Canadian Context" (2017) Supp 1 Innov Aging 1369; Bouchard, *supra* note 817 at 524; Bouquet & Jaeger, *supra* note 917 at 185; Charmarkeh, *supra* note 917; Baum & Mahizhnan, *supra* note 917.
[1852] Currently, witnesses appearing before the House of Commons by videoconference must use an approved headset and conduct an onboarding test before their testimony. They are provided with a headset or can be reimbursed for the expenses incurred to acquire an approved headset. Using a computer is highly recommended, rather than a mobile device such as a cellphone: Guide for Witnesses Appearing Before House of Commons Committees, *supra* note 919.

Another way to encourage broader participation in committee inquiries is to diversify the types of submissions accepted beyond written briefs and appearances in public hearings. Audio and video submissions, for example, could facilitate the participation of individuals who do not have the means or ability to submit a written brief. Given the sensitive nature of some issues related to human rights, these types of submissions could encourage participants who would not be comfortable discussing their views before committee members. Online surveys, also, constitute "excellent data-gathering tools".[1853] The UK's JCHR notably turned to online surveys to gather the public's views on the proposed Bill of Rights Bills. Extending the types of submissions accepted might encourage the participation of individuals who are unable or reluctant to partake in traditional participation processes.

The distribution of pro and con witnesses selected to appear in public hearings can also influence the quality of the evidence collected by committee members. They are responsible for choosing the witnesses invited to appear before them. A bias in the selection of witnesses can modulate the inputs and evidence gathered during public hearings. The distribution of witnesses who support the bill and those voicing their concerns must be balanced and unbiased.

The distribution of witnesses selected by existing parliamentary committees has sometimes been unequal and potentially biased. For instance, Genevieve Fuji Johnson, Mark Burns and Kerry Porth inquired about the witnesses heard during the Bill C-36, *Protection of Communities and Exploited Persons Act* committee hearings.[1854] Both the House of Commons and the Senate committees were almost exclusively composed of Conservative government members. Committee members selected a higher proportion of witnesses supporting the bill introduced by the government, in contrast with witnesses who articulated criticisms of the bill.[1855] They note that this inequality of representation did not reflect an unequal distribution of perspectives for and against the bill in prospective witnesses: 59% of the briefs received were indeed criticizing the

[1853] Peters & Abud, *supra* note 916 at 10.
[1854] These hearings were held by the Standing Committee on Justice and Human Rights and the Senate Standing Committee on Legal and Constitutional Affairs.
[1855] Genevieve Fuji Johnson, Mark Burns & Kerry Porth, "A Question of Respect: A Qualitative Text Analysis of the Canadian Parliamentary Committee Hearings on The Protection of Communities and Exploited Persons Act" (2017) 50:4 Canadian Journal of Political Science 921 at 940.

bill.[1856] Consequently, the bias in the distribution of pro and con witnesses heard by the committee was apparent.

The composition of a joint committee is likely to result in a more balanced representation of diverse interests in public hearings than regular parliamentary committees. These committees regroup members from multiple political affiliations, including independent senators. This composition could reduce the likeliness of a partisan selection of witnesses.

Ensuring transparency in the selection process can help mitigate the risk of bias when choosing witnesses for a committee, including considering the representation of different groups and maintaining a balanced distribution of witnesses in favour and against the bill under review. Because the committee is responsible for conducting its activities, including selecting witnesses, its members cannot be compelled to invite specific witnesses or ensure an unbiased distribution of witnesses.[1857] However, their report could include explicit information on the written briefs received and the individuals or organizations invited to appear before the committee. This information is already available to the public in various documents published on the parliamentary committees' website. Centralizing them in the proposed committee's report, its main tool to present its findings, would increase transparency in the participation process.

In order to effectively carry out its mandate of Charter review, the proposed committee should have the authority to engage with external stakeholders, including ministers and civil society. While parliamentary committees have existing powers to engage with external stakeholders, the distinct nature of a Charter review mandate necessitates structuring these interactions to facilitate robust assessments of the compatibility of bills with the Charter.

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[1856] *Ibid* at 927–928: "There were more prospective witnesses articulating serious criticisms of the bill than those highlighting its strengths. Thirty four (58.62%) who were against the bill and 24 (41.38%) who were in favour of it submitted briefs to the commons committee, and 38 (66.67%) who were against and 19 (33.33%) who were in favour submitted briefs to the senate committee. Of the 24 individuals and organizations in favour that submitted briefs to the commons committee, 16 (66.67%) testified. Of the 34 individuals and organizations against, 11 (32.35%) testified. In addition, the committee invited 21 individuals and organizations favouring the bill and 7 opposing it that had not submitted briefs (Table 1c). The senate committee heard from 10 (52.63%) of the 19 pro individuals and organizations that submitted briefs and 9 (23.68%) of the 38 con individuals and organizations from the group who submitted briefs. An additional 14 pro and 8 con individuals and organizations that did not submit briefs were invited (Table 2c). (…)".

[1857] Section 18 of the *Constitution Act, 1867*, states that Parliament is responsible for defining "the privileges, immunities, and powers to be held, enjoyed, and exercised" by House of Commons and Senate members".

*iv. Secondary Functions Supporting Charter Review*

Parliamentary committees tasked with human rights oversight possess multifaceted mandates that extend beyond their core duty of rights review. The *2018 UN Draft Principles* underscore the importance of endowing these committees with broad mandates.[1858] While this thesis primarily delves into the role of parliamentary rights review committees within the lawmaking process, it is imperative to recognize that these bodies can undertake various functions that collectively contribute to advancing effective and sustainable rights protection.

Notably, parliamentary committees have the capacity to engage in thematic inquiries, a practice that not only deepens their understanding of societal issues but also enhances their scrutinizing capabilities by enabling them to ground their evaluations in firsthand information.[1859] This comprehensive engagement potential is demonstrated by current federal committees, as well as similar bodies in the UK and Australia, which can conduct studies and inquiries.[1860]

Engaging with external stakeholders, in addition to the power to determine which bills to review and a clear analytical framework, could all support the proposed joint committee's functions of Charter review.

C) The Structural Characteristics of Joint Committees of Rights Review and Rights Protection

This section examines three structural characteristics that are required for a joint human rights committee to perform its Charter review functions in a way propitious to fostering effective and sustainable rights protection: (i) its independence from government, as well as (ii) credible reports grounded on democratic deliberations that are (iii) submitted in a timely manner.

*i. Guarantee of Independence: A Mixed Composition*

To function properly, a committee of rights review must conduct its work in a non-partisan manner and operate independently, free from political pressures. Particularly, the committee must be able to carry out its responsibilities without interference or influence from the government.[1861]

[1858] Office of the United Nations High Commissioner for Human Rights, *supra* note 1415, s 1.
[1859] Kavanagh, *supra* note 1638 at 122.
[1860] See e.g., *Rules of the Senate of Canada*, *supra* note 1429, ss 12–9.
[1861] Hiebert, *supra* note 1413 at 15. See also McQueen, *supra* note 1421 at 8.

As Moulds suggests, the relationship between a committee and the executive can generate legitimacy concerns and give rise to skepticism.[1862] Political and governmental influence could limit the potential of the proposed committee to perform a robust Charter review.

Several characteristics can impact its independence, including transparency in the appointment process of members[1863] and access to sufficient financial resources.[1864] The composition of the committee, particularly its membership, is especially crucial regarding its capacity to function independently.

The composition of joint committees is, in itself, conducive to independence from the government. First, joint committees encompass members from diverse political affiliations, including members from the House of Commons and the Senate. Evren Elverdi highlights that including representation from all political parties ensures independence and accountability.[1865] An incidental feature of this mixed composition is that it limits the possibilities of government dominance.[1866] The presence of Senate members, in itself, supports independence. The vast majority of senators are now independent and acting largely outside of party discipline.[1867] Their presence thus diminishes the likeliness of the executive majority on the committee.[1868] Consequently, the composition of the proposed joint parliamentary committee is susceptible to fostering the committee's independence.[1869]

Its potential to limit government dominance depends on the rules related to its composition. Joint committees can comprise an equal number of members from each chamber or a higher proportion of members from one chamber – generally the lower house. In Canada, the internal rules of parliamentary committees state that joint committees must include a number of members from each chamber proportional to their representation in Parliament. [1870] As a result, federal joint committees are traditionally composed of about a third of members from the Senate and two-thirds

[1862] Moulds, *supra* note 371 at 116–17.
[1863] Elverdi, *supra* note 1389 at 326–327.
[1864] Office of the United Nations High Commissioner for Human Rights, *supra* note 1415, s 7. The UN 2018 Draft Principles insist that the committee must receive "sufficient financial and human resources by the Parliament to enable it to carry out its functions effectively."
[1865] Elverdi, *supra* note 1389 at 326–327.
[1866] *Ibid* at 327.
[1867] Only 15 out of the 105 Senators are currently associated with a political party, all with the Conservative party: Senate of Canada, "Senators," online: *SenCanada* <https://sencanada.ca/en/senators/>.
[1868] Elverdi, *supra* note 1389 at 326–327.
[1869] *Ibid*.
[1870] Bosc & Gagnon, *supra* note 1475.

from the House of Commons. For example, the Special Joint Committee on the Constitution of Canada was composed of fifteen members of the Commons and ten senators, reflecting the composition of each chamber as per party division.[1871] Likewise, the Standing Joint Committee for the Scrutiny of Regulations and the Standing Joint Committee on the Library of Parliament consist of approximately twice as many members from the House of Commons as from the Senate. In contrast, the UK's JCHR and the Australian PJCHR both include members from the lower and upper houses in equal proportion. The first comprises twelve members and an equal number of members from each chamber. The other comprises five members from the House of Representatives and five from the Senate. Of these ten members, half are from the government, including a committee chair with a casting vote.[1872] An equal proportion of members of both chambers, as is the case at the JCHR and PJHCR,[1873] can lessen the likeliness of government dominance in the proposed committee. A fifty-fifty representation appears preferable, given the importance of independence to its Charter review functions.

The UK and the Australian joint committee on human rights are generally considered to be acting in an independent manner. Regarding the JCHR, Hiebert contends the committee demonstrably acts free from governmental influence and partisanship:

> [the committee] has independent legal advice from a highly respected human rights lawyer; is willing to conduct evidence-based hearings when not convinced by unsubstantiated government claims for new coercive powers; regularly questions government claims or explanations when it does not find these persuasive; provides a transparent account of its queries and replies; and reports on bills while debate is still ongoing in at least one house of parliament. [1874]

Similarly, Campbell and Morris argue that the PJCHR fosters a level of bipartisan involvement in human rights matters that demonstrates an appropriate degree of impartiality for addressing such issues.[1875]

Numerous structural characteristics, including its membership, can thus affect the ability of parliamentary committees of rights review to conduct independent scrutiny of bills.

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[1871] Hogg & Wang, *supra* note 1661 at 7.
[1872] Hutchinson, *supra* note 741 at 82.
[1873] *Human Rights (Parliamentary Scrutiny) Act 2011*, *supra* note 1671, s 5.
[1874] Hiebert, *supra* note 25 at 132.
[1875] Campbell & Morris, *supra* note 1413 at 9–10.

*ii. Credible Report Motivated by Democratic Deliberation*

The proposed reform stems from the premise that parliamentarians should deliberate on rights concerns in their debates, especially during committee inquiries. The transparency of the parliamentary process allows the public to observe the nature of the deliberation occurring during committee work. They can expose how the government tackled rights concerns, notably on the rights considerations identified in bills and the assumptions behind the government's judgments on their compatibility with Charter rights. However, the mere possibility of deliberation does not ensure that these deliberations are conducted in a principled and non-partisan manner. Current deliberations in committees are largely framed by partisanship; in Commons committees, especially, Charter concerns are mainly invoked to support a political agenda, if addressed at all.

As committee reports present the committee's conclusions grounded on these deliberations, partisan deliberations can affect the credibility of these reports. They can impact the committee's perceived legitimacy in the eyes of external stakeholders.[1876] These reports must be viewed as credible by other members of Parliament and the public: they constitute a crucial part of the committee's functions of informing them on the Charter concerns arising from bills.[1877] For the committee to be credible, its reports must be perceived as motivated by "principled deliberations and consensus."[1878]

At its core, deliberation appears incompatible with partisanship as it exists in Parliament.[1879] Deliberating involves "to reflect, to ponder and to contemplate."[1880] In *Considerations on Representative Government*, J.S. Mill provided the classical definition of deliberations in Parliament. He described Parliament as an arena where elected representatives "whose opinion is overruled, feel satisfied that it is heard and set aside not by a mere act of will, but for what are thought superior reasons, and command themselves as such to the representatives of the majority of the nation."[1881] Based on the work of Jürgen Habermas, an advocate for a

[1876] Roberts Lyer & Webb, *supra* note 742 at 47.
[1877] Hiebert, *supra* note 1413 at 15.
[1878] Elverdi, *supra* note 1389 at 329. See also Hiebert, *supra* note 1413 at 15.
[1879] In her words, "[p]artisan representatives, who support their party 'right or wrong', can be counted on to promote their party's perspective on what is the common good, and not to judge on their merits the positions defended in the assembly.": Dominique Leydet, "Partisan Legislatures and Democratic Deliberation" (2015) 23:3 The Journal of Political Philosophy 235 at 235.
[1880] S Susen, "Jürgen Habermas: Between Democratic Deliberation and Deliberative Democracy" in R Wodak & B Forchtner, eds, *The Routhledge Handbook of Language and Politics* (Abingdon: Routledge, 2018) 43 at 44.
[1881] Mill 1977, at 447, cited in Leydet, *supra* note 1879 at 239.

deliberative model of democracy, political scientist Katarzyna Jezierska states that a practice is deliberative:

> if it meets certain pragmatic presuppositions. These are the openness and full inclusion of everybody affected, the symmetrical distribution of communicative rights, the absence of force in a situation in which only the force of the better argument is decisive, and the sincerity of the utterances of everybody affected (e.g., Habermas, 1998b; 2001b; 1998a).[1882]

These definitions contrast with the current partisan scheme existing in Parliament – especially in the House of Commons – where parliamentarians promote their party's perspectives of the common good rather than judging their merits.[1883] The focus on supporting parties' political agenda affects the ability of parliamentarians to take part in democratic deliberation.

Democratic deliberation can occur despite this adversary atmosphere.[1884] For example, Leydet suggests that acting as "critical, though partial, publics" and recognizing the legitimacy of dissent can stimulate substantive exchanges in a parliamentary group dominated by political parties.[1885] In her words, "[w]hile partisanship makes MPs impervious to the force of the better argument, it motivates them to be effective advocates".[1886] Achieving such results, she adds, requires that:

> parliamentary debates must achieve a publicity of reasons that operates 'critically' rather than 'demonstratively'. This means not only publicizing the reasons that ground the parties' positions, but also getting the parties to engage with the positions and the reasons of their adversaries in a way that informs citizens about the facts, the issues, and the options on hand.[1887]

In other words, partisanship does not prevent democratic deliberations; it could even contribute to them,[1888] as long as publicized parliamentary debates are not just a smokescreen. Grégoire Webber qualifies legislature as a *forum of justification*: "[t]hrough the exchange of reasons, legislators seek

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[1882] Katarzyna Jezierska, "With Habermas against Habermas. Deliberation without Consensus" (2019) 1 Journal of Public Deliberation Article 13 at 7–8.
[1883] In her words, "[p]artisan representatives, who support their party 'right or wrong', can be counted on to promote their party's perspective on what is the common good, and not to judge on their merits the positions defended in the assembly.": Leydet, *supra* note 1879 at 235.
[1884] See e.g., *Ibid* at 236.
[1885] *Ibid* at 257.
[1886] *Ibid* at 236.
[1887] *Ibid* at 236.
[1888] *Ibid*.

to justify to each other (and to the citizens they represent) why the proposition for legislative action they favour should be adopted by the assembly."[1889] In this sense, legislatures create a "culture of justification",[1890] under which ministers and government ought to explain their policy choices and how they fare again guaranteed rights.[1891]

A credible report is thus one that enhances transparency in the committee's decision-making.[1892] It should clearly state the committee's findings regarding the possible impacts of a bill on the Charter and what information supports these findings.

Currently, committee reports only contain proposed amendments, if any. Commons committees' reports, especially, cannot include remarks or recommendations.[1893] Senate reports have, at times, included information on the evidence received, but these notes remained dispersed and short.

Contrarily to the rules currently prevailing regarding the limited content of committee reports, the proposed committee should publish comprehensive and detailed reports inspired by those of the UK and Australian joint committees. These committees' reports present an extensive analysis of the bills inquired. The UK committee, in particular, is well-known for its "detailed and of an impressive quality" reports.[1894] Its reports, ranging from 50 to more than 120 pages, start by explaining the background of the bill and the scope of their inquiry. A vast portion is then dedicated to presenting the various provisions of the bills and how they fare against the rights guaranteed by the ECHR. This analysis relies heavily on written and oral evidence from witnesses. Each report concludes with a summary of the committee's recommendations and proposed amendments. These reports include the formal minutes of the committee meetings and a list of witnesses. They also provide links to the published written evidence and to transcripts of the inquiries. Though the Australian committee's reports are shorter than those of the UK, they also detail their analysis of how bills engage the guaranteed rights. Their concluding comments include the minister's response

[1889] Webber, *supra* note 922 at 150.
[1890] The expression was coined by South African public lawyer Etienne Mureonik: Etienne Mureinik, "A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10:1 South African Journal on Human Rights 31 at 32.
[1891] Kavanagh, *supra* note 1638 at 124. See also David Dyzenhaus, "What is a 'Democratic Culture of Justification'?" in Murray Hunt, Hayley J Hooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing: Portland, 2015) 425.
[1892] Office of the United Nations High Commissioner for Human Rights, *supra* note 1415, ss 5 and 6.
[1893] Bosc & Gagnon, *supra* note 1432.
[1894] Meagher, *supra* note 1680 at 14. For example, see Joint Committee on Human Rights, *supra* note 1721.

to their preliminary report and their views on this additional information. The reports of the UK and Australian committees enhance transparency on the committee inquiry by making available their reasoning and recommendations, as well as the evidence grounding their results.

A credible report is thus one that presents the findings and recommendations of the committee following non-partisan deliberations among its members.

*iii. Timely reports*

Timeliness – especially the lack of it – can constitute a critical limitation to the committee's ability to contribute to effective and sustainable rights protection.[1895] A suitable balance must be reached between allowing the committee to make its inquiry, on the one hand, and allowing the government to implement its agenda in a timely fashion, on the other.[1896] The committee must have enough time to perform robust scrutiny of bills while avoiding delaying the lawmaking process.[1897]

Procedures must foresee that the committee has enough time to do its work effectively without unnecessarily delaying the lawmaking process. To quote former deputy clerk Floyd McCormick,

> In order to function effectively, a parliamentary body needs rules and practices that establish how it will manage the limited time it spends in formal sessions. The purpose of time-management procedures is to ensure that the parliamentary body can deal with the business placed before it in a manner that allows that body to fulfill its core functions efficiently and effectively.[1898]

In the context of a committee of rights review, these procedures could address two facets of timeliness impacting its ability to perform its Charter review functions effectively: the time granted for its inquiry and the timing of its report submission in the parliamentary process.

[1895] Mowbray, *supra* note 1711 at 211.
[1896] McQueen, *supra* note 1421 at 18. See also Feldman, *supra* note 1412 at 85.
[1897] Moulds, *supra* note 371 at 187.
[1898] Floyd McCormick, "Passive Time Management and the Erosion of Scrutiny of Government Bills in the Yukon Legislative Assembly" in David Groves, Charles Feldman & Geneviève Tellier, eds, *Legislatures in Evolution: Les législatures en transformation* (Ottawa: University of Ottawa Press, 2022) 155 at 157.

Regarding the first facet, the time allocated for scrutiny can impact the extent and quality of the rights review performed. Discussing the Australian PJCHR, Moulds found a strong correlation between the "time allocated for scrutiny and the strength of the impact of the scrutiny on the Bill."[1899] Many scholars likewise concluded that the quality of scrutiny is affected by a shorter time for scrutiny.[1900] Constitutionalist Dominique Dalla-Pozza's research indicates that the enactment of intricate legislation, such as counter-terrorism laws, necessitates a sufficient timeframe to ensure substantive and thorough examination.[1901] Still, Moulds nuances that "short time frames for scrutiny do not necessarily negate the potential for rights-enhancing legislative and public impacts."[1902] Thus, the time allocated to the committee to perform scrutiny is an important, though not determinative, feature of its inquiry.[1903]

For its part, the submission stage of the parliamentary process is crucial for committees to influence parliamentary debates. Moulds, among others, notes that tabling the report after completing the second reading affects the committee's ability to genuinely impact the legislation's content.[1904] Similarly, Hutchinson points out that if the committee does not report promptly, "then its reports may not be available to inform the deliberations of parliament or to assist with engagement around human rights before legislation is passed."[1905] She argues that the passage to Parliament of any bill raising human rights concerns before receiving the committee's concluding report is troublesome.[1906] In the same vein, discussing the JCHR, Tolley also emphasizes the importance of tabling the report before the second reading for the institution to influence parliamentary debates: "earlier rights problems are identified in a bill, the more substantive the discussion in Parliament is likely to be."[1907] Without the committee's report, Parliament might enact bills without full knowledge of their impacts on the guaranteed rights.

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[1899] Moulds, *supra* note 371 at 188.
[1900] Fletcher, *supra* note 1128 at 80; Dominique Dalla-Pozza, "Refining the Australian Counter-terrorism Legislative Framework : How deliberative has Parliament been?" (2016) 27:4 Public Law Review 271.
[1901] Dalla-Pozza, *supra* note 1900; Dominique Dalla-Pozza, "Promoting Deliberative Debate? The Submissions and Oral Evidence Provided to Australian Parliamentary Committees in the Creation of Counter-Terrorism Laws" (2008) 23:1 Australasian Parliamentary Review 39.
[1902] Moulds, *supra* note 371 at 206.
[1903] *Ibid* at 192.
[1904] *Ibid* at 188.
[1905] Hutchinson, *supra* note 741 at 86.
[1906] *Ibid* at 90.
[1907] Tolley, *supra* note 1413 at 48.

The creation of a committee of rights review, as the one proposed in this Chapter, could necessitate enacting measures encouraging the timely submission of its reports. In the existing parliamentary process, the report stage of the second reading begins at the submission of the committee's report. The amendments proposed by the committees are then debated in the chamber. However, in the presence of a new committee assessing the Charter compatibility of bills in parallel with the inquiry made by another parliamentary committee, this stage would include two reports: the report of the committee of rights review and the report of the regular committee. Without specific measures, the report stage could go forward when the parliamentary committee submits its report, even if the committee of rights review has yet to submit its own recommendations.

The example of the Australian human rights committee provides a relevant illustration of this issue. Moulds mentions that Parliament has often proceeded to the "critical second reading" without having the PJCHR's bill analysis.[1908] It has proven problematic numerous times, with reports ending up being published after the passage of legislation in both houses of Parliament.[1909] In 2018, 6.7% of legislation was passed prior to final reports.[1910] Discussing the PJCHR's inquiry into antiterrorism legislation in Australia, Mould notes that the committee had expressed "strong frustration" with the timeframe available to provide an analysis of such complex legislation.[1911] Ultimately, its report was tabled after the second reading in the Senate and two days before the amended Bill passed through the House.[1912]

In that regard, I opine that the parliamentary procedures – including the proposed committee's internal procedures – should reduce the possibility that its reports are not submitted to Parliament promptly. In Hutchinson's words, these measures should allow the committee to engage "in a race to undertake its full analytical, information gathering and reporting processes (which frequently include complex human rights issues) before the passage of legislation."[1913] Various factors could influence the proposed committee's capacity to table its reports early enough in the adoption process to impact the content of legislation.

[1908] Moulds, *supra* note 371 at 57.
[1909] Hutchinson, *supra* note 741 at 87.
[1910] *Ibid*.
[1911] Moulds, *supra* note 371 at 151.
[1912] *Ibid*.
[1913] Hutchinson, *supra* note 741 at 87.

One of the main factors affecting timeliness relates to the exchanges between the committee and sponsoring ministers.[1914] Delays or failures in responding to the committee's request have often delayed PJCHR's reporting.[1915] In 2016, only 8% of requests had received a reply by the requested date when one was stipulated.[1916] Moreover, 13% of government responses were received after passing bills.[1917] Specific measures were successfully introduced in 2016 to improve the response rate, raising the rate of responses received by the time requested to 30% the following year.[1918] These measures included setting a date for submitting its final report in its initial report, and concluding its inquiry even without a government response. The committee also put up a public register on the PJCHR's website exposing the due dates of the government responses and whether they are late or received.[1919] These measures, associated with an improvement in the response rate of government, could inspire similar internal procedures in federal lawmaking.

Another measure that could prevent the passage of bills without the Charter review report would be to impose a minimum period between the introduction of a bill and the end of the second reading. Williams and Reynolds recommended the presence of such a "guaranteed minimum time period,"[1920] a recommendation supported by Moulds[1921] and Fletcher.[1922] Rights review is a multifaceted inquiry that takes time. Witnesses must also be able to assess the bill and prepare their submission for it to be relevant.[1923] Enough time must be granted after the bill's introduction to Parliament before public hearings are held, then before the end of the second reading.[1924]

Finally, the committee should meet often enough to support its ability to submit its report promptly. Joint committees typically meet when both chambers are sitting, which can lead to a lesser rate of their meetings. Discussing the PJCHR, Moulds suggests that this procedural factor influences its ability to report in time.[1925] As infrequent meetings can cause delays in tabling their

[1914] Moulds, *supra* note 371 at 57.
[1915] Hutchinson, *supra* note 741 at 89.
[1916] *Ibid*.
[1917] Fletcher, *supra* note 1128 at 165.
[1918] Hutchinson, *supra* note 741 at 87.
[1919] *Ibid* at 89.
[1920] Williams & Reynolds, *supra* note 1413 at 479.
[1921] Moulds, *supra* note 371 at 272.
[1922] Fletcher, *supra* note 1128.
[1923] Macfarlane, Hiebert & Drake, *supra* note 21 at 73.
[1924] *Ibid* at 79.
[1925] Moulds, *supra* note 371 at 57.

reports, the committee's procedure should provide for regular meetings among committee members.

In this section, I present a specific institutional reform with the goal of enhancing the extent and quality of the Charter review conducted within Parliament. The essence of the proposal is to establish a joint parliamentary committee tasked with systematically assessing bills for their Charter compatibility before adoption. A meticulously designed framework would empower this dedicated committee of rights review to reinforce good governance within the realm of federal lawmaking. More precisely, this approach would permit an additional in-depth assessment of bills' Charter compatibility, one anchored in civil society's genuine needs and interests, in addition to providing an opportunity to publicly scrutinize government judgments on the Charter compatibility of the bills it introduces for adoption. With a broad advisory mandate and the necessary structural features, such a committee could strengthen Parliament's engagement in Charter review. The presence of such a parliamentary committee of rights review would enable Parliament to fulfill its distinctive and vital role in fostering effective and sustainable rights protection.

**Conclusion**

In this chapter, I have advocated for greater parliamentary involvement in Charter review during federal lawmaking. Given the crucial role of legislatures in rights protection, Parliament must actively assess the Charter compatibility of the bills it debates and adopts. Far from redundant, this extra safeguard can minimize the risk of adopting legislation detrimental to the rights. It also increases opportunities for overseeing governmental action and engaging civil society in lawmaking.

Currently, parliamentary rights review falls short of fostering effective and sustainable rights protection. Parliament lacks an institutionalized mechanism for robustly assessing the Charter compatibility of bills, leading to limited and unstructured assessments. Charter review in Parliament is influenced by political dynamics, including partisanship and party discipline in the House of Commons. Senators' deference to the House of Commons further limits effective Charter

review. While free voting and independent senators might mitigate these issues, their true impact remains uncertain.

The view defended throughout this Chapter is that a joint parliamentary committee specialized in Charter review would constitute the most appropriate institution to support Parliament's review functions. Committees serve as the primary venues for scrutinizing bills within Parliament. Due to their inquiry functions and powers, they are well-suited to conduct an assessment like Charter review, leading to a better understanding of the impacts of bills on the Charter. Furthermore, the public nature of their deliberations and reports contributes to transparency in lawmaking: civil society and voters can be informed of their findings and recommendations, assisting in holding the government accountable for proposing legislation infringing Charter rights. An exclusive mandate of Charter review would further the committee's rights-enhancing abilities by allowing its members to develop in-depth knowledge of rights issues and to devote sufficient time and resources to conduct this multifaceted assessment. The proposed reform's final element is establishing a joint rather than a regular parliamentary committee. Composed of members from both chambers of Parliament, joint committees tend to be less partisan, in addition to combining the strengths of each chamber: the legitimacy of elected representatives as well as the independence and expertise of senators. In a nutshell, a joint committee specialized in Charter review could, in my opinion, allow Parliament to materialize its fundamental role in rights protection.

Parliamentary rights review can cover more extensive aspects than the rights review currently performed by the government. As discussed in Chapter 3, the rights review done at the executive stage of lawmaking is performed by the Department of Justice. It aims at determining if bills are consistent with judicial review and is limited primarily to the jurisprudential facets of the Charter. While the mandate of the Department of Justice calls for a review of this nature, legislatures are not limited in a similar fashion. In contrast, legislatures assess the rights compatibility of bills through parliamentary inquiries and debates[1926], including opportunities for public input.[1927] This process involves assessing the merits of legislative objectives and how they

[1926] *Schmidt*, *supra* note 26 at para 275.
[1927] Paul G Thomas, "Parliament and Legislatures: Central to Canadian Democracy?" in John C Courtney & David E Smith, eds, *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 153 at 162.

can best be achieved.[1928] According to Hiebert, the resulting legislation would reflect "more reasoned judgment about whether legislation is justified in light of its adverse implications for protected rights."[1929]

In that sense, the present proposition contrasts with the 2012 private bill discussed earlier, which suggested mandating the Law Clerk and Parliamentary Counsel of the House to assess the Charter compatibility of bills.[1930] This bill, rejected at the first reading, favoured a Charter review performed by a legal actor, thus limited to the jurisprudential concerns in bills. Such Charter review contrasts with the concept of Charter review defended in this thesis. Presumably, both mechanisms of parliamentary rights review could exist simultaneously.

This Chapter does not intend to propose a specific model for such a committee nor to provide an exhaustive discussion of all the features it should entail. Numerous questions going beyond the scope of this Chapter – and this thesis – would be interesting to explore. For example, what other functions should the proposed committee entail? Should it conduct studies, whether on its own accord or at the government's request? Should it also be involved during the development of legislation, as is the case for the JCHR? What should be the relationship between this committee and other parliamentary committees? And what importance should courts give to the committee's reports during judicial review?

In conclusion, it is imperative to acknowledge that the mere existence of a mechanism of Charter review does not guarantee its efficiency or robustness. The effectiveness of any institutional reform depends not only on its functional and structural characteristics but also on the willingness of the involved actors to engage constructively in the process. Even with an optimal joint committee of rights review, the political dynamics hindering the current parliamentary rights review may persist. To quote Macfarlane, Hiebert, and Drake, "[n]o parliamentary committee can eliminate or even fully counterbalance executive power or the political factors influencing a government's pursuit of its legislative agenda."[1931] Nonetheless, implementing such a committee could enable Parliament to assert its distinct role in Charter review and increase awareness of the potential detrimental impacts of legislation on marginalized communities.

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[1928] Hiebert, *supra* note 12 at 88.
[1929] *Ibid* at 102.
[1930] Private Member's Bill C-537, *supra* note 218.
[1931] Macfarlane, Hiebert & Drake, *supra* note 21 at 169.

# Conclusion

Designing human rights regimes and mechanisms of rights review is a multifaceted endeavour that demands a nuanced equilibrium among various stakeholders and interests. Both must carefully balance a broad spectrum of factors, concerns and needs.[1932] What constitutes an optimal model, one that maximizes the outcomes for the benefit of all, remains uncertain; all models are associated with various benefits and drawbacks.[1933] Still, the extensive body of literature on human rights regimes offers valuable insights into the influence that their institutional features can exert on effective and sustainable rights protection.

With the aim of contributing to this discussion, I conducted an in-depth analysis of a specific aspect of the Canadian human rights regime: Charter review within the lawmaking process, commonly known as pre-enactment review. Adopting an institutionalist, comparative and interdisciplinary approach, I explored the intricate relationships between the institutional structures of the lawmaking process and the effective and sustainable protection of Charter rights. For that purpose, I critically examined the pre-enactment review in federal lawmaking, which reflects Canada's predominant court-centric approach to rights protection. After identifying gaps and inadequacies in the existing mechanisms of rights review at both the executive and parliamentary stages of lawmaking, I put forth institutional reforms aimed at enhancing the involvement of the political branches in Charter review throughout the lawmaking process.

Chapter 1 delved into the prevailing court-centric approach to rights protection, a focal point guiding this thesis's discussion. While not a system of pure judicial supremacy, the Charter operates under a model where courts are primarily responsible for upholding guaranteed rights. This stance finds support through a range of indicators, some related to lawmaking institutions, while others pertain to the behaviours of political and judicial actors in relation to their Charter responsibilities and those of other branches. This court-centric approach bears two significant implications: first, judicial review is the principal avenue for addressing infringements to Charter rights in legislation; second, the interpretations derived from judicial decisions act as guiding principles shaping how lawmakers assess Charter considerations in bills. As explained in this Chapter, relying excessively on the judiciary to give effect to Charter rights leads to various issues.

[1932] Ontario Human Rights Commission, *supra* note 1317 at 32–33.
[1933] *Ibid* at 3.

Beyond the obstacles to accessing Charter litigation, judicial decisions provide a limited portrait of the scope and meaning of Charter rights due to courts only reviewing contested laws and difficulties related to using social science evidence within these recourses. In the specific case of socio-economic rights, judicial deference has slowed the development of sections 7 and 15 of the Charter to encompass certain socio-economic deprivations. These hurdles particularly affect members from marginalized communities, who frequently experience rights violations yet encounter obstacles in asserting their interests, amplifying their vulnerability to further rights violations.[1934]

Against that background, in Chapter 2, I assert that achieving effective and sustainable rights protection requires more than judicial oversight alone. Judicial review must be accompanied by robust governing policies and appropriate institutional mechanisms. Emphasizing the need for a more comprehensive framework for rights review to fully realize Charter rights, this chapter introduces the normative framework that justifies and guides the enhanced role of lawmakers in rights protection. Drawing from theories of shared responsibilities and good governance, this normative framework yields two implications: the lawmaking process should encompass mechanisms of rights review that prompt thorough Charter engagement by government and Parliament, and these mechanisms should adhere to principles of good governance.

Considering this normative framework as a guiding lens, Chapters 3 and 4 investigated strategies for enhancing political engagement in Charter review. In Chapter 3, I identified shortcomings in the current assessment conducted by the government during the drafting of bills and advocated for establishing a federal human rights institution. This institution would complement the legalistic Charter review conducted by the Department of Justice by offering non-jurisprudential advice to the government. Specifically, it would assess the socio-economic impacts of bills, expanding the range of Charter review carried out during the executive lawmaking process.

In Chapter 4, the focus shifted to the role of Parliament in Charter review. This Chapter emphasized the lack of institutionalized Charter review in parliamentary processes and the constraints associated with the partisan and deferential dynamics characterizing the House of Commons and the Senate. As a remedy, I recommended establishing a joint committee of rights

[1934] O'Brien, Lambek & Dale, *supra* note 22 at 160. See also Sylvestre, *supra* note 6.

review. This committee would conduct in-depth assessments of the bills' impacts on the Charter and report to Parliament to inform chamber debates, thereby enhancing Parliament's engagement in rights protection.

The thesis has pursued two central inquiries to address its overarching research goals. Firstly, it has explored the roles and responsibilities of the legislative, executive, and judicial branches of government in protecting human rights within the Charter framework. This exploration has aimed to outline the distinct contributions of each branch in the broader human rights landscape. By examining each branch's specific roles and responsibilities, the thesis provided valuable insights into how mechanisms of rights review at each level can collectively create a robust and harmonized human rights regime. Secondly, the thesis highlighted the shortcomings in the existing framework for pre-enactment review, opening the door to introducing two potential institutional reforms to strengthen Charter review within the federal lawmaking process.

The thesis is thus attuned to the deficiencies and gaps inherent in the current pre-enactment review and attempts to rectify them by presenting proposed reforms. The institutional reforms delineated in Chapters 3 and 4 present tangible proposals that prompt reconsidering how lawmakers address Charter-related issues. These reforms are tailored to amplify the awareness of Charter rights within the federal lawmaking process, achieved through the active engagement of both the government and Parliament in Charter review. Individually, each reform could contribute to fostering rights protection. Yet, implementing both mechanisms of rights review, combined with judicial review, would yield an all-encompassing assessment of human rights, thereby cultivating an environment conducive to effective and sustainable rights protection.

This approach is all the more relevant when considering the inclusion of socioeconomic interests within the scope of the Charter. The examples presented within this thesis expose the limitations inherent to the prevailing court-centric model of rights protection, which may not adequately cater to the distinctive challenges experienced by marginalized individuals and communities. Engaging lawmakers in Charter review offers an opportunity to bridge this gap and address marginalized communities' specific needs and interests, resulting in more equitable and sustainable rights protection for all members of society.

Indeed, this thesis advocates for an expanded conception of Charter compatibility during pre-enactment review. Contrarily to the prevailing approach that equates Charter compatibility

with "compatibility to jurisprudence," this alternative conception encompasses a broader scope: it ensures alignment with the Charter's inherent principles rather than confining itself to conformity with judicial interpretations of rights. Such a view of the Charter extends beyond a detached and mechanical application of legal precedent; it recognizes the need for a nuanced and all-encompassing approach to constitutional interpretation that considers broader societal dynamics and normative assessments.[1935] Involving lawmakers in Charter review opens up the possibility to transcend the limitations of judicial interpretations and adopt a proactive stance towards socio-economic rights. Further, lawmakers are not subjected to the same limitations as courts when considering the socio-economic impacts of legislation, including issues of justiciability. In fact, the Supreme Court has already acknowledged the legislator as the appropriate locus for addressing the socio-economic dimensions of constitutional protection,[1936] reinforcing the credibility and relevance of pre-enactment review. This approach thus cultivates a broader understanding of rights, one which could extend to interpretations of the rights that courts would overlook or decline to endorse due to institutional and epistemological limitations.

This research also contributes to constitutional law by illuminating the often overlooked non-judicial dimensions of rights protection and the intricate interplay among institutional frameworks in policy creation and rights protection. It notably fosters a better understanding of Parliament's distinct contributions to rights protection, which stem from its role in endorsing, legitimizing, and critiquing bills, principally those introduced by the government.[1937] Additionally, incorporating Senators into the proposed parliamentary committee of rights review aligns with current constitutional trends,[1938] offering a valuable perspective on the unique inputs of upper houses in rights protection and legislative processes. These findings underscore the multifaceted nature of rights protection and the imperative of a comprehensive, multi-branch approach for fostering a robust human rights regime.

Exploring the distinctive attributes of the government and Parliament in rights review opens up avenues for future investigation into the most effective ways to implement and structure

[1935] Connor, *supra* note 64 at 42.
[1936] See e.g., *Gosselin*, *supra* note 39 at para 141; *Eldridge*, *supra* note 46 at 85.
[1937] Thomas, *supra* note 741 at 195. See e.g., Connor, *supra* note 64 at 39; Glenn, *supra* note 89 at 211.
[1938] See e.g., Robert VandenBeukel, Cochrane & Godbout, *supra* note 97 at 831; Cardinal & Grammond, *supra* note 97 at 87 ss.

mechanisms of rights review facilitating thorough Charter review during lawmaking. Although this thesis does not aim to offer a definitive blueprint for the suggested mechanisms of rights review, researchers have the opportunity to expand upon the insights and discoveries presented to develop a more comprehensive conceptualisation of such mechanisms.

Further investigation is particularly crucial to examine the potential clashes between political and judicial interpretations that might emerge if lawmakers engage in constitutional interpretation and Charter review.[1939] Embracing a shared responsibilities approach to the Charter entails each branch of government independently construing the scope and meaning of rights, thereby fulfilling constitutional duties according to their understanding.[1940] Given the indeterminate nature of human rights, divergent and even conflicting interpretations of these rights can emerge.[1941] The fluid nature of Charter rights, particularly within the framework of section 1, allows for reasonable variations in assessing their implications, especially in cases implicating complex socioeconomic dynamics.[1942] Such complexities can engender distinct viewpoints, leading to disagreements among political entities, civil society, scholars, and even within the Supreme Court.[1943] The multiplication of locus for rights interpretation could notably lead to revisiting the understanding of the notwithstanding clause,[1944] currently perceived as a tool for suppressing rights by overriding judicial interpretations. Indeed, the proposed reform has the potential to generate a level of democratic deliberation that could reach the threshold necessary to validate the act of overriding Charter rights as interpreted by the courts.[1945]

Challenging the prevailing court-centric approach to rights protection also opens up important avenues for re-evaluating various institutional frameworks for policy- and decision-making. While this thesis's focal point is Canada's federal lawmaking system, its implications can

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[1939] Alexander & Schauer, *supra* note 61 at 1359.
[1940] Baker, *supra* note 35 at 4.
[1941] Campbell, *supra* note 407 at 9; Knopff et al, *supra* note 63 at 622.
[1942] Perry, *supra* note 32 at 646 and 648.
[1943] Robert Dahl, "Decision-making in a Democracy: The Supreme Court as National Policy-Maker" (1957) 6 Journal of Public Law 279 at 280. See also Hiebert, "Compromise and the Notwithstanding Clause", *supra* note 73 at 113.
[1944] For an interesting recent and ongoing debate on the judicial power to declare laws inconsistent with Charter rights in cases where legislatures invoke section 33, see Geoffrey Signalet, "Legislated Rights as Trumps: Why the Notwithstanding Clause Override Judicial Review" (2022) 61:1 Osgoode Hall Law Journal, online: <https://ssrn.com/abstract=4254342>; Grégoire Webber, "The Notwithstanding Clause, the Operation of Legislation, and Judicial Review" (2022) Queen's University Legal Research Paper No 2022-003, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4214650>; St-Hilaire & Foccroulle Ménard, *supra* note 81; Robert Leckey, "Advocacy Notwithstanding the Notwithstanding Clause" (2019) 28:4 Constitutional Forum 1.
[1945] Karazivan & Gaudreault-DesBiens, *supra* note 401 at 501.

resonate in parallel parliamentary or Westminster-style structures sharing comparable traits. Moreover, its conclusions and insights transcend the boundaries of lawmaking; they could apply equally in diverse policymaking spheres, notably encouraging reflections on reforming institutional mechanisms for developing regulation and other executive action.

This thesis holds relevance not only within theoretical and academic dialogues but also within the practical spheres of legal practice and policy formulation. Its practical implications are multifaceted. By delving into the intricate interplay of the institutional aspects in Charter review, legal practitioners can better understand how different branches of government contribute to rights protection, enabling them to present more informed arguments in courtrooms, legislative forums and in advocacy. Policymakers, along with being exposed to potential reform ideas, can acquire insights into the manner in which legislative decisions influence Charter protection, including their distinct impacts on diverse groups. This awareness empowers them to make well-informed decisions when shaping and assessing proposed legislation. This thesis thus offers a transformative lens through which legal professionals and policymakers can reshape their approaches to Charter implementation, ensuring more effective and sustainable rights protection.

Although this thesis offers substantial insights into constitutional law and human rights protection, it is important to acknowledge its limitations. First, the mere establishment of institutional mechanisms or processes does not guarantee that they are effective. The effectiveness of mechanisms of rights review, in particular, relies heavily on the commitment and dedication of the relevant actors in considering and adhering to the Charter's provisions: they must seriously attempt to identify potential adverse impacts in bills and mitigate them. This issue is exemplified by the comparative examples presented in this thesis, notably the UK and Australian joint committees on human rights, which have yet to lead to significant amendments to bills. Further, as determinations regarding the meaning and scope of Charter rights are not binding on future governments, the extent of rights protection within political institutions – and, in broader terms, the emphasis placed on rights during lawmaking – can vary from one government to another.

Another important limitation lies in the inherent dynamics of Westminster systems, which are likely to persist even when supplemented with additional institutional mechanisms to

strengthen the lawmaking process.[1946] These dynamics, discussed in Chapter 4, have historically hindered the extent and quality of Charter review within Parliament. Even within a joint committee explicitly designed to facilitate robust rights review, the influence of partisanship and party loyalty can substantially impact the viewpoints and behaviours of committee members.[1947] This influence can potentially compromise the essential attributes of impartiality and objectivity that are vital for Charter review to be effective. An increasing number of independent senators and the prevalence of free votes within the House of Commons does not ensure a growing insulation of Charter review from the influences of partisanship. A realistic understanding of Westminster political dynamics is that complete detachment from partisan forces may remain overly optimistic.

Moreover, including the population in lawmaking through participatory processes does not necessarily translate into enhanced protection of Charter rights, particularly for marginalized communities. As explained in Chapter 2, should participatory processes fall short of effectively involving these marginalized groups, there is a risk of inadvertently magnifying the voices of already influential factions in decision-making, thereby exacerbating the marginalization of vulnerable groups. Even with a representative participant sample that incorporates the viewpoints of all affected groups, the collected inputs may still yield adverse effects on marginalized communities. The intensification of citizen engagement does not assure an automatic enhancement in safeguarding the interests and rights of marginalized groups.

Additionally, this thesis primarily addresses Charter protection in federal lawmaking, leaving unexplored various other areas of rights protection that warrant attention. It does not cover the sphere of provincial policies, which heavily influence socio-economic areas such as housing, social welfare, and healthcare. Furthermore, the distinctive Canadian context, characterized by the intricacies of federalism and the coexistence of Indigenous communities, introduces an added layer of complexity to the comprehension of rights protection and the examination of rights beyond the judicial sphere.[1948] This thesis acknowledges the importance of considering the experiences and interests of Indigenous communities during lawmaking, notably when discussing violence against Indigenous women and discrimination against Indigenous children under the *Indian Act*. However,

[1946] Kelly, *supra* note 559 at 99; Hiebert, *supra* note 23 at 45.
[1947] Mark Tushnet, "Some Observations on Legislative Capacity in Constitutional Interpretation" (2008) 2:3 Legisprudence 163 at 164.
[1948] Appleby, MacDonnell & Synott, *supra* note 100 at 444.

it does not explicitly address the need for institutional adjustments to assess bills' impacts on Indigenous rights, guaranteed under section 35 of the *Constitution Act, 1982*. These facets of rights protection merit comprehensive examination.

Nonetheless, this thesis suggests significant improvements to the current approach for addressing Charter concerns in lawmaking. Acknowledging the shortcomings of the existing approach, this thesis advocates for necessary changes. The institutional reforms presented could cultivate a heightened "culture of rights" among legislators, in which respect for human rights is considered essential when developing and enacting legislation.[1949] Although they may not offer perfect or all-encompassing solutions, these reforms serve as initial stepping stones for initiating ongoing discourse and prospective reforms to elevate the lawmaking process beyond its current trajectory. They provide foundational support upon which forthcoming enhancements and refinements can be constructed, facilitating the exploration of more effective and inclusive methodologies of policy formulation. This progression paves the way for cultivating a sturdier and more comprehensive framework that effectively safeguards human rights in Canada.

[1949] Kavanagh, *supra* note 1638 at 124.

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