

Methodological Appendix

The breadth of data gathered for this study is too voluminous for ordinary legal citation in this book. The data is held in analytical summaries with complete citation and case-history (or ‘sheppard’) data in the possession of the book’s editors and are publicly available on request from the author at jeff.king@ucl.ac.uk. The methodology for aggregating statistics is outlined below.

Figure	Comment
Figure 8.2 Delays	<p>This table excludes declarations of incompatibility from three cases in which the declaration of incompatibility was issued <i>after</i> the remedial amendment came into force: <i>R (Wright) v (1) Secretary of State for Health (2) Secretary of State for Education & Skills</i> [2009] UKHL 3; <i>R (on the application of Hooper and others) v Secretary of State for Work and Pensions</i> [2003] EWCA Civ 813; and <i>R (on the application of Wilkinson) v Inland Revenue Commissioners</i> [2003] EWCA Civ 814. See the remedial provisions set out in Ministry of Justice, <i>Responding to Human Rights Judgments</i> (2012, Cm 8432) Annex A.</p>
Figure 8.3 Remedial lag time averages	<p>The method of aggregating Canadian, French and German data is described in the notes to Figure 8.4 below.</p> <p>The lag time for responses to UK declarations of incompatibility are calculated up to the date on which the remedial provision came into force. The lag time averages for Canada, France and Germany are calculated based on the times stipulated in the court decisions. There may be a gap between when remedial legislation entered into force and the date stipulated by the judicial decision, but the working assumption is that typically the remedial legislation will enter into force before the expiry of the date stipulated by the court.</p> <p>Notably, two German cases did not specify a timeline for implementation, and in some Canadian cases, the claimants returned to court for further extensions. Where the latter occurred, the total sum was calculated on the basis of the entirety of the period obtained.</p>
Figure 8.4 Comparative	<p>To facilitate cross-national comparison (especially with the UK) and to respond to theoretical concerns of rights-based review in particular, certain</p>

<p>declarations of unconstitutionality</p>	<p>filters were applied. Generally, the subset of cases considered here include those declarations in which: (1) the court assessed the constitutionality of a primary statute, including those of federal, provincial/state/Land/devolved assembly (thus excluding regulations and other subordinate legislation); and (2) the grounds for decision were based wholly or partly on the primary national constitutional bill of rights.</p> <p>The US data is complex because it is only available on a fragmentary basis. The principal database used to identify the 14 US cases is the Supreme Court Database (http://scdb.wustl.edu/index.php). The cases were selected by filtering for declarations of unconstitutionality, federal and state laws and regulations, and for the following Amendments of the US Constitution: 1, 2, 4–9, 13–15. Thereafter, all cases were examined to ensure that it was primary statutes only that were struck down. No strong distinction is made at the remedial level between reading in or reading down.</p> <p>Canadian data was compiled by manually examining all law reports for the SCC, Federal Courts and nine of the 10 provinces. There was reliance on the analytical indices provided in these reports (examining them for ‘Charter’, ‘Civil Rights’, and ‘Constitution Act’), and a measure of human error is possible both in the law reports themselves as well as in our review of them. This is, however, unlikely, given the importance of such cases and frequency of appeals. The results were cross-checked against partial lists compiled in the publications of Hogg, Bushell/Thornton, Roach and Choudry, and the methodology and sample of results was cross-checked by different readers. The Canadian data focused on review by higher courts (not tribunals, which may also review legislation for constitutionality) of legislation for compliance with the Canadian Charter. Furthermore, we excluded a significant number of cases whose remedies could conceivably have been available under the interpretive presumption under section 3 HRA (which arguably includes remedies called reading in, reading down and severance in Canada (under <i>Schachter v. Canada</i> [1992] 2 SCR 679): cf <i>Ghaidan v Godin Mendoza</i> [2004] 3 WLR 113 (HL) and A Kavanagh, <i>Constitutional Review under the UK Human Rights Act</i> (Cambridge, Cambridge University Press, 2009), chs 3 and 4), even though the interference with the legislative scheme was unmistakable. Only the case of <i>Skolski v Quebec</i> [2005] 1 SCR 2001 was excluded from the SCC batch on such grounds. The rest are available in the analytical summaries noted above. Due to lack of law reports, it was not possible to include Quebec</p>
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for the entire period or Alberta cases after 2010.

All case histories were followed up or 'sheppardised'. No declaration within the same proceedings was double-counted, and thus any lower court decision which proceeded to the higher courts and was affirmed or reversed was counted once or struck from the list. In one case, a declaration of a lower court that was approved in principle by the Supreme Court of Canada, but in different proceedings, was counted: see *Canada (AG) v Several Clients and Several Solicitors* (2000) 189 NSR (2d) 313; (2001) 197 NSR (2d) 42 (affirmed, NS Court of Appeal), and *cf Lavallee (et al.) v Canada (AG)* [2002] 3 SCR 209.

Constitutional judicial review is available outside the Canadian Charter for rights cases, eg, under the Canadian Bill of Rights and under certain provincial charters of rights (eg, Quebec). However, the invalidation of statutes on such grounds is relatively uncommon, despite notable exceptions (eg, *Chaoulli v Quebec (AG)* [2005] 1 SCR 759).

Constitutional review under the Basic Law in Germany and under the Constitution of the Fifth Republic in France are centralised through the German Constitutional Court and the French Constitutional Council. In each case, a list of all declarations was obtained via the detailed statistics provided by the German Constitutional Court and elaborate search-engine for researchers provided on the website of the French Constitutional Council.

In the case of Germany, all decisions issued since 2000 were individually examined to determine the subset of cases concerning rights-based review of primary statutes (both federal and Land). The cases were selected from instances where the statutes were declared unconstitutional, and not where they were interpreted under a strong presumption of conformity with the Basic Law. This latter interpretive remedy is known as *Verfassungskonformeauslegung* (ie, 'Constitutionally compatible interpretation') and these were not included in the sample.

In the case of France, a subset of declarations of unconstitutionality was obtained through the Conseil's online database and all were examined

	<p>thereafter to determine the subset and were examined manually to determine the subset pertaining to rights-based review. In each case, the exercise was carried out by native speakers of German (Stefan Theil) and French (Quentin Montpetit) respectively.</p> <p>The precise grounds for decision in French cases are not always clear. The author and researcher decided that where the recitals indicated an incompatibility with the rights provisions of the 1958 Constitution (as amended), it was counted for our purposes regardless of whether other grounds proved more preponderant in the analysis. Some borderline cases were excluded. Furthermore, non-compliance with the Charter of the Environment (2004), which is incorporated into the Constitution, was also counted.</p> <p>In France, the traditional jurisdiction of the Constitutional Council was invoked only by the procedure under Article 61 of the Constitution, which triggered at the request of the President, Prime Minister, presidents of the national assembly or senate, or 60 senators or deputies, a constitutional <i>preview</i> procedure for certain bills prior to their being enacted as law. An amendment in 2008 introduced Article 61-1, and with it a procedure whereby references could be made from the Court of Cassation and the Council of State (Conseil d'Etat) where constitutional rights and liberties are in question. Thus, France has had rights-based constitutional <i>review</i> since this amendment came into force on 1 March 2010. Questions referred to the Council under this procedure are known as Questions Prioritaires de Constitutionnalité (QPC). Despite their short lifespan, QPC cases account for 51 of the total of 91 rights-based declarations of unconstitutionality between 2000 and 2012.</p>
<p>Figure 8.6 Absence of legislative focus</p>	<p>In this case the author made a qualitative assessment of whether it was reasonable to infer that the point at issue in the case was among the moral and policy considerations considered during the legislative process. It was <i>not</i> a condition of finding legislative focus that any use or consideration of rights rhetoric occurred. Nor was the assessment based on an extensive forensic search of Hansard. Where there was doubt, the category of 'unknown' was applied.</p>
<p>Figure 8.7 Tacking, whole act and remedial order</p>	<p>The only close call in this section was part V of the Protection of Freedoms Act 2012. I included it as a whole act response given the nature of that particular Act.</p>

responses	
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