

THE POSSIBILITIES OF INSTITUTIONAL DIALOGUE IN SOUTH AFRICA
THROUGH WEAK FORM JUDICIAL REVIEW

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A mini-thesis submitted in partial fulfilment of the requirements for the LLM
degree in the Faculty of Law of the University of the Western Cape.

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DECLARATION

I John Henry Kiewiets declare that 'The possibilities of institutional dialogue in South Africa through weak form judicial review' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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November 2012

Signed:

Supervisor:

Signed:



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I first want to give thanks to my Lord and Saviour Jesus Christ for giving me the grace, strength and courage to complete this dissertation. Without Him, none of this would have been possible. The Lord has blessed me with influential people who has help me to make this project a success, and therefore I want to give special thanks to Professor Wessel Le Roux for his guidance, wisdom and his patience with me throughout this project.



KEY WORDS

Institutional dialogue

Notwithstanding clause

Separation of powers

Constitutional supremacy

Strong-form of review

Judicial independence

Courts

Constitutional court

Weak-form of review

Dominant-party status



ABSTRACT

The 1996 Constitution of the Republic of South Africa is the supreme law of the Republic and in enjoying this status it is prescribing the composition of the three different arms of government as well as each branch's status within the new constitutional dispensation.¹ Prior to this era of constitutional supremacy South Africa was subject to the principle of parliamentary sovereignty, an era where the courts could only challenge legislation on procedural grounds, but had no general power to declare legislation unconstitutional.

The Constitution further provides for a separation² of powers between these arms of government, and it has vested the judicial authority³ in the courts and conferred strong judicial review powers⁴ upon the Constitutional Court.

The head of executive has recently argued that “the powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote”.⁵ The preceding quote is one of many statements and claims that forms part of a national debate on the nature and scope of the Constitutional Court's powers in South Africa. The Constitutional Court has in recent years handed down judgments that were not favourable to the legislative⁶ and executive⁷ arms of the South African government. These

¹ Constitution of the Republic of South Africa, 1996.

² Constitution of the Republic of South Africa Act, 1996 s.41(1)(f).

³ Constitution of the Republic of South Africa Act, 1996 s.165(1).

⁴ Constitution of the Republic of South Africa Act, 1996 s.172(1).

⁵ <http://mg.co.za/article/2012-03-02-what-the-judicial-review-should-be-about> accessed on 12/02/2012 02:47 PM.

⁶ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

⁷ *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 ZACC 23; *Democratic Alliance v The Acting National Director of Public Prosecutions* (288/11) [2012] ZASCA 15 (20 March 2012).

judgments are evident in the existing and on-going tension between, the three arms of government.



ABBREVIATIONS

S.A.	South Africa.
E.C.H.R.	European Convention on Human Rights.
E.C.H.R.	European Court of Human Rights.
C.C.R.	Canadian Charter of Rights.
S.C.A.	Supreme Court of Appeal.



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CHAPTER ONE

“The executive must be allowed to conduct its administration and policymaking work as freely as it possibly can. The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote”⁸

JACOB ZUMA

1.1. Introduction and problem statement.

The preceding quote is one of many statements and claims that forms part of a national debate on the nature and scope of the Constitutional Court’s powers in South Africa (SA). Currently, a national debate⁹ about the Court’s powers is on-going, and the current dominant political party in government is arguing in favour of alternative forms of judicial review for SA.¹⁰

The Court has in recent years handed down judgments that were not favourable to the legislative¹¹ and executive¹² arms of the SA government. These judgments and the national debate are evident in the existing and on-going tension between, the three arms of government. In the midst of all these tensions it is all important to take cognisance of the fact that in a system of constitutional supremacy or parliamentary sovereignty only one mandatory has a final say, it is either parliament or the constitutional court, but it can never be both.

⁸ <http://www.mg.co.za/article/2011-11-04-courting-disaster-with-the-judiciary> (accessed on 09 February 2012) 09:22AM.

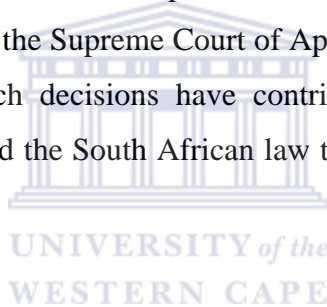
⁹ <http://www.businesslive.co.za/southafrica/2012/03/05/we-can-change-the-constitution:redebe> (accessed on 06 March 2012) 10:12 AM.

¹⁰ <http://mg.co.za/article/2012-03-02-what-the-judicial-review-should-be-about> (accessed on 07 March 2012) 02:47 PM.

¹¹ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

¹² *Justice Alliance of South Africa v President of the Republic of South Africa and Other* Case CCT 53/11 2011 ZACC 23; *Democratic Alliance v The Acting National Director of Public Prosecutions* (288/11) [2012] ZASCA 15 (20 March 2012).

Leading figures in the African National Congress (ANC) are now questioning the Constitutional Court's powers to intervene in policy decisions and the standing that court's afforded to political parties, who otherwise would not have been able to win the battle in the political arena, but successfully challenged executive and legislative decisions in court. The very young, 18 year old Constitutional Court is currently under review, and it is further evidence of, not only tensions between branches of state, but that the independence and abilities of the current Constitutional Court is being questioned. In February 2011, the Minister of Justice and Constitutional Development, Mr Jeff Radebe, released a discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African for comments. The Department of Justice has invited interested research institutions to submit proposals for the assessment which will include, *inter alia*, a comprehensive analysis of the decisions of the Constitutional Court and the Supreme Court of Appeal with a view to establishing the extent to which such decisions have contributed to the reform of South African jurisprudence and the South African law to advance the values embodied in the constitution.¹³



1.2. The different forms of judicial review.

Tushnet distinguishes between weak and strong-form of review, and he describes weak-form of review as review which “combines some sort of power in courts to find legislation inconsistent with constitutional norms with some mechanism whereby the enacting legislature can respond to a court decision to that effect, and therefore weak-form systems vary with respect to both the nature of the judicial power, which can be merely declaratory or provisionally suspensive, and the form

¹³ Tlali Tlali Department of Justice and Constitutional Development ‘*Proposals invited for the review of Con Court and SCA*’ 26 March 2012 available at www.politicsweb.co.za (accessed on 01 August 2012).

of legislative response, which can be re-enactment or slight modification of the impugned legislation”.¹⁴

Strong-form of judicial review according to Tushnet “places the power to determine the consistency of legislation with constitutional norms in a court authorized to deny legal effect to statutes it concludes are inconsistent with those norms”.¹⁵ The notwithstanding clause, section 33 of the Charter of Rights of the Canadian constitution, as Tushnet puts it, is a primary example of a weak-form of review mechanism”.¹⁶

Tushnet is of the view that “a weak-form review may provide legislatures with information that they lack at the enactment stage and the advantage of allowing legislatures to respond better to the court’s decisions”. Tushnet describes weak-form as review as to “create a dialogue between the courts and the legislatures”.¹⁷

Not all the legal authors are in support of a weak or strong-form of judicial review, Waldron for example, states his case against judicial review conditionally based on four different assumptions: Waldron’s first assumption is that “the society has a broadly democratic political system with universal adult suffrage, and it has a representative legislature, to which elections are held on a fair and regular basis, and that these democratic institutions are in reasonably good order. They may not be perfect and there are probably on-going debates as to how they might be improved”.¹⁸ Waldron’s second assumption is that “the society we are considering has courts that are well-established and politically independent judiciary, again in reasonably working order”.¹⁹

¹⁴ Tushnet M.V ‘*The Rise of Weak-form Judicial Review*’ in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (2011) 321-333 323.

¹⁵ Tushnet M.V ‘*The Rise of Weak-form Judicial Review*’ in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (2011) 321-333 325.

¹⁶ Tushnet M.V ‘*The Rise of Weak-form Judicial Review*’ in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (2011) 321-333 329.

¹⁷ Tushnet M.V ‘*The Rise of Weak-form Judicial Review*’ in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (2011) 321-333 330.

¹⁸ Waldron J ‘*The Core Case Against Judicial Review*’ (2005-2006) 115 *Yale L.J.* 1346 1361.

¹⁹ Waldron J ‘*The Core Case Against Judicial Review*’ (2005-2006) 115 *Yale L.J.* 1346 1363.

Thirdly, Waldron assumes, that “there is a strong commitment on the part of most members of the society to the idea of individual and minority rights²⁰, and that this commitment is a living consensus and not just lip service and that the members of the society take rights seriously”.²¹ Finally, Waldron assumes that “there are substantial dissensus as to what rights are and what they amount to, and that the rights-disagreement are mostly not issues of interpretation in a narrow legalistic sense”.²²

Waldron’s argument is that “in cases which the assumptions fail, his argument against judicial review does not go through”.²³ In the case of outcome-based reasons, Waldron suggests “that courts are good at deciding some issues and not others, but outcome-related reasons cut in both directions,²⁴ and in the case of process-related reasons weigh unequivocally against judicial review and the preponderance of the process-related reasons weigh in favour of the legislature”.²⁵

Sinnott-Armstrong, however define “the difference between weak-form and strong-form judicial review as supposed to lie in where and when the dialogue ends”.²⁶ Sinnott-Armstrong is introducing a ‘third legal system’ that combines weak judicial review with strong judicial review, which he calls “a compound system”. In a system with only strong judicial review, Sinnott-Armstrong suggests, “legislatures never get to overturn judicial interpretations of constitutional provisions other than by means of a new constitutional amendment”.

In a system of pure weak judicial review, according to Sinnott-Armstrong, “legislatures always get to overturn judicial interpretations of constitutional provisions simply by passing an in-your-face statute, but in a compound system, “legislatures sometimes can and sometimes cannot overturn judicial

²⁰ Waldron J ‘*The Core Case Against Judicial Review*’ (2005-2006) 115 *Yale L.J.* 1346 1364.

²¹ Waldron J ‘*The Core Case Against Judicial Review*’ (2005-2006) 115 *Yale L.J.* 1346 1365.

²² Waldron J ‘*The Core Case Against Judicial Review*’ (2005-2006) 115 *Yale L.J.* 1346 1367.

²³ Waldron J ‘*The Core Case Against Judicial Review*’ (2005-2006) 115 *Yale L.J.* 1346 1402.

²⁴ Waldron J ‘*The Core Case Against Judicial Review*’ (2005-2006) 115 *Yale L.J.* 1346 1376.

²⁵ Waldron J ‘*The Core Case Against Judicial Review*’ (2005-2006) 115 *Yale L.J.* 1346 1386.

²⁶ Sinnott-Armstrong W ‘*Weak and Strong Judicial Review*’ (2003) 22 *Law and Philosophy* 381-392 386.

interpretations of constitutional provisions”. Sinnott-Armstrong suggests that “it is not enough for Tushnet to praise weak-form of review, since weak-form of review is also available in the compound system”.²⁷

1.3. The concept of dialogue.

The concept of dialogue, has elicited much debate and comments amongst leading constitutional law authors, academics and scholars. It is however, important to mention at this stage of this enquiry, that different viewpoints and stand points exists with regards to the legitimacy and effectiveness of the concept of dialogue, in particular an institutional dialogue as we will see later in this dissertation.

Prominent constitutional law authors like Hogg and Bushell, for example, in their definition of the concept of a dialogue, is describing it as consisting “those cases in which a judicial decision striking down a law on Charter grounds is followed by some action by the competent legislative body”. In all these cases Hogg and Bushell suggests, that “there must have been consideration of the judicial decision by government, and a decision must have been made as to how to react to it. This may also have occurred in cases where a decision was not followed by any action by the competent legislative body”.²⁸

The Constitutional Court of South Africa has described a dialogue, different from what is offered by the Hogg and Bushell. In the case of *S v Mhlungu*,²⁹ Sachs J described the concept of dialogue as follows:

“ I might add that I regard the question of interpretation to be one to which there can never be an absolute and definite answer and that, in particular, the search of where to locate ourselves on the literal/purposive continuum or how to balance out competing provisions, will always take the form of a principled judicial

²⁷ Sinnott-Armstrong W ‘Weak and Strong Judicial Review’ (2003) 22 *Law and Philosophy* 381-392 384.

²⁸ Hogg P.W and Bushell A ‘*The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such A Bad Thing After All)*’ (1997) 35 No. 1 *Osgoode Hall LJ* 75 82.

²⁹ *S v Mhlungu and Others* 1995 (3) SA867 (CC).

dialogue, in the first place between members of this court, then between our court and other courts, the legal profession, law schools, parliament, and indirectly, with the public at large”.³⁰

Woolman, however, is of the opinion that “if a court refuses to say more than is necessary to decide a case on its facts, then one can hardly expect any meaningfully predictive principle to be drawn from the judgement (let alone a principled dialogue)”.³¹ The problem with minimalism, Woolman suggests, is that, “it fails to acknowledge that many minds can produce better knowledge, greater predictive certainty, and more politically legitimate outcomes, under appropriate conditions, and one way to produce better results on multi-member judicial panels is to ensure that such panels possess a healthy mix of judges”. Another solution according to Woolman, “is for courts to share the responsibility for constitutional interpretation with other state actors and non-state actors who are in a better position to provide both the information and the insight required to place the best possible gloss, empirically and normatively, on a constitutional right”.³²

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1.4. The aim of the research.

The aim of this research is in the main to determine, what, if any, the possibilities are for a weak-form of judicial review in SA by possibly incorporating a constitutional mechanism that can give rise to an institutional dialogue³³ between the legislative and judicial arms of government. This research will be a comparative analysis of the SA predominantly strong-form³⁴ of judicial review and judicial review under the Commonwealth weak-form of judicial review of

³⁰ *S v Mhlungu and Others* 1995 (3) SA867 (CC) para129.

³¹ Woolman S ‘*The Amazing Vanishing Bill of Rights*’ (2007) 124 SALJ 762 – 794 785.

³² Woolman S ‘*The Amazing Vanishing Bill of Rights*’ (2007) 124 SALJ 762 – 794 792.

³³ Tushnet M.V ‘*The Rise of Weak-form Judicial Review*’ in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (2011) 321-333 332.

³⁴ s.172(1).

which Canada and England forms an integral part of.³⁵ In doing so, there will be looked at the Charter of Rights of Canada³⁶ (CCR) and in particular section 33 the notwithstanding clause that provides that parliament or the provincial legislature may expressly declare in an Act of parliament or of the legislature, that the Act or a provision thereof shall operate notwithstanding a provision on section 2, fundamental freedoms or legal rights in section 7 to 14, or equality rights in section 15 of the Charter.³⁷ The discussion on Canada will also include section 1 of the Charter which provide for the limitation of Charter rights as well as the remedies that section 24 afforded to Canadian court.

The examination will also be on sections 3 and 4 of the Human Rights Act 1998³⁸ (HRA) of England which provides that, so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible³⁹ with the European Convention on Human Rights (ECHR)⁴⁰, and only if the court is satisfied that the provision is incompatible with the Convention rights it may make a declaration of that incompatibility.⁴¹

If a court is satisfied that the provision is incompatible with a Convention right and that the primary legislation concerned prevents removal of that incompatibility it may make a declaration of that incompatibility.⁴² Further on the examination of the HRA will be a discussion on section 6 which prohibit a public authority to act incompatible with the Convention as well as section 10 which provide for a remedial action after a finding of Convention-incompatibility. Central to this examination shall be section 172⁴³, section 38 and section 167 which provides for strong review and section 39(2)⁴⁴ of the 1996 Constitution of SA which provides that when interpreting any legislation or when developing the

³⁵ Gardbaum S 'The New Commonwealth Model of Constitutionalism' (2002) 49 *Am J Comp L* 707 709.

³⁶ Constitution Act 1982 PART 1 CANADIAN CHARTER OF RIGHTS AND FREEDOMS.

³⁷ Constitution Act 1982 PART 1 CANADIAN CHARTER OF RIGHTS AND FREEDOMS s.33(1).

³⁸ Human Rights Act 1998.

³⁹ Human Rights Act 1998 CHAPTER 42 Art.3(1).

⁴⁰ European Convention on Human Rights

⁴¹ Human Rights Act 1998 CHAPTER 42 Art.4(2).

⁴² Human Rights Act 1998 CHAPTER 42 Art.4(4).

⁴³ s.172.

⁴⁴ s.39(2).

Common law or customary law, every court tribunal or forum must promote the spirit, purport and object of the Bill of Rights. Of importance to the discussion on South Africa, will be section 36 of the constitution which provides for the limitation of rights in the Bill of Rights, provided that the limitation is reasonable and justifiable.

1.5. *The research questions.*

The primary question that this research seeks an answer to is, whether it is possible to achieve a weak-form of judicial review through an institutional dialogue between the judicial and legislative arms of government in SA within the current constitution. If not, what do we need to do?

Secondary, if constitutional amendments will have to be made, what impact will these constitutional amendments have on constitutional adjudication and interpretation in SA? Where and when will this dialogue end, and who will have the last say in constitutional interpretation, parliament or the Constitutional Court? What impact will it have on the principle of constitutional supremacy? In attempting to find answers to these research questions, this research will mainly focus on the relationship between the legislature and the courts, and in this regard the case studies will also focus on cases where the constitutional validity of impugned laws was at issue, although judicial review can take a variety of forms, depending on the context.⁴⁵

1.6. *The rationale of the research.*

The rationale behind this research is to contribute meaningful to the national debate on the extent and scope of the Constitutional Court's powers, role and functions.⁴⁶ This research will also attempt to give insight and make

⁴⁵ de Ville JR, *Judicial Review of Administrative Action in South Africa* Revised Edition (2003) 297.

⁴⁶ Jeff Radebe Minister of Justice Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State - February 2012.

recommendations on the topic of judicial review and whether a weak-form of judicial review should be seen as a possible solution to ongoing tension between the judicial legislative and executive arms of government. This research also seeks to contribute to certainty and clarity on the extent and scope of the powers, roles and functions of the judicial, legislative and executive arms of government and what the relationship between these arms of government should be.

1.7. Layout of the different chapters.

Chapter one is an introduction into the research and statement of the current problem in SA, its aim and rationale, as well as the research questions it seeks an answer to. Chapter two will be an in-depth discussion on judicial review from a Canadian perspective with the main focus on sections 33, the notwithstanding clause, section 1, the limitation clause as well as section 24 which empowers the courts with certain remedies. Crucial to the discussion around Canada will be certain landmark court decisions to determine the Canadian courts' approach during judicial review. The different standpoints of leading constitutional law authors and academics will be discussed as far as judicial review in Canada is concerned. Different views on the current status of the notwithstanding clause will be looked at as well as whether section 33, section 1 or the remedies in section 24 is capable of realising a dialogue between the legislative and judicial arms of the Canadian Government.

In chapter three the focus will be on the HRA 1998, and in particular sections 3,4, 6 and 10 of the Act. This discussion will also include court decisions as well as the views of leading legal authors and academics with regards to the effect and consequences of section 4 of the Act on the court's declaratory powers under the HRA. Central to the discussion on the HRA, will be an assessment of the different approaches and standpoint on the scope and limits of an interpretation in terms of section 3 of the HRA. In discussing sections 3 and 4, it will also be looked at

whether there is in fact an institutional dialogue between the legislative and judicial branches in England and whether sections 3 or 4 is realising this dialogue.

The fourth chapter will be a discussion on judicial review in post-apartheid SA, and the key sections under discussion will be sections 172, 167 and 38 of the SA constitution. There will also be looked at section 39(2) and section 36, and what, if any, it can offer in searching for the possibility of a weak-form of judicial review through an institutional dialogue in SA. There will be a discussion on the review power exercised by the courts and in this regard a few examples from case law will be looked at. Also key to the discussion on South Africa is the different opinions that exists in respect of which method of constitutional interpretation will best interpret the constitution of SA and whether it should be weak-form, strong-form or pragmatic exercise of judicial review.

Chapter five will be a detailed comparison of judicial review in Canada, England and SA respectively. In this chapter it will also be attempted to propose answers to the primary as well as the secondary questions this research is seeking an answer to. The final part of chapter five will be devoted to discuss the way forward and to make recommendations for constitutional reform and possible amendments.

CHAPTER TWO: JUDICIAL REVIEW UNDER THE CANADIAN CHARTER OF RIGHTS.

2.1. Introduction.

Canada, amongst other countries of its kind, have been categorized as a commonwealth country, and that countries such as Canada have created a new third model that stands between the polar models of constitutional and legislative supremacy.⁴⁷ Judicial review of statutes in Canada is a longstanding part of the Canadian constitution, because it has been needed since 1867 to impose the rules of federalism on the two levels of government, but judicial review on Charter grounds dates only from 1982,⁴⁸ and by virtue of section 33, a judicial decision to strike down a law for breach of section 2 or sections 7 to 15 of the Charter is not final”.⁴⁹

Prior to 1982, Canada’s federal and provincial legislatures collectively exercised the same parliamentary sovereignty enjoyed by the mother parliament at Westminster.⁵⁰ Canada has only recently in 1982 adopted the Charter of Rights⁵¹ (CCR) that has since influenced constitutional and statutory interpretation in Canada.

⁴⁷ Gardbaum S ‘*The New Commonwealth Model of Constitutionalism*’ (2002) 49 *Am.J. Comp. L.* 707 709.

⁴⁸ Hogg P.W ‘*The Charter of Rights and American Theories of Interpretation*’ (1987) 25 *Osgoode Hall L.J.* 87 99.

⁴⁹ Hogg P.W ‘*Constitutional Law of Canada*’ Student Edition (2004) 846.

⁵⁰ Gardbaum S ‘*The New Commonwealth Model of Constitutionalism*’ (2002) 49 *Am.J. Comp. L.* 707 719.

⁵¹ Constitution Act 1982 PART I CANADIAN CHARTER OF RIGHTS AND FREEDOMS.

In this chapter, there will be a discussion on section 33 of the CCR which is viewed by Hogg as “an anomaly that is simply incompatible with constitutionally guaranteed rights”.⁵²

Crucial to the discussion will also be section 1 of the Charter which provide for the limitation of rights. There will also be looked at the types of remedies that the Charter confers upon Canadian courts and in this regard the focus will be on section 24. It is almost impossible to attempt to make a detailed analysis of judicial review in Canada without carefully and closely examining the approach of the courts during judicial review. I will also critically discuss the views and perspectives of leading constitutional law authors on the topic of judicial review and the concept of institutional dialogue in the Canadian context. The central reason for the discussion on Canada is to unfold the Canadian model of judicial review and to ascertain whether there is institutional dialogue between courts and parliament in Canada and if section 33, section 1 or section 24 is the reason for it.

The reasons why it is possible for a legislature to overcome judicial decision striking down a law for breach of the Charter, lies, according to Hogg and Bushell, in four features of the Canadian Charter of Rights that facilitate dialogue: First, “section 33 which is the power of legislation override; secondly, section 1, which allows for ‘reasonable limits’ on guaranteed Charter rights; thirdly, the ‘qualified rights’, in section 7, 8, 9 and 12, which allow for action that satisfies standards of fairness and reasonableness; and fourthly, the guarantee of equality of rights under section 15(1), which can be satisfied through a variety of remedial remedies”. Each of these four features, according to Hogg and Bushell, “is usually offering the competent legislative body room to advance its objectives, while at the same time respecting the requirements of the Charter as articulated by the courts”.⁵³

⁵² Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 844.

⁵³ Hogg P.W and Bushell A “*The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such A Bad Thing After All)*” (1997) 35 No.1 *Osgoode Hall L J* 75 82.

2.2. The Canadian design of judicial review.

2.2.1. The limitation analysis in section 1.

Section 1 of the Charter provides as follows:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁵⁴

The CCR in section 1 provides that the rights and freedoms guaranteed in the Charter are not absolute⁵⁵ and can be limited by laws as long as the limitation is reasonable and can be demonstrably justified in a free and democratic society. The consequences of applying the limitation analysis can have a two-fold effect; it can either cause the limitation in question to be declared unreasonable and unjustified or it could happen that the limitation be upheld and found to be reasonable and justified in an free and democratic society.

The same as in most jurisdictions, the courts in Canada should be guided by a standard test to apply when determining what is reasonable in a case before it. According to Hogg, because of section 1, judicial review of legislation under the Charter of Rights “is a two-stage process. The first stage of judicial review is to determine whether the challenged law derogates from a Charter right. If it does not, then the review is at an end: the law must be upheld. If the law is held to derogate from a Charter right, then the review moves to the second stage. The second stage is to determine whether the law is justified under section 1 as a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society”.⁵⁶ During the first stage, according to Hogg, “the burden of proof is on the party alleging a breach of a Charter right, but during the second stage, the burden of proof shifts to the government seeking to support the challenged law”.⁵⁷ The court in *R v Oakes* held that the standard of proof is a civil

⁵⁴ Constitution Act 1982 PART I CANADIAN CHARTER OF RIGHTS AND FREEDOMS s.1.

⁵⁵ Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 790.

⁵⁶ Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 718.

⁵⁷ Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 795.

standard, namely, on a preponderance of probability.⁵⁸ The Canadian Supreme Court in *R v Oakes*⁵⁹ has developed the test for reasonableness and defined it as follows:

“To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, once a sufficiently significant objective is recognized, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves a form of proportionality test. There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair as little as possible the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance”.⁶⁰

This test in *R v Oakes* can be summarised as to require the limitation to have important objectives, and that by way of a proportionality test show that reasonable and justifiable means are chosen. Such proportionality tests requires the measures to be rationally connected to the objects, and it should impair as little as possible the rights or freedoms in question. Finally it requires proportionality between the effect of the measures and the sufficiently important objectives.

It appears as if the *Oakes* analysis includes very strict tests and that much is expected before a limitation can be justified in terms of section 1 and also a lot must be proved for it to be declared unreasonable and unjustified.

2.2.2. The notwithstanding clause.

Section 33 was the crucial element of the federal-provincial agreement of November 1981 that secured the consent of those provinces other than Quebec

⁵⁸ *R v Oakes* [1986] 1. S.C.R. 103 para 67.

⁵⁹ *R v Oakes* [1986] 1. S.C.R. 103.

⁶⁰ *R v Oakes* [1986] 1. S.C.R. 103 paras 69 – 70.

that had until then been opposed to the Charter on the ground that it limited the sovereignty of their legislatures. Section 33 preserved that sovereignty, provided the legislature satisfied the requirements of the section.⁶¹

The override clause of section 33 according to Hogg is to be inserted, to placate the provinces who feared the power of judicial review, enables judicial decisions under most of the provisions of the Charter to be overridden by the competent legislative body.⁶²

Section 33⁶³ of the Charter of Rights provides *inter alia*:

33(1) Parliament or the legislature of a province may expressly declare in an Act of parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or section 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under section (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Section 33, apart from the fact that it allows for overriding provisions in legislation and the consequences of such notwithstanding provisions, section 33 does not automatically applies to all the provisions of the Canadian Charter, but only to sections 2, and 7 to 15 of the Charter.

⁶¹ Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 838.

⁶² Hogg P.W 'The Charter of Rights and American Theories of Interpretation' (1987) 25 *Osgoode Hall L.J.* 87 - 89.

⁶³ Constitution Act 1982 PART I CANADIAN CHARTER OF RIGHTS AND FREEDOMS s.33(1).

The effect of the notwithstanding clause is that it preclude a court from declaring a piece of legislation or a particular section thereof unconstitutional if the legislation complies with the section 33 requirements for notwithstanding.

A declaration under section 33, according to Hogg, will be held to be invalid by the courts if it fails to satisfy the various requirements of section 33, and the declaration must be confined to the rights specified in section 33, it must be specific as to the statute that is exempted from the Charter and as to the rights that are overridden and it may not be given retroactive effect.⁶⁴ In the case of *Ford v Quebec (Attorney General)*⁶⁵ it was held that a section 33 declaration is sufficiently expressed if it refers to the number of the section, subsection or paragraph of the Charter which contains the provision or provisions to be overridden. It seems that the Canadian parliament or any provincial legislature is required to be specific with regards to the Charter provisions the legislation intends to override, and that no *Carte Blanche* overriding may take place.

It is also clear from the wording of section 33 that any notwithstanding provision only has a period of five years in which it can operate, meaning that there is no continuity of the notwithstanding provision after the expired period, unless it is re-enacted by the Canadian parliament or a provincial legislature. This is further confirmation not only of the limited application of section 33, which only applies to section 2 and sections 7 to 15 of the Charter, but also a further restriction of a five year operating period, unless re-enacted. This five-year period, according to Hogg and Bushell, will always include an election, and will often yield a change of government.⁶⁶

⁶⁴ Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 844.

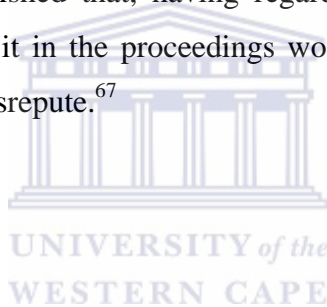
⁶⁵ *Ford v Quebec (Attorney General)* [1988] 2 S.C.R. 712.

⁶⁶ Hogg P.W and Bushell A 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35 No.1 *Osgoode Hall L J* 75 84.

2.2.3. The remedies under section 24.

The CCR is conferring *locus standi* upon anyone for the enforcement of rights and freedoms under the Charter and therefore section 24 provides as follows:

- (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- (2) Where. In proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.⁶⁷



According to Hogg, the remedies afforded to courts in terms of section 24, “is available only for a breach of the Charter and it is not a remedy for unconstitutional action in general, and it is not the exclusive remedy for breach of Charter rights”. Hogg is of the view that “subject to the important qualification that a remedy must be appropriate and just in all the circumstances of the case, there is no limit to the remedies that may be ordered under section 24(1), and they include defensive as well as affirmative remedies”.⁶⁸

According to Hogg, while the supremacy clause section 52(1) requires a court to hold that an unconstitutional statute is invalid, the courts do not always nullify statutes, but uses various techniques in statutory interpretation, including, *inter alia*, temporary validity where the courts postpone the operation of the declaration

⁶⁷ Constitution Act 1982 PART I Canadian Charter Of Rights And Freedoms s.24.

⁶⁸ Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 877-878.

of invalidity;⁶⁹ severance, when only part of the statute is held to be valid, and the rest can independently survive and the court will hold that the bad part should be severed from the good part, thereby preserving the part that complies with the constitution;⁷⁰ reading-in, where the court read words into the statute;⁷¹ reading down, when the statute will bear two interpretations, one of which would offend the Charter right and the other which would not and in that case the court will hold that the latter one is the correct one;⁷² constitutional exemption, where the court exempts a statute from complying with the constitution and;⁷³ reconstruction, this is where the court reconstruct unconstitutional legislation.⁷⁴

2.3. An assessment of the approach of the courts.

The Canadian parliament's response towards unconstitutionally declared legislation can be categorised into three different categories, namely, (1) no response; (2) amend the legislation to be constitutionally compliant or repeal with constitutional compliant legislation and; (3) re-enactment of the legislation by inserting a section 33, notwithstanding clause.

The case of *Ford v Quebec*⁷⁵ is the only example where parliament has used section 33, the notwithstanding clause to overturn a judicial decision to nullify legislation that infringed upon Charter guaranteed rights and freedoms. The Supreme Court had struck down Quebec's law banning the use of languages other than French in commercial signs.⁷⁶ In the opinion of the court language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the

⁶⁹ Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 852.

⁷⁰ Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 857.

⁷¹ Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 859.

⁷² Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 864.

⁷³ Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 864.

⁷⁴ Hogg P.W *Constitutional Law of Canada* Student Edition (2004) 866.

⁷⁵ *Ford v Quebec* [1988] 2 S.C.R. 712.

⁷⁶ *Ford v Quebec* [1988] 2 S.C.R. 712 para 83.2.

language of one's choice, and that language is not merely a means or medium of expression, but it colours the content and meaning of expression.⁷⁷

After the *Ford v Quebec* case, Quebec enacted a new law that continued to ban the use of any language but French in all outdoor signs and the province protected the new law with a section 33 notwithstanding clause.⁷⁸ The *Quebec* case can be classified as a category no.3 case.

A classical example of a category no.1 case is the case of *R v Big M Drug Mart Ltd.*⁷⁹ Here, a company was charged with unlawful carrying on the sale of goods on a Sunday which was contrary to the Lord's Day Act of 1970.⁸⁰ The Supreme Court of Canada struck down the Lord's Day Act, and the court held that the purpose of that Act was to compel the observance of the Christian Sabbath and this was a violation of the guarantee of freedom of religion under section 2(a) of the Charter.⁸¹ It has been argued by Hogg and Bushell that the court had the last word when it struck down the Lord's Day Act, because the Act was never repealed, but was simply dropped from the next consolidation of federal statutes.⁸²

In the case of *Hunter v Southam Inc.*,⁸³ the appellant challenged section 3 of the Combines Investigation Act that authorised entering and search and seizure despite a person's security against unreasonable search and seizure afforded to everyone in terms of section 8 of the Charter.⁸⁴ The court held that in the absence of a valid procedure for prior judicial authorization, searches conducted under the Act would be unreasonable.⁸⁵ Parliament had immediately after the *Hunter* decision amended the Combines Investigation Act to meet the court's

⁷⁷ *Ford v Quebec* [1988] 2 S.C.R. 712 para 40.

⁷⁸ Hogg P.W and Bushell A 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35 No.1 Osgoode Hall L J 75 84.

⁷⁹ *R v Big M Drug Mart Ltd* [1985] 1 S.C.R. 295.

⁸⁰ *R v Big M Drug Mart Ltd* [1985] 1 S.C.R. 295 para 1.

⁸¹ *R v Big M Drug Mart Ltd* [1985] 1 S.C.R. 295 para 136.

⁸² Hogg P.W and Bushell A 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35 No.1 Osgoode Hall L J 75 94.

⁸³ *Hunter et al. v Southam Inc.* [1984] 2 S.C.R. 145.

⁸⁴ *Hunter et al. v Southam Inc.* [1984] 2 S.C.R. 145 p148.

⁸⁵ *Hunter et al. v Southam Inc.* [1984] 2 S.C.R. 145 p161.

requirements,⁸⁶ and the Act was later repealed and the new provision was introduced in the Competition Act of 1986.⁸⁷ Parliament's response to this judgment can be categorised as a category no.2 response.

In the case of *R v O'Connor*⁸⁸ the issue was whether and under what circumstances an accused is entitled to obtain production of sexual assault counselling records in the possession of third parties.⁸⁹ The accused wanted access to the records compiled during counselling sessions with the victims. The court held that the Crown's well-established duty to disclose all information in its possession is not affected by the confidential nature of the therapeutic records.⁹⁰ The Canadian parliament responded with new legislation that subjects all records to a two-stage process that balances the accused's rights against the complainant's privacy and equality rights and the social interest in encouraging the reporting of sexual assaults.⁹¹ Parliament's response to the *O'Connor* decision can be classified as a category no.2 response.

In the case of *R v Daviault*⁹² the issue was whether evidence of extreme self-induced intoxication, tantamount to a state of automatism, constitute a defence to the offender of sexual assault. The court held that voluntary intoxication does not constitute a defence to an offence of general intent, but if a different approach to the approach followed by the court is considered desirable, parliament is free to intervene. Parliament responded with legislation providing that self-induced intoxication would no longer be a defence to a criminal offence involving an assault or any other interference or threat of interference by a person with the bodily integrity of another person by adding a new section 33 into the Criminal

⁸⁶ Hogg P.W and Bushell A 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35 No.1 Osgoode Hall L J 75 89.

⁸⁷ Hogg P.W and Bushell A 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35 No.1 Osgoode Hall L J 75 89 in footnote no. 51.

⁸⁸ *R v O'Connor* [1995] 4 S.C.R. 411.

⁸⁹ *R v O'Connor* [1995] 4 S.C.R. 411 para 1.

⁹⁰ *R v O'Connor* [1995] 4 S.C.R. 411 para 7.

⁹¹ Tushnet M.V 'New Forms of Judicial Review and the persistence of Rights –and Democracy-Based Worries' (2003) Vol. 33 Wake Forest L. Rev. 813-838 829.

⁹² *R v Daviault* [1994] 3 S.C.R. 63.

Code.⁹³ Parliament's part in the dialogue on this issue according to Hogg and Bushell reads like a rebuttal of the majority's position in *R v Daviault*, and it will be interesting to see how the courts will respond when the issue comes before the court for a second time.⁹⁴ This is another example of a category no.2 response from parliament.

In the case of *Thibaudeau v Canada*⁹⁵ the provisions in the Income Tax Act which allowed a non-custodial parent to deduct child support payments from his income, and which required a custodial parent to include child support payments in a income was challenged for infringing section 15(1) of the Charter.⁹⁶ The Supreme Court held that there was no breach of the custodial parent's right to equality under section 15(1) of the Charter.⁹⁷ In 1997, amendments to the Income Tax Act were enacted, under which child support payments are no longer deductible by a non-custodial parent, and are no longer taxable as income of the custodial parent.⁹⁸ This is yet another classical example of a category no.2 response from parliament.

In the case of *Vriend v Alberta*⁹⁹ the applicant was a laboratory coordinator at a college and was given a permanent, full-time position in 1998. In 1990, in response to an enquiry by the president of the college, Mr Vriend disclosed that he was homosexual. In 1991, the board of the governors of the college adopted a position statement on homosexuality and shortly thereafter the president of the college requested Mr Vriend to resign from employment but he refused. The college then terminated his employment because he gay and it was contrary to the

⁹³ Hogg P.W and Bushell A "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35 No.1 Osgoode Hall L J 75 103.

⁹⁴ Hogg P.W and Bushell A "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35 No.1 Osgoode Hall L J 75 104.

⁹⁵ *Thibaudeau v Canada* [1995] 2 S.C.R. 627.

⁹⁶ *Thibaudeau v Canada* [1995] 2 S.C.R. 627 p 628.

⁹⁷ *Thibaudeau v Canada* [1995] 2 S.C.R. 627 pp 699-700.

⁹⁸ Hogg P.W and Bushell A "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35 No.1 Osgoode Hall L J 75 105.

⁹⁹ *Vriend v Alberta* [1998] 1 S.C.R. 493.

college's policy on homosexuality.¹⁰⁰ The court held that the exclusion of gay men and lesbians constitutes total, not minimal, impairment of the Charter guarantee of equality.¹⁰¹ The exclusion of sexual orientation from the Individual Rights Protection Act does not meet the requirements of the *Oakes* test and cannot be saved under section 1 of the Charter.¹⁰² Parliament's response to the *Vriend* decision is a classical example of a category no.1 response.

In the case of *Canada (Attorney General) v Hislop*,¹⁰³ the government appealed against the Ontario Court of Appeal's finding of unconstitutionality of sections 44(1.1) and 72(2) of the Canada Pension Plan. Under the Canada pension Plan, the spouse of a contributor was entitled to apply for a survivor's pension after the death of the contributor, and if the survivor's pension was approved, it would be payable for each month following the death of the contributor. However, if the application of the survivor was not received by government within 12 months of the death of the contributor, the arrears that could be claimed by the survivor were limited to a 12-month period preceding the receipt of the application.¹⁰⁴

Until July 2000, for the purposes of entitlement to a survivor's pension under the Act, the survivor had to have been married to the contributor or had to be of the opposite sex who was cohabitating with the contributor in a conjugal relationship at the time of the contributor's death.¹⁰⁵ The Court held that sections 44(1.1) and 72(2), although found within remedial legislation, restricts the availability of that legislation to marginalised groups.¹⁰⁶

The Court held that these provisions as applied to same-sex survivors are discriminatory and violates section 15(1) of the Charter and cannot be justified under section 1.¹⁰⁷ The Court concluded that, class members who were precluded by sections 44(1.1) or 72(2) from receiving the survivor's benefits, and who

¹⁰⁰ *Vriend v Alberta* [1998] 1 S.C.R. 493 para 7.

¹⁰¹ *Vriend v Alberta* [1998] 1 S.C.R. 493 para 127.

¹⁰² *Vriend v Alberta* [1998] 1 S.C.R. 493 para 128.

¹⁰³ *Canada (Attorney General) v Hislop* [2007] S.C.R. 429.

¹⁰⁴ *Canada (Attorney General) v Hislop* [2007] S.C.R. 429 paras 1-2.

¹⁰⁵ *Canada (Attorney General) v Hislop* [2007] S.C.R. 429 para 4.

¹⁰⁶ *Canada (Attorney General) v Hislop* [2007] S.C.R. 429 para 121.

¹⁰⁷ *Canada (Attorney General) v Hislop* [2007] S.C.R. 429 para 123.

otherwise meet the eligibility requirements, will be entitled to payment of that benefit.¹⁰⁸

Recently in 2012, in the case of *R v Tse*,¹⁰⁹ the constitutionality of section 184.4, the emergency wiretap provision of the Criminal Code was challenged. This provision permits a peace officer to intercept certain private communications without prior judicial authorisation, if the officer believes on reasonable grounds that the interceptions is immediately necessary to prevent an unlawful act that would cause serious harm, provided that judicial authority could not be obtained with reasonable diligence.¹¹⁰ The Supreme Court held that the appropriate remedy is to declare section 184.4 unconstitutional and leave it to parliament to redraft a constitutionally compliant provision and in doing so, parliament may wish to address the additional concerns that the Court have expressed about the provision. The Court suspended the declaration of invalidity for a period of 12 months to afford parliament the time needed to examine and redraft the provision.¹¹¹

By considering the Canadian parliament's approach towards unconstitutionally declared legislation throughout the view examples from case law discussed above, it appears that parliament's response can mostly be categorised as category no.2. Meaning that parliament had in the majority of instances either amended the legislation to be Charter rights compliant or repealed the legislation that were in breached of the Charter rights.

2.4. The opinions of legal authors.

2.4.1. Legal scholars in support of the dialogue theory.

Some constitutional law scholars however, have very distinct views and takes completely different standpoints as far as the dialogue theory is concerned. Hogg and Bushell are of the view that “judicial review is not ‘a veto over the politics of

¹⁰⁸ *Canada (Attorney General) v Hislop* [2007] S.C.R. 429 para 134.

¹⁰⁹ *R v Tse* [2012] S.C.C. 16

¹¹⁰ *R v Tse* [2012] S.C.C. 16 paras 1-2.

¹¹¹ *R v Tse* [2012] S.C.C. 16 para 102.

the nation', but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole".¹¹² By holding this view, Hogg and Bushell are suggesting that the courts should not be having the final voice in Charter rights interpretation but should rather enter into a dialogue with the other branches of government.

Hogg and Bushell are of the view that in circumstances when the Canadian parliament use the section 33, notwithstanding provision, "it is likely that the public will realize that the legislature is, in fact, overriding a judicial interpretation of a particular Charter right or freedom, rather than the actual Charter right or freedom itself".¹¹³ The effect expressed notwithstanding clauses in Acts, is, according to Hogg and Bushell, is that it will "liberate" the statute from the provisions of section 2 and sections 7 to 15 of the Charter".¹¹⁴

The authors Hogg and Bushell pose the questions of: first, whether it is possible to have a dialogue between two institutions when one is so clearly subordinate to the other? Secondly, does dialogue not require a relationship between equals? Hogg and Bushell are answering these two questions by suggesting, that,

"where a judicial decision is open to legislative reversal, modification or avoidance, then it is meaningful to regard the relationship between the court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the Charter values that have been identified by the court, but which accomplishes the social or economic objectives that the judicial decision impeded".¹¹⁵

¹¹² Hogg P.W and Bushell A "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35 No.1 Osgoode Hall L J 75 105.

¹¹³ Hogg P.W, Bushell A and Wright W.K "Charter Dialogue Revisited _ OR "Much Ado About Metaphors" (2007) 45 No.1 Osgoode Hall L J 1 35.

¹¹⁴ Hogg P.W and Bushell A "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35 No.1 Osgoode Hall L J 75 83.

¹¹⁵ Hogg P.W and Bushell A "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35 No.1 Osgoode Hall L J 75 79-80.

Tremblay is more pro-dialogue theory and hold that, “ section 33 is not the only provision that can give rise to an institutional dialogue in the interpretation of the Canadian Charter of Rights, but both section 33 and section 1 through its application, can give rise to an institutional dialogue”.¹¹⁶ According to Tremblay “a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under section 33 of the Charter). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it”.¹¹⁷

2.4.2. Legal scholars more doubtful about the dialogue theory.

Macfarlane,¹¹⁸ for example, believe that some of the remedies developed by the Canadian courts are “conducive to dialogue” while others are viewed as “preventing dialogue”, these remedies includes the “suspended declaration remedy, reading in, reading down and severance”. The suspended declaration remedy, Macfarlane hold, “is most often used where invalidating the law would leave a troubling policy vacuum and the court knows some type of legislative response is necessary”. Reading in, reading down and severance, according to Macfarlane, “almost never result in dialogic responses from the legislature,

¹¹⁶ Tremblay L.B ‘The legitimacy of judicial review: The limits of dialogue between courts and legislatures’ (2005) 1 Con 3 No.4 617 – 648 618.

¹¹⁷ Tremblay L.B ‘The legitimacy of judicial review: The limits of dialogue between courts and legislatures’ (2005) 1 Con 3 No.4 617 – 648 626.

¹¹⁸ Macfarlane E ‘Dialogue or compliance? Measuring legislatures’ policy responses to court rulings on rights’ (2012) 0(0) International Political Science Review 1-18 11-14 available at <http://www.ips.sagepub.com> (accessed on 06 August 2012).

because the court is doing the work of the legislature and therefore the legislature almost always treat the matter as being settled”.¹¹⁹

Macfarlane is holding that, “Canada is widely considered the model for dialogue review in other parliamentary systems, but suggests that these jurisdictions should approach dialogue theory with an abundance of caution”. Of the weak-form systems of review, Macfarlane suggests, “Canada’s is theoretically closer to the strong-form model than the others and in contrast to Canada, a more meaningful dialogic exchange might take place in a system like the United Kingdom”.¹²⁰

2.4.3. Critiques of the dialogue theory.

Critiques of Hogg and Bushell’s concept of dialogue finds it to be problematic in several respects. Manfredi and Kelly, for example, are of the view that, “first, the empirical demonstration on which dialogue depends suffers from several flaws. Secondly, even without these flaws, the metaphor as constructed in the Hogg and Bushell’ study provides only a weak responds to the normative issues implicit in the democratic critique of Charter-based judicial review”.¹²¹

Sinnott-Armstrong disagrees with the concept of dialogue, by holding that “there is no true dialogue when a court finds that legislation violates the constitution, and the legislature responds, though, we are going to pass it again anyway. The legislature is such a case, is not responding to the court’s reasons, Sinnott-Armstrong suggests”.¹²²

¹¹⁹ Macfarlane E ‘Dialogue or compliance? Measuring legislatures’ policy responses to court rulings on rights” (2012) 0(0) *International Political Science Review* 1-18 11-14 available at <http://www.ips.sagepub.com> (accessed on 06 August 2012).

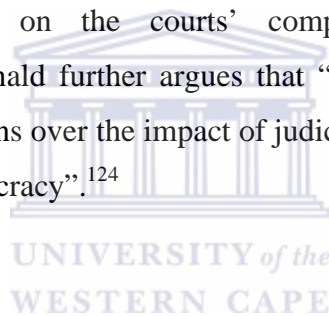
¹²⁰ Macfarlane E ‘Dialogue or compliance? Measuring legislatures’ policy responses to court rulings on rights” (2012) 0(0) *International Political Science Review* 1-18 14 available at <HTTP://www.ips.sagepub.com> (accessed on 06 August 2012).

¹²¹ Manfredi C.P and Kelly J.B ‘Six Degrees of Dialogue: A Responds to Hogg and Bushell’ (1999) 37 No.3 *Osgoode Hall L J* 513 515.

¹²² Sinnott-Armstrong W ‘Weak and Strong Judicial Review’ (2003) 22 *Law and Philosophy* 381-392 385.

Petter, is of the view that “dialogue theory is seriously deficient and the theory mitigates more than it legitimates, and by acknowledging the subjective nature of Charter decision-making, dialogue theory undercuts the legitimacy of judicial review as it seeks to explain why legislatures should be allowed to trump judicial decisions”. Another deficiency of the dialogue theory, according to Petter, is “its tendency to discount the extent to which judicial decision-making under the Charter drives public policy-making in Canada”.¹²³

Mc Donald is of the opinion that, “if Hogg and Bushell think or imply they have refuted all democratically inspired objections to judicial review, they significantly overstate their case, because many democratic objections to judicial review is not merely about who gets the final say”. Mc Donald hold that, “despite the academic fixation on the counter-majoritarian difficulty, not all democratic objections to judicial review focus on the courts’ comparative lack of democratic accountability”. Mc Donald further argues that “in particular, some democratic objectors express concerns over the impact of judicial review on the overall health and wellbeing of a democracy”.¹²⁴



In responds to the critiques on Hogg and Bushell’s concept of and interpretation of dialogue, they hold that, “with dialogue they did not mean that the courts and legislatures were literally talking to each other, but that the court decisions in Charter cases usually left room for a legislative response, and usually received a legislative response”.¹²⁵

¹²³ Petter A ‘Twenty years of Charter justification: From liberal legalism to dubious dialogue’ (2003) 52 *UNBLJ* 187 195-196.

¹²⁴ Mc Donald L ‘Rights, ‘dialogue’ and democratic objections to judicial review’ (2004) 32 *Fed. L. Rev.* 1 24.

¹²⁵ Hogg P.W, Bushell A and Wright W.K ‘Charter Dialogue Revisited _ OR “Much Ado About Metaphors’ (2007) 45 No.1 *Osgoode Hall L J* 1 4.

2.5. Conclusion.

An assessment of the case law discussed in chapter two as well as the appreciated analysis and views of leading constitutional law authors in respect of section 33 of the Charter, it appears as if section 33 is not currently contributing towards an institutional dialogue in Canada.

In their 1997 article, Hogg and Bushell are claiming, that, their study of 66 cases in which laws was held to be invalid for breach of the Charter, that all but 13 elicited some response from the competent legislative body. In seven cases, the response was simply to repeal the offending law. In the remaining 46 cases, a new law was substituted for the old law. In two, the decisions were overruled and the new law essentially re-enacted the law that had been held to be invalid, once through the use of section 33 and once through the use of section 1.¹²⁶

Since their 1997 article, Hogg and Bushell claim, there have been 23 cases in which a law was held to be invalid for breach of the Charter, and of those 23 cases, 14 or approximately 61 per cent elicited some response from the competent legislative body. In one case, the response was simply to repeal the offending law, and in the remaining 13 cases, a new law was substituted for the offending law. In no case did the legislative sequel amount to the decision being overruled using either section 33 or section 1.¹²⁷

The fact that the notwithstanding clause has not been enforced in such a long period, might be one of the reasons why the notwithstanding clause has lost its dominance in Charter rights litigation. Therefore, another possibility is that it might be that the institutional dialogue do exists between the Canadian courts and the parliament, but it appears as if this dialogue is not been realised as a result of

¹²⁶ Hogg P.W, Bushell A and Wright W.K 'Charter Dialogue Revisited _ OR "Much Ado About Metaphors' (2007) 45 No.1 *Osgoode Hall L J* 1 51; See also Hogg P.W and Bushell A 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' 35 No.1 *Osgoode Hall L J* 75 97 – 100.

¹²⁷ Hogg P.W, Bushell A and Wright W.K 'Charter Dialogue Revisited _ OR "Much Ado About Metaphors' (2007) 45 No.1 *Osgoode Hall L J* 1 51-52.

section 33, but rather the remedies under section 24, subject to prior application of the limitation analysis in section 1.

It appears that in the midst of all the possible remedies that are available to the courts when the rights in sections 2, and 7 to 15 has been infringed, the notwithstanding clause in section 33 have the potential of barring the courts from exercising those remedies but to adhere to the notwithstanding provisions in statutes, although section 33 has only been invoked only once during its existence in the Charter.

It appears as if section 33, although still exists as a notwithstanding clause in the CCR it, to a certain extent does not have that ‘veto effect’ on Charter rights anymore. It has been argued by Hogg and Bushell that section 33, in practice has become relatively unimportant, because of the development of a political climate of resistance to its use.¹²⁸



¹²⁸ Hogg P.W and Bushell A *'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)'* 35 No.1 Osgoode Hall L J 75 83.

CHAPTER THREE: JUDICIAL REVIEW UNDER THE HUMAN RIGHTS ACT 1998.

3.1. Introduction.

It is important to note at this stage that England do not have a Bill of Rights, although attempts to adopt a Bill of Rights is currently in progress.¹²⁹ Prior to the Human Rights Act (HRA),¹³⁰ English law failed to develop effective protection for human rights against incursions by public officials and authorities, and much of the blame for the parlous defence of civil liberties and human rights can be attributed to the judges' sentimental attachment to the *Wednesbury* test established in the case of *Associated Provincial Picture Houses v Wednesbury Corporation*¹³¹ as the appropriate standard for reviewing official action. Under the *Wednesbury* test, action was only reviewable if it was so unreasonable that no reasonable decision-maker would have taken it.¹³²

Parliamentary sovereignty, according to Herling and Lyon, have two elements: that parliament may make or unmake any law and that a parliamentary statute is the highest law known in the United Kingdom and may not be set aside except by parliament itself.¹³³

The pre-HRA approach is also described by Francesca Klug as a "legislature first" approach in which the courts are explicitly barred from scrutinising clearly expressed Acts of parliament.¹³⁴

¹²⁹ Ministry of Justice 'Responding to human rights judgments' Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011-12 p.6 available at <http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf> (accessed on 08 November 2012).

¹³⁰ Human Rights Act 1998.

¹³¹ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

¹³² Leigh I 'The standard of judicial review after the Human Rights Act' in Fenwick H, Phillipson G and Masterman R *Judicial Reasoning under the UK Human Rights Act* (2007) 174.

¹³³ Herling D and Lyon A *Briefcase on Constitutional and Administrative Law* 4 ed (2004) 37.

¹³⁴ Klug F 'Judicial Deference Under The Human Rights Act 1998' (2003) Issue 2 *E.H.R.L.R.* 125-133 127-128.

The HRA came into force in October 2000, and its purpose is to give greater effect in domestic law to the human rights set out in the European Convention on Human Rights (ECHR).¹³⁵ The ECHR was adopted in 1950, ratified by the United Kingdom in 1951 and entered into force in 1953. The unusual feature of the Convention, it is said, is that it provides a mechanism for individuals to enforce their Convention rights against state parties.¹³⁶ The Convention is now administered by two bodies, namely, the Committee of Ministers of the Council of Europe (CMCE) and the European Court of Human Rights (Court of Human Rights) in Strasbourg. At an international level, any individual, non-governmental organisation or group of individuals can petition the Court of Human Rights alleging a violation of Convention rights.¹³⁷ The Court of Human Rights was established in January 1959 in terms of Article 19 of the Convention which awarded it a status of permanency¹³⁸ and its jurisdiction has been recognised by 47 European states.

Crucial to this enquiry and discussion on England, is the Court of Human Rights, wherefore the HRA imposes an obligation on the interpreters of the HRA to follow an interpretation that is compatible with and give effect to the Convention rights.¹³⁹ The HRA also puts an obligation on a court or tribunal, that, when determining a question which has arisen in connection with a Convention right, to take into account, judgments, decisions, declarations and advisory opinions of the Court of Human Rights.¹⁴⁰ Section 6 of the HRA also imposes further obligation upon public authorities, including the courts,¹⁴¹ not to act incompatible with the ECHR wherefore such incompatibility would be unlawful.¹⁴²

¹³⁵ European Convention on Human Rights

¹³⁶ Starmer K, Strange M and Whitaker Q with Anthony Jennings QC and Tim Owen QC *Criminal Justice, Police Powers & Human Rights* (2002) 1.

¹³⁷ Starmer K, Strange M and Whitaker Q with Anthony Jennings QC and Tim Owen QC *Criminal Justice, Police Powers & Human Rights* (2002) 1.

¹³⁸ European Convention on Human Rights Article 19.

¹³⁹ Human Rights Act 1998 s.3(1).

¹⁴⁰ Human Rights Act 1998 s.2(1)(a).

¹⁴¹ Human Rights Act 1998 s.6(3)(a).

¹⁴² Human Rights Act 1998 s.(6)(1).

This chapter is devoted entirely to the discussion on the HRA of England, and of crucial importance to the discussion are sections 3, 4, 6 and 10 of the Act. These provisions, however, lie central to statutory interpretation in England, and therefore directs constitutional interpretation in England.

After the introduction, this chapter starts off with a description of the HRA model of judicial review, by inter alia, a discussion on section 3, the interpretation clause; section 4, which permit courts to make a declaration of Convention-incompatibility; section 6 which makes it unlawful for a public authority to act incompatible with the Convention; section 10 which is providing a process for remedial action, should parliament decide to amend or repeal Convention-incompatible laws.

The discussion in this chapter will also include the inescapable voice of the United Kingdom's Superior Courts, in cases where the Convention-compatibility of impugned laws was mainly at issue. The case law will include judgments from as early as the late 1990s and until as recent as the years 2010s.

In the case of *Jackson v Attorney General*¹⁴³ it was held that the United Kingdom do not have an uncontrolled constitution and the European Convention on Human Rights as incorporated into law by the Human Rights Act 1998 created a new legal order. The doctrine of parliamentary supremacy can now be seen to be out of place in the modern United Kingdom.¹⁴⁴

In the opinion of Lord Elias, before the coming into operation of the Human Rights Act, the courts played a traditionally subservient role, but the Human Rights Act has transformed the relationship between courts and parliament, conferring far greater powers upon the courts than they have hitherto been entitled to exercise.¹⁴⁵

¹⁴³ *Jackson and others v Attorney General* [2005] UKHL 56.

¹⁴⁴ *Jackson and others v Attorney General* [2005] UKHL 56 para 102.

¹⁴⁵ Rt Hon Lord Justice Elias ANNUAL LORD RENTON LECTURE 24 November 2009 at the Institute for Advanced Legal Studies, London STATUTE LAW SOCIETY p 6.

The purpose of the HRA is *inter alia*, to give further effect to rights and freedoms guaranteed under the ECHR.¹⁴⁶ It is however important to note that the purpose of the HRA and the scope of the application of sections 3 and 4 of the Act can only be fully understood through the readings, commentaries and appreciated views, though very distinct from each other, of leading constitutional law authors, academics and scholars. The opinions of legal authors and academics should be viewed with a full understanding of how legislation is being interpreted in courts and therefore the voices of judges in the UK courts are of utmost importance to this research.

According to Francesca Klug, the purpose of the HRA is to “allow the courts to apply human rights principles where they were once barred from doing so. It was not enacted so that the courts could have the final say in areas where there is no settled human rights answer any more than it allows them to abdicate from their responsibility to scrutinise on the grounds that is outside their sphere of competence”.¹⁴⁷

According to Mark Elliott, “the Human Rights Act is essentially an interpretive instrument,¹⁴⁸ and it is clear that the carefully and subtly drafted Act preserves the principle of parliamentary sovereignty”.¹⁴⁹

3.2. Review powers under the HRA.

3.2.1. Convention-compatible interpretation.

Section 3¹⁵⁰ as the guiding section in respect of statutory interpretation under the HRA is very prescriptive as to how primary as well as subordinate legislation should be interpreted, and in doing so it provides as follows:

¹⁴⁶ Human Rights Act of 1998 Preamble.

¹⁴⁷ Klug F ‘*Judicial Deference Under The Human Rights Act 1998*’ (2003) Issue 2 E.H.R.L.R. 125-133 132.

¹⁴⁸ Elliott M *The Constitutional Foundations of Judicial Review* (2001) 200.

¹⁴⁹ Elliott M *The Constitutional Foundations of Judicial Review* (2001) 201.

¹⁵⁰ Human Rights Act of 1998 s.3.

(1). In so far as it is possible to do so, primary legislation and subordinate legislation must be read and give effect in a way which is compatible with the Convention rights.

(2). This section -

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not effect the validity, continuing operation or enforcement of any incompatible primary legislation, and

(c) does not effect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) if primary legislation prevents removal of the incompatibility.

The literal reading of section 3 tells us that the interpreter of legislation must first find an interpretation which is compatible with the Convention rights, but subject to possibility.

It has been argued by Palmer that section 3(1), is a powerful tool whose use is obligatory, and it is not an optional canon of construction, nor is its use dependent on the existence of ambiguity.¹⁵¹ A closer look at Palmer's opinion on section 3(1) is that this author is of the view that the instructions flowing from the wording of this subsection means that its directions is peremptory and inescapable and therefore courts must follow it.

In the case of *Ghaidan v Godin-Mendoza*,¹⁵² the court held that section 3 is a key section of the Human Rights Act, and that one of the primary means by which Convention rights are brought into this country. Parliament has agreed that all legislation existing and future should be interpreted in a particular way.¹⁵³

¹⁵¹ Palmer E *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007) 119.

¹⁵² *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

¹⁵³ *Ghaidan v Godin-Mendoza* [2004] UKHL 30 para 26.

Judicial review in terms of section 3 is makes it possible for legislation to be Convention-compatible through re-interpretation by the courts and not by way of re-enactment through the legislature.

3.2.2. Declaration of incompatibility.

Section 4 of the HRA provides that:

- (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
- (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
- (3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in exercise of a power conferred by the primary legislation, is compatible with a Convention right.
- (4) If the court is satisfied –
 - (a) That the provision is incompatible with a Convention right, and
 - (b) That (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.

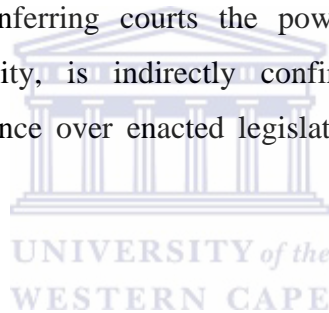
Subsection 6 declares that a declaration in terms of section 4 does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and is not binding on the parties to the proceedings in which it is made.¹⁵⁴

Section 4 of the HRA, however, is conferring on the courts the power to declare Convention-incompatible any legislation, whether primary or subordinate, that cannot be read in line with the Convention. Considering the reading strategies that is available to courts during a section 3 interpretation, which includes the

¹⁵⁴ Human Rights Act 1998 s.4(1) – (4) and (6).

remedies of reading in as well as reading down, it appears that the courts would have to do much before opting for a section 4 declaration of Convention-incompatibility. The section 4 declaration is also seen by most authors as a measure of last resort and courts should first try to find an interpretation that can make the impugned laws Convention-compatible.

In a situation where it is impossible for the courts to find a Convention-compatible reading of a statute, and it does make a Convention-incompatible declaration, it would not affect the validity, continuing operation or enforcement of the provisions and it is neither binding upon the parties before the court. Looking deeper and more closely to the wording of subsection 6, it appears as if parliament or any organ of state cannot be compelled to give effect to the orders of the courts in respect of Convention-incompatible laws. It further appears as if section 4, although conferring courts the power to make a declaration of Convention-incompatibility, is indirectly confirming parliament's status of sovereignty and dominance over enacted legislation, whether it is Convention-compliant or not.



3.2.3. Section 6.

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if –
 - (a) As the result of one or more provisions of primary legislation, the authority could not have acted differently; or
 - (b) In the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
- (3) In this section “public authority” includes –

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

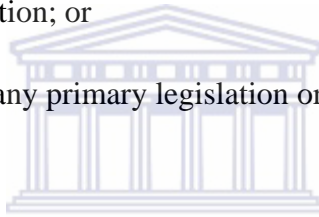
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(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) “An act” includes a failure to act but does not include a failure to –

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.¹⁵⁵



Section 6, although its provisions forbid a public authority to act incompatible with the Convention, the section has limited application, *inter alia*, that a public authority does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament. Section 6 is further only limited to actions of a public nature and exclude any act of a private nature. Section 6 is also not binding upon parliament for any failure to introduce or to table any proposal or legislation in parliament, as well as any remedial order.

¹⁵⁵ Human Rights Act 1998 s.6.

3.2.4. Remedial action.

Section 10, in granting power to take remedial action it provides as follows:

- (1) This section applies if –
 - (a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies –
 - (i) all persons who may appeal have stated in writing that they do not intent to do so;
 - (ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or
 - (iii) an appeal brought within that time has been determined or abandoned; or
 - (b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom arising from the Convention.
- (2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.
- (3) If, in the case of subordinate legislation, a Minister of the Crown considers-
 - (a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and
 - (b) that there are compelling reasons for proceeding under this section, he may by order make such amendments to the primary legislation as he considers necessary.

- (4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister proposes to proceed under paragraph 2(b) of Schedule 2.
- (5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.
- (6) In this section “legislation” does not include a Measure of the Church Assembly or of the General Synod of the Church of England.
- (7) Schedule 2 makes further provision about remedial orders.¹⁵⁶

Section 10 of the HRA provides for the taking of remedial action, but section 10 should not be read in isolation, but should be read in conjunction with section 4. Any remedial action taken in terms of section 10 is subject to a declaration of Convention-incompatibility under section 4, and where such declaration is still subject to an appeal. Therefore section 10 do not provide for automatic remedial action taken by the relevant Minister, but all the pre-requisites in both section 4 and section 10 must be fulfilled in order for a section 10 remedial action to take place.

3.3. An assessment of the court's interpretation and parliamentary response.

3.3.1. Examples of Convention-compatibility interpretations in terms of section 3.

The following two cases are clear examples of the changes that the HRA has brought to statutory interpretation in the United Kingdom. One year before the

¹⁵⁶ Human Rights Act 1998 s.10.

HRA came into force, in *Fitzpatrick v Sterling Housing Associates Ltd*,¹⁵⁷ the House of Lords held that whilst a same-sex-couple could constitute a family for the purposes of the Rent Acts, the definition of spouse to include a person living with the original tenant as his or her husband or wife pointed to a gendered heterosexual relationship between one man and one woman and could therefore not be read into the legislation in order to make it European Convention of Human Rights compatible. The majority court refused to interpret the Rent Act in favour a surviving partner to a homosexual co-habitation, despite the court's obligation to adhere to the prohibition of discrimination in Article 14 of the Convention.¹⁵⁸

In the case of *Ghaidan v Godin-Mendoza*,¹⁵⁹ four years after the HRA came into force, the House of Lords was faced with materially analogous facts as in the case of *Fitzpatrick v Sterling Housing Associates Ltd*. The original tenant died, but he was involved in a stable and monogamous homosexual relationship with Godin-Mendoza until his death. After the death of the deceased, Mr Godin-Mendoza was still living in the flat and Mr Ghaidan, the landlord brought an action in court for the possession of the flat.¹⁶⁰ The court held that interpretation under section 3 is the prime remedial remedy, and that resort to section 4 must be an exceptional course, and that there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights.¹⁶¹ Lord Steyn agreed with the Court of Appeal that, 'as his or her wife or husband' in the statute means 'as if they were his wife or husband'.¹⁶²

The case of *R v A*,¹⁶³ is a clear example of how the court exercised a very strong review through a section 3 interpretation. Section 41 of the Youth and Criminal Evidence Act that prevented an accused from calling evidence about the complainant's prior sexual history in respect of the issue of whether she had

¹⁵⁷ *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 ALL ER 705.

¹⁵⁸ European Convention on Human Rights Art.14.

¹⁵⁹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

¹⁶⁰ *Ghaidan v Godin-Mendoza* [2004] UKHL 30 para 2.

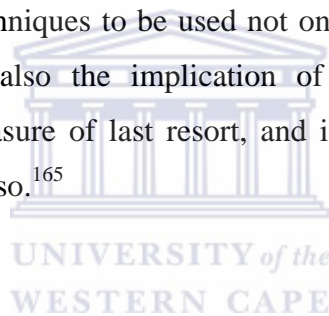
¹⁶¹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30 para 50.

¹⁶² *Ghaidan v Godin-Mendoza* [2004] UKHL 30 para 51.

¹⁶³ *R v A* [2001] UKHL 25.

consented to his conduct was challenged. The House of Lords held that section 41 should be read in favour of the accused, and that due regard always being paid to the importance of seeking to protect the complainant's dignity from humiliating questions, the test of admissibility is whether the evidence is nevertheless so relevant to the issue of consent, that to exclude it would endanger the fairness of the trial under section 6 of the Convention.¹⁶⁴

In *R v A*, lord Steyn refers to section 3 as an emphatic adjuration by the legislature, and held that the obligation under section 3 is a strong one, and it applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. Lord Steyn further held it to be in the will of parliament as reflected in section 3 that it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. Lord Steyn was of the view that, the techniques to be used not only involve the reading down of express language, but also the implication of provisions. A declaration of incompatibility is a measure of last resort, and it must be avoided, unless it is plainly impossible to do so.¹⁶⁵



3.3.2. Examples of cases where a Convention-compatible interpretation was impossible.

These case where a declaration of Convention-incompatibility was simply unavoidable for the courts, can further be categorised into three different categories, *inter alia*, no.1, where the legislation have been remedied by later primary legislation; no.2, where the legislation have been remedied by a remedial order under section 10; no.3, where the related provisions had already been remedied by primary legislation at the time of the declaration.

¹⁶⁴ *R v A* [2001] UKHL 25 para 46.

¹⁶⁵ *R v A* [2001] UKHL 25 para 44.

3.3.2.1. Where the legislation have been remedied by later primary legislation.

In *McR's Application for Judicial Review*,¹⁶⁶ the applicant was charged with a number of sexual offences against a mentally retarded woman. All the offence with which the applicant was charged with, were all charges of attempted buggery contrary to section 62 of the Offences against the Person Act 1861. The applicant argued that section 62 was in breach of Article 8 of the Convention. The applicant sought a declaration of incompatibility under section 4 of the HRA and an order of certiorari quashing the decision of Magistrate Court to remand the applicant on the charges of attempted buggery. The court held that, the continued existence in the law of Northern Ireland of section 62 of the Offences against the Person Act 1861, was incompatible with article 8 to the extent that it interfered with consensual sexual behaviour between individuals. Parliament responded with the enactment of later primary legislation and section 62 was repealed in Northern Ireland by the Sexual Offences Act 2003, and the new provisions came into force on 1 May 2004.¹⁶⁷

In *Bellinger v Bellinger*,¹⁶⁸ Mrs Bellinger was at birth in 1946 correctly classified and registered as a male.¹⁶⁹ Mrs Bellinger was a post-operative male to female transsexual who got validly married to Mr Bellinger on 2 May 1971. Section 11(c) of the Matrimonial Causes Act 1973 provided that a marriage is void unless the parties are respectively male and female.¹⁷⁰ Mrs Bellinger appealed against a decision of the trial court, that she was not validly married to her husband, by

¹⁶⁶ *McR's Application for Judicial Review* [2002] NIQB 58.

¹⁶⁷ Ministry of Justice 'Responding to human rights judgments' Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011-12 p 44 available at <http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf> (accessed on 08 November 2012).

¹⁶⁸ *Bellinger v Bellinger* [2003] UKHL 21.

¹⁶⁹ *Bellinger v Bellinger* [2003] UKHL 21 para 3.

¹⁷⁰ *Bellinger v Bellinger* [2003] UKHL 21 para 1.

virtue of the fact that at law she was a man. The House of Lords declared section 11(c) of the Matrimonial Causes Act 1973 to be incompatible with Articles 8 and 12 of the Convention, because it made no provision for the recognition of gender reassignment, and section 11(c) remains a continuing obstacle to Mr and Mrs Bellinger marrying each other.¹⁷¹ Here, the response from parliament was the remedying of the situation by enacting the Gender Recognition Act of 2004, which came into force on 4 April 2005.¹⁷²

In *R (on the application of Royal College of Nursing and others) v Secretary of State for the Home Department*,¹⁷³ the applicants challenged the lawfulness of a scheme established under the Safeguarding Vulnerable Groups Act 2006, which prohibits those placed on lists established under the scheme from working with children and or vulnerable adults.¹⁷⁴ All the claimants alleged that the scheme is unlawful in four specific respects, *inter alia*, it is in breach of articles 6 and 8 of the Convention because it limited the right to representation prior to listing; it prevented individuals listed from an opportunity of a full merits review on appeal and; the minimum barring of 10 years is disproportionate.¹⁷⁵ The court found that procedures which denied the right of a person to make representations as to why they should not be included on a barred list breached Article 6 and had the potential to give rise to breaches of Article 8 of the Convention.

Section 67(2) and (6) of the Protection of Freedoms Act 2012 amends Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 and gives the person the opportunity to make representations as to why they should not be included in the

¹⁷¹ *Bellinger v Bellinger* [2003] UKHL 21 para 50-52.

¹⁷² Ministry of Justice 'Responding to human rights judgments' Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011-12 p 48 available at <http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf> (accessed on 08 November 2012).

¹⁷³ *R (on the application of Royal College of Nursing and others) v Secretary of State for Home Department* [2010] EWHC 2761.

¹⁷⁴ *R (on the application of Royal College of Nursing and others) v Secretary of State for Home Department* [2010] EWHC 2761 paras 1-2.

¹⁷⁵ *R (on the application of Royal College of Nursing and others) v Secretary of State for Home Department* [2010] EWHC 2761 para 34.

children's or adults' barred list before a barring decision is made. These provisions commenced on 10 September 2012.¹⁷⁶

3.3.2.2. Where the legislation have been remedied by a remedial order under section 10.

In the case of *R (on the application of H) v Mental Health Review Tribunal for the North and East London Region and the Secretary of State for Health*,¹⁷⁷ the applicant was convicted of manslaughter in the year 1988 and he was ordered to be detained in a hospital and to be subject to special restrictions. He was admitted to Broadmoor Hospital and in 1999 he applied to the Mental Health Tribunal for discharge pursuant to section 73 of the Act.¹⁷⁸ The Court of Appeal held that sections 72 and 73 do not require the tribunal to discharge a patient if it cannot be shown that the patient is suffering from a mental disorder and the court concluded that sections 72 and 73 of the Mental Health Act 1983 is incompatible with Article 5(1) and 5(4) of the Convention.¹⁷⁹ This case is a classical example where through a remedial order made in 2001, parliament responded by amending the Mental Health Act and the amendments came into force on 26 November 2001.¹⁸⁰

¹⁷⁶ Ministry of Justice 'Responding to human rights judgments' Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011-12 p 57 available at <http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf> (accessed on 08 November 2012).

¹⁷⁷ *R (on the application of H) v Mental Health Review Tribunal for the Northern and East London Region and The Secretary of State for Health* [2001] EWCA Civ 415.

¹⁷⁸ *R (on the application of H) v Mental Health Review Tribunal for the Northern and East London Region and The Secretary of State for Health* [2001] EWCA Civ 415 para 1.

¹⁷⁹ *R (on the application of H) v Mental Health Review Tribunal for the Northern and East London Region and The Secretary of State for Health* [2001] EWCA Civ 415 para 31.

¹⁸⁰ Ministry of Justice 'Responding to human rights judgments' Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011-12 p.43 available at <http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf> (accessed on 08 November 2012).

3.3.2.3. Where the related provisions have already been remedied by primary legislation at the time of the declaration.

In the case of *R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and another*,¹⁸¹ the first applicant a British national and the second applicant a foreign national who was sentenced to 18 and 45 years imprisonment respectively. The applicants contended that the early release provisions of the Criminal Justice Act were discriminatory because it was in breach of their rights under articles 5 and 14 of the Convention. They claimed that it denied them a right enjoyed by long-term prisoners serving determinate sentences of less than 15 years or life sentences prisoners as well as the right to be released on the recommendation of the Parole Board. The House of Lords declared sections 46(1) and 50(2) of the Criminal Justice Act 1991 incompatible with article 14 in conjunction with article 5 of the Convention, to the extent that these sections prevented prisoners liable for removal from having their cases reviewed by the Parole Board in the same manner as other long term prisoners.

This case is a classical example of a situation where the related provisions had already been repealed by primary legislation at the time of the declaration. Sections 46(1) and 50(2) of the Criminal Justice Act 1991 had already been repealed and replaced by the Criminal Justice Act 2003, but they continued to apply on a transitional basis to offences committed before 4 April 2005. The Criminal Justice and Immigration Act 2008 have amended the Criminal Justice Act 1991 to remove the incompatibility in the transitional cases. The amended came into force on 14 July 2008.¹⁸²

¹⁸¹ *R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and another* [2006] UKHL 54.

¹⁸² Ministry of Justice 'Responding to human rights judgments' Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011-12 p 53 available at <http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf> (accessed on 08 November 2012).

Considering the case law examined in this chapter, it appears as if the courts have in most cases exercised strong review power when conducting a section 3 interpretation. In the cases where it was however impossible for the courts to find a Convention-compatible interpretation of legislation, and declared legislation Convention-incompatible under section 4, it appears as if there was parliamentary response in all the cases. It can also be safely inferred from parliament's response, that, there is a two-way communication between courts and parliament as a result of the courts declaratory powers in section 4.

3.4. The opinions of legal authors: activism or constraint.

The question of when it is no longer possible to interpret legislation compatible with the Convention and when to make a declaration of Convention-incompatibility remains a question that is open for debate amongst legal scholars. Constitutional law scholars takes different standpoints on the issue of how broad a section 3 interpretation should be, therefore this issue is often the topic of debate amongst legal authors, academics and sometimes judges too.

3.4.1. Legal scholars in support of judicial activism.

Kavanagh for example argues that the “metaphor of dialogue is equally applicable not only to section 3(1) of the Human Rights Act of England,¹⁸³ but also to ordinary instances of statutory interpretation whereby parliament enacts the legislation and the courts interpret it by determining its meaning when applied to a particular case”. Kavanagh argue that, “even if we accept that encouraging dialogue is one of the purposes of the Human Rights Act to which the courts should give effect, this does not support the conclusion that section 4 is the only

¹⁸³ Kavanagh A ‘Choosing between sections 3 and 4 of the Human Rights Act 1998: Judicial reasoning after *Ghaidan v Mendoza*’ in Helen Fenwick, Gavin Phillipson and Roger Masterman *Judicial Reasoning under the UK Human Rights Act* (2007) 135.

or even the primary way of fulfilling that purpose, but it could also be carried out by adopting an interpretation under section 3”.¹⁸⁴

Allan for example is of the view that, “by preserving the validity, continuing operation, and enforcement of incompatible primary legislation, the Human Rights Act upholds a formal principle of parliamentary sovereignty”. In substance, Allan hold, “it acknowledges that the meaning of formally valid statutory provisions depends on considerations of justice, rooted in a legal tradition of respect for basic values of individual liberty and human dignity. The idea that legislation is superior to precedent as a source of law is accurate enough for everyday purposes, but it obscures the truth that, in the last analysis, a statute obtains its meaning from its context of application”.¹⁸⁵ Allan, however, is of the opinion that “in the great majority of cases, section 3 is likely to be applicable, for the intention to comply with the Convention can normally be safely assumed and the necessary adjustments made to the statutory language – or a suitably charitable reading adopted without any constitutional overreaching”.¹⁸⁶

Allan is of the view that, “if we acknowledge a duty to interpret statutes in accordance with the rule of law, the relevant parliamentary intent must be constructed, rather than discovered or surmised. It is a matter of forging the best reconciliation we can between the statute’s literal provisions, on the one hand, and the demands in the context of constitutional principle, on the other. When those demands are urgent and pressing, adherence to an overly literal, or prima-facie reading can amount to constitutional vandalism”.¹⁸⁷

¹⁸⁴ Kavanagh A ‘Choosing between sections 3 and 4 of the Human Rights Act 1998: Judicial reasoning after *Ghaidan v Mendoza*’ in Helen Fenwick, Gavin Phillipson and Roger Masterman *Judicial Reasoning under the UK Human Rights Act* (2007) 136.

¹⁸⁵ Allan T ‘Parliament’s Will and the Justice of the Common Law: The Human Rights Act in Constitutional Practice’ 47. available at <http://www.clp.oxfordjournals.org> (accessed on 03 July 2012).

¹⁸⁶ Allan T ‘Parliament’s Will and the Justice of the Common Law: The Human Rights Act in Constitutional Practice’ 41 available at <http://www.clp.oxfordjournals.org> (accessed on 03 July 2012).

¹⁸⁷ Trevor Allan “Parliament’s Will and the Justice of the Common Law: The Human Rights Act in Constitutional Practice” 44 available at <http://www.clp.oxfordjournals.org> (accessed on 03 July 2012).

van Zyl Smit, in total contradiction with Klug, is in support of the courts, crossing legislative boundaries while conducting a section 3 interpretation. van Zyl Smit is of the view that there is pressure on courts in cases under the HRA “to do more than just interpret, to do something verging on amendment”. According to van Zyl Smit, this pressure stem from the widely held view that section 3 also plays a “remedial role” under the framework of the HRA”. The sense in which section 3 is remedial, van Zyl Smit hold, is that it “enables judges to protect Convention rights which would have otherwise been breached if the statute governing the case was interpreted according to ordinary principles of statutory interpretation”.¹⁸⁸

3.4.2. Legal scholars in support of judicial constraint.

Klug, for example, is not in support the fact that courts cross should cross legislative boundaries while conducting an interpretation in terms of section 3 and therefore hold that “by concluding that there cannot be ‘no-go’ areas for judges under the Human Rights Act does not, however, necessarily require them to intrude on the rightful role of elected and accountable politicians”. Klug argues that the HRA was specifically structured to allow the courts to uphold rights while also retaining parliamentary authority. Behind the construction of sections 3 and 4, according to Klug, was a “carefully tough-out constitutional arrangement that sought to inject principles of parliamentary accountability and transparency into judicial proceedings without removing whole policy areas to judicial determination”. Sections 3 and 4, Klug says, “sought to create a new dynamic between the judicial and legislative branches of the state”.¹⁸⁹ Klug is of the opinion that the approach could be called “a dialogue approach or a relationship approach in which the institutions of the state influences each other, rather than

¹⁸⁸ van Zyl Smit J ‘HRA section 3 and the limits of statutory interpretation’ available at www.statutelawsociety.org (accessed on 20 September 2012).

¹⁸⁹ Klug F ‘Judicial Deference Under The Human Rights Act 1998’ (2003) Issue 2 *E.H.R.L.R.* 125-133 130-131.

the role of the judiciary being the police or correct the wrong decisions of the legislature”.¹⁹⁰

Kyritsis also argue that judges should exercise constraint during their interpretation process. Kyritsis describes the courts and the legislature as “partners to a joint enterprise and as such partners, courts and legislatures ought to be responsive to each other’s contributions and to the distinctive values that each brings to the common project”.¹⁹¹ According to Kyritsis, “constitutional review in its paradigmatic form is compatible with the assignment of an active role to the legislature by virtue of the fact that the role of the judge is remains subsidiary to that of the legislature”.¹⁹²

3.5. Conclusion.

In September 2012 Lord Chancellor and Secretary of State for Justice by Command of Her Majesty has presented a report to the Joint Committee on Human Rights on the government’s response to human rights judgments. It has been reported that since the HRA 1998 came into force on 2 October 2000, only 27 declarations of incompatibility have been made. Of these declarations, *inter alia*, 19 have become final and were not subject to further appeals. Eight declarations have been overturned on appeal. Of the 19 declarations of incompatibility that have become final, 11 have been remedied by later primary legislation; three have been remedied by a remedial order under section 10 of the HRA; four related to provisions that had already been remedied by primary

¹⁹⁰ Klug F ‘Judicial Deference Under The Human Rights Act 1998’ (2003) Issue 2 *E.H.R.L.R.* 125-133 131.

¹⁹¹ Kyritsis D ‘Constitutional Review in Representative Democracy’ (2012) 32 No.2 *Oxford Journal of Legal Studies* 297-324 298.

¹⁹² Kyritsis D ‘Constitutional Review in Representative Democracy’ (2012) 32 No.2 *Oxford Journal of Legal Studies* 297-324 318.

legislation at the time of the declaration and; one is under consideration as to how to remedy the incompatibility.¹⁹³

Although, in terms of section 4 of the HRA, courts are only permitted to make a declaration of Convention-incompatibility, the courts can still give effect to Convention rights by exercising strong review through its interpretive freedom afforded to it through section 3 of the HRA. Section 3, by conferring this interpretive freedom upon courts, appears to be reducing the parliamentary dominance over legislation, and it is therefore placing a 'trump card' in the hands of the courts. Although section 3 requires the courts to follow an interpretation that is consistent with the ECHR, it appears as if section 3 is rather silent on how and to what extent a section 3- interpretation should be, except for 'as far as possible to do so'.

Considering the wording of section 3 of the HRA, inter alia, 'as far as it is possible to do so' one can assume that the Act has given much discretion upon the courts during a section 3 interpretation. I humbly and carefully would rephrase the sections as to mean 'do whatever is possible to do' during a section 3 interpretation process. On the assumption that I have correctly rephrased the section, I would suggest that the courts would have to attempt everything interpretatively possible in order to make the legislation Convention-compatible before opting for a section 4 declaration. This 'as far as it is possible to do so' or on my rephrased version 'do whatever is possible to do' is evident of the wide discretionary and interpretive power that is vested in the courts through section 3. By considering this interpretive power and discretion afforded to courts, one can safely assume that 'as far as possible to do so' or rephrased as 'do whatever is possible to do' means that use whatever remedy that can possibly be used to make legislation Convention-compliant. Thus, the remedies available to courts under the HRA, appears to be very broad, except for the fact that it cannot compel parliament to comply with or to act in accordance with its orders.

¹⁹³ Ministry of Justice 'Responding to human rights judgments' Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011-12 p 40 available at <http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf> (accessed on 08 November 2012).

It appears as if the HRA had, through section 3, conferred a status of partial or limited judicial supremacy upon courts for as far as a section 3 interpretation of legislation is concerned. Therefore one can safely infer from the status conferred upon courts through section 3 that even if parliament enact laws that infringes upon Convention rights, courts have the interpretive freedom to give relief and to give effect to Convention rights. It appears as if parliament, through its response towards declarations of Convention-incompatibility, is *de facto* accepting responsibility to amend or repeal Convention-incompatible legislation, but this *de facto* taking of responsibility by parliament, although viewed as an institutional dialogue by some authors, is not enough. It would have been a more secured dialogue if parliament has a *de jure* responsibility towards Convention-incompatible legislation.



CHAPTER FOUR: JUDICIAL REVIEW IN POST-APARTHEID SOUTH AFRICA UNDER THE CONSTITUTION, 1996

4.1 Introduction

On 5 April 1937 the then Appellate Division of the Supreme Court of South Africa ruled in *Ndlwana v Hofmeyer* that the South African Parliament was sovereign (that is, no longer subject to the imperial Parliament in London after the Statute of Westminster, 1931) and that the doctrine of parliamentary sovereignty meant that the court had no power to test the validity of an Act of Parliament, not even on procedural grounds.¹⁹⁴ This position was overturned 15 years later in 1952, when the same court ruled in *Harris v Minister of the Interior* that the South African courts may indeed review or test the legislative work of Parliament, but on procedural grounds alone.¹⁹⁵ This remained the position in South Africa for the next three decades: South African courts could only challenge impugned laws on procedural grounds, but did not have the power to declare a piece of legislation invalid and unconstitutional, nor could the courts make an order of unconstitutionality in respect of the conduct of the President.¹⁹⁶ As George Devenish remarks “the passing of the Statute of Westminster in 1931 gave birth to this system of parliamentary sovereignty”.¹⁹⁷

The early 1990s brought a dramatic end to the Westminster model of parliamentary sovereignty in South Africa. Heinz Klug claims that “with the adoption of the Interim Constitution [in 1994] the history of constitutionalism in South Africa could be summarised as the rise and fall of parliamentary

¹⁹⁴ *Ndlwana v Hofmeyer* 1937 AD 229 238. The court ruled that an Act of Parliament proved itself on production of the duly published version and that “the procedure express of implied in the South Africa Act is so far as Courts of Law are concerned at the mercy of Parliament like everything else” (238).

¹⁹⁵ 1952 (2) SA 428 (AD).

¹⁹⁶ Meintjies-Van der Walt L (et al) *Introduction to South African Law: Fresh Perspectives* 2nd ed (2011) 45.

¹⁹⁷ Devenish GE *A Commentary on the South African Constitution* (1998) 9.

sovereignty”.¹⁹⁸ Devenish agrees that “the constitution is the highest law in the land, and that parliament is no longer sovereign as is the position in the Westminster model, but the 1996 constitution creates a new *grundnorm* for the state and the body politic”.¹⁹⁹

Constitutional sovereignty or supremacy under the 1996 Constitution implies two things: (i) legislation in conflict with the Constitution is legally invalid,²⁰⁰ and (ii) the Constitutional Court is the final adjudicator of the constitutional validity of legislation.²⁰¹ Unlike its Canadian and British counterparts, the 1996 Constitution links the idea of constitutional supremacy and constitutional democracy to strong form judicial review, based in large part on an extensive Bill of Rights, as inherited via Germany from the United States of America.²⁰² This implies a new role for the courts and a different relationship between the courts and the other branches of government.

The fundamental nature of the break with the past has been a constant theme in the jurisprudence of the Constitutional Court. In *Executive Council of the Western Cape Legislature v President of the RSA* the court stated:

The new Constitution establishes a fundamentally different order to that which previously existed. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution; it is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the Constitution expressly or by necessary implication.²⁰³

It is important at this stage to point out that South Africa has a history of social and racial inequalities and apartheid. The fall of parliamentary sovereignty in the 1990s thus coincided with a constitutional commitment to redress the inequalities of the past within a system that caters for the rights of both the majority and the minority. This ideal of an egalitarian and human rights orientated society

¹⁹⁸ Klug H ‘*The Constitution of South Africa: A Contextual Analysis*’ (2010) 6.

¹⁹⁹ Devenish GE *A Commentary on the South African Constitution* (1998) 36.

²⁰⁰ Section 2 of the Constitution read with section 172(1)(a).

²⁰¹ Section 167(5) of the Constitution.

²⁰² Currie I and De Waal J *The new Constitutional and Administrative law: Volume 1 Constitutional law* (2001) 21 37.

²⁰³ 1995 (4) SA 877 (CC) para 62.

supported the birth of a new Constitutional Court, which has become the final interpreter and the biggest source of protection of the rights entrenched in the South African constitution.²⁰⁴ The Constitution and its interpretation by the Constitutional Court in particular, Heinz Klug holds, “have become a central pillar of South African law”.²⁰⁵ As Karl Klare understood from the outset, the new task of the court is essentially to facilitate change in the regulatory state, and not, as in the liberal tradition, to guard the rights of individuals against the state.²⁰⁶ In *S v Makwanyane* Mohamed J stated that:

the South African constitution retains from the past only what is defensible and represent a decisive break from and ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the constitution.²⁰⁷

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, Ngcobo J stated that:

South Africa is a society in transition. It is a transition from a society based on inequality to one that is based on equality. This transition was introduced by the interim constitution which was designed to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms.²⁰⁸

As said before, it is to ensure the enjoyment of all constitutional rights and freedoms that the Constitution confers upon the Superior Courts, *inter alia*, the High Courts, the Supreme Court of Appeal and the Constitutional Court, the power to exercise a strong form of judicial review. In terms of section 167(5) read with sections 2 and 172(1)(a), the South African Constitutional Court, unlike its

²⁰⁴ The Constitutional Court was formally opened by former President Nelson Mandela on 14 February 1995 see <http://www.constitutionalcourt.org.za/site/thecourt/history.htm#why> (accessed on 07 August 2012).

²⁰⁵ Klug H *The Constitution of South Africa: A Contextual Analysis* (2010) 6.

²⁰⁶ Klare K 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146.

²⁰⁷ *S v Makwanyane* 1995 (3) SA 391 (CC) para 262.

²⁰⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 73.

Canadian and British counterparts, has the final authority to declare that a rights violation has occurred and that law or conduct is thus legally invalid.

At first glance, this strong review power might appear completely incompatible with the idea of inter-branch constitutional dialogue as developed by Hogg and rather as an example of liberal constitutionalism. However, the Constitution also softens this strong review power by creating the opportunity for the other branches to respond to a judicial finding that a rights violation has occurred. This might happen during the limitation analysis under section 36 or during the remedial stage of litigation under sections 38 and 172(1)(b). By creatively using these open-ended provisions, the court may, as a matter of judicial policy, enter into a facilitating dialogue with the other branches of the development state by, in effect, turning its strong review powers into a system of weak review. Even more important in this regard is section 39(2) which, like section 3 of the Human Rights Act, embodies the weak review power to re-interpret existing law in line with the spirit, object and purport of the Bill of Rights.

This chapter takes a closer look at these operational provisions of the Constitution and the different approaches to judicial review and institutional dialogue which these provisions imply. These provisions have understandably given rise to different understandings about the proper degree of judicial activism (strong review power) and restraint (weak review power) required under the South African constitution. Leading constitutional law authors have different viewpoints about which form of judicial review will best suit the transformative aspirations of the South African constitution. The chapter introduces and critically discusses some of the viewpoints offered by these authors and academics. Finally, the chapter also focuses on the jurisprudence of the Constitutional Court. Specific landmark decisions will be discussed to illustrate how the Court has struggled to find the appropriate balance between constitutional design (mandating strong form review) and constitutional practice (often necessitating weak form review and deference to the other branches of government as partners in a contested and ongoing constitutional dialogue).

4.2 Review powers by constitutional design

4.2.1 Provisions supporting strong review

The Constitution provides that the Bill of Rights applies to all law and binds the legislature, executive, judiciary and all organs of state,²⁰⁹ and that all law or conduct which is inconsistent with the constitution is invalid, and the obligations imposed by it must be fulfilled.²¹⁰ These provisions are supplemented with section 172 which reads as follows:

- (1) When deciding a constitutional matter within its powers, a court –
 - (a) must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Section 172 must be read with section 38 which provides that anyone listed in the section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and that the court may then grant "appropriate relief, including a declaration of rights". As Currie and De Waal points out, the constitution itself provides very little guidance on constitutional remedies but "sanction a flexible approach to remedies", because it only states that the remedies must be appropriate.²¹¹

The discretionary or directory nature of sections 38 and 172(1)(b) contrast sharply with the peremptory nature of section 172(1)(a). Where the Court finds that a rights

²⁰⁹ Section 8(1).

²¹⁰ Section 2.

²¹¹ Currie and De Waal *The Bill of Rights Handbook* 5th ed (2005) 195.

violation cannot be justified, it has no choice but to exercise its strong review powers and to declare the unconstitutional law or conduct legally invalid. Section 172(1)(b) allows the Court to combine this strong review power with a strong remedy such as reading in (converting the Court into the legislature),²¹² or a structural interdict (converting the Court into the executive).²¹³ On face value, section 172 tells us that the constitution has vested unlimited and absolute judicial review powers in the Constitutional Court, because the constitutional court is the court of final instance in all constitutional matters and, in terms of section 167(3), its decisions cannot be overturned by another institution, court or forum.

Section 167 prescribes the composition of the Constitutional Court, as well as the scope and boundaries of the powers that the Court is allowed to exercise.²¹⁴ It confers upon the Constitutional Court the highest rank in the hierarchy of the courts in South Africa. Currently, in terms of section 167, the Constitutional Court is only limited to constitutional matters, and in this regard it is the final arbiter with regards to the constitutional matters.²¹⁵ Section 167(3) confers upon the Constitutional Court the final voice on whether an Act of parliament or a provincial Act or the conduct of the President is constitutional. The Constitutional Court must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court or a court of similar status before that order has any force.²¹⁶

There is no doubt that the constitutional drafters designed a specialist apex court in constitutional matters, the Constitutional Court, with extremely strong powers of review.

²¹² *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 1999 (1) SA 6 (CC).

²¹³ *Nyathi v Members of the Executive Council for the Department of Health Gauteng* Case CCT 19/07 [2008] ZACC 8.

²¹⁴ Section 167(1) and (2).

²¹⁵ Section 167(3).

²¹⁶ Section 167(5) read with sections 172(2)(a).

4.2.2 Provisions supporting weak review

A finding that a right in the Bill of Rights has been violated is not conclusive of the question whether the violating law or conduct is unconstitutional and legally invalid. The Constitution prescribes a process of rights analysis in which such a finding only constitutes the first step in a two stage process. Section 36 read with section 7(3) provides for the limitation of rights in the Bill of Rights, but only in terms of a law of general application and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The court has a wide discretion to determine whether a rights violation is justifiable or not and must take into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.²¹⁷

As explained by Currie and De Waal the rights and freedoms in the constitution are not absolute:

A law that limits a right infringes the right, but the infringement will not be unconstitutional if it takes place for a reason that is accepted as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom. The reasons for limiting a right need to be exceptionally strong.”²¹⁸

This limitation analysis involves a two-stage process, and in this regard, the court asks two questions. The first is whether a right in the Bill of Rights has been infringed by law or conduct. The second (which necessary depends on a positive answer to the first question) is whether the infringement can be justified as a permissible limitation of the right.²¹⁹ The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the

²¹⁷ Section 36(1); see also *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) para 104.

²¹⁸ Currie and De Waal *The Bill of Rights Handbook* 5th ed (2005) 163-164.

²¹⁹ Currie and De Waal *The Bill of Rights Handbook* 5th ed (2005) 166; see also *S v Zuma* 1995 (1) SACR 568 (CC) para 21.

weighing up of competing values, and ultimately an assessment based on proportionality.²²⁰

The burden of proof during the limitation analysis rests on the party relying on the legislation to establish this justification (most often the state department responsible for the administration of legislation or a government policy).²²¹

Section 36 provides the basis for a structured dialogue between the judiciary (having made a finding that legislation or conduct violates a right) and the other branches of government (responding to the judicial finding by explaining and justifying the policy objectives or reasons behind the rights violation). While the Court retains the final word on the justifiability of a rights violation pursuant to a government policy objective, the open-ended wording of section 36 allows for different degrees of deference towards the other branches of government and by design thus invites weaker forms of judicial review (based on low levels of scrutiny, such as rationality, and deference to the legislature and complexity of policy and law making in a modern development state).

Having found that a rights violation cannot be justified the Court is compelled, as was said above, to declare the law or conduct unconstitutional and legally invalid. However, the remedial provisions introduced above allow a Court to suspend or otherwise undermine the finality of the declaration of validity in order to give the offending branch of government an opportunity to respond to the declaration of invalidity. Section 172(1)(b)(ii) explicitly provides for this possibility as was designed to ensure that the legislature and executive are given a meaningful chance to respond to the exercise of the testing right by the Constitutional Court. The open-ended wording of section 172(1)(b) allows the court to combine its strong review powers with weak remedies and so to ensure ongoing institutional dialogue with the other branches of government after the litigation.

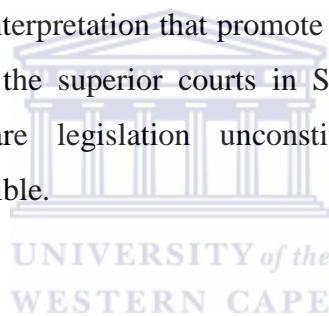
The invitation for weaker forms of review implicit in sections 36 and 172(1)(b)(ii) find explicit recognition in section 39(2) which provides as follows:

²²⁰ *S v Makwanyane* 1995 (2) SACR 1 (CC) para 104.

²²¹ *S v Makwanyane* 1995 (2) SACR 1 (CC) para 102.

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.²²²

In sharp contrast to the strong review power entailed by the remedial process of reading in after a declaration of constitutional invalidity, section 39(2) invites the indirect application of the Bill of Rights and the constitutional review of legislation through its creative re-interpretation only. The section is similar to section 3 of the HRA in the United Kingdom and thus a classical example of a weak form of review. An interpretation as provided for in section 39(2) results in an interpretation where the court will not declare the legislation to be invalid and inconsistent with the constitution, but the court is using the reading strategy of reading down in order to find an interpretation that is promoting the spirit, purport and objects of the Bill of Rights. The constitution of South Africa provides that the courts must use an interpretation that promote the spirit, purport and object of the Bill of Rights, but the superior courts in South Africa, unlike its British counterpart, can declare legislation unconstitutional if a section 39(2) interpretation is not possible.



4.3 The reviews powers exercised: a few examples from the case law

The Constitutional Court's jurisprudence contains numerous examples of the both strong and weak form review. This jurisprudence is too comprehensive to discuss in detail here and one or two examples will have to suffice.

Classical examples of strong form review include *S v Makwanyane* (in which the Court declared the death penalty unconstitutional) and more recently *JASA v President of the Republic of South Africa and Others*²²³ (in which the Court declared the extension of the term of the Chief Justice unconstitutional). These judgments left no room for further legislative or executive action in response to the judgments (short of constitutional amendment).

²²² Constitutional of the Republic of South Africa, 1996 s.39(2).

²²³ *Justice Alliance of South Africa v President of the Republic of South Africa and Others* [2011] ZACC 23.

In a number of cases the court could have deferred the problem back to the legislature to remedy but refused to do so, thus opting to combine its strong review powers with a strong remedy. The classical example remains *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*²²⁴ (in which the court opted to resolve the problem itself by acting as a quasi-legislature and amending the legislative provision in question by reading words into the text. In *Fourie v Minister of Home Affairs*²²⁵ the Court was divided on the question whether parliament should be shown deference and involved in the development of the law. The majority opted to suspend the declaration of unconstitutionality to allow a coherent policy response from government. The minority, per O'Regan J, saw no need to keep the matter open and to allow the legislature time to develop a response and preferred to remedy the unconstitutional legislation by reading words into the Act. More recently, the Court opted for the approach of O'Regan J in *C v Department of Health and Social Development, Gauteng*.²²⁶ In the latter judgment the court declared and remedied. While the matter was resolved without further dialogue with the legislature, the Court reveals itself particularly sensitive to the dialogical relationship between the branches of government. Both Yacoob J and Skweyiya J took special time to explain the status of the remedial intervention by the Court.

Glenister shows that the Court is willing to exercise strong review powers even in the absence of clear textual authority in the Constitution. In *Glenister v President of the Republic of South Africa*²²⁷ case. The ANC as the ruling party adopted a resolution at its national conference in Polokwane calling for a single police service and the dissolution of the Directorate of Special Operations (DSO). The applicant's main complaint in the Constitutional Court was the disbanding of the DSO and its replacement with the Directorate of Priority Crime investigation DPCI.²²⁸ The court was concerned with whether the establishment of the DPCI

²²⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 (1) SA 6 (CC).

²²⁵ *Fourie and Another v Minister of Home Affairs and Another* 2003 (5) SA 301 (CC).

²²⁶ *C v Department of Health and Social Development Gauteng and Others* Case CCT 55/ 11[2012] ZACC 1.

²²⁷ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

²²⁸ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 63.

was rationally connected to a legitimate governmental purpose.²²⁹ The court held that the evidence cannot be said to establish that the purpose of parliament as reflected in the impugned laws was to protect leaders of the ANC²³⁰, as contented by the applicant²³¹, and the court therefore dismissed the challenge based on rationality.

The court held that public confidence in mechanisms that are designed to secure independence is indispensable²³², and the provisions creating the DPCI fails to afford it an adequate measure of autonomy and it lacks the degree of independence arising from the constitutional duty on the state to protect and fulfil the rights in the Bill of Rights, mainly because the DPCI is insufficiently insulated from political influences in its structure and functioning.²³³ The court held that failure on the part of the state to create a sufficiently independent anti-corruption entity infringes a number of rights, including, the right to equality, human dignity, freedom, security of the person, administrative justice and socio-economic rights, including the right to education, housing and health.²³⁴ Finally the court declared Chapter 6A of the South African Police Services Act inconsistent with the constitution and invalid to the extent that it fails to secure an adequate degree of independence for the Directorate for priority Crimes Investigation,²³⁵ and suspended the declaration of invalidity for a period of eighteen months in order to give parliament the opportunity to render the defect.²³⁶

The Constitutional Court makes a number of remedies available to the superior courts, especially the Constitutional Court during judicial review. Michael Bishop describes SA's constitutional remedies as "seeking not only to redress the immediate problems before the court but attempt to deter future infringement".²³⁷

²²⁹ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 68.

²³⁰ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 69.

²³¹ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 61.

²³² *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 207.

²³³ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC), para 208.

²³⁴ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC), para 198.

²³⁵ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC), para 251.5.

²³⁶ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC), para 251.6.

²³⁷ Bishop M in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* Student Edition (2007) 9-3.

According to Currie and De Waal, constitutional remedies are “forward-looking, individualistic and retributive”.²³⁸

These remedies include, granting appropriate relief, including a declaration of rights,²³⁹ inherent power to protect and regulate their own process and to develop the common law,²⁴⁰ declaration of inconsistency and invalidity, suspending a declaration of invalidity, a temporary interdict or temporary relief.²⁴¹ The courts can also use reading down, when it ‘remedies’ the constitutional defect by ensuring that the statute does not bear an unconstitutional bearing.²⁴² The remedy of reading-in is also available to the courts, and instead of removing words from legislation, when a court reads-in it adds words to the statute to cure the constitutional defect.²⁴³ Opposite to reading-in, the courts can use severance when one part of the legislation is severed or cut from the rest of the legislation, and it is appropriate when only part of the legislation is invalid.²⁴⁴

In *Satchwell v President of the Republic of South Africa*,²⁴⁵ the applicant, a judge, challenged the constitutionality of sections 8 and 9 of the Judges’ Remuneration and Conditions of Employment Act 88 of 1989 and its regulations in respect of Judges administrative recess, leave, transport allowances, travelling and subsistence. Ms Satchwell stated that she and the late Ms Lesley Carnelley have been involved in an intimate, exclusive and permanent relationship since about 1986. In terms of South African law, they were unable to enter into a valid

²³⁸ Currie and De Waal *The Bill of Rights Handbook* 5th ed (2005) 196.

²³⁹ Constitution of The Republic of South Africa, 1996 s.38.

²⁴⁰ Constitution of The Republic of South Africa, 1996 s.173.

²⁴¹ Constitution of The Republic of South Africa, 1996 s.172(1) and (2).

²⁴² Bishop M in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* Student Edition (2007) 9-8.

²⁴³ Bishop M in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* Student Edition (2007) 9-15.

²⁴⁴ Bishop M in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* Student Edition (2007) 9-12.

²⁴⁵ *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284 (CC).

marriage, but they lived in every respect as a married couple and are acknowledged as such by their respective families and friends.²⁴⁶

The applicant contended that the impugned provisions violated her right to equality in terms of section 9 of the constitution because they denied her and Ms Carnelley certain specific benefits that are generally afforded to judges and their spouses. The basis for her alleged unconstitutionality was that the omission from the provisions of the words “or partner in a permanent, same-sex life partnership”.²⁴⁷

The court held that the denial of benefits to same-sex partners while affording them to married judges is, in effect, a differentiation on the grounds of sexual orientation which is a listed ground in section 9 of the constitution.²⁴⁸ The court has held that, from the date of the order the omission from the regulations of the Act, of the words “or partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support” is inconsistent with the constitution.²⁴⁹ The court finally held that the words “or partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support” must be read into the regulations of the Act.²⁵⁰

Parliament responded to the Constitutional Court’s judgement, and the 1989 Judges’ Remuneration and Conditions of employment Act was replaced on 22 November 2001 by Act 47 of 2001, which is the new Act dealing with judge’s remuneration and conditions of employment. The 1995 regulation to the 1989 Act was also replaced by new regulations promulgated on 5 July 2002. The main differences between the 1989 legislation and the 2001 legislation is that the latter includes constitutional court judges within its scope, but still affords benefits only

²⁴⁶ *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284 (CC) para 4.

²⁴⁷ *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284 (CC) para 14.

²⁴⁸ *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284 (CC) para 21.

²⁴⁹ *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284 (CC) para 37.2.3.

²⁵⁰ *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284 (CC) para 37.2.4.

to spouses of judges, and does not extend benefits to their permanent same-sex life partners,²⁵¹ despite the constitutional court's ruling in *Satchwell*.

The applicant, for the second time, challenged the constitutionality of the amended law which still afforded benefits to spouses of certain judges, but not to permanent same-sex life partners who have undertaken reciprocal duties of support.²⁵² The constitutional court, for a second time, held that the omission from section 9 and 10 of the Act, after the word spouse, of the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support" is inconsistent with the constitution.²⁵³

The two *Satchwell* judgments must not be misread as an example of a constitutional dialogue between the judiciary and the legislature. The first *Satchwell* judgment is a classical example of strong form review where the court combined a declaration of unconstitutionality with the strong and quasi-legislative remedy of reading in. The judgment left little or no room for a response from the legislature. The subsequent legislative amendment cannot be regarded as a response to the judgement by the Court but, on the contrary, simply disregarded the judicial intervention and amendment of the earlier Act. The second *Satchwell* judgment simply restated the legal position established in the first *Satchwell* judgment.

Just as the jurisprudence reveals a tension between suspension or reading in (Fourie) there is also a tension between reading down (under section 39(2)) and reading in (under section 172(1)). A classical example of this tension is provided by *Daniels v Campbell*.²⁵⁴ The matter appeared before the Constitutional Court for confirmation on the constitutionality of certain provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act. Both these two

²⁵¹ *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) para 2.

²⁵² *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) para 12.

²⁵³ *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) para 14.1.

²⁵⁴ *Daniels v Campbell and Others* (CCT 40/03) 2004 ZACC 14.

Acts failed to include persons married according to Muslim rites as spouses for the purposes of these Acts.²⁵⁵

Sachs J, writing for the majority court, defined the word spouse, in its ordinary meaning to include parties to a Muslim marriage, and that such a reading is not linguistically strained. The constitutional values of equality, tolerance and respect for diversity, the court held, point strongly in favour of giving the word spouse a broad and inclusive construction.²⁵⁶ The majority held that the potential under-inclusiveness and consequent discriminatory impact is avoided simply by correcting the interpretation, and that it is not necessary to follow the process the High Court felt compelled to do, that is, of making a declaration of invalidity coupled with a curative remedial reading-in.²⁵⁷ The court then used reading down to include spouses to a marriage in terms of the Muslim rites.²⁵⁸

However, in a strongly worded and argued minority judgment, Moseneke DJP defended the preference for strong review or weak review under the circumstances. The minority court held that the word spouse must be given a meaning limited to a party to a marriage valid in SA law and solemnised in accordance with the Marriage Act. Moseneke DJP was of the view that it is just and equitable to cure the omission of Muslim spouses from the respective definitions of the Acts by reading-in appropriate words.²⁵⁹

In *C v Department of Health and Social Development Gauteng*,²⁶⁰ the constitutionality of sections 151 and 152 of the Children's Act was at issue. The impugned provisions provided for a child to be removed from family care by state officials and placed in temporary safe care, but do not provide for the child to be brought before the children's court for automatic review of that removal.²⁶¹

²⁵⁵ *Daniels v Campbell and Others* (CCT 40/03) 2004 ZACC 14 para 1.

²⁵⁶ *Daniels v Campbell and Others* (CCT 40/03) 2004 ZACC 14 paras 19 – 21 and para 31.

²⁵⁷ *Daniels v Campbell and Others* (CCT 40/03) 2004 ZACC 14 para 34.

²⁵⁸ *Daniels v Campbell and Others* (CCT 40/03) 2004 ZACC 14 para 40.

²⁵⁹ *Daniels v Campbell and Others* (CCT 40/03) 2004 ZACC 14 para 67.

²⁶⁰ *C v Department of Health and Social Development Gauteng and Others* Case CCT 55/ 11[2012] ZACC 1.

²⁶¹ *C v Department of Health and Social Development Gauteng and Others* Case CCT 55/ 11[2012] ZACC 1 para 1.

The applicant contended that the absence of a provision for automatic review of the removal and placement in temporary safe care of the child is in breach of the children's constitutional rights to family care or parental care, the best interests of the child being considered paramount and the rights to dignity and privacy to the extent that they include and protect the right to family life.²⁶²

Skweyiya J writing for the minority found the limitations imposed by the sections of the Children's Act to be unconstitutional²⁶³ and held that in the ordinary course, where reading-in can provide an effective remedy, it will generally be preferable to a bald declaration of invalidity and a suspensive order, coupled with interim relief.²⁶⁴ The minority court held that, when reading words into a statute, the relevant considerations to be borne in mind are what the consequences of the order would be and whether they would amount to an unconstitutional intrusion into the legislative realm. The court must therefore define the reading-in in a sufficiently precise manner, which is in keeping with the legislative scheme, so as to impair the legislative purpose as little as possible while removing the constitutional complaint.²⁶⁵ To cure the defect, the minority held, something must be added to these sections, and reading-in offers this solution.²⁶⁶ One passage from the minority judgment in *C v Department of Health and Social Development, Gauteng* that I consider worthy of repeating, is, in the words of Skweyiya J, that,

by making a final order of this kind, however, I do not suggest that the Court has crowded-out parliament's role in further investigating how best to serve the interests of children, for whom a removal from the home is necessary, and in enacting appropriate legislation. Indeed, a final order of reading-in does not give the judiciary the ultimate word on pronouncing on the law. Instead it initiates a conversation between the

²⁶² *C v Department of Health and Social Development Gauteng and Others* Case CCT 55/ 11[2012] ZACC 17.

²⁶³ *C v Department of Health and Social Development Gauteng and Others* Case CCT 55/ 11[2012] ZACC 17 para 39.

²⁶⁴ *C v Department of Health and Social Development Gauteng and Others* Case CCT 55/ 11[2012] ZACC 17 para 46.

²⁶⁵ *C v Department of Health and Social Development Gauteng and Others* Case CCT 55/ 11[2012] ZACC 17 para 50.

²⁶⁶ *C v Department of Health and Social Development Gauteng and Others* Case CCT 55/ 11[2012] ZACC 17 para 52.

legislature and the courts, for parliament's legislative power to amend the remedy continues to subsist beyond the granting of the relief, and may be exercised within constitutionally permissible limits at any future time. I would therefore encourage the legislature to exercise its entitlement to alter the remedy, should it see fit to do so, in view of its specialist expertise and, of course, subject to its constitutional mandate.²⁶⁷

Yacoob J, writing for the majority court, however, held that, it cannot be just and equitable, without qualification, either to declare the sections inconsistent with the constitution and invalid, or to suspend the order of invalidity to allow the legislature to remedy the defect. The majority court held that the only feasible way forward is reading-in, and this course will not unduly intrude into the domain of parliament because parliament can amend the statute at any time.²⁶⁸ The court then finally read words into the sections.²⁶⁹

It is not easy to postulate any principle which governs the Court's exercise of its review powers and which could explain when the Court would exercise strong review powers and when not. The most controversial judgment in which the Court opted from a weak form of review is *Grootboom v The Government of the Republic of South Africa and Others*.²⁷⁰ Tushnet celebrates this case as an example of weak form review. However, Tushnet is not the only constitutional scholar with strong views about the appropriate level of review that the South African Constitutional Court should exercise.

²⁶⁷ *C v Department of Health and Social Development Gauteng and Others* Case CCT 55/ 11[2012] ZACC 1 para 57.

²⁶⁸ *C v Department of Health and Social Development Gauteng and Others* Case CCT 55/ 11[2012] ZACC 17 paras 87,88 and 89.

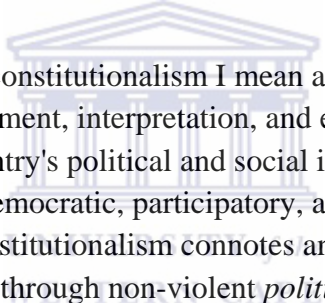
²⁶⁹ *C v Department of Health and Social Development Gauteng and Others* Case CCT 55/ 11[2012] ZACC 17 para 94.

²⁷⁰ *Grootboom v The Government of the Republic of South Africa and others* 2000 (11) BCLR 1169 (CC).

4.4 Weaker or stronger? The views of academic constitutional scholars

4.4.1 Scholarly support for strong forms of judicial review

The classical defence of strong form review in post-apartheid South Africa is provided by Karl Klare's plea for transformative constitutionalism.²⁷¹ Klare claimed that the post-apartheid Constitution is transformative in character (as opposed to preservative). His concern was that the post-apartheid judiciary would fail to develop the adjudicative methods and interpretive techniques that are implied by a transformative view of law. His concern was, and remains, how the inherited liberal legal culture (modes of reasoning and methods of interpretation) undermine the best transformative aspirations or demands of the Constitution. Klare provided a rich definition of transformative constitutionalism:²⁷²



By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed [...] to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent *political processes grounded in law*.

Transformative constitutionalism describes an optimistic theory of social change through law (large scale; long term; court centred). Klare advocated the transformation of post-apartheid society through rights litigation and adjudication by pro-rights social movements and activist post-apartheid courts. He initially tried to sell this vision of the judicial role and nature of judicial power at a CALS Judges Conference in January 1995 (two weeks before first case was heard by the Constitutional Court). In the context of the mid 1990s, Klare's idea of transformative constitutionalism presented a vision of the Constitutional Court unrestrained by the traditional liberal attempt to limit the power of the court to purely legal matters. It was an open invitation to the Court to exercise its strong

²⁷¹ Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 SAJHR 146.

²⁷² Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 SAJHR 146 150 (my emphasis).

review powers in the name of the social-democratic political morality implied by transformative constitutionalism as a substantive political morality.

Frank Michelman, another US American legal scholar who attended the first CALS Judges Conference in 1995 shared similar views about the judicial role in society.²⁷³ According to Michelman, the task of the Court is to virtually represent political freedom (understood as deliberative self-government) to a political society which has been overtaken by the instrumental pursuit of private interests. Michelman argued that the constitutional drafters also adopted this view of the Constitutional Court when they decided to defer the decision about the constitutionality of the death penalty to the Court and deliberately left the text of the Constitution open-ended. This left the Court with no other ground for its decision but its own deliberative self-government express through an independent and autonomous substantive judgment: “judges best collaborate with the framers by exercising their own judgments as to ‘which proposed and contested reading or application best carries out the political project that is incompletely constituted by constitutional language and history’”.²⁷⁴

As far as section 39(2) is concerned, Michelman argues that that the section contains an express instruction, what he call a “constitution-conforming instruction”, to judges engaged in the interpretation of statutory terminology, according to which the judges must interpret legislation with a view to promoting the spirit, purport and objects of the Bill of Rights, “presumably before deciding whether they must declare the statute invalid and resort (perhaps) to remedial reading in”.²⁷⁵

At the end of the Court’s first year of jurisprudence, Alfred Cockrell coined the term “rainbow jurisprudence” to describe the superficiality of the early judgments of the Constitutional Court. The term reflected Cockrell’s attitude towards the

²⁷³ Michelman F ‘Constitutional authorship, “Solomonic solutions”, and the unoriginalist mode of constitutional interpretation’ (1998) *Acta Juridica* 208.

²⁷⁴ Michelman F ‘Constitutional authorship, “Solomonic solutions”, and the unoriginalist mode of constitutional interpretation’ (1998) *Acta Juridica* 208 231.

²⁷⁵ Michelman F ‘On the uses of interpretive “charity”: Some notes on application, avoidance, equality and objective constitutionality from the 2007 term of the constitutional court of South Africa’ (2008) 1 *Constitutional Court Review* 24.

Court's "unwillingness to apply substantive reasoning in its judgments in its first year of sitting in 1995".²⁷⁶ According to Cockrell the interpretation of the bill of rights in the constitution involves the making of substantive value judgments.²⁷⁷ He claimed that the Constitution signalled a transition from a formal to a substantive vision of law in South Africa.²⁷⁸ Cockrell claimed that the strong review powers of the Court should be grounded in robust substantive reasoning such as that provided by O'Regan J's analysis of the value of dignity in *S v Makwanyane* and Ackermann J's exploration of the meaning of freedom in *Ferreira v Levin*. According to Cockrell, these cases represent a "rigorous consideration of the substantive reasons that powers constitutional adjudication".²⁷⁹ Cockrell describes Kriegler J's dictum in *S v Makwanyane* that judges of the Constitutional Court are judges, not sages and that their discipline is the law, not ethics or philosophy and certainly not politics and Sachs J's dictum in *S v Makwanyane* that *inter alia* their function is to interpret the law as it stands, and whatever their personal views on a subject might be, their response must be a purely legal one, "as an outright denial of the intrusion of substantive reasons into the process of constitutional adjudication".²⁸⁰

The academic support for strong form review does not only amount to a call for robust substantive reasoning, but also takes the form of a defence of the direct application of the Bill of Rights (rights analysis under section 36 and a definite finding under section 172) over the indirect application of the Bill of Rights (under section 39(2)). Stu Woolman is of the view that "the words 'all law' in section 8 of the Bill of Rights subject all legal disputes that engage a specific substantive provision found in sections 9 to 35 of the Bill of Rights to the direct application of the Bill of Rights".²⁸¹ Woolman is contending that

²⁷⁶ Cockrell A 'Rainbow Jurisprudence' (1996) 12 SAJHR 1 11.

²⁷⁷ Cockrell A 'Rainbow Jurisprudence' (1996) 12 SAJHR 1 2.

²⁷⁸ Cockrell A 'Rainbow Jurisprudence' (1996) 12 SAJHR 1 3.

²⁷⁹ Cockrell A 'Rainbow Jurisprudence' (1996) 12 SAJHR 1 13.

²⁸⁰ Cockrell A 'Rainbow Jurisprudence' (1996) 12 SAJHR 1 14. Cockrell's defence of substantive constitutional interpretation must be read against the background of Ronald Dworkin's influential defence of a moral reading of the US American Constitution (Dworkin R 'Freedom's Law :The Moral Reading of the American Constitution' (1999) 34).

²⁸¹ Woolman S 'The Amazing Vanishing Bill of Rights' (2007) 124 SALJ 762 773.

when the prescriptive content of the substantive rights does not engage the law or conduct at issue, then section 39(2), interpretation and development of the law can take place, and when indirect application is given priority over direct application, it does too much work and turns all of section 8 into surplusage and makes sections 8(2) and 8(3) redundant.²⁸²

The over-reliance on section 39, Woolman argues, might also have the unintended result of undermining the rule of law, and the two-step interpretive process designed by the drafters of the Bill of Rights which ought to produce black letter constitutional law. The use of section 39(2) to avoid robust substantive reasoning might be “useful in cobbling together majorities on the Constitutional Court” but, insists Woolman, “often leaves readers of a judgment at an absolute loss as to how the Bill of Rights might operate in some future matter”.²⁸³ Woolman is directing his critique against the influential view of Iain Currie that the post-apartheid Constitutional Court would do best to avoid substantive moral reasoning as far as possible. It is to this call for a judicial policy of weak and tentative forms of review that my attention turns next.



4.4.2 Scholarly support for weak forms of judicial review

Iain Currie writes that “to have the last word on the meaning of the Constitution is at once an awesome power and a power in name only since it cannot be exercised without the co-operation of the other branches of the state”.²⁸⁴ In direct reaction to the call by Cockrell and others for substantively deep and broad constitutional review, Currie favours decisions that are narrow and shallow. Relying on the work of Cass Sunstein, Currie called for judicial minimalism and the judicious avoidance of controversial issues of political morality.²⁸⁵ According to him, “the strategy of deciding as little as possible and leaving as much as possible

²⁸² Woolman S ‘*The Amazing, Vanishing Bill of Rights*’ (2007) 124 SALJ 762 777.

²⁸³ Woolman S ‘*True in Theory, True in Practice: Why Direct Application still matters*’ in Woolman S *Constitutional Conversations* (2008) 113 135.

²⁸⁴ Currie I ‘*Judicious Avoidance*’ (1999) 15 SAJHR 138 158.

²⁸⁵ Currie I in Woolman S (et al) *Constitutional Law of South Africa* (2007) 32-17; see also Currie and de Waal *The Bill of Rights Handbook* 5th ed (2005) 161.

undecided is a strategy that is particularly useful to courts, which are required to decide an issue rapidly and efficiently and to justify their decision”.

Currie explicitly defends this weaker form of tentative review on grounds of separation of powers or what I have described throughout this thesis as the possibility of co-operative dialogue between the judiciary and the other branches of government:

[A] political motivation in favour of minimalism is that it provides a means of negotiating the problem of counter-majoritarianism, and avoidance is one way of keeping out of the way of democratic institutions. Minimalism is a recognition that the democratic institutions rather than the courts are the most appropriate ‘forums of principle’ in society and, particularly on issues of great public controversy, should be given room to make wide-ranging rules and to debate the substantive principles underlying those rules: Good judges recognise that fundamental decisions are made democratically.²⁸⁶

As far as section 39(2) is concerned, Wessel le Roux also claims (against the views of Woolman) that weak form review, or the consistent preference for section 39(2) interventions and the indirect application of the Bill of Rights over section 172 interventions and direct application, is needed to sustain the diversity of constitutional meaning that he associates with the idea of an open and democratic democracy.²⁸⁷ Le Roux complains that the Constitutional Court has not been “particularly creative in exploring the opportunities which the principle of [...] reading-down offered the cause of legal and societal transformation in post-apartheid South Africa”.²⁸⁸

Lourens du Plessis is also in support of judicial review centred on the application of section 39(2). In response to the debate between Cockrell and Currie, or what he calls constitutional absolutism and constitutional minimalism, Du Plessis argues that both stances are unacceptable. He suggests that the extremes of both positions are best prevented by “properly invoking subsidiarity as a constitutional

²⁸⁶ Currie I ‘Judicious Avoidance’ 15 SAJHR 138 1999 149-150.

²⁸⁷ Le Roux W ‘Undoing the past through statutory interpretation: the Constitutional Court and the marriage laws of apartheid’ (2005) 26 *Obiter* 526.

²⁸⁸ Le Roux W ‘Undoing the past through statutory interpretation: the Constitutional Court and the marriage laws of apartheid’ (2005) 26 *Obiter* 526 546.

reading strategy”.²⁸⁹ Adjudicative subsidiarity, du Plessis suggests, “also stands to facilitate compliance with the final constitution’s section 39(2) constitutional injunction to promote the spirit, purport and objects of the Bill of Rights when developing the common law and customary law”.²⁹⁰ According to Du Plessis, the principle of subsidiarity can be defined as “requiring the court first to try and resolve a dispute by applying ordinary legal principles, as interpreted or developed with reference to the Bill of Rights, before applying the Bill of rights directly to the dispute”.²⁹¹

As far as section 36 is concerned, Stu Woolman and Henk Botha calls for a thicker conception of limitation analysis but at the same time embrace the dialogical possibilities inherent in section 36.²⁹² Woolman and Botha present section 36 as the heart of “shared constitutional interpretation”. They explain this approach to constitutional meaning as follows:

From this perspective, powers of judicial review are best understood, not as part of a battle for ascendancy between courts and legislatures (though they may turn into that), or as a means of frustrating the will of the political majority, but, rather, as a shared project of constitutional interpretation.²⁹³

Section 36 is best read as facilitating this institutional comity between the judiciary and legislature in as far as it avoids a court centred constitutional order in which the outcome of a legal dispute is dependent entirely on rights definition and because it limits the analysis to the threshold of the constitutional as opposed to the politically optimal.²⁹⁴

The debate between the academic champions of weaker forms of review, whether grounded in the constitutional design (section 39(2) or section 36) or in judicial

²⁸⁹ Du Plessis L ‘Interpretation’ in Woolman (et al) *Constitutional Law of South* (2007) 32-136 32-143.

²⁹⁰ Du Plessis L ‘Interpretation’ in Woolman (et al) *Constitutional Law of South Africa* (2007) 32-136 32-154.

²⁹¹ Du Plessis L ‘Interpretation’ in Woolman S (et al) *Constitutional Law of South Africa* (2007) 32-136 32-143.

²⁹² Woolman S and Botha H in Woolman S (et al) *Constitutional Law of South Africa* (2007) 34-1.

²⁹³ Woolman S and Botha H in Woolman S (et al) *Constitutional Law of South Africa* (2007) 34-1 34-105.

²⁹⁴ Woolman S and Botha H in Woolman S (et al) *Constitutional Law of South Africa* (2007) 34-1 34-108.

policy, and the champions of strong and substantive review, has given rise to a third view which calls for constitutional pragmatism as the appropriate stance on the issue of judicial review in post-apartheid South Africa.

4.4.3 Scholarly support for the pragmatic exercise of judicial review powers

Mark Kende defends the Constitutional Courts against Ran Hirschl's complaint that the exercise of strong form review has given rise to a new post-apartheid "juristocracy", on the one hand, and complaints by Jackie Dugard that the exercise of weak form review has betrayed the pro-poor commitments of the Court, on the other.²⁹⁵ In place of an absolute choice between either strong form review or weak form review, Kende argues that the Court does best when it pragmatically combines the Constitution's transformative promise with its realistic possibilities.²⁹⁶ Kende calls this approach to constitutional review and adjudication "African transformative pragmatism" and claims that it combines a strong-anti-subordination principle and some caution.²⁹⁷ Kende regards the *Fourie* and *Grootboom* judgments as good examples of this brand of critical pragmatism.²⁹⁸ According to Kende this pragmatism is needed (i) to minimise the counter-majoritarian difficulty and to allow the post-apartheid Parliament to develop its institutional responsibilities, and (ii) to preserve its institutional integrity.²⁹⁹

Theunis Roux presents an extended defence of judicial pragmatism as guiding methodology of new Constitutional Courts in young constitutional democracies, such as the Constitutional Court of South Africa. Along similar lines as those developed by Kende, Roux argues against strong and principled constitutional

²⁹⁵ Kende M *Constitutional Rights in Two Worlds: South Africa and the United States* (2009) 286.

²⁹⁶ Kende M *Constitutional Rights in Two Worlds: South Africa and the United States* (2009) 288.

²⁹⁷ Kende M *Constitutional Rights in Two Worlds: South Africa and the United States* (2009) 287.

²⁹⁸ Kende M *Constitutional Rights in Two Worlds: South Africa and the United States* (2009) 271 and 287.

²⁹⁹ Kende M *Constitutional Rights in Two Worlds: South Africa and the United States* (2009) 272 and 275.

adjudication (such as that championed by Dworkin) as this kind of constitutional absolutism or maximalism is bound to endanger the institutional legitimacy and security of the Court. Constitutional adjudication is therefore inevitably strategic adjudication. Successful courts in young democracies generate legal legitimacy by exercising a combination of strong review, when it is institutionally safe to do so, and weak review, when it is institutionally risky to stand on a matter of constitutional principle.

It is understandable that the pragmatism defended by Kende and Roux will not find broad support from normative constitutional law scholars, let alone judges. Kende recalls the view of the Chief Justice of Moldova on the issue:

He seemed surprised. He said that such an approach sounded like a strategic and political one, not suitable for a court that must simply apply the law and let the chips fall where they may.³⁰⁰

The Chief Justice makes a valuable point. A principled approach to the review powers of the Constitutional Court, such as that developed by Cockrell, Currie and Du Plessis is preferable to the strategic instrumentalism which characterizes the pragmatism of Roux and Kende. The foundational value of the rule of law and the institutional independence of the judiciary entrenched in section 165 of the Constitution is hard to reconcile with the kind of pragmatism suggested by Roux as working philosophy of the Constitutional Court.

4.5 Conclusion.

Through examining and discussing the SA position on judicial review it appears as if SA has a system that contains both strong-form and weak-form of judicial review. This is so, because sections 172 and 38 can result in a strong-form of review whereas sections 39(2) and 36 can direct judicial review in a less harsh direction. Although the constitution makes provision for both strong and weak

³⁰⁰ Kende M *Constitutional Rights in Two Worlds: South Africa and the United States* (2009) 275.

review, it appears as if the Constitutional Court has exercised a predominantly strong-form of review as was seen through the cases discussed in this chapter.

As stated by O'Regan J that during the first five years the Constitutional Court 29 legislative provisions were declared to be invalid, and in the following five years another 29 legislative provisions were declared invalid, and since then in a period of seven years, 32 have been declared invalid. During the seventeen years 57 challenges to legislative provisions have been upheld.³⁰¹

Over the past eighteen years, although, its strong remedies has not always been utilised by the Court, and a strong-form of review was not always opted for by the Constitutional Court, it strongly appears as if section 172 formed and is still the basis for the predominantly strong-form of judicial review in South Africa.



³⁰¹ Kate O'Regan, Judge of the Constitutional Court (1994 – 2009), Helen Suzman Memorial Lecture, Johannesburg, November 22 2011.

CHAPTER FIVE.

5.1. A comparative analysis of the different positions in Canada, England and South Africa respectively.

This chapter will start off with a comparative analysis of judicial review in Canada, England and South Africa (SA) insofar as the nature, extent and boundaries of judicial interpretation of impugned laws that infringes fundamental rights are concerned. Four questions will be asked in respect of the positions in Canada, England and SA as already discussed in chapters 2, 3, and 4 above. These questions are *inter alia*: one, what can we learn or adopt from the Canadian experience?; two, what can SA learn or adopt from the position under the Human Rights Act (HRA)?; three, is it possible to only have weak-form of review in South Africa, and if so, how can it possibly be done?; four, are there any risks involved in having weak-form of review only, what is there to lose? Finally in this chapter, some carefully thought-out suggestions and recommendations will be made for possible constitutional reform and the way forward.

Different from England, the South African superior courts have the power to declare unconstitutional and inconsistent any law or conduct which is inconsistent with the constitution.³⁰² In Canada, too, the Charter confers upon the courts the power to obtain such remedy as the court considers appropriate and just in the circumstances,³⁰³ but in Canada the courts' judicial remedies and declaratory powers are limited to the extent of the application of the notwithstanding provisions in legislation.³⁰⁴

In England, again, courts are limited in their declaratory powers and remedies in the sense that it can only make a declaration of Convention-incompatibility, but cannot make any order obligating the legislature to respond to its court orders.³⁰⁵

What makes Canada different from SA is that in SA the superior courts can declare any law or conduct unconstitutional to the extent of its inconsistency with

³⁰² ss. 167(5) and 172.

³⁰³ Constitution Act 1982 PART I Canadian Charter of Rights and Freedoms s.24(1).

³⁰⁴ Constitution Act 1982 PART I Canadian Charter of Rights and Freedoms s.33.

³⁰⁵ Human Rights Act of England ss.3 and 4.

the South African constitution³⁰⁶, but in Canada courts can, but not in every situation. On face value it appears as if the notwithstanding clause in section 33 is conferring a status of parliamentary or legislative sovereignty on legislatures in respect of laws that was passed in accordance with section 33 of the Charter of Rights in Canada.

Another feature of Charter rights interpretation is that, even after a declaration of unconstitutionality of impugned legislation that infringes fundamental rights, the Canadian parliament can still re-enact the same legislation and incorporate a notwithstanding clause to exclude Charter rights. The Canadian courts, too, cannot order parliament to refrain from incorporating notwithstanding clauses or to amend or repeal legislation containing such clauses.

To distinguish Canada from England, it is clear that they both are Commonwealth countries and both exercise a weak-form of judicial review, but in England, courts cannot declare a piece of legislation unconstitutional, but may only make a declaration of Convention-incompatibility, if a section 3 interpretation cannot make the legislation Convention-compatible.³⁰⁷ The situation in Canada is that there is a limitation on interpretation and remedies if Charter rights are subject to a notwithstanding clause. Under the HRA, courts have interpretative freedom during a section 3 interpretation, but parliament is not obligated to amend or repeal laws that are not Convention-compatible after a declaration of incompatibility. Whereas, it appears as if the Constitutional Court in SA is vested with almost unlimited power of judicial review,³⁰⁸ and the 1996 constitution has elevated the Superior Courts to a status of judicial supremacy.³⁰⁹

In terms of section 39(2)³¹⁰ of the SA constitution the courts, when interpreting legislation, must promote the spirit, purport and objects of the Bill of Rights, and by doing so the superior courts are using a reading strategy of reading down to give effect to section 39(2). Under the HRA, as far as it is possible to do so,

³⁰⁶ ss. 2 and 172.

³⁰⁷ Human Rights Act of 1998 ss. 3 and 4.

³⁰⁸ s.172.

³⁰⁹ s.167.

³¹⁰ s.39(2).

legislation must be read and give effect in a way which is Convention-compatible, but here the court are not only applying reading down as a strategy, but the courts can also read words into legislation to make it Convention-compatible. In both SA and England, court must first find an interpretation that is Bill of Rights-compliant and Convention-compatible, but if such interpretations are impossible then the SA courts can declare legislation to be unconstitutional and section 4 of the HRA permits a declaration of incompatibility with the Convention.

In both South Africa and Canada, section 1 of the Charter and section 36 of the South African Bill of Rights permit the limitation of rights subject to justifiability and reasonableness, but under the HRA there is no limitation clause.

One outstanding feature of England that set it totally apart from both SA and Canada is that it do not have a Bill of Rights, although attempts to adopt a Bill of Rights is currently in process.³¹¹ It was reported that in March 2011, a Commission was established to investigate the creation of a Bill of Rights that incorporates and builds on all the obligations under the ECHR, and to ensure that these rights continue to be enshrined in British law. Whereas in South Africa we have a Bill of Rights for at least 18 years, and in Canada, too, the Charter of Rights exists for the past 30 years.

The advantage of a section 172 interpretation and powers is that, it not only allows the constitutional court to declare legislation unconstitutional, but it can order parliament to react positively towards its declarations. In terms of section 4 of the HRA however, a declaration is possible, but parliament cannot be ordered by the courts to amend or repeal Convention-incompatible laws. In Canada, too, although the court can use an appropriate remedy under the circumstances, its hands are tied as far as section 33 is concerned.

³¹¹ Ministry of Justice 'Responding to human rights judgments' Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011-12 p 6 available at <http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf> (accessed on 08 November 2012).

As far as the appropriate relief is section 24 of the Charter is concerned, it only applies to the rights and freedoms in the Charter of Rights (bearing in mind any notwithstanding clauses) and not to the whole Canadian Constitution, but the remedies in terms of sections 172 and 38 of the SA constitution, applies to all the rights, freedoms and privileges in the SA constitution.

5.2. *What can SA learn or adopt from the Canadian experience?*

The discussions in chapter two is indicating that section 33, although still part of the Canadian Charter of Rights, has not been used by the Canadian parliament for at least 13 years. This appears to be evident that the notwithstanding clause has become unimportant. According to Hogg and Bushell, in practice section 33 has become relatively unimportant because of the development of a political climate of resistance to its use. Only in Quebec, Hogg and Bushell hold, does the use of section 33 seem to be politically acceptable and even in Quebec there is only one example of the use of section 33 to overcome the effect of a judicial decision.³¹²

If SA would have to incorporate a constitutional mechanism similar to section 33 of the Charter, it will mean that we will have partial parliamentary sovereignty as far as legislation containing a notwithstanding clause is concerned and considering the Canadian experience, such a mechanism would not contribute to an institutional dialogue in SA. Canada is a country with a longstanding history of judicial review of over 200 years and SA is only exercising judicial review of legislation for the past 18 years. We cannot compare ourselves entirely with Canada.

³¹²Hogg P.W and Bushell A 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35 No.1 Osgoode Hall L J 75 83.

5.3. What can SA learn or adopt from the position under the HRA?

In our SA constitution we already have section 39(2) which is drafted in a similar fashion as section 3 of the HRA, although SA courts are only using the remedy of reading down and not also reading-in when doing a section 39(2) interpretation.

As far as section 4 of the HRA is concerned, it limits the courts to a declaration of Convention-incompatibility and courts cannot declare legislation unconstitutional or order parliament to act positively towards Convention-incompatible declarations. Further, the HRA created no duties or obligations upon parliament to amend or repeal laws that have been declared Convention-incompatible. Considering parliament's response to declarations of incompatibility, it appears as if the British parliament tacitly accepts responsibility to amend or repeal Convention-incompatible legislation, but that alone is no guarantee that parliament will in future continue to '*de facto*' accept that responsibility. It would have placed the courts in a better position if courts could have been able (constitutionally mandated) to order parliament to respond to its declarations, and at the same time parliament would have been '*de jure*' responsible to repeal or amend legislation that is not Convention-compatible.

More important is that, the HRA only came into force in the year 2000, and therefore twelve years is not enough in order to determine whether sections 3 and 4 is the best possible mechanism to ensure and maintain effective relationships between British legislatures and courts, and to avoid tension between them.

5.4. Is it possible to only have weak-form of review in SA, and if so, how can it possibly be done?

In searching for this possibility it is important to have regard to our SA law-making process, which prescribed compulsory requirements for the enactment and amendment of legislation. An attempt to answer the question of whether it is possible to achieve weak-form of review through an institutional dialogue in SA,

and if possible, what needs to be done, has to be a two-stage approach, this dissertation suggests.

The first stage in an attempt to only have weak-form review or amend section 172 or section 167 of the constitution to reduce the Constitutional Court's powers to have a weaker form of review only, involves formal constitutional amendments, regulated in terms of section 74 of the constitution. The second stage, which I consider the difficult stage, is the practical stage.

As far as SA is concerned, a number of factors need to be considered before attempting to propose any constitutional changes (constitutional mechanism(s)) that would realise this possibility of weak-form review only.

5.4.1. The first stage.

In discussing the first (formal) stage of this possibility, I want to raise two concerns. First, having regard to the current political situation, in particular the African National Congress's (ANC) dominant political party status in SA. Obtaining the required majority parliamentary votes³¹³ to amend the constitution would be relatively easy for the ANC to achieve.

It was reported that President Jacob Zuma wants the constitutional court's powers to be reviewed, and in February 2012 he declared that "we don't want to review

³¹³ The Constitution of the Republic of South Africa Act 108 of 1996 s.74(1)-(3). Section 74(1)-(3) provides as follows: Section 1 and this subsection may be amended by a Bill passed by –

- (a) the National Assembly, with a supporting vote of at least 75 per cent of its members;
and
 - (b) the National Council of Provinces, with a supporting vote of at least six provinces.
- (2) Chapter 2 may be amended by a Bill passed by –
- (a) the National Assembly, with a supporting vote of at least two thirds of its members; and
 - (b) the National Council of Provinces, with a supporting vote of at least six provinces.
- (3) Any other provision of the Constitution may be amended by a Bill passed –
- (a) by the National Assembly, with a supporting vote of at least two thirds of its members;
and
 - (c) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment –
 - (i) relates to a matter that affects the Council;
 - (ii) alters provincial boundaries, powers, functions or institutions; or
 - (iii) amends a provision that deals specifically with a provincial matter.

the constitutional court, we want to review its powers”.³¹⁴ I ascribed this possibility exclusively to the ANC’s current political status, by holding the majority votes and control over eight of the nine provinces of SA.³¹⁵

Choudhry, for example, is of the view that SA is emerging as a “leading example of a dominant-party democracy, with the ANC having won every national election since 1993, now in power in eight of nine provinces, and with no sign of a credible electoral competitor on the horizon”.³¹⁶ Factors that explain the ANC’s dominant-party status in South Africa, according to Choudhry, are, *inter alia*, the lack of an opposition party that could credibly contend for power. Choudhry holds that, the apparent unwillingness of black voters to support the opposition parties had led to explain those parties’ lack of success in racial terms.³¹⁷

According to Choudhry, in discharging its constitutional function as the ultimate interpreter of the constitution, the court should draw upon a set of background assumptions about the nature of the South African politics, derive its constitutional role from that broader understanding, and craft constitutional doctrine to give effect to that role.³¹⁸ Choudhry argues that anti-domination is a doctrine that would render illegitimate any exercise of public power that has as its principal goal the preservation, enhancement or entrenchment of the dominant status of a dominant political party.³¹⁹

De Vos, in response to the Democratic Alliance’s (DA) national leader and Premier of the Western Cape, Helen Zille’s suggestion of a united opposition or ‘super opposition’, is of the view that “it seems like a misdiagnosis of the fundamental pathology underlying our political system”. De Vos is of the opinion

³¹⁴ <http://www.timeslive.co.za/politics/2012/02/13/zuma-wants-constitutional-court-powers-to-be-reviewed> (accessed on 15 February 2012).

³¹⁵ 2009 Elections Report pp.100 – 105 available at <http://www.elections.org.za/content/Dynamic.aspx?id=1316&name=Elections&LeftMenuId=100&BreadcrumbId=220> (accessed on 02 August 2012).

³¹⁶ Choudhry S ‘ “He had a mandate” The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) 2 *Constitutional Court Review* 2 3.

³¹⁷ Choudhry S ‘ “He had a mandate” The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) 2 *Constitutional Court Review* 2 13.

³¹⁸ Choudhry S ‘ “He had a mandate” The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) 2 *Constitutional Court Review* 2 33.

³¹⁹ Choudhry S ‘ “He had a mandate” The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) 2 *Constitutional Court Review* 2 34.

that, “given the distinct nature of our electoral system and composition of political parties, in the long run a united opposition might do more harm than good, and that many ANC voters will never vote for a party led by a white person and many DA voters, too, will never vote for a political party led by a black person”.

De Vos further holds that, “the more successful the DA (or an amalgamation of the DA and other opposition parties) becomes and the more opportunities it provides to its members to gain access to political power and financial rewards, the more often some of its leaders will be caught in tender scandals and the more one will read about how corrupt the party has become”. De Vos sees politicians in opposition as “great defenders of a justiciable constitution because it limits the power of their opposition in government and can help to check the abuse of power by the government and can force it to be more open, transparent and accountable. Once in power, former opposition parties have a tendency to be less enthusiastic about the constitution which they suddenly discover places pesky limits on their ability to do as they please”.³²⁰

Secondly, the SA history, a history of inequalities, and apartheid, and I therefore think that only a strong-form of review can redress this inequalities and can heal the wounds of apartheid. Apartheid was also a product of parliamentary sovereignty and therefore, in order to avoid a repetition of this shameful experience, democracy, including multi-party representation and input is strongly recommended in the South African context.

5.4.2. The second stage.

The second stage in an attempt to only have weak-form review (the practical stage), begs the questions of, how will SA be able to avoid another situation where (although it only happened once in SA) an order of constitutional invalidity

³²⁰ De Vos, P ‘*Unified opposition maybe not such a bright idea*’ available at www.constitutionallyspeaking.co.za (accessed on 25 October 2012).

by the constitutional court has been disrespected, similar to *Satchwell*?³²¹ How will we be able to stop a dominant-political party let parliament from passing Bills, despite major disagreements between political parties, protestations and the unhappiness of the general public at large in respect of the essentials a Bill? A good example is the Protection of State Bill.³²² The Bill proposed to criminalise the unlawful and intentional communication, delivery or the making available of state information classified as top secret and that conviction on such offence would carry a punishment of at least 15 to a maximum of 25 years imprisonment.³²³ In asking these questions and making this suggestion, I am alive to the section 74 requirements for constitutional amendments, but I am making this suggestion in the light of the nature and importance of the constitution of South Africa.

More important questions that the second stage is asking, is, if institutional dialogue happens (through weak-form review only), where or when will this dialogue end, and who will have the final say in constitutional interpretation in SA, parliament or the constitutional court? Currently, the Constitutional Court has the final voice³²⁴ in all constitutional matters in SA, and to repeal or abolish sections 172 or 167 will mean that, if there is disagreement between the Courts and parliament, then parliament will have the last say, and eventually, it will take us back to parliamentary sovereignty to a certain extent.

Moseneke J is of the view that “the function of the Constitutional Court is counter-majoritarian at times, but is ultimately supportive of democracy, and it upholds protection that ensures democratic process and protects both minority and majority rights under the beneficence of our constitutional arrangements”.³²⁵ Constitutional supremacy as a principle is too high a price to pay in exchange for a weak-form of review only.

³²¹ *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC).

³²² Protection of State Information Bill [B6-2010].

³²³ Protection of State Information Bill [B6-2010] clause 36(1).

³²⁴ s.167(3)(a) and (c).

³²⁵ Moseneke D Deputy Chief Justice of the Republic of South Africa ‘*Striking a Balance Between the Will of the People and the Supremacy of the Constitution*’ (2012) 129 (Part 1) SALJ 9 22.

5.5. Are there any risks involved in having only weak-form of review in SA - what is there to lose?

As mentioned above, currently, this possibility of amending the constitution as to only have weak-form of review is currently only open to the ANC, being the ruling political party in SA (on the assumption that the ANC wants to change or reduce the Constitutional Court's powers). In the context of the ANC's dominant-party status, this possible amendments to the constitution, if done by the ANC, can and will raise many concerns, not only amongst politicians, legal scholars, academics, the judicial community, but also the SA society at large.

Many questions can be asked in this regard, for example, will the views and opinions of the minority political parties, academics, scholars of law and the general SA society be considered in the process of the possible amendments to the constitution? The current debates and protestation around the Protection of State Information Bill³²⁶ (the so-called 'Secrecy Bill') begs the question of whether not such possible constitutional amendment, if it happen, should rather be done through multi-political party considered proposals for the constitutional amendments.

As Chaskalson J puts it, and I am in agreement with him, "The constitution, however, is not ordinary legislation to be amended at the whim of the majority. It is the foundation of the nation's values and aspirations. As such, and to ensure the allegiance of all citizens, good constitutions seek to accommodate the diverse interests and concerns of different groups. In the interest of nation building we are bound by all its provisions, and cannot pick and choose those that we honour and those that we don't".³²⁷ In this regard, I think that the views of the greater South African society should be considered before any attempt in amending the

³²⁶ Protection of State Information Bill [B6-2010].

³²⁷ Chaskalson A 'Is South Africa's Constitution in Danger?' Address presented at a public dialogue : Hosted by the Centre for Conflict Resolution, Cape Town on Thursday 10th May 2012 available at http://www.ifaisa.org/Is_South_Africa's_Constitution_in_Danger? (accessed on 30 May 2012).

constitution, to abolish sections 172 and 167 or to incorporate a constitutional mechanism that is drafted in the similar fashion as in the case section 33 of the Charter of Rights of the Canadian constitution or the Human Rights Act's sections 4.

Another concern is threats to the institutional security and independence of the judiciary, including the separation of powers. In this regard I want to make mention of recent statements made by President Jacob Zuma and others.

President Jacob Zuma recently declared that:

“The executive must be allowed to conduct its administration and policymaking work as freely as it possibly can. The powers conferred to the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote”.³²⁸

It is statements such as these one's made by President Jacob Zuma that is evidence of tension between, the executive and parliament with its democratic mandate from the people on the one hand and the constitutional court which is constitutionally mandated on the other hand. The constitutional court has recently handed down judgments that are not always favourable to parliament³²⁹ or the executive.³³⁰ As mentioned earlier in this dissertation, in a system of constitutional supremacy or parliamentary sovereignty, it is obvious that only one mandatory has a final say, it is either parliament or the constitutional court, but it can never be both.

Earlier in this year, Mr Jackson Mthembu, ANC National Spokesperson stated that, the continued attempt by the DA to use the courts to undermine and paralyse government, is granting blanket permission to political parties to ask for the review any state decision, using courts and that democracy can be undermined by

³²⁸ The Editorial 'Courting disaster with the judiciary' available at <http://mg.co.za/article/2011-11-04-courting-disaster-with-the-judiciary> (accessed on 09 February 2012).

³²⁹ *Democratic Alliance v The Acting National Director of Public Prosecutions* (288/11) [2012] ZASCA.

³³⁰ *Justice Alliance of South Africa v President of the Republic of South Africa and Other Case* CCT 53/11 [2011] ZACC 23.

simply approaching courts to reverse any decision arrived at by a qualified organ of state.³³¹

Deputy Chief Justice of the Constitutional Court, Moseneke J, is of the opinion that, “if there is a danger in parliamentary sovereignty, there is also a danger in constitutional supremacy”. According to Moseneke J, “contemporary attacks on the Constitutional Court as undermining the popular will have traction precisely because they are rooted in a legitimate fear”. In response to a recent statement by ANC secretary-general Gwede Mantashe, that the Constitutional Court was thwarting the will of the people by finding legislation passed by parliament to be unconstitutional, Moseneke J, acknowledge that “tension clearly exists between democratic theory and constitutional supremacy, but this is not a dilemma peculiar to our shores, and it is perhaps endemic to all constitutional democracies. Moseneke J is of the view that it is not open to the courts to look away when confronted with unconstitutionality, but they are enjoined to declare the problem and to fashion redress.”³³²

In response to President Jacob Zuma’s statement in parliament, Rautenbach is of the view that, within the SA context, there is a major jurisprudential obstacle that obstructs the introduction of a cavalier approach by parliament. In order to change this situation either the constitutional court will have to override its many judgments in which it has pronounced this legality doctrine, or parliament by following the prescribed procedure for the amendment of the constitution will have to delete the rule of law as a fundamental principle from section 1 of the constitution or proclaim categorically that the rule of law does not contain a rational-relationship rule. Because the constitutional court has the last say on whether such an amendment is rationally related to a legitimate government purpose, the government will have to convince the court that a legitimate

³³¹ Staff Reporter ‘ANC:SCA ruling undermines democracy’ available at <http://www.mg.co.za/article/2012-03-20-sca-ruling-undermines-democracy-says-anc> (accessed on 24 March 2012).

³³² Moseneke D Deputy Chief Justice of the Republic of South Africa ‘*Striking a Balance Between the Will of the People and the Supremacy of the Constitution*’ (2012) Vol. 129 (Part 1) SALJ 9 17.

governmental purpose exists to dispose of what the constitutional court considers to be an essential feature of the rule of law.³³³

The supremacy clause in section 2 of the constitution, Rautenbach holds, does not permit the exclusion from any action from judicial review, and that political questions cannot be separated from legal questions.³³⁴ It would be unwise for anybody to develop policies only in terms of politics and not to heed the constitutionality of the actions to implement the policy. Although the constitutional court is the authoritative interpreter of the constitution, a cavalier approach by individuals and other branches of government to see what they can get away with without paying too much attention to the 'debatable ground of constitutional study' is inappropriate. According to Rautenbach, the doctrine according to which 'political questions' are immunised from judicial review cannot work, because legal rules and their content are often determined by the dynamics of politics, in any sense of the word and in all spheres of government. However, this inevitable state of affairs cannot mean that a constitutional project of which constitutional supremacy and judicial control are essential elements can be qualified in order to let politics run an unrestrained course. The constitution affords parliament and the executive ample freedom, margins of appreciation and discretion to decide on the contents of policies and their implementation, but this freedom is constitutionally limited and its exercise is subject to judicial control.³³⁵

Frank Michelman agrees with Rautenbach that constitutional supremacy is a constitutional value incorporated into section 1 of the 1996 constitution, and that whenever and insofar as a legal norm or rule of decision laid down by the final constitution comes into practical collision with a legal norm or rule of decision laid down by any sort of non-constitutional law (as construed), be it parliamentary legislation, subordinate legislation, common law, or customary law, the final

³³³ Rautenbach IM 'Policy and judicial review – political questions, margins of appreciation and the South African constitution' (2012) 1 TSAR 20-34 26.

³³⁴ Rautenbach IM 'Policy and judicial review – political questions, margins of appreciation and the South African constitution' (2012) 1 TSAR 20-34 28.

³³⁵ Rautenbach IM 'Policy and judicial review – political questions, margins of appreciation and the South African constitution' (2012) 1 TSAR 20-34 33.

constitution's norm is to be given precedence by anyone whose project is to carry out the law of South Africa.³³⁶

5.6. Conclusion.

By considering the factors discussed above, I do not think that SA is yet ready for major constitutional changes that will have the effect of reducing the Constitutional Court's review powers under either one of sections 172 or 167 of the constitution. Several factors definitely have to be taken into consideration before any attempt should be made in realising the possibility for weak-form review only.

There are major inescapable factors that have to be considered before proposing any current or future amendment to the SA strong-form review embedded in sections 172 and 167. These factors should enjoy due consideration by the current dominant-party let parliament before attempting to make amendments to the essential elements of SA predominantly strong-form review.

SA has a very young democracy and we are only exercising judicial review of legislation for the past 18 years. Therefore we cannot compare SA to certain Commonwealth countries where predominantly weak-form review is exercised, for example England and Canada.

The SA history is another reason why a weak-form review only might not be the best thinkable solution to resolve ongoing tensions between the judiciary and the other branches of the South African government. In 1994, SA has departed from a system of parliamentary sovereignty and has entered into an era of constitutional supremacy.

The ANC's dominant-party status is yet another reason for me holding that a weak-form of review will not be the best form of judicial review for SA. I am

³³⁶ Woolman S and Botha H in Woolman S, Roux T and Bishop M '*Constitutional Law of South Africa*' Student Edition (2007) 11-34 to 11-36.

fully in support of the first two assumptions made by Waldron in his case against judicial review. Waldron assumes *inter alia*, that, (1), the society has a broadly democratic political system with universal adult suffrage, and it has a representative legislature, to which elections are held on a fair and regular basis, and that these democratic institutions are in reasonably good order. They may not be perfect and there are probably on-going debates as to how they might be improved;³³⁷ (2), the society we are considering has courts that are well-established and politically independent judiciary, again in reasonably working order.³³⁸ Considering the current political situation in SA, I think that SA complies with Waldron's second assumption, because we do have a politically independent judiciary that is in a reasonably working order. SA also have democratic institutions that are in reasonably good order, except for the ANC's dominant-Party status our legislature is mainly representing only one dominant political party. Therefore I think that our mixture of strong and weak-form review should be retained, and therefore no attempts should be made to amend sections 172 or 167 of the constitution.

Finally, an institutional dialogue cannot be a bad thing³³⁹ to the constitutional and statutory interpretation of any state, but my view is that in the SA context, we can strive towards this dialogue, but only if we can keep our strong-form together with the alternative weaker forms of review offered in the constitution. If institutional dialogue is realised and maintain with retaining SA strong-form of review, it cannot pose any threat to the independence of the judiciary and the supremacy³⁴⁰ of the constitution of SA.

³³⁷ Waldron J 'The Core Case Against Judicial Review' (2005-2006) 115 *Yale L.J.* 1346 1361.

³³⁸ Waldron J 'The Core Case Against Judicial Review' (2005-2006) 115 *Yale L.J.* 1346 1363.

³³⁹ Hogg P.W and Bushell A 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35 No.1 *Osgoode Hall L.J.* 75 82.

³⁴⁰ Constitution of the Republic of South Africa, 1996 s.2.

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