Bills of Rights and the Right to Participate in Politics

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For the sake of this comment, I am assuming that the core of James Allan's book, *The Vantage of Law*[1] is the claim that from the perspective or vantage of a concerned citizen, giving judges the power and the opportunity to make moral judgments at the point of application of the law is undesirable. It is especially undesirable when judges have the last word on matters in which they have been able to make a moral judgment because that enables them to impose that moral judgment on the community without the community's having the opportunity to reject or revise the judgment. It follows that constitutionally entrenched bills of rights and legislative charters of rights are unjustifiable because they give judges what is in practice an un-revisable power to impose their moral judgments at the point of application.

I intend to contest that claim on a number of grounds. Firstly, I shall argue that if we are to permit judicial review of the legality of government action on grounds which go beyond merely ensuring that government does not exceed the powers granted to it by law, there are many advantages from the perspective of ordinary citizens in permitting review on broad substantive moral grounds such as ensuring equality, freedom of religion and of expression and due process of law rather than on traditional common law grounds related to the way in which government decisions are made, such as irrelevant considerations and *Wednesbury* unreasonableness.

Secondly, I shall suggest that Allan's objections to the way in which bills and charters of rights tend to weaken public participation in decision-making on a range of important issues by making the moral decisions of the judges un-reviewable can be met by mandating periodic review of the content of bills and charters, preferably by an elected convention. I shall suggest that, if periodic mandatory revision is introduced, entrenched bills of rights are likely to be more attractive to the informed citizen than is the right to participate in making decisions about the difficult moral questions which arise under bills and charters.

Finally, I shall suggest that those jurisdictions, such as the UK and Victoria, which have adopted charters which do not empower the courts to give a remedy for a breach of the charter other than a declaration of incompatibility may have added to the problems which Allan identifies. The 'remedy' of a statement of incompatibility takes

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1 (Ashgate Publishing, 2011).

from the courts their core function of settling disputes between parties and replaces it with the power to make broad declarations about the consistency of legislation with broad rights, encouraging the courts to make moral judgments at the point of application. The way forward may be to restrict the courts to their core function, which is to decide disputes between the parties and to give a remedy to the wronged party, rather than making general declarations about the content of the law and the consistency of legislation with a broadly defined right.

I. Allan's arguments

Allan targets permitting judges to make last word moral judgments at the point of application, especially on issues arising under a bill of rights, on a number of overlapping grounds:

1. Individuals have a right to participate in politics. That right is best protected by allowing issues with respect to rights to be determined by means of democratic political processes.
2. The right to participate is an important right, which should not be limited on utilitarian or instrumental grounds such as the ground that appointed judges are more likely to make correct decisions about the content of our rights than are democratically elected legislatures.
3. There is no consensus on the right answer to many moral issues. Given the lack of consensus, the best way to decide these issues is to decide them by means of democratic politics. If decisions made about abortion, euthanasia, illicit drugs and criminal procedure are made by legislatures, the concerned citizen is able to make his or her views count.
4. Bills of rights are typically drafted in very broad terms, giving the judges who interpret and apply them great freedom to determine their specific content. Hence judges have the freedom to impose their own moral values, whereas everyone else in the community is bound by their decisions, even if they believe that they are wrong.
5. Judges are not democratically responsible. To allow them to make the final decision reduces the role of citizens in determining the law and in determining the weight to be given to various competing moral claims. The ordinary citizen usually can have no input in a case before the court.
6. Excluding citizens from having a role in the making of these decisions leads to apathy, alienation, the politicisation of the judiciary and other undesirable results.
7. Bills of rights are motivated by paternalism. Supporters of bills of rights believe that they know which rights are important and are willing to bind future generations to particular sets of rights.

In my opinion, Allan's critique fails for a number of reasons. Firstly, much of Allan's discussion focuses on what he terms the benevolent legal system. He too readily assumes that reasonably just legal systems are benevolent and rights respecting

with respect to all their citizens and fails to recognise that in many reasonably just legal systems, some marginalised groups have little or no political power and have been targeted for unfair and discriminatory treatment. Secondly, Allan gives too much weight to the right to participate in decision making, as compared with the weight to be given to other rights such as the right to freedom of religion and conscience and the right to be treated with equal respect. It may be reasonable to limit the scope of the right to participate in order to ensure adequate institutional protection for other basic rights. Thirdly, Allan pays too little respect to institutional design. I shall argue that most of Allan's objections to bills of rights can be met by intelligent institutional design. Once they are met, the intelligent republican who favours community self-government, may have good reasons for favouring a bill of rights, even an entrenched one. The comment approaches these issues by considering the nature of rights, the justification for rights against the state and the arguments for entrenching some of those rights subject to mandatory periodic revision.

II. The nature of rights

The existence of a right provides an argument in favour of a political decision benefitting an individual or group even if the community is made worse off by that decision.[2] In fact, there is no right if the person or group who has the benefit of it only has that benefit when granting it benefits the community as a whole. Although rights are claims against the community, some rights may be justified by the argument that the community will be better off if individuals are given those rights than if they are not. However, once the rights are granted, individuals remain entitled to them even when to grant them has a negative impact on general welfare.[3] Few rights are absolutes, so at some point most, perhaps all rights must give way if the loss to the community in granting them becomes too great.

Secondly, as a general rule, the possessor of a right may exercise the right even if, morally, it is a bad thing to do.[4] If I have a right to payment from you, I can exercise that right and insist on payment even if as a result, your children starve. For this reason, rights tend to be valued in societies which place great stock on individual liberty and are not considered worthy of much of protection in societies which aim to make people morally better, for example in Allan's theocratic legal system. The two features which I have mentioned, the fact that a right is a claim against utility and that rights possessors can usually exercise rights when it is a morally bad thing to do, means that rights, especially those we may consider placing in a bill of rights, very often protect people whom the majority consider to be bad people doing bad things.

III. Rights against the state

2 Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 90–4.

3 Ibid 94–6.

4 Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009) 266–7.

Bills of rights typically give individuals rights against the state. Given the two features of rights mentioned above, we might reasonably ask, why should citizens have rights against the state, if the effect is to enable them to do morally bad things which have a negative impact on community welfare. There are at least three reasons for doing so. First, states act through human agents who are on average, as good and bad as the rest of us. Many of the rights we may want against the state are immunities, which give us freedom from certain types of state action and may protect us against the bad acts which states, even usually benevolent ones, perpetrate against their citizens. So freedom of speech, although expressed positively, gives us freedom from state interference if we say things of which the state disapproves.

Secondly, as Allan is quick to remind us, there is a great deal of moral disagreement. That means that many of us at some time in our life will find ourselves adopting and defending a moral position which a majority in our community believes is wrong, even evil. This may lead us to do things which a majority believes to be evil. The possession of immunity rights may prevent the majority from imposing their views on us by force through the agencies of the state. Thirdly, a related point, we may be members of an ethnic, religious or other minority who have suffered state sanctioned discrimination in the past and fear discrimination in the future. Rights against the state may protect us from future state sanctioned discrimination.

IV. Should some rights against the state be entrenched?

Allan is not against giving citizens rights against the state, just against formal or de facto entrenchment of those rights so that they impose legally enforceable limits on the powers of the legislature. Therefore, he is not open to the charge that he fails to recognise that some rights, such as the right to free speech and the right to freedom of association, need to be protected in order for democracy to function properly. He recognises that these rights are important but wants the legislature, not the courts to determine how these rights are best protected, especially in benevolent legal systems. What distinguishes benevolent legal systems from others is that their ordinary legislation and other aspects of their legal systems usually give reasonably comprehensive rights and other protections to citizens facing the exercise of state power. In most cases these rights are sufficient. Allan's view is that going beyond these protections and trying to cover the holes by means of entrenched bills or charters of rights does more harm than good.

I disagree for a number of reasons. Firstly, we cannot assume, as Allan does, that benevolent legal systems are uniformly benevolent in their treatment of all people within their jurisdiction. Secondly, in my opinion, Allan gives too much weight to the right to participate and too little weight to the need to provide institutional protection for other basic rights.

A. BENEVOLENT LEGAL SYSTEMS AND THE PROTECTION OF MINORITIES

Historical and contemporary examples show that even reasonably democratic and benevolent societies are capable of treating particular ethnic, religious and other minorities harshly and with little respect for their rights. Having basic guarantees of rights in a bill or charter gives the persecuted minority a set of publicly accepted standards governing state behaviour to which they can appeal. And entrenching those rights in an enforceable bill of rights enables the minority to have their complaints of unfair treatment heard and determined in a reasonably impartial tribunal.

When a benevolent legal system subjects a group to state power with few rights protections, the group is usually one which is relatively powerless and easily vilified. The group in Australia at the moment which is most subject to state power with few protections is immigrants without a visa, often asylum seekers from brutal and troubled regimes. They have almost no power in the political system and are easily presented as a threat to national security. The ordinary legislation with respect to them allows them to be detained for long periods of time with little access to the courts.[5] Although they have committed no crimes, they are given fewer rights and their treatment is harsher in many ways than that of criminals.

Close behind them are aborigines, a group which has over a long period of time been subject to state power with few of the usual protections. That is still the case. It is difficult to believe that the Commonwealth would grant itself a five year lease over the property of any other group without giving the owners a right to rent or to full compensation as it has done over aboriginal property in the Northern Territory.[6] Other relatively powerless and unpopular minorities such as the Jehovah's Witnesses and Communists have been singled out for exercises of state power with few of the normal protections.[7]

Having guarantees of rights does not ensure that relatively powerless minorities will not be subject to state power without the usual protections. But it at least gives them another chance to challenge the exercise of state power. There is no guarantee that they will succeed (of course, in some cases they should not succeed) because there is little evidence that courts have a better record on these matters than do legislatures. But the second chance to raise the issue and put their case in detail is worth much. Minority groups are not always given a full and fair hearing when legislation is proposed subjecting them to the power of the state with few protections. Very often, the minority will be politically weak and hence will not have the influence necessary to gain a hearing.

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5 *Migration Act 1958* (Cth) divs 6, 7 and 8.

6 *Northern Territory National Emergency Response Act 2007* (Cth) s 31.

7 *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

Often it is very difficult to gain adequate rights protection for weak and unpopular groups when they need it most as the state is only likely to subject them to its full power without adequate protections when their unpopularity is at its height. For example, the government only moved to give itself five-year leases over aboriginal land and to take other measures limiting aboriginal control over their incomes and other aspects of their lives when there were allegations of widespread and systematic child abuse in aboriginal communities. At a time like that, it is difficult to argue that the aboriginals in those communities were worthy of the protection and respect due to other groups in the community.

It is much easier to decide that everyone is worthy of a minimum degree of protection from state power and implement that decision in the relatively calm and rational atmosphere likely to surround a debate about a charter of rights than it is in the emotionally charged atmosphere which is likely to infect the debate at any time of perceived crisis. So the interests of weak and unpopular groups are more likely to receive adequate consideration and proper protection when a bill or charter of rights is being considered than at a time of crisis. Adopting a charter of rights in a rational and calm atmosphere is a way of attempting to guarantee the weak and the unpopular that they will receive adequate protection even in times of crisis. However, it does have one important disadvantage; the drafters of a bill or charter of rights have a relative lack of knowledge compared to those who later may have to make decisions about how to deal with a perceived crisis. Those on the spot will have a greater knowledge of the state of affairs confronting them than will the earlier drafters of a charter of rights and hence will have a better understanding of the measures necessary to deal with it. Their greater knowledge suggests that they should be entrusted with the power to make the decisions untrammelled by a charter of rights. However, in my opinion, this argument is outweighed by the need to make dispassionate decisions about the protection which should be accorded to unpopular minorities in times of crisis. It is difficult to make those decisions when the crisis is on us.

B. OVERVALUATION OF THE RIGHT TO POLITICAL PARTICIPATION

In my opinion, Allan overvalues the right to political participation. One of his key arguments is that entrenching a bill of rights limits public participation in determining moral issues with respect to rights by taking decisions with respect to those matters out of the hands of democratically elected legislatures and placing them in the hands of a small elite of courts and lawyers.

The right to participate in political decision-making is not an absolute right and because it is shared with so many others, citizens who exercise it may have little practical influence over decisions on matters of concern to them. As a result, it may be rational for them to accept some restrictions on this right in order to protect other rights which are equally or more important and which they can reasonably expect to be able to exercise in a way which has greater impact on their lives. Such rights include the right to own property, the right to freedom of religion and of conscience and the right to freedom of expression.

Inability to exercise these rights can have a profound influence on the everyday life of the individual, usually a much greater influence than inability to exercise the right to participate in political decision-making will have. There are a number of reasons for this. Firstly, although the right to participate in political decision-making is important, the practical importance of its exercise for the way we live is limited by the fact that it is shared with all other citizens. Of course, political decisions can have a dramatic influence on our lives; it is our ability to influence those decisions which is limited and reduces the importance of the right to participate. Part of the price of allowing all citizens to participate in political decision-making is the need to set up institutions which can make decisions which bind all citizens, including those opposed to the decision. These institutional arrangements reduce the practical significance of the right to each individual.

Secondly, freedom of religion, freedom of conscience and the right to own property are more intimately connected with the way people live their lives from day to day. Although all citizens have these rights, unlike the right to political participation, their practical value is not so greatly diminished by the fact of their being shared with all others. The fact of their being shared does impose some limits; I cannot consistently with freedom of religion practice a religion which imposes on me a duty to forcibly convert others. But the limits do not reduce the practical significance of the right to such a great extent.

Because the practical significance of the right to political participation is reduced by its shared nature, we tend to delegate control of political decision-making to specialists who have made politics their profession and who have exercised or aspire to exercise political power. They tend to value the right to participate in political decision-making more highly than the other rights. They are the exception rather than the norm. As one might expect, politicians tend to be more opposed to bills and charters of rights than are members of the public. Allan assumes that the concerned citizen shares the interests and attitudes of the politician, valuing the right to political participation more highly than I think is the case. His views may be coloured by nostalgia for a simpler time, when political issues could be settled in public meetings of concerned citizens in the town square. More disturbingly, they are a moderate version of Rousseau's ideal of the state, in which the citizen-body, through the general will, has the right and the power to control every aspect of the life of each individual citizen.

The tendency to value rights such as the right to own property and freedom of religion more highly than the right to participate in political decision-making is reflected in the way we maintain control of these areas of our lives. Although we can delegate control of our property and even of our spirituality to others, we are less likely to do so than we are to delegate political decision-making. Because of their significance in our lives, we tend to keep decision-making with respect to these rights in our own hands. Guaranteed rights are devices which enable us to do this by limiting the extent to which the state can control these aspects of our lives.

C. THE VALUE OF JUDICIAL REVIEW OF ENTRENCHED RIGHTS

If I am correct in assuming that some rights are of more practical value to us than is the right of political participation, we may be justified in taking measures to ensure that these rights receive some protection from change by means of the political process, even at the loss of some of our right to participate. One way of doing this is to entrench these rights in a charter or bill of rights and to give courts the power to enforce them against the state.

Once we have decided that certain rights are so important that they are worthy of protection from political change, there are a number of advantages in empowering courts to enforce these rights, even if we concede that courts are no better placed than are legislatures to determine what our rights are. Firstly, everyone has guaranteed access to courts, ensuring that they can have their side of the argument heard and considered, whereas it is often difficult to gain access to the legislature to put our views about specific proposals. Legislatures can refuse to hear us and although we can put our case in the arena of public opinion, we are not guaranteed a hearing before the legislature itself. However, courts cannot pick and choose whom they will hear in the way that legislatures can. If a case falls within the jurisdiction of a court and if the plaintiff satisfies the relevant standing rules, the court must hear the case.

Secondly, being able to take the issue to court enables the party to have the impact of legislation on his or her rights considered. Legislatures necessarily consider the overall picture and cannot conceive of how a general law will operate in every case to which it applies. A court must consider the particular facts and can tailor its decisions to those facts, enabling a much more nuanced approach.

There are, of course, problems in permitting courts to enforce bills of rights. The most important is that bad decisions can become entrenched and difficult to change. If the legislature makes a mistake, the public can pressure it to reverse its decision and to repeal the offending legislation. If it fails to do so, the public can throw the recalcitrant legislators out at the next election and replace them with legislators who are willing to reverse the decision. This is not an option with a court, because judges are tenured and hence are less accountable for their decisions. The problem is not, in my opinion, insurmountable and may be overcome by mandatory periodic reviews of the content of any charter or bill of rights, allowing the courts' interpretation of the rights to be considered and reversed if necessary.

The second is that the rich and the powerful have more access to the courts than do the poor and powerless. If one justification for rights is to ensure that the interests of minorities are not ignored, the fact that they may find it difficult to access the courts suggests that entrenching a bill of rights may be of little use to them. However, this problem may be overcome, at least in principle, by the provision of appropriate legal aid.

V. Rights, remedies and democratic self-government

In Charter jurisdictions, such as the UK, New Zealand and Victoria, there has been a refusal to allow individuals a remedy for breach of their Charter rights.[8] The only remedy allowed has been that of the declaration of incompatibility.[9] In my opinion, this has the potential to deprive the Charters of much of their value to ordinary citizens facing the power of government. Unenforceable rights are of no great value to an individual complaining of the breach of a right. The individual wants the breach remedied. Declarations of incompatibility are of value not so much to the wronged individual but to organisations representing classes of people or to businesses such as the media who face similar issues on a regular basis and who want to make a point. As a result, the broad thrust of the Charters may be to gain a ruling from courts about the content of our rights rather than to protect an individual from government.

Declarations of Incompatibility in my opinion achieve an inappropriate institutional balance between parliament and the courts because they deny the courts their proper role, which is to settle disputes by determining people's rights in concrete disputes. The drafters of the Charters, because they were reluctant to allow the court to give individuals remedies for breaches of their rights have developed a role for the courts which departs from their core business of settling disputes. Instead they are given the role of entering into a dialogue with the legislature about whether legislation is consistent with the Charter.

The debate takes place at two levels. First, the courts are given power to interpret legislation so as to be consistent with Charter rights, a power which Allan and other critics argue is tantamount to a power to rewrite the legislation. It is undoubtedly a broad power, especially as the courts in the UK have interpreted it.[10] The second is the power to issue declarations of incompatibility, which enables a court to declare that legislation is incompatible with the Charter. Allan argues that these powers go beyond power to enter into a dialogue over rights and in practice give the court the last word in that parliament almost always accepts the court's ruling and modifies the legislation in accordance with it.

The role which the Charters give the courts is in my opinion a major departure from the core role of the courts, which is to settle disputes and sets them up in opposition to the legislature as declarers of legal standards in many areas. No doubt, the drafters of the Charters were influenced by the US model in which the Supreme

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8 *Human Rights Act 1998* (UK) s 4; *New Zealand Bill of Rights Act 1990* (NZ) s 4; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.

9 *Human Rights Act 1998* (UK) s 4; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36. This remedy is not available in New Zealand.

10 The House of Lords has held that the *Human Rights Act* may require that words be added to legislation so that it is interpreted in a way which is consistent with both the ordinary, unambiguous meaning of the language and with the intention of parliament; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571–2 (Lord Nicholls).

Court has come to rival Congress in many areas of law making, seeming to take jurisdiction away from the legislature in areas such as abortion law, desegregation and criminal procedure. The US position was the result of deliberate decisions by powerful representative groups to bring representative actions in the courts to enforce the Bill of Rights as a way of forcing social change. *Brown v Board of Education*[11] is a classic example of this type of litigation. No doubt the drafters of the Charters were influenced by the US position to seek a way of ensuring that the Charters were not used to strip the legislature of jurisdiction. The way they chose to do this was to deny the courts the power to enforce Charter rights against government. In this way they hoped to prevent the courts from making enforceable decisions about the scope of rights at the behest of representative groups which had the potential to take important issues out of the hands of parliament.

I think that this approach has had the opposite result to what was intended. By denying the courts the power to give a remedy, the Charters have made it the core business for courts in charter cases to pass judgment on legislative compliance with the Charter, leading to the situation which the drafters of the Charters no doubt hoped to avoid, in which the courts are de facto setting the standards in some areas of law and effectively depriving parliaments of their jurisdiction in these areas. It is this result which Allan so deplores because it deprives the people of power to influence the decision.

The solution may be to do the opposite of what the Charters have done; give the courts the power to give remedies in Charter cases but strip them of the law making power which the Charter confers. This could be done by repealing the provisions giving expanded powers of interpretation and the power to issue declarations of incompatibility. That of course would not prevent the courts from laying down broad and binding standards when giving remedies for breaches of rights. The most radical way to prevent this would be to abolish the doctrines of invalidity and of precedent in their application to rights cases. A less radical but effective way to limit the ability of the courts to take matters out of the hands of the legislature is to have mandatory periodic reviews of the contents of a charter or bill.

There are costs in doing this. If the doctrines of invalidity and precedent were abolished, rights cases would be a mass of single instances and we would have no binding interpretation of the charters. As a result, representative actions would be deprived of much of their usefulness and members of minorities facing government action would not so easily gain the benefit of a decision in one case in their favour. Of course, it is likely that a consensus as to the correct interpretation would develop in the courts over time and that consensus would influence government action. But a decision would not bind anyone other than those subject to the judgment orders. In particular, it would not bind other courts, making it much easier for government to resist or reject the interpretation adopted as a general guide to the meaning of the Charter. These costs suggest that the remedies may be worse than the disease. On the other hand, mandatory

11 347 US 483 (1954).

periodic review of the content of a bill or charter is relatively costless and may be the best way of ensuring that the courts do not have the final say on rights issues.

VI. Rights, change and paternalism

Allan argues that supporters of entrenched bills of rights are paternalists at heart, believing that they know better than their descendants which rights are so important that they should be given semi-permanent protection in an entrenched charter. Entrenching rights involves an element of trying to second-guess the future and some rights guaranteed in an old instrument such as the US Constitution look anachronistic today. It is paternalistic to try to entrench rights which we see as important because our descendants may disagree with us. However, this is not a compelling argument against entrenching rights but relates to the way in which they are entrenched. In my opinion, if we adopt a bill of rights, we should entrench the bill but require a convention to revise the bill after a set period of time. The bill as revised should then be put to the people in a referendum inviting them to determine whether the bill should remain in force and inviting them to accept or reject the propose amendments. In that way we can avoid any paternalism by allowing each generation to revise the bill and to choose to continue it or not.

VII. Conclusion

In *The Vantage of Law,* Allan argues that it is wrong to permit judges to make moral judgments at the point of application of the law, especially if those judgments are effectively entrenched so that they cannot be reviewed or reversed except by the courts themselves. His major reason is that this prevents concerned citizens from having any influence over important decisions with respect to rights and vests the power to make those decisions in a narrow judicial oligarchy. Hence he concludes that entrenched bills and charters of rights should not be adopted as they empower judges to make moral decisions at the point of application and protect those decisions from revision except by the courts themselves.

I have argued that Allan is wrong for a number of reasons. Firstly, Allan assumes that relatively benevolent legal systems are equally benevolent to all their citizens. History suggests that that is not the case, as in many benevolent systems there are groups which have been the subject of adverse legal discrimination. Having a bill of rights gives such groups two chances to complain about adverse treatment, one in the legislature and one in the courts. As they cannot be denied access to the courts, which cannot normally decline jurisdiction, this improves their chance of a having their point of view heard.

Secondly, Allan overvalues the practical importance of the right to political participation to the informed citizen. In a large representative democracy, citizens may have little practical input into political decision-making. Hence, they may consider it in

their best interests to give up some power to influence political decision-making in exchange for enhanced protection of rights, especially of those rights which are likely to be of greater significance in their lives, such as freedom of speech, freedom of conscience and the right to own property.

Thirdly, Allan ignores the advantages in terms of clarity, transparency and consistency in framing judicial review of government action in terms of broad substantive moral rights. The alternatives, limiting review of government action to ensuring that government does not exceed the limits of its legal powers or basing review on grounds related to the way in which government decisions are made, such as irrelevant considerations and *Wednesbury* unreasonableness, are not attractive alternatives. The first is too narrow, giving individuals little protection against government interference with their rights, while the second, although giving better protection, is technical and complex, often preventing the parties from raising their real concerns and making Administrative law the realm of the cognoscenti.

Hence, there is much to be said in favour of bills and charters of rights giving judges power to evaluate government decisions according to broad moral standards. However, if we give judges that power, we raise the spectre of binding judicial decisions on these matters which, in practice, only the judges can revise. To avoid that problem, some legislative charters have not given the courts the power to strike down legislation inconsistent with the Charter, but have limited the 'remedy' to a statement of incompatibility. I have argued that that may have been a mistake because it takes from the courts their core function of settling disputes about the legal rights of the parties, reducing the usefulness of the Charter to a person challenging government action, and encourages the courts to make broad pronouncements with respect to whether legislation is consistent with some basic rights. A better way of ensuring that the decisions of courts under bills and charters of rights are revisable through the political process is to have an elected convention conduct a mandatory, periodic review of their content, with the power to implement changes or to send proposed changes to a referendum.