

Evaluating the Human Rights Performance of Legislatures

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Abstract

Despite increased recognition of the role of legislatures in protecting human rights, particularly through their scrutiny of proposed legislation, there has been little detailed consideration of how best to evaluate their performance in discharging this role. This article aims to fill this significant gap by outlining and defending a methodology for carrying out such an evaluation. Our objective is to provide a rich and valid account of the performance of legislatures by identifying strengths and weaknesses of existing legislative institutions and processes. Such a process can also inform recommendations as to how institutions and processes, in particular legislatures, might be improved.

1. Introduction

Evaluation is an increasingly important part of human rights practice and human rights scholarship. In particular, there is a distinct and growing literature that reflects on the methodologies that are appropriate for evaluating human rights performance. The literature responds to the diverse contexts

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in which questions about human rights performance arise, from worldwide surveys of overall human rights compliance by States, through attempts to track the impact of treaty ratification, refugee policy, economic and military assistance, democracy and direct foreign investment on human rights,¹ to small scale studies of the impact of individual public and private sector projects.²

There is a well-developed literature that considers methodologies for evaluating the relative performance of States and the impact of human rights projects within States. However, these methodologies are not suited to all human rights evaluations. Evaluation methodologies need to be carefully tailored to their objectives to ensure that appropriate questions are being asked and answered and that appropriate techniques are being employed. Just as measures that are designed to provide ‘very gross comparisons of states’ repressiveness’ are not appropriate to provide ‘very fine assessments’ of the relationship between rights and development,³ such measures do not purport to (and cannot coherently be used to) evaluate, for example, the relative performance of different governmental institutions within individual States.

One area in which the methodological literature is especially sparse is in relation to evaluation of the performance of legislatures in protecting human rights. There are at least two partial explanations. The first is that much of the drive to develop methodologies for human rights evaluation has come from a desire to identify nations whose human rights record is weakest and track the impact of local and international interventions aimed at improving that record.⁴ A focus on the output of legislatures is rather beside the point in a State where human rights are daily threatened by extrajudicial killings and imprisonment or famine and disease. The second partial explanation is that, until recently at least

1 Landman, ‘Measuring Human Rights: Principle, Practice, and Policy’, (2004) 26 *Human Rights Quarterly* 906 at 907–8. See, for example, Hathaway, ‘Testing Conventional Wisdom’, (2003) 14 *European Journal of International Law* 185 at 185–9; Goodman and Jinks, ‘Measuring the Effect of Human Rights Treaties’, (2003) 14 *European Journal of International Law* 171 at 171–3; Donnelly and Howard, ‘Assessing National Human Rights Performance: A Theoretical Framework’, (1988) 10 *Human Rights Quarterly* 214; and United Nations Development Programme, *Human Development Report 2004: Cultural Liberty in Today’s Diverse World* (Geneva/New York: UNDP, 2004) at 128.

2 See, for example, Barsh, ‘Measuring Human Rights: Problems of Methodology and Purpose’, (1993) 15 *Human Rights Quarterly* 87; Cingranelli (ed.), *Human Rights: Theory and Measurement* (Basingstoke: Macmillan and Policy Studies Organization, 1988); and Landman, *ibid.*

3 Barsh, *ibid.* at 121.

4 Barsh, *ibid.* at 115–6, notes that the indicators used to measure human rights were designed to detect repression of human rights and that they, therefore, ignore subjective, positive concepts of freedom. Freedom House’s annual survey, *Freedom in the World*, evaluates trends in the ‘state of global freedom as experienced by individuals’, the opportunity for individuals to act spontaneously, without their political rights or civil liberties being subject to restriction by the state’. Freedom House, ‘Freedom in the World 2005: Survey Methodology’, available at: <http://www.freedomhouse.org/template.cfm?page=35&year=2005>. Human Rights Watch is motivated by a similar aim. It monitors State compliance with human rights norms with the goal of uncovering human rights abuses and holding governments publicly accountable for violations of human rights. See Human Rights Watch, ‘About HRW’, available at: <http://www.hrw.org/about/whoware.html>.

and especially in the discipline of law, academic debates about the protection of human rights in democratic States have tended to focus on the role of the judiciary;⁵ the extent to which international and comparative constitutional law may influence judicial decision-making;⁶ the role of the executive;⁷ and the effects of a Bill of Rights.⁸ Scant attention was paid to the role played by legislatures in the domestic protection of human rights, despite their central role in governance and the democratic legitimacy they lend to the recognition and conferral of rights.⁹ The result is that there is very little published detailed analysis on the performance of legislatures in the protection of human rights domestically and even less discussion of what methodology is suitable when going about such an analysis.¹⁰

In this article, we outline a methodology for evaluating the performance of legislatures in protecting human rights when they carry out their law-making function. The primary objective of this methodology is to provide a rich account of the performance of a particular legislature, or several legislatures within a federal State, in a manner that enables researchers and practitioners to identify

- 5 See, for example, Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective', in Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1999) 454; Hunt, 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession', (1999) 26 *Journal of Law and Society* 86; and Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts?', (2003) 38 *Wake Forest Law Review* 635.
- 6 See, for example, Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', (1988) 62 *Australian Law Journal* 514. For a recent survey, see Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement', (2005) 119 *Harvard Law Review* 109; Waldron, 'Foreign Law and the Modern *Ius Gentium*', (2005) 119 *Harvard Law Review* 129; Young, 'Foreign Law and the Denominator Problem', (2005) 119 *Harvard Law Review* 148; and Koh, 'International: Law as Part of Our Law', (2004) 98 *American Journal of International Law* 43.
- 7 See, for example, Risse, Ropp and Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (New York: Cambridge University Press, 1999), which studies the mechanisms and processes by which governments are induced to move from repressive behaviour to human rights rule-consistent behaviour.
- 8 See, for example, Alston, *supra* n. 5; and Ison, 'A Constitutional Bill of Rights—The Canadian Experience', (1997) 60 *Modern Law Review* 499.
- 9 See Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 32–3, 53–5 and 283–5.
- 10 Janet Hiebert's work is the notable exception: Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal and Kingston: McGill-Queen's University Press, 2002); Hiebert, 'Parliamentary Review of Terrorism Measures', (2005) 68 *Modern Law Review* 676; Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review', (2005) 35 *British Journal of Political Science* 235; and Hiebert, 'Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?', (2006) 4 *International Journal of Constitutional Law* 1. There is also some useful analytical work: see, for example, Hiebert, 'A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny', (1998) 26 *Federal Law Review* 115 at 116–18 and 125–31; Kinley, 'Parliamentary Scrutiny of Human Rights: A Duty Neglected?', in Alston, *supra* n. 5, 158 at 161–8; Galligan, 'Senate Committees: Can They Halt the Decline of Parliament?', (1991) 5 *Legislative Studies* 40 at 46–7; and Lester, 'Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998', (2002) 33 *Victoria University of Wellington Law Review* 1 at 16–21.

strengths and weaknesses of existing legislative institutions and processes and to make recommendations about how institutions and processes might be improved. It is not designed as a comparative tool for assessing human rights performance across a large number of States. Rather, it is designed as a tool to provoke reflection within a State about how well a particular institution of government is working in the protection of human rights. It is most useful in established democratic States in which the legislature is broadly representative and in which a rule of law tradition means that legislation is regularly enforced. It is not likely to produce meaningful data in States where the legislature functions as a façade, attempting to legitimise a powerful and unrepresentative government, or where there is no well-established legal order and legislation is routinely ignored or defied by the government. It was developed and first implemented by us in order to assess the human rights performance of Australian legislatures as part of a broader project on the role of legislatures in the protection of human rights.¹¹

In established democratic States, legislatures perform several distinct functions. They are representative bodies providing a mechanism by which citizens participate in public affairs and government; they are forums in which governments can be held accountable for their conduct; and they are (more or less) deliberative law-making bodies. In discharging each of these functions they can affect the enjoyment of human rights.

The methodology outlined here focuses principally on the last function, the law-making function. It does so because of the significant and direct effect of this function on human rights. In established democratic States, the law that legislatures enact is regularly enforced and its human rights impact is felt by citizens and others. Legislatures can enact laws that protect human rights. They can enact laws that limit human rights. They can accept or reject legislative proposals (in parliamentary systems this includes government proposals) or amend them so as to increase or reduce the protection given to human rights and to increase or reduce any limitation of human rights. When and how legislatures do so affects the law that is enacted and operates within the State.

A further reason for focussing on the performance of legislatures in protecting human rights is connected to the observation we made earlier: that until recently, the principal institutional focus for human rights scholars in democratic States has been the courts.¹² The increasing focus on legislatures in the theoretical and empirical literature has been driven by several

11 The methodology that we propose requires a significant commitment of time and resources. We were fortunate to secure funding from the Australian Research Council under its Discovery Project grants scheme. The project publications and working papers can be found on the project website at: <http://cccs.law.unimelb.edu.au/go/research-and-publications/legislatures-and-human-rights-project/index.cfm>.

12 For recent surveys, see, for example, Friedman, 'The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty (Pt 5)', (2002) 112 *Yale Law Journal* 153; and Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

factors but two are particularly noteworthy. First, some scholars have increasingly emphasised the contestability of questions about what human rights standards require, and the role of legislatures in provisionally resolving those questions.¹³ Second, these and other scholars concerned with the legitimacy of courts enforcing human rights instruments and Bills of Rights have recognised the need to test the assertion that legislatures are particularly unsuited to address the issues of principle that arise in connection with human rights (and the corresponding assertion that courts are particularly suited to addressing those issues).¹⁴ Both demonstrably suggest the need for measures of the effectiveness of legislatures in protecting human rights.

There are two significant challenges that must be confronted in developing a methodology to evaluate the human rights performance of legislatures. The first is conceptual: what standard of human rights compliance can the evaluator coherently employ, given that human rights are often contestable and that democratically elected representative institutions often have a legitimate role in identifying how those contestable issues should be resolved. The second is more practical and institutional: ensuring that the methodology is sufficiently nuanced and flexible to accommodate the complexity of the legislative and policy process. Part 2 considers these two sets of conceptual and institutional challenges. They must be taken seriously in devising an appropriate methodology for evaluating the performance of legislatures. It is not sufficient to rely on standard methodologies for evaluating human rights situations in general when developing an appropriate methodology for institutional evaluation. These two challenges mean that some of the standard methodologies developed for evaluating human rights are not suitable for an evaluation that is focussed on the effectiveness of the performance of a particular institution of democratic government. In Part 3, therefore, we give an overview of some of the evaluative methodologies that are commonly used in relation to human rights and discuss the manner in which they can best be deployed to evaluate the performances of legislatures. The final part of the article, Part 4, outlines a three-element approach to evaluate the performance of legislatures in discharging their law-making function. Law-making is a deliberate action.¹⁵ In a well-functioning legislature, the decision as to when and how to protect or limit human rights will be a deliberate action.

13 See especially Waldron, *supra* n. 9 at 224–31.

14 Stone, 'Disagreement and an Australian Bill of Rights', (2002) 26 *Melbourne University Law Review* 478 at 493–5; and Sadurski, 'Judicial Review and the Protection of Constitutional Rights', (2002) 22 *Oxford Journal of Legal Studies* 275. See, generally, Christiano, 'Waldron on Law and Disagreement', (2000) 19 *Law and Philosophy* 513 at 542; Eisgruber, 'Democracy and Disagreement: A Comment on Jeremy Waldron's Law and Disagreement', (2002) 6 *Journal of Legislation and Public Policy* 35 at 45–6; and Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron', (2003) 22 *Law and Philosophy* 451 at 479–82.

15 Raz, 'Intention in Interpretation', in George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996) 249 at 265–8.

Our methodology, therefore, places significant emphasis on understanding the operation and performance of those legislative institutions and processes that inform (or fail to inform) legislators about the human rights impact of their actions.

2. Challenges in Evaluating the Human Rights Performance of Legislatures

A. *The Contestability of Human Rights*

A major difficulty facing the evaluation of human rights performance is that human rights are contestable. Questions about human rights give rise to pervasive disagreement, even among people who agree that human rights exist and are valuable and who share whatever cultural context is necessary to make discussion of rights meaningful.¹⁶ As Jeremy Waldron argues, disagreement arises in relation to ‘what it means to call something a right’, ‘what rights we have—what they are rights *to*—and what they are based on’. In particular,

even if there is a rough or overlapping consensus on a set of basic rights or civil liberties such as those secured by the amendments to the US Constitution or those enshrined in the European Convention on Human Rights (ECHR), there is ferocious disagreement about what this consensus entails so far as detailed applications are concerned.¹⁷

Debates about rights are an inescapable part of politics. What one group may regard as a step forward for rights, another (using the same rights framework) may regard as a violation, or even an abuse, of rights. For example, in the United Kingdom, amongst other jurisdictions, there has been an intense, popular and academic debate about whether racial and religious vilification ought to be prohibited by law.¹⁸ At one level, an Act that prohibits religious vilification could be described as a violation of human rights. It infringes on the right of freedom of expression and potentially infringes the rights of religious freedom for groups that believe they are religiously compelled to warn others of the danger of ‘untrue religions’ and advocate the unquestionable truth of their own religious ideals.¹⁹ At another level, it is protective

16 See Donnelly, ‘Cultural Relativism and Universal Human Rights’, (1984) 6 *Human Rights Quarterly* 400. Compare Douzinas, ‘The End(s) of Human Rights’, (2002) 26 *Melbourne University Law Review* 445 at 457–63.

17 Waldron *supra* n. 9 at 11–2 [emphasis in original].

18 Culminating in the debate in the House of Commons (1 February 2006) where the House of Lords’ far-reaching amendments to the government’s proposal were narrowly accepted.

19 See, for example, McGoldrick and O’Donnell, ‘Hate-Speech Laws: Consistency with National and International Human Rights Law’, (1998) 18 *Legal Studies* 453 at 454–64; Hutton, ‘A Gagging Order Too Far’, *Observer*, 19 June 2005; and Owen, ‘Getting Used to Abuse’, *Index on Censorship* (London), 2 February 2005.

of rights—particularly the rights of those religious minorities that find themselves vilified in ways that leave them open to physical attacks, discrimination and psychological damage.²⁰ Debates over this type of legislation in different jurisdictions demonstrate both disagreement about the content of rights (for example, whether the right to religious freedom includes the right to vilify other religions) and also the weight to be given to the various rights considerations at play. Democratic legislatures in broadly comparable jurisdictions have come to different conclusions about the desirability of such legislation.²¹

This example starkly presents the challenges for a methodology that aims to assess the human rights performance of a legislative body. Does parliamentary enactment of this legislation advance or retard the protection of rights in the United Kingdom? How can the evaluator make this judgment? The contestability of human rights means that in many instances there is no external standard to which the evaluator can appeal. The evaluator cannot assume that it is possible to adopt an Olympian detachment that gives their assessment of the legislation and its compliance with human rights some objective quality superior to the assessment made by the parliament. Nor can they simply adopt the rulings of judges or tribunals on human rights as a standard. While judges and tribunals can articulate and apply legal standards derived from human rights instruments, their rulings cannot resolve the moral, political and philosophical disagreements at the heart of many rights issues.²² (This is not to deny the concept of disciplinary expertise in human rights. Lawyers, philosophers, historians, political scientists and others have constructed their own frameworks for analysing and understanding rights. But even among such experts there will be disagreements, different perspectives and disciplinary biases.)

We propose, therefore, that an evaluation should not focus solely on whether the outputs of legislatures comply with human rights but focus also on the processes used by, and capacity of, legislatures when engaging with human rights issues. The process element of such an approach would investigate whether legislative procedures (i) identify proposed legislation that raises potential human rights issues; and (ii) trigger or otherwise result in

20 Home Office Press Release 089/2005, 'Protecting Our Communities From Hatred'; and Branigan, 'New Hate Law "could have stopped riots"', *Guardian*, 10 June 2005. Compare Victoria, Australia, *Parliamentary Debates*, Legislative Assembly, 5 June 2001 at 1643 (Richard Wynne).

21 Contrast the Racial and Religious Tolerance Act 2001 (Vic) and the Racial and Religious Hatred Act 2006 (UK) with the failure to pass the Anti-Discrimination Amendment (Religious Tolerance) Bill 2005 (NSW). For a wider survey of the impact of constitutional norms, see Rosenfeld, 'Hate Speech In Constitutional Jurisprudence: A Comparative Analysis', (2003) 24 *Cardozo Law Review* 1523.

22 See, generally, Waldron, *supra* n. 9.

deliberative processes that give proportionate attention to human rights issues. When this is added to the other methodologies discussed in more detail below, it creates a rich picture of the role of legislatures in the protection and infringement of human rights and one that takes seriously the commitment to the importance of democratic deliberative processes in resolving contested questions about rights.

It is important to note that although this focus on process minimises the contestability problem, it does not completely avoid it. The first element of this approach requires an evaluator to identify whether proposed legislation limits a human right, but, importantly, does not require the evaluator to assess whether that burden is justified. In the case of religious vilification, for example, the legislation would be identified as placing limitations on the right to freedom of expression and religion, but no assessment would be made as to whether the limit was justified. The second element requires an evaluator to assess the seriousness of the potential limit, but again does not require the evaluator to assess whether the limit is justified. Although both elements do require the evaluator to make potentially controversial judgments about human rights, the controversy is more attenuated than that which is involved in asking directly whether legislation breaches human rights standards. This is reflected in the decision-making record of human rights institutions (courts and tribunals) that demonstrate much more agreement on whether a particular law places a limit on a right than on whether the impact of the legislation on human rights is justified.²³

B. Institutional Complexity

Another problem that arises in devising a methodology for evaluating the human rights performance of legislatures is that it is necessary to pay serious attention to the institutional complexity of the law and policy making process. In some contexts, in particular when comparing the rights performance of different States, it may be reasonable to evaluate only the outcome of such processes—to ask how well a particular right is being protected ‘on the ground’. But the outcome of such an evaluation only yields limited information about where institutional responsibility for the protection of rights is being compromised. It does not differentiate between the various institutions that might be responsible for those outcomes, making it difficult or impossible to

23 McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’, (1999) 62 *Modern Law Review* 671 at 683–95.

identify how those institutions and processes might be altered in order to improve those outcomes.²⁴

Equally, a methodology for evaluating the rights-performance of legislatures needs to examine the different internal processes and institutional contexts of otherwise similar legislatures. For example, where—as in the United Kingdom, New Zealand and the Australian Capital Territory—a human rights statute requires both executive certification of human rights compliance and parliamentary scrutiny against human rights standards, it is important to investigate how each of these processes contributes to human rights compliance; how public scrutiny through these processes affects internal scrutiny in the executive branch; and how all are affected by the presence or absence of judicial scrutiny.²⁵

Accordingly, evaluations of legislatures cannot simply focus on the situation 'on the ground'. Nor can they overlook the need for a nuanced understanding of the complex and overlapping, formal and informal stages of the policy and legislative processes. A legislature should not be analysed as an undifferentiated 'black box' that takes policy preferences or legislative texts as inputs and produces legislation as its output. Any methodology that aims to produce rich information about legislative performance has to acknowledge the diversity of internal legislative processes and actors that are capable of affecting human rights. For analytical purposes, in a parliamentary system, those processes and actors might include policy formation in government departments, policy approval by ministers or Cabinet, drafting of proposed legislation, approval of that draft by Cabinet, introduction of the draft into Parliament, scrutiny of the proposed legislation by back-bench party committees and parliamentary committees, parliamentary debate, enactment of legislation and post-enactment evaluation, potentially leading to the formation of new policy and all potentially involving formal and informal consultation with stakeholders and reiterations of part or all of this cycle.²⁶ In a presidential system with strong judicial review, analysis of legislative processes and actors might focus on the role of lobbyists and committees in policy formation and legislative drafting, the role of

24 For example, the difficulties faced by religious minorities in establishing places of worship might be due to the constitutional establishment of some other religion; legislation that discriminates against religious minorities; discriminatory policies adopted by the legislature under facially neutral legislation; or the inability of the state to combat private actions of members of majority religions harassing religious minorities. If the difficulties faced by religious minorities require a response, they will require different responses, directed at different institutions, in each of these situations.

25 Hiebert, 'A Hybrid Approach', supra n. 10 at 116–20.

26 Compare Bridgman and Davis, *Australian Policy Handbook* (St Leonards, NSW: Allen & Unwin, 1998) at 26–8 for discussion of the role of public policy in the Australian political process.

legislative sponsors and cross-party support and the impact of the possibility of judicial review against human rights standards following enactment.²⁷

In evaluating the performance of legislatures in the protection of human rights, therefore, it is necessary to develop a methodology that is sophisticated enough to distinguish between these stages of the legislative process and to evaluate human rights protection at each of these stages. An approach that simply categorises the outputs of the legislative process according to whether they advance or retard the protection of human rights may contribute some information to an assessment of the overall protection of human rights in a State and, for some purposes, this is the most useful and relevant information. However, for our purposes, it is insufficient as it does not adequately identify a programme of institutional reform that aims to improve the performance of the legislature or to draw on its strengths to propose mechanisms that might usefully be adopted by other legislatures.

3. Methodological Approaches To Evaluating Rights Performance

We noted above that there is a wide and growing literature that addresses methodological approaches to evaluate rights performance. This is not the occasion to survey the full breadth of that literature.²⁸ However, some aspects of that literature are particularly relevant to developing a methodology for evaluating the human rights performance of legislatures. It is those aspects that we focus on here. In this section, we consider some of the most commonly used methodologies for evaluating human rights and assess their suitability for use in a project for evaluating the human rights performance of legislatures.

A. Expert Evaluations

Expert evaluations of the rights situation in a particular country or countries are a common method by which to evaluate rights. They require experts to score the country's protection of particular rights against broadly defined criteria. One well-known example of this approach is the annual Freedom House report *Freedom in the World* that ranks States according to two broad categories: political

27 Some of these issues are canvassed from the perspective of congressional deliberation on constitutional (rather than human rights) issues in Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System* (Durham, NC: Duke University Press, 2004) at 11–30; and Peabody, 'Congressional Attitudes toward Constitutional Interpretation', in Devins and Whittington (eds), *Congress and the Constitution* (Durham, NC: Duke University Press, 2005) 39.

28 Instead see, for example, Landman, *supra* n. 1, for a broad survey of the methodology of human rights measurement.

rights and civil liberties.²⁹ A group of experts, drawing on a range of sources (including news reports, non-governmental organisation publications, academic analyses and visits to the region), give each country a raw score between zero and four for 25 questions.³⁰ Zero represents the 'smallest degree' of liberty and four the 'greatest degree of rights or liberties present'. After the experts have given their score for each question, the totals are tallied and averaged. On the basis of these averages, States are ranked as being 'free', 'partly free' or 'not free'. States are also ranked for political and civil liberties based on their raw score for the two checklists.

The *Freedom in the World* report is a significant undertaking because of its scale (192 States and 14 territories)³¹ and the difficulties in obtaining information from many of those States. Its categorisation of States as free, partly free or not free, is useful as having concrete scores can focus attention on areas in which a State's rights-performance is weak. It can also illustrate the extent to which the human rights situation in a State has improved or deteriorated over time and give some sense of the degree to which this has happened.

There are two reasons, however, that we do not adapt this kind of approach as the sole methodology for our study of the human rights performance of legislatures.

The first is the contestability of rights, an issue that we flagged in Part 2 above. Our focus is on the performance of legislatures in established democracies. In this context, heavy reliance on experts to evaluate human rights compliance presents the issue of contestability in its most acute form. It is difficult to explain why the assessment of such experts should be regarded as the primary measure when assessing the output of legislatures in established democracies. Such concerns are less relevant in constructing worldwide scales that aim to present a broad evaluation of the rights situation on the ground in a wide variety of countries. This is particularly so when the government

29 The Freedom House methodology has been criticised for its lack of transparency and for collapsing multiple dimensions of human rights performance into single indicators. Goldstein describes the basis for assigning scores in the Freedom House evaluations as 'entirely impressionistic' (Goldstein, 'The Limitations of Using Quantitative Data in Studying Human Rights Abuses', in Jabine and Claude (eds), *Human Rights and Statistics: Getting the Record Straight* (Philadelphia: University of Pennsylvania Press, 1992) 35 at 48. However, Landman, *supra* n. 1 at 928, observes that, '[t]he measures of personal integrity rights violations have over the years shown reasonably high intercoder reliability'. Bernt criticises the ranking exercises as disguising political and cultural choices, see Bernt, 'Measuring Freedom? The UNDP Human Freedom Index', (1991–1992) 13 *Michigan Journal of International Law* 720 at 731–2. Other more transparent approaches that rely on indirect observation of human rights performance include the CIRI Human Rights Dataset Project and the Purdue Political Terror Scale. Each of these codes the narrative reports on human rights violations in the United States State Department Country Reports and Amnesty International Annual Reports: see, respectively, <http://www.humanrightsdata.org/>; and Gibney and Dalton, 'The Political Terror Scale', (1996) 4 *Policy Studies and Developing Nations* 73.

30 Freedom House, *supra* n. 4.

31 *Ibid.*

is repressive, democracy non-existent or attenuated and political dialogue limited. In such circumstances, where there is little reason to defer to the assessment made by democratic institutions about the appropriate balance between human rights and other considerations, there may well be good reason for using the view of independent experts as a measure of rights performance.

The second is that our aims are different from those of Freedom House and other similar exercises that aim to produce broad rankings of the overall protection of rights in large groups of States and to track those rankings over time. Instead, we aim to produce a rich description of the performance of particular institutions within a State or small group of States. Our use of expert evaluation is, therefore, targeted to ensure that we go beyond an assessment of legislative procedures while minimising the impact of the contestability of rights. While there may be room for debate over conceptions and applications of human rights there are also cases where legislatures may simply cross clear legal lines (for example, in relation to the prohibition of torture) with little or no regard for the rights at issue. We describe below how our targeted use of expert evaluation is also complemented with other forms of evaluation in order to meet our aim of developing a rich picture of legislatures that does not simply assume an objective answer to complex rights questions and that focuses on process as well as outcome.

B. Indicators

Another commonly used quantitative measurement methodology in the human rights field relies on indicators rather than on expert opinion³² in order to assess the fulfilment of rights in a particular State or States.³³ ‘Indicator’ is used in a number of senses in the literature, but the central concept is a ‘piece of information [usually a statistical measure] used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation.’³⁴ Indicators are frequently used in measuring economic and social rights, especially as those rights are often measured in the context of development projects where

32 Although Barsh, *supra* n. 2 at 91 and 107, notes that many indicators still rely on various forms of subjective expert opinion: ‘The concept/indicator distinction is therefore more a question of relative level of generality, than a question of observability.’

33 Sano and Lindholt, ‘Human Rights Indicators: Country Data and Methodology 2000’, Danish Institute for Human Rights, available at: <http://www.humanrights.dk/departments/international/PA/Concept/Indicato/Ind2000>, at 55–6, demonstrate that the concept can become blurred. See also Thede, ‘Human Rights and Statistics—Some Reflections on the No-Man’s-Land Between Concept and Indicator’, International Centre for Human Rights and Democratic Development, available at: <http://www.ichrdd.ca/english/commdoc/publications/demDev/statisticsIndicators.html>.

34 Green, ‘What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement’, (2001) 23 *Human Rights Quarterly* 1062 at 1065.

indicators are commonly used as measures of progress. The best known, and probably most sophisticated of these, are those used by the United Nations Development Programme (UNDP). At present, the UNDP does not include direct human rights measurements in its reports,³⁵ but uses indicators to analyse a range of issues, particularly those associated with economic and social rights,³⁶ generally employing a set of indicators for each index.³⁷ For example, the gender-related development index takes into account the following indicators: female/male life expectancy; female/male adult literacy rate; female/male education enrolment ratio; and female/male estimated earned income.³⁸ This gives a snap-shot of gender equality within a given society. Such indicators can play a useful role in allowing for longitudinal and comparative studies, and produce helpful data that adds to the picture of human rights compliance in a State.

While this method might seem to escape the problems of the conceptual disagreements about rights in developing and applying the indicators themselves, it is impossible to escape the need for value judgments about the appropriate interpretation of rights and which indicators are most useful in assessing compliance with that right.³⁹ For example, the ratification of human rights treaties has been employed, but also attacked, as a useful indicator for demonstrating the commitment of a State to human rights.⁴⁰

Despite some of the limitations of indicators, there is certainly a place for indicators in evaluating the human rights performance of legislatures. Again, it is necessary to avoid simply importing the indicator measurements that are used to evaluate the state of human rights on the ground but that do not (and do not set out to) determine which institutions have responsibility for human rights violations. Instead, indicators that are targeted to the procedures of the legislature are the most useful in this type of evaluation. For example, relevant indicators of whether or not legislatures take human rights seriously include the resources, time and personnel allocated to the various legislative mechanisms that have a role in scrutinising proposed

35 For a useful summary of the political criticisms of the index, as well as a critique of the UNDP's methodology, see Bernt, *supra* n. 29. The Human Freedom Index was only ever employed in 1991: United Nations Development Programme, *supra* n. 1 at 128.

36 See United Nations Development Programme, *supra* n. 1 at xiii–vi.

37 Aggregating sets of indicators assists with some of the problems of data interpretation discussed subsequently. See Kaufmann, Kraay and Zoido-Lobaton, *Aggregating Governance Indicators*, World Bank Development Research Group and Governance Regulation and Finance, World Bank Institute, Policy Research Working Paper 2195, October 1999, available at: <http://ssrn.com/abstract=188548>, at 1–4.

38 United Nations Development Programme, *supra* n. 1 at 217–20.

39 See Bollen, 'Political Rights and Political Liberties in Nations: An Evaluation of Human Rights Measures, 1950 to 1984', in Jabine and Claude (eds), *Human Rights and Statistics: Getting the Record Straight* (Philadelphia: University of Pennsylvania Press, 1992) 188, for a discussion of measuring political rights and freedoms.

40 See Hathaway, 'The Cost of Commitment', (2003) 55 *Stanford Law Review* 1821 at 1822–3; Hathaway, *supra* n. 1 at 185; and Goodman and Jinks, *supra* n. 1 at 171.

laws for compliance with human rights. In many legislatures, the principal mechanisms include parliamentary committees. The information derived from these indicators is useful but rather remote from the impact of the committee system on the human rights compliance of the proposed legislation the committees consider. These indicators must, therefore, be supplemented by some consideration of the extent to which committees' human rights analysis and recommendations are taken seriously and result in concrete improvements in human rights compliance.⁴¹ A second set of indicators, therefore, includes the number and proportion of committee recommendations for amendments to proposed legislation that are accepted by the proponents of the legislation or by the legislator itself. Such supplementary indicators are also enriched by the qualitative information gained from interviews with committee members. For example, members of scrutiny committees may claim that their committees are very effective in obtaining changes to legislation and point to a small number of salient examples. A wider study of how often the legislature does in fact consider and act on the recommendations of committees can assist the evaluator in determining whether the cases put forward by committee members are the exception rather than the rule. Again, however, careful analysis is needed. Committees may reasonably put considerable time and political effort into obtaining important amendments to significant legislation while recognising that a host of less important amendments may never be achieved.⁴² Nonetheless, as long as it is supplemented with appropriate additional data that is more qualitative in nature, indicators related to the time, resources and personnel dedicated to human rights issues within a legislative process can provide a useful insight into how seriously the legislature takes human rights compliance. Designing indicators of how successful the legislative process is in identifying legislation that limits human rights and how effective such processes are in ensuring full and proper consideration of the human rights implications of such legislation is a complex matter. It is discussed more fully in Part 4 of this article.

C. Self-assessment

Another useful type of measurement for evaluating human rights performance does not measure (or even claim to measure) a set of objective circumstances but measures what the population believes about how well particular rights

41 Compare Aldons, 'Rating the Effectiveness of Committee Reports: Some Examples', (2001) 16 *Australasian Parliamentary Review* 52 at 59–60.

42 As Lindell has pointed out, '[a] short single amendment may have much greater significance than a [sic] numerous minor amendments', Lindell, 'How (and Whether) to Evaluate Parliamentary Committees—From a Lawyer's Perspective', talk given on 18 November 2004 to a meeting of the *Canberra Evaluation Forum*, available at: <http://www.aph.gov.au/house/house.news/magazine/ath24.lindell.pdf> at 6.

are protected in a given State.⁴³ This approach is particularly useful in the development context when the aim is to measure the extent to which development contributes to freedom in the sense that individuals perceive that they have an expanded range of life-choices.⁴⁴ Some preliminary work has also been done outside the development context.⁴⁵ The principal controversy surrounding these measures is whether it is possible to establish cross-cultural reliability,⁴⁶ but this is less important in a context where a particular legislature and the views of a particular population are being explored.

This approach gives some sense of the concerns of ordinary people.⁴⁷ It may be said, therefore, to reflect appropriately the democratic character of rights. With a sufficiently large sample size it may also allow longitudinal tracking of perception of rights. People's subjective beliefs about how well human rights are protected, however, are only a rather indirect indicator of how well those rights are in fact protected. The reason that experts are used to assess States in other quantitative measures is that rights concepts are complex and require some degree of technical knowledge. Moreover, subjective measures may also fail to give an accurate view of rights protection when rights abuses are focussed on a fairly small minority of the population, while much of the population is ignorant of (or accepts the legitimacy of) those abuses.

The final and most salient problem for our purposes is, once again, the lack of institutional specificity. It may be plausible to measure public confidence in, or beliefs about, members of the legislature and their capacity to protect human rights, but these are very indirect indicators of the human rights

43 See, for example, Spogárd and James, 'Governance and Democracy—The People's View', Paper presented at the United Nations University Millennium Conference, 19–21 January 2000.

44 Barsh, *supra* n. 2 at 118.

45 See Galligan and McAllister, 'Citizen and Elite Attitudes Towards an Australian Bill of Rights', in Galligan and Sampford (eds), *Rethinking Human Rights* (Leichhardt, NSW: Federation Press, 1997) 144; Community Agency for Social Enquiry, 'Monitoring Socio-Economic Rights in South Africa: Public Perceptions', 1998, available at: <http://www.case.org.za/htm/soceco3.htm>; and European Commission, 'Central and Eastern Eurobarometer: Public Opinion in Central and Eastern Europe, Nos. 1–8' (1990–1998). A similar project has recently been launched in Kenya: Miano, 'Launch of Public Perception Survey on Human Rights in Kenya', Kenya Human Rights Commission, available at: <http://www.khrc.or.ke/news.asp?ID=30>.

46 Barsh, *supra* n. 2 at 96–7 and 119; and Landman, *supra* n. 1 at 923–4.

47 See Hydén, Court and Mease, *Making Sense of Governance: Empirical Evidence from Sixteen Developing Countries* (Boulder, CO: Lynne Rienner Publishers, 2004) at 207–8 for further advantages and disadvantages of using surveys as compared with the views of experts. The World Governance Survey, for example, drew on a group of 'Well Informed Persons' (WIPs) for their data: Hydén, Court and Mease, 'Measuring Governance: Methodological Challenges', World Governance Survey Discussion Paper No. 2, United Nations University, available at: <http://www.odi.org.uk/WGA.Governance/Docs/WGS-discussionPaper2.pdf>. Similarly, Freedom House has a panel of experts (led by three people in the latest survey): see Karatnycky, Piano and Puddington (eds), *Freedom in the World: The Annual Survey of Political Rights and Civil Liberties 2004*. Despite the claim that Freedom House makes to cultural neutrality, all the key people responsible for overseeing the project and making assessments of rights were Americans. The possibility (or even perception) of potential bias is reduced by surveying an appropriate sample of the public.

performance of legislatures. Moreover, it seems unlikely that members of the general public have the knowledge or institutional understanding to consistently distinguish the responsibility of the legislature and other branches of government for at least some aspects of human rights performance.

This is not to say that self-assessment measures have no place in evaluating the human rights performance of legislatures. Their greatest value for our purposes is in identifying attitudes towards rights, both amongst legislators (and their staff) and members of the wider population. Relevant data includes what these cohorts understand human rights to mean (as compared to some theoretical or legal definition of the term) and gaining insight into how legislators perceive the legislature to work in relation to human rights. These views can be useful compared with those of the general population to test the understanding of, and the commitment to, human rights expressed by those in the legislative system; something that bears on the extent to which legislatures give effect to the democratic nature of rights. If, for example, legislators take quite a different view of the nature and importance of rights from the community, then this calls into question the claims of legislatures to be best placed to protect rights because of their democratic nature.

D. Qualitative Measurements

Qualitative approaches attempt to measure how well rights are protected by using descriptive evaluations rather than attempting to provide numerical valuations or rankings. Despite the disadvantages of such approaches, they are not uncommonly employed.⁴⁸ The measures are more difficult to compare over time or between States. They are more overtly subjective than their quantitative counterparts.

As argued above, however, it is difficult to get away from some degree of subjectivity when evaluating rights. Properly undertaken qualitative evaluations require the evaluator to deal with this subjectivity openly and honestly. A qualitative analysis should clearly set out the conception of human rights that it intends to employ and the reason for doing so, and outline a clear and detailed analysis of the strengths and weaknesses of a State and its institutions in the area of human rights.

Qualitative measures allow for more detailed analyses of the processes under exploration than some of the previously discussed quantitative measurements do. This has two advantages. The first is that it allows for appropriate debate over whether those who have undertaken the analysis have done

48 For example, the International Centre for Human Rights and Democratic Development (now 'Rights and Democracy'), an institution established by the Canadian Parliament, is one of many organisations that consciously decided to opt for qualitative rather than quantitative measurements in evaluating rights compliance: see Thede, *supra* n. 33 at 2.

so properly, taking into account the full range of factors that require consideration. Second, it allows for a more precise targeting of the problems (if any) that are identified. This is a reason why most bodies that do make use of quantitative measurements tend to also use some level of qualitative analysis or description to underpin their quantitative conclusions.

When developing the qualitative components of a methodology for evaluating the human rights performance of legislatures, it is important to bear in mind that as wide a variety of actors as possible should be involved. Members of the legislature themselves, of course, are an invaluable source of information but may well be unavailable or unwilling to speak openly about rights issues. Party politics may mean that politicians will be more interested in promoting the strengths of their own party's (or their own personal) commitment to human rights and to denigrating the capacity of other parties to properly protect rights.⁴⁹ Interviews with former members of legislatures may be useful in eliciting more honest and objective evaluations, but partisanship is still difficult to avoid. Even when politicians are willing to participate and to consider issues of rights from a principled, rather than political, stance, their perspectives still require testing against other data and the views of other participants in or observers of the process, such as expert advisers to scrutiny committees, statutory officers (such as ombudsmen and public auditors), non-governmental organisations that seek to influence the legislative agenda, political journalists and political advisers.⁵⁰

Furthermore, if the complexity of the policy and legislative processes is to be taken seriously, it is necessary to give proper consideration to those who are involved in the development of legislation before it enters the legislature. The precise nature of such roles will depend on the structure of government in each State. The types of personnel who will be relevant in many systems will include senior public/civil servants, those responsible for legislative drafting and those who undertake research for members of the legislature (for example, those who work in parliamentary libraries).

4. A Methodology for Evaluating the Human Rights Performance of Legislatures

As outlined in the preceding part, each of the standard forms of evaluation brings useful information to a thorough examination of the role of a legislature in protecting human rights. Yet, each form of evaluation also has limitations and it is not possible to simply transfer one of the existing methodologies for

49 However, in preliminary interviews that we have carried out in four Australian states, many parliamentarians have spoken relatively candidly and have been prepared to be critical of the actions undertaken by their own party while in government.

50 Compare Pickerill, *supra* n. 27 at 161–5.

evaluating human rights to construct an evaluation of institutions. It is, therefore, necessary to construct a methodology that combines the most relevant and useful forms of evaluation for human rights and to place those forms clearly within the institutional context rather than simply replicating methodologies developed for different purposes.

In this part, we articulate and defend a methodology for evaluating the human rights performance of legislatures that satisfies the objectives and constraints identified. Its key components are:

- a comprehensive compilation and analysis of the rights-oriented elements of each stage of the legislative process augmented by interviews with relevant parties;
- an analysis of the impact of those elements on all of the legislation considered by the relevant parliaments during a particular study period; and
- a set of case-studies that draws on information available on the public record and interviews with relevant parties.

These methodologies have been designed to assess the performance of legislatures in relation to the rights protected under the International Convention on Civil and Political Rights (ICCPR).⁵¹ The rights in the ICCPR include the rights to: life; freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from slavery; liberty and security; freedom from arbitrary detention; freedom of movement; equality before the law; freedom from arbitrary interference with privacy or family; freedom of religion; freedom of belief; and freedom of expression.⁵² Some of these rights (such as freedom of expression) can be limited in order to protect public order and the rights and freedoms of others, while others cannot (such as the prohibition on torture).⁵³

We adopt the rights set out in the ICCPR as the framework for the purposes of this study for several reasons. 154 States have ratified the ICCPR and undertaken to ‘respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind.’⁵⁴ The international community generally has accepted these rights, which, therefore, provide a widely accepted standard of the minimum human rights obligations of States. This widespread acceptance has led to an extensive academic literature regarding the ICCPR, as well as interpretation of the rights by international bodies such as the Human Rights Committee as to the meaning and application of the rights in the ICCPR.⁵⁵ This makes it easier to determine if the standards have been breached using widely agreed definitions of these

51 International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR).

52 Articles 2(1), 6–9, 12, 14 and 17–19, ICCPR, respectively.

53 Article 4(1), ICCPR.

54 Article 2(1), ICCPR.

55 For a good overview of the jurisprudence see Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd edn. (Oxford: Oxford University Press, 2005).

core rights. Finally, limits on such rights created by legislation can be identified with somewhat greater ease than restrictions on other type of rights, particularly economic rights. However, in recognition of the contestability of rights, discussed above, we have included within this methodology space for legislators to express their own conception of rights for the purposes of identifying the extent to which those conceptions overlap with the conception of rights set out in the ICCPR. If the conception of rights outlined by legislators is at least as wide as that set out in the ICCPR, then failure to protect these rights adequately might indicate a systemic failure in the legislative system. If, however, legislators have a conception of rights that is narrower than that set out in the ICCPR, then a more complex evaluation needs to be undertaken that takes this differing conception seriously.

A. Process-mapping

The first component of the methodology aims to present a comprehensive compilation of the elements of legislative process that provide explicit attention to human rights, such as legislative committees, and an analysis of their common features and differences.

It achieves this in two ways.

First, by a desk study of how the rights-oriented elements of the legislative process are formally specified in the constitutions, statutes, standing orders, terms of reference, procedure manuals and so on that establish and regulate legislatures,⁵⁶ and of how these elements operate in practice, as evidenced in the primary records of these processes. The latter element is significant and cannot be overlooked: a committee whose terms of reference direct it to scrutinise legislation against human rights standards but which never meets or which instead devotes its time to non-human rights issues is likely to make only a very limited contribution to the overall legislative performance on human rights issues. At the same time, it is important to avoid the lure of a simplistic quantitative measure of committee performance, such as number of sitting days or number of references to human rights matters.⁵⁷ It is even more important to avoid inappropriate comparison between these measures as applied to vastly different legislative arrangements.⁵⁸

Second, by interviews with current and former participants in these processes (politicians and public servants including legislative drafters,

56 Here it is important to have regard to the issues identified in Part 2 B above.

57 Compare Whittington, 'Hearing About the Constitution in Committees', in Devins and Whittington (eds), *Congress and the Constitution* (Durham, NC: Duke University Press, 2005) 87.

58 For a survey of the wide variety of committee arrangements within democratic legislatures see Olson, *Democratic Legislative Institutions: A Comparative View* (Armonk, NY: ME Sharpe, 1994) at 56–73.

committee staff and legislative research staff) and knowledgeable observers (for example, specialist parliamentary/congressional journalists) in order to move beyond the formal specification of the rights-oriented processes and gain a deep understanding of how those processes operated in practice. The interviews are conceived in much the same way as Pickerill's interviews in his important study of deliberation about constitutional issues in the US Congress.⁵⁹ "These interviews [should be] designed to develop an accurate and reliable description of how the statutes were conceived, drafted, altered, debated, and passed,"⁶⁰ and, in particular, how human rights issues (or constitutional issues in Pickerill's case) bore on the process of enacting those statutes. The interviews should explore participants' attitudes to human rights (including their sources and value, without any assumption that legislators share the researchers' conception of rights); their knowledge of and attitudes to human rights processes (including their motivations to invoke or engage with those processes; the operation, effects and effectiveness of those processes, in general and in concrete cases); and significant achievements and failures by legislatures in protecting rights.

A semi-structured interview format allows for follow-up and probing questions (Figure 1). Interviews provide a valuable opportunity to test tentative theories developed from the public record against the experiences of those who work within the system. Furthermore, they will enable researchers to deepen their understanding of how undocumented (perhaps political, personal or resource-related) factors affect the capacity of committees and other rights-attentive legislative mechanisms to identify and respond to rights issues. Finally, they allow for a better evaluation of the political prospects of any reform suggestions that are developed in the course of the research.

B. Impact Analysis

While the views of those directly involved in the legislative process can provide a useful insight into the effectiveness of legislative procedures, it is important to measure their subjective and possibly partial responses against a more independent evaluation of the legislative record and the impact of the rights-oriented elements of the legislative process. This is why the second essential element of a suitable methodology is a legislative audit that reviews every piece of proposed legislation introduced into the legislature over the specified period. (Given the significant resources this requires, the study period is likely to be limited. In our case we undertook this analysis over a three-year period.) As foreshadowed in Part 2 A above, the review should (i) identify proposed legislation *that raises*

59 Pickerill, *supra* n. 27 at 161.

60 *Ibid.*

1. Can you tell me about how you and your colleagues see human rights in your legislative process: In particular, how important are human rights? And what are the challenges in recognising and addressing human rights issues in the legislative process? Can you give me some examples?
Probes:
 - a. What are human rights and where do they come from?
 - b. How important are they, relative to other concerns?
 - c. What are the challenges in recognising and addressing human rights issues? What helps?
 - d. What motivates parliamentarians to raise or not raise human rights issues? (Individual background, particular rights, particular issues, external influences)
 - e. [For parliamentarians only] What kind of human rights issues are of most concern to you?
 - f. Do you think that parliamentarians give too much, not enough or about the right amount of attention to human rights issues?
2. Can you tell me about the contexts and processes in which you have been involved in which human rights issues arise (e.g. party room, parliamentary debate, committees)?
Probes:
 - a. How effective are parliamentary and legislative processes in identifying and responding to human rights issues?
 - i. When human rights issues do arise, how often do they make a difference to the substance of legislation or to whether or not a Bill is passed?
 - ii. Can you give me an example of where it did make a difference?
 - iii. What sort of factors makes it more likely that human rights issues will have an impact on legislation? What make it less likely?
 - iv. What sources of information do you find useful in drawing your attention to human rights issues associated with Bills?
 - b. How could parliamentary and legislative processes be modified to ensure that appropriate account is taken of human rights issues?
3. If you could make one change that would improve Parliament's performance in the protection of human rights, what would that change be?
4. What do you rank as the most significant achievement of Parliament in the protection of human rights in the last 10 years?
5. What do you rank as the most significant failure by Parliament in the protection of human rights in the last 10 years?
6. Can you suggest anyone else who might have something useful to contribute to this research?

Figure 1. Semi-structured interview schedule used in Australian implementation of this methodology.

potential human rights issues; and (ii) code how the legislative processes identified in the first component of the methodology respond to such legislation, whether by triggering amendments or other responses that result in deliberative processes giving proportionate attention to the human rights issues. The information collected in a particular evaluation will depend on the details of the legislative process being studied.

In the Australian context (and this will be the case in many Westminster parliaments) the information gathered (Figure 2) gives a detailed picture of the health of the parliamentary process in protecting rights. After identifying the Bill and the House in which it was introduced, the data collected identifies whether it is a Private Members Bill, which is important as the success or failure of a Bill often depends on government sponsorship. The researcher then assesses the Bill as limiting rights, protecting rights (or both) or irrelevant to rights. In making that assessment, the researcher pinpoints the relevant Article of the

- Reference details (date introduced, House of legislature into which the Bill was introduced, Bill number and title, whether a Government Bill or Private Member's Bill)
- Investigator's assessment of whether the Bill limits or protects any of the human rights within the scope of the evaluation (and if so which and how) or whether it fails to engage any of those rights
- Whether the explanatory memorandum accompanying the Bill identifies and/or attempts to justify any limits on human rights and if so how
- For each Parliamentary Committee that considered the Bill:
 - Whether the Report of the Committee (including any dissenting reports):
 - identifies any limits on human rights and if so how
 - attempts to justify any limits on human rights and if so how
 - recommends any amendments to the Bill to reduce those limits and if so what
 - recommends any amendments to improve the protection of human rights and if so what
 - Whether any government response to the Report
 - attempts to justify any limits on human rights and if so how
 - accepts any amendments to the Bill to reduce those limits and if so what
 - accepts any amendments to improve the protection of human rights and if so what
- Any references in parliamentary debate (Hansard) to human rights, noting in particular references to sources cited by legislators for their assessment of human rights issues
- For each amendment proposed to the legislation
 - Investigator's assessment of whether it limits or protects any of the human rights within the scope of the evaluation and if so how
 - Whether it was made in response to any Committee report
 - Whether it was ultimately successful
- Whether the Bill was ultimately enacted or rejected

Figure 2. Data recorded and coded during the legislative audit in the Australian implementation of this methodology.

ICCPR that is either being limited or enhanced by the Act. When there are doubts about the scope of the ICCPR Article (for example, whether limitations on symbolic expression are covered by freedom of expression rights) then the researcher uses the views of the UN Human Rights Committee and the published views of international human rights law experts to supplement the words of the ICCPR. The next set of data requires the researcher to identify whether the rights issues involved were *identified* in the explanatory memorandum; a report by a parliamentary committee (and, if so, whether the government made any response to this finding); or in the parliamentary debates recorded in Hansard. This analysis does not require the researcher to determine whether the debate in the parliament or the analysis in the committee report was sufficiently robust, accurate or came to the right conclusion, but simply that a discussion of the human rights issues took place. Finally, the researcher records whether any amendments were introduced in response to human rights claims and whether the legislation passed.

Most of these questions (with the important exception of the question of whether the legislation limits or benefits rights) can be answered by making use of the public record and without the researcher making a judgment about whether any particular piece of legislation violated rights. This takes seriously the claims outlined earlier that researchers should not simply substitute their own judgment for that of democratic legislatures when assessing rights performance.

The limitations of a purely quantitative analysis, however, mean that it is necessary to supplement and triangulate these measures with qualitative techniques in order to develop a rich and nuanced understanding of legislative performance. However, the comprehensive audit of the legislative record carried out and the quantitative results it produces remain important in ensuring that the cases selected for detailed study are representative, and allows for triangulation of the results of the case-studies.

C. Case-Studies

The third stage of the methodology requires the selection of representative case-studies of key pieces of proposed legislation that have been introduced in the legislature in question, preferably drawn from the period covered by the legislative audit. Case-studies should be selected to reflect the range of ways in which legislatures act to affect the human rights set out in the ICCPR. As noted in Part 1 above, legislation can intentionally or unintentionally protect or limit human rights. Case-studies should include representative instances of each type of legislation. Case-studies can be identified through the interviews with participants. Cross-reference with the results of the legislative audit reduces the risk of cases identified in this way being mischaracterised as representative

rather than as outliers. For example, in the course of an interview, a Minister could identify a piece of legislation as a good example of the way in which their government is committed to protecting human rights. The legislative audit may, in fact, reveal that this legislation is atypical of Bills passed during the study period and that the government has more typically used its majority to reject private members' Bills that attempt to improve protection of human rights. This does not mean that the legislation identified by the Minister should be treated simply as an outlier and disregarded as a case-study. Indeed, it might be useful to explore what circumstances gave rise to the legislature being prepared to pass the Minister's Bill despite its general reluctance to use legislation for this purpose. Similarly, even rights-violating legislation that seems pathological and not indicative of the general approach of the legislature to protecting rights (for example, legislation rushed through under threat of terrorist attack or national emergency) can be useful for demonstrating the way in which generally effective rights scrutiny mechanisms can buckle under the strain of unusual circumstances. A good range of case-studies will include examples of legislation that is both particularly protective of human rights, and legislation that is particularly inconsistent with human rights, while ensuring that the data from the comprehensive analysis of legislation is used to clearly identify how typical particular case-studies are of the legislature in question.

For those legislative proposals that protect rights, researchers should examine whether they passed (a particularly important issue for Bills—in parliamentary systems rights—protective Bills are often Private Members' Bills that do not attract government support); whether they were promoted by supporters of the Bill in terms of human rights; what form of opposition (if any) was made to the Bill; and the ways in which the Bill could be said to further human rights. It is important that these Bills be included in the case-studies because to focus solely on the ways in which parliament can act to limit human rights is to give an incomplete picture of its relationship with human rights.

Researchers should also examine Bills that limit or burden rights to assess whether those Bills were considered in a manner that reflected the fact that rights were at issue. It is here that some element of expert assessment of the rights impact of particular legislation is used. Once again, the problem that the content of human rights are controversial and contestable is partially attenuated by focussing on process and analysing whether the legislature gives proportionate attention to the possible limit or burden on human rights. In making this assessment researchers should focus on the standards set by the UN Human Rights Committee as the most authoritative source of interpretation of the ICCPR and on the writings of international human rights experts as a useful secondary source.

This detailed study of particular legislative proposals will allow a richer and more complex snap-shot of the role of legislatures in the protection of human rights than simple reliance on quantitative analysis could produce. By analysing

cases in which the legislature has poorly protected human rights and cases in which it has done well, it will be possible to develop more sophisticated conclusions about the possibility for reform of the current system.

5. Conclusions

Developing a deeper understanding of how, and how well, legislatures protect human rights makes an important contribution to academic and political debates about the role of legislatures and the extent to which courts should be involved in adjudicating rights issues. At present, much of the debate about these issues is reduced to assertions about the competence or incompetence of legislatures as protectors of human rights. Defenders or detractors of legislatures choose case-studies that suit their conclusions and make little attempt to assess or explain whether such case-studies are representative of the overall performance of legislatures.

The methodology that we have developed and defended here presents one way forward. The multi-stage methodology draws on a variety of pre-existing methods and some specifically designed approaches, developed to take account of the particular conceptual complexities of rights and the institutional peculiarities of legislatures. Its various components allow for triangulation of results. It meets our primary objective that our methodology provide a rich and valid account of the performance of legislatures, enabling investigators to identify strengths and weaknesses of existing legislative institutions and processes and making it possible to recommend how they might be improved.

These issues are not simply of academic interest. Around the world the commitment of legislatures to human rights is being tested as they respond to terrorism, national security concerns and natural disasters. It is essential to develop strong, credible methodologies that will assist in assessing and strengthening the capacity of legislatures to protect rights and in assessing the need for other institutions to supplement or oversee legislatures in carrying out this role.