Article

Judicial Review: A Fertile Field of Contention

Muhammed Ahmed Mayat
Independent Researcher
Muhammedahmedmayat@gmail.com

Abstract

Although it constitutes a core feature of democratic South Africa, judicial review of legislative action remains a contentious issue globally. The best case for such review remains convincing only in justifying a severely constrained judicial power of veto in specific circumstances. In developing a novel construction of judicial review, the author has analysed various political and philosophical arguments, both in support of and against various forms of judicial review. Furthermore, he argues that the crucial question is not one of efficiencies but rather of political legitimacy, and he contends that any form of legislative judicial review will legitimately subvert legislative decisions only where the underpinnings of democracy and rights are threatened, with scant means of recourse being available. The author's revised model advocates the strict application of legislative judicial review to particular circumstances pertaining primarily to minority rights. The model attempts to rid judicial review of its present construction of existing pathologies while retaining some form of legitimate protection where necessary.

Keywords: judicial review, public law, separation of powers

UNISA university of south africa PRESS

Journal of Law Society and Development
https://upjournals.co.za/index.php/JLSD
Volume 6 | Number 1 | 2019 | #3295 | 21 pages

https://doi.org/10.25159/2520-9515/3295
ISSN 2520-9515 (Online)
© Unisa Press 2020

Introduction

In South Africa, normative acceptance of judicial review of legislative action on constitutional grounds as a core protective tool of democracy is so ubiquitous and synonymous with concepts of justice and democracy that an enquiry into its very existence is more likely to elicit rebuke than debate. Debate over the interpretation of constitutional and moral thought garners strong attention and focus, whereas existential questions of judicial review fade into the former's preponderance in the minds of the citizenry. This article seeks to evaluate the general arguments made against judicial review without being encumbered by hard constitutional realities. The discussion is restricted to judicial review of legislation on rights-based grounds (and this is the meaning that will be attached to all further references to "judicial review").

This article is not intended to be a complete compendium of arguments for judicial review but merely an introduction to an interesting debate. It begins by evaluating the arguments made about the efficiencies of the judicial review system, after which the democratic and political legitimacy of judicial review is analysed. Finally, an alternative system and model of judicial review is proposed.

Waldron's Suppositions and the Questions Posed by Judicial Review

A discussion of judicial review can be pathologised by reference to obscure hypothetical permutations. These permutations serve as a convenient argument for supporters of rights-based judicial review, but it is one that proves to be destructive of healthy and constructive discussion. In arguing against judicial review, Waldron, presupposes the existence of four conditions that militate against these obscure pathologies (2006, 1360):

1. Democratic institutions are in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage.
2. A set of judicial institutions exists, again in reasonably good order, which has been set up on a non-representative basis to hear individual lawsuits, settle disputes and uphold the rule of law.
3. Most members of society and most of its officials are committed to the idea of individual and minority rights.
4. Among the members of society who are committed to the idea of rights there is persistent, substantial and good-faith disagreement about rights (ie about what the commitment to rights actually amounts to and what its implications are) (Waldron 2006, 1360).

These suppositions are, effectively, realistic traits of strong and healthy democracies that one can reasonably infer to be present in South Africa. The veracity of such an

inference is not evaluated further here, and the article will proceed by presupposing the existence of such conditions.

Waldron's suppositions paint a picture of a society that is collectively committed to rights but which simultaneously disagrees bona fide about the exact nature and extent of such rights. Disagreement must ultimately be resolved by some means or the other so as to allow for constructive action. Waldron's last supposition is of particular interest: restricting the discussion initially to good-faith disagreement allows for constructive strides to be made in the debate; however, as Waldron himself recognises, disagreement is unlikely to occur only at the peripheries of rights but may also include disagreement on core interpretation (2006, 1367).

In dealing with the last issue (ie disagreement on core interpretation), it is important again to separate gross and obvious violations of rights from bona-fide disagreement over the interpretation of rights. In a functioning democracy, the legislative process is certain to preclude any obvious and overt infringements of rights. For instance, a law that forbids all females to attend school can be declared explicitly unconstitutional and will never be entertained by the legislature in a modern democratic society simply because its very essence is alien to prevailing *boni mores* (public policy and moral sentiment) – that is, its very notion is passively rejected by the broader citizenry. This idea often spirals into contentious debate about the potentially progressive role a judiciary may play by protecting liberal and progressive rights where the citizenry may itself be regressively unprotective. This notion of greater judicial insight into the nature and extent of rights in a society committed to democratic ideals will be debunked later in this article.

Parliament, as the legislative arm of government, acts as a forum for rigorous constructive debate and settlement. In a healthy democracy, the legislature is committed to the rights of individuals and represents a broad spectrum of views. Legislation is therefore supposedly born in an environment acutely concerned with upholding rights, and in this respect it reflects fair populist ideals of these rights according to the proponents of anti-judicial review. This is an assumption I shall proceed on.

Evaluating Judicial Review

Rights-based judicial review gives the dissenters (those who feel a particular statute infringes rights) a final opportunity to present their case to a judiciary that is conferred with what is effectively the power of veto over what (at this stage) we will presume to be a majoritarian view (ie legislation passed by a parliament representative of the broader citizenry).

Judicial review of legislation generally tends to be divided into the categories of "strong" and "weak" review. These categories are not concrete and remain arbitrary in

scope; however, there is general consensus that "strong" review refers to a system in which courts may make bold incursions into legislative action through powers of severance (the strongest form) by declining to apply a statute or by amending it. South Africa is an example of a system with strong legislative judicial review because of its activist remedial methods (Du Plessis 2011, 95). In weaker systems, the courts may traditionally scrutinise statutes for rights infringements but may not decline to apply them. In some systems, courts may be allowed to issue declarations of incompatibility with a particular right (Waldron 2006, 1136). Even weaker forms of review exist where the courts must apply legislation regardless of any infringement, though they may favour an interpretation that avoids such violations (Pannett 2008, 2).

In the strongest form of review the judiciary effectively acts as the ultimate arbiter in legislative–constitutional disputes. Two questions arise from such power being conferred upon them: the more fundamental question goes about the political and democratic legitimacy of judicial review (Bellamy 2011, 91); the other is a more substantive enquiry into whether the judiciary is in fact well placed to adjudicate on such disputes (Raz 1998, 45). Judicial review must prove its democratic and jurisdictional legitimacy; and the courts must justify their existence by demonstrating some ability to protect rights better (possibly by demonstrating superior faculties of discernment and judgement). The latter enquiry evaluates judicial competency; the former deals philosophically with the legitimacy of the jurisdiction of the judiciary to overrule "majoritarian" legislative enactments. I consider the latter enquiry first.

Judicial Ability to exercise Better, More Reasoned Judgment

The initial arguments expressed are premised on the notion that "reliable epistemological grounds for reaching correct decisions on rights disputes" exist. Hutchinson argues that such a ground is non-existent, which renders this argument moot (2008, 60). I am inclined to follow Hutchinson; however, I will proceed initially (for argument's sake) with the assumption that sound grounds exist upon which "correct" decisions may be reached.

Waldron starts by considering the argument that courts are better suited to decision-making because rights issues "present themselves to judges in the form of flesh-and-blood individual situations" (2006, 1379). Judicial duty is presumed to expose judges to greater personal scenarios and in this respect they should be better placed than the legislature to draw on moral insight, because they are routinely confronted by such thought experiments. Waldron treats this line of reasoning as a fallacy. He conjectures that when issues reach higher-level courts (such as the Constitutional Court in South Africa), what remains before the court is more likely abstract arguments of a right than practical individual examples (Waldron 2006, 1380).

He notes further that the legislature itself is a fertile ground of debate which does not preclude moral thought experiments. This is the case in South Africa, where the legislative process largely encourages public engagement and discussion. Since *Middelburg Municipality v Gertzen*,[1] the view that the legitimacy of legislation is determined by the extent of deliberation prior to its adoption has been recognised (Du Plessis 2011, 97–98). The Constitution entrenches rights to public access and participation; section 59 reads:

> (1) The National Assembly must – *(a)* facilitate public involvement in the legislative and other processes of the Assembly and its committees ….

Similar obligations are placed on the National Council of Provinces and the provincial legislatures (see section 72). The need for public participation even in the case of delegated legislation is also recognised in the Promotion of Administrative Justice Act 3 of 2000 (section 4 of PAJA). The architects of the South African representative democracy have demonstrated a clear commitment to a representative and accommodating legislative process. This spirit, together with the implied expectation of individual legislators to engage with their constituencies and the broader public on legislative issues, makes light of the suggestion that courts possess superior contemplative insight in this regard. Furthermore, the freedoms of speech and expression allow for robust domestic discussion and debate that may mould the construction of societal rights and allow for progressive extensions of or restrictions in the interpretation of rights.

Another reason used to augment the case for judicial review is the explicit reasoning that must be provided in judgments (Waldron 2006, 1382). This again is not as conclusive an argument as it may appear. The legislator has been established as a ground of vigorous debate and discussion that is not only restricted to democratically elected representatives but includes the broader citizenry. As a natural consequence of this environment, the reasons and justification for decision-making must be, and indeed are, present. However, to conclude hastily that the reasoning is equal qualitatively would be incorrect.

I hypothesise that qualitative differences must exist in the reasoning process and justifications provided by a legislature and the judiciary stemming from their inherently different perspectives. Courts traditionally arrive at conclusions through a strictly legal perspective, whereas legislatures traditionally adopt a more holistic approach to exercising their duty. This alternative view represents an efficiency in which legislative contemplation is inhibited from a proper, unbiased appreciation of rights (see Fallon 2008 for a brief discussion of judicial efficiencies). This is not to suggest that a

---

[1] *Middelburg Municipality v Gertzen* 1914 AD 544.

conclusion arrived at through judicial contemplation in any way carries more substantive weight than legislative decisions: any unintended incidental portrayal of the judicial machinery as a grand bulwark against abusive legislation or as an institution offering comparatively advantageous decisions should be disregarded. At most, such an advantage would be sufficient only as an auxiliary protective tool in limited prescribed circumstances – as is discussed below.

Judicial Review as a Protective Mechanism

The construction of judicial review and the Constitutional Court as protectors of constitutionally enshrined ideals of democracy which "can themselves be regarded as exemplary of a true democratic process" (Bellamy 2008, 336) is an interesting one.

This is an argument made by Rawls. He designates the US Supreme Court (the definitive vehicle of judicial review in the United States) an "exemplar of public reason" and advances an argument to support this designation. First, he maintains that it upholds democratic principles and that its overriding of democratic process (the legislative process) is intended to preserve democracy.

Secondly, he argues that judicial process is exercised in a manner that is archetypically democratic because in exercising its judgement, the court is constrained to employ only reasons that reflect democratic process and society (Rawls 1993, 231).

Similar arguments in support of current review processes may be offered by the proponents of judicial review in the South African context. The construction of the judiciary as a protector of rights presupposes judicial protective superiority (possibly stemming from the belief that the judiciary is better placed to identify rights and accurately interpret the precise limitations of their scope). Criticisms of a model with scant judicial rights-based review have been that this would be a reversion to apartheid-style parliamentary supremacy. For instance, section 34 of the 1983 Constitution[2] stated that "no court of law shall be competent to inquire into or to pronounce upon the validity of an Act of Parliament".

I dispute this puerile deduction. There are a number of immediate differences between the structures of the current and the apartheid-era legislatures. The apartheid-era parliamentary structure was unrepresentative of the broader citizenry, which enabled it to perpetuate oppression. The current legislature broadly reflects the general population: it is committed to democracy and rights protection and allows for minority views to be expressed and appreciated. Existing systemic inefficiencies that impair the legislature's ability to provide an adequate unbiased appreciation of rights must be acknowledged,

---

[2] Constitution of the Republic of South Africa Act 110 of 1983.

but this alone is insufficient to justify the current system of rights review in its entirety, as is discussed below.

Determining the actual and proper interpretation of a bill of rights is a considerably contentious issue (Tribe 1986). This is a global legal truism in environments of generally wide-worded rights and non-specific limitations. It is a debate that demands lengthy discussion and evaluation. This point has deliberately be left for last under this heading as it is worthy of considerable discussion. Constrained by limitations of space, this article will deal with these issues only on their surface – leaving in argument's trail infinitely more questions than answers.

Waldron recognises the tendency of rights disputes to be focused on the terms of a bill of rights. This may be positive in that its format facilitates easy focus on abstract rights issues but, conversely, such bills are rarely constructed with disagreements in mind and can often be non-conducive to good-faith explorations of contentious issues (Waldron 2006, 1380–1381). Waldron further criticises the "rigid textual formalism" that he deems bills of rights to encourage due to their general form (2006, 1380), a criticism which may not be directly imported to South African courts that appear to prefer a "value-based" approach to a strict constructionist one (Du Plessis 2000, 242). Although the South African approach is not beyond criticism, this matter will not be entertained here.

Fallon concedes many of Waldron's outcome-based criticisms but questions the relevance of testing the likelihood of a court's arriving at a superior answer to rights-based questions against that of the legislature. Fallon suggests that the question should revolve around whether there exist good outcome-related reasons for using judicial review also for protection (2008, 1705).

Fallon reasons that it is more important to avoid infringements of protected rights. He further assumes a position that legislative action would be more likely to infringe rights than inaction and as such there exists a strong protective interest in having veto-points strike down oppressive legislative action (the need for veto-points is considered below). Some of these are plausible assumptions but they still remain open to strong criticism.

Despite their substantive difference, we may reconcile both Waldron's and Fallon's arguments as being centred on the interpretation of rights and their limitations.

The realms of constitutional discourse offer considerable debate on interpretative ideals; however, the reality is that there exists considerable latitude for judges to explain reasonably their arrival at any conclusion on rationally contentious issues, given the vague nature of constitutional wording. To quote one of America's leading constitutional theorists, Lawrence Tribe, on constitutional interpretation (a statement which holds true for rights interpretation universally):

> Is reading the text just a *pre*text for expressing the reader's vision in the august, almost holy terms of constitutional law? Is the Constitution simply a mirror in which one sees what one wants to see? (Tribe 1986, 6).

The character of contemporary debate might appear to suggest as much. Liberals characteristically accuse conservatives of reading into the Constitution their desires to preserve wealth and privilege and the prevailing distribution of both. Conservatives characteristically accuse liberals of reading into the Constitution their desires to redistribute wealth, to equalise the circumstances of the races and the sexes, to exclude religion from the public realm, and to protect personal privacy (Tribe 1986, 6).

The vague nature of rights and the equally vague nature of their limitation allows for the disproportionate concentration of arbitrary power in the hands of the judiciary. The limitation clause (section 36), despite its purport, does little to remedy this flaw. A large, diversified Bench may militate against intentional unconscionable anomalies; however, any suggestion of impartial judicial action would be impractical. To suggest that decisions on contentious constitutional issues are untinged by latent judicial partiality (particularly given the vague nature of these rights) is tomfoolery. While Benches may ostensibly represent diverse backgrounds and interests, they are essentially composed of individuals who are schooled in similar intellectual traditions (see Mahoney 2015, 43) and who are likely to have relied, in part, on similar systems of patronage to ascend to the seat of judgment. I hypothesise that a Bench of eight individuals is no less likely to exercise collective bias than an individual is inclined to exercise bias, given the commonalities that bind judges of the Constitutional Court.

Fallon, an advocate of judicial review, acknowledges the elitism implicit in deferring judgment to the judiciary.

Many, if not most, arguments that courts should be presumed to be better than legislatures at determining whether legislation violates individual rights have a troublingly elitist cast — especially if one follows Waldron in assuming that the kinds of right commonly incorporated into bills of rights are moral rights. The preference for having a small number of lawyers in robes resolve contested questions about individual rights almost inevitably reflects one or another species of antipopulism, frequently coupled with highly idealised portraits of the few who wield judicial power (Fallon 2008, 1697).

In any event, if one were to accept the premise that there does in fact exist a "correct" interpretation of the nature and extent of rights (unlikely), then one must accept that this standard and the process of reaching such conclusions are unknown and incapable of articulation and that there then exists no reason why the judiciary is any more likely to arrive at such "correct decisions" than the legislature is.

Hutchinson, however, launches a fatal attack on the notion that rights interpretation lies anywhere else but with the masses.

Like other legal theorists, Waldron and Fallon seem to insist that there is some objective ground or moral facts-of-the-matter in regard to rights disputes. In making their respective cases, Waldron and Fallon make a similar philosophical claim that, even if there is widespread disagreement about the precise definition and scope of rights, it is possible "to get at the truth about rights" and that acknowledgement of reasonable disagreement does not preclude reasoned judgements about what is right and wrong (Hutchinson 2008, 58).

A similar criticism may be made of Du Plessis's reliance on an interpretative model (a value-based approach) which, in his view, will provide the court "with a clearly defined institutional role through which it can exercise its review as a valid rebuttal of counter-majoritarian arguments" (Du Plessis 2000, 243). No model of interpretation can displace this democratic truism.

References to concepts such as correct interpretation based on constitutional principles or reasonable judgments are evidence of a reliance on some sort or form of objective position – a possible unintended epistemological claim that has grave consequences for the debate. The scenarios contemplated in this debate are not of infringements of a blatant and explicit kind intended for the subjugation or persecution of a race, gender or religion. That is, the contemplated disputes are inherently more nuanced, given that this entire thought exercise occurs in a society committed to safeguarding rights but which disagrees bona fide on the nature and extent of these rights. To suggest that there exists any standard of correctness would be to incorrectly construe democracy at its most basic level. The acceptance of objective constitutional interpretation as chimera leads directly to an appreciation of a populist view expressed through appropriate democratic institutions and processes.

Democracy and Judicial Review

There are two issues which present themselves explicitly when we deliberate whether or not judicial review is incongruent with democratic ideals, as Hutchinson suggests.

One is the idea of interpretation resting with the masses (as discussed above). The second issue is whether or not the vesting of veto power over legislative action with a small group of unelected elite is incongruent with democratic ideals (issues of political and legal legitimacy). Ruminating over either question invariably leads the strong democrat to the conclusion that it is in the people that a view or system must find its legitimacy. This line of populist democratic rhetoric will be discontinued here in favour of contextual analysis, lest argument descend into self-defeatist abstraction.

A central theme embedded in the democratic spirit (and one that may be found at the heart of all democratic revolutions) is the rejection of the elite power for majoritarian governance. Implicit in concepts of democracy is governance by the will of the people. Abraham Lincoln's proclamation of democracy's being a government "of the people, by the people, and for the people" resonates with democrats the world over. Representative democracy embodies this spirit by allowing for frequent elections and public participation in decision-making. Judicial review of rights-based disputes represents a conferment of this fundamental power on unelected elites. Hutchinson aptly describes distrust of elites as a foundation of democratic thought:

> All elite power – be it the monied few, the judicial aristocracy, the political elite, the bureaucratic oligarchy, the corporate nabobs, or whoever – is to be distrusted. Regarding the Waldron–Fallon debate, this distrust extends to those philosophers, sages or experts who claim that there is some set of objective values or truths to which a democratic society must conform or by which it can be disciplined. This strong version of democracy accepts that there is no single set of rights entitlements or practical realisation of them that will always be morally superior. Rather, it is for the people to determine for themselves what is best for them (Hutchinson 2008, 59).

Evidently, moral authority is not a function of any institution or any select group of individuals. No judicial authority can profess to possess some form of greater vantage in the determination of moral legitimacy over legislative systems reflective of societal engagements in its democratic structure (Hutchinson 2008, 60). A natural product of a democratic thought process is the understanding that disputes must be guided by popular opinion.

Waldron holds that systems of judicial review are inconsistent with democracies and their emphasis on strong public participation. Democracies follow no rigid universal structure, size or pattern, nor are they required to. The commonality that permeates democratic systems is a preference for ordering society and authority *per* the views of the majority of society's members. The democratic ideal may be described as being "much more than a formal process for tallying people's preferences and distributing political power" (Hutchinson 2008, 59). This is an ideal that envisages a society fashioned by its constituents, one in which the majoritarian voice guides constitutional discourse and the interpretation of rights as opposed to its being held hostage by unelected cloaked "experts".

Accepting majoritarian election as a legitimate source of moral authority has profound ramifications. On what grounds, then, can the judiciary strike down legislation passed by representatives of "the people" after democratic engagement with "the people"?

The legitimacy of power conferred upon a small subset of unelected officials (judges) to make decisive calls on enacted legislation has been argued to be found in majoritarian

election itself (Fallon 2008, 1723). Such power responds to deeply consequential societal issues which are well understood and thoroughly debated by ordinary citizens and their elected representatives. Rawls argues that the court's legitimacy stems from a mandate conferred by the people (through the Constitution) (1993, 231). *Prima facie*, it does not seem counter-democratic to suggest that where "the people" elect a system which allows legislation to be subject to judicial scrutiny and severed on the grounds of its being unconstitutional, then such a system acquires democratic force rather than being incongruent with democratic ideals.

In South Africa, judicial review on constitutional grounds finds its legal legitimacy in the Constitution (section 167(5)): *prima facie* evidence of majoritarian assent to this system. But this does not provide any necessary or conclusive answer to the questions of democratic legitimacy. Would it be democratically legitimate for systems of constitutional judicial review established at the time of democracy to continue to restrain legislative action 23 years later (Fallon 2008, 1720)?

A rebuttal in a South African context would be that the entrenchment of judicial review in the Constitution may be overridden where such sentiment is shared by the super-majority – while not easy, this remains a possibility. This option to be exercised by a super-majority allows for a change of system should it be warranted (see Fallon 2008) – a valid point constrained by practical reality in South Africa.

An acceptance of judicial review as the ratified current status quo, despite its constitutional entrenchment, is *prima facie* valid although not necessarily reflective of true majoritarian opinion, partly because of the lack of continued broad-based debate on our Constitution. There is a strong tendency on the part of the broader citizenry to treat the Constitution (or at least most parts of it) as a definite and sacrosanct body of fundamental principles. Furthermore, there exists a prevailing narrative that treats judicial review as imperative and vital to democracy. These misconceptions stem largely, in my opinion, from a scepticism of parliamentary power that may be traced back both to the pre-democracy era and to a slanted dominant media narrative. Together, these notions conspire to quell any debate over meaningful constitutional amendments (even before it reaches the legislature) and results in a tacit majoritarian assent to the status quo rather than any explicit assent to the system itself.

This inefficiency is not of direct consequence but supports the Jeffersonian ideal of the frequent lapsing of fundamental law and institutional structure to allow for each generation to elect its own form of governance:

> Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right. It may be said that the succeeding generation exercising in fact the power of repeal, this leaves them as free as if the constitution or law has been expressly limited to 19 years only (Boyd et al 1950).

Regardless, Bellamy rejects the argument of a mandatory source of legitimacy put forward by Rawls on more substantive grounds. He maintains that even a successful referendum would be insufficient to legitimise rights-based judicial review adequately. "We the people" (a phrase also found in the Preamble to the South African Constitution) may be sovereign, but that does not make whatever institutions or mechanisms they choose *ipso facto* democratic, for they may deploy that sovereign power to establish a non-democratic political system. Yet democratic legitimacy requires the system to be democratic "in its operation and not merely in its establishment" (Bellamy 2008, 340). This advances the case for public involvement in the decision-making process.

In contrast, the Constitutional Court in South Africa may at times be remarkably dismissive of majoritarian opinion, as evidenced by the elitist rhetoric below:

> Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority (see *S v Makwanyane* para 88).[3]

This attitude is laden with implicit counter-democratic claims to judicial moral authority. Furthermore, Chief Justice Chaskalson failed to account for the fact that parliamentary sovereignty employed during apartheid is fundamentally different from a democratic system with limited powers of legislative review in that the former was exclusive and counter-democratic by its very nature.

Bellamy's thesis that the "legitimacy of democratic processes derives from their own inherent constitutional properties as mechanisms for citizens to engage with each on [sic] other on equal terms" is an incredibly persuasive argument. Equality before and in the law is demanded, but this does not demand equality of the courts with majoritarian opinion (Bellamy 2008). For judicial review of legislative action to claim democratic legitimacy, the judiciary would need to be suitably guided by public reasoning (both of the people and of their representatives) – which, in many cases, it is not (Bellamy 2008, 344).

Bellamy's argument proves to be most persuasive, and a supporting conclusion can be reached by analysing judicial review through the lens of a separation-of-powers

---

[3] *S v Makwanyane & Another* (CCT 3/94).

framework. The assumption of the separation of powers being a vital component of the modern democratic ideal is made in subsequent reasoning. This strong assumption provides a good context for this discussion, but one from which the ultimate conclusion – namely, that judicial review is democratically illegitimate – stands independently.

The three "arms of government" are not equal and cannot be treated as equals (Madison 1788, 257). The legislature, treated as the most politically legitimate representative of the people, must assume a role of ascendancy in this regard. Locke himself recognised this reality and considered the legislative branch to be supreme (see his *Two Treatises of Government* (1988)). A codified constitution and concepts of constitutional supremacy do not negate this inherently superior political legitimacy. The traditional differentiation between legislative and judicial duty in democratic discourse offers significant insight into what democratically legitimate judicial action should be.

Montesquieu differentiates between judicial and legislative duty:

> Again, there is no liberty, if the judiciary power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression (Montesquieu 1752, 173).

He elaborates:

> Were it [the judicial power] joined with the legislative, the life, liberty and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative (Montesquieu 1752, 172).

Any form of judicial intrusion into the legislative arena would therefore represent an infringement of the separation-of-powers principle. Ideally, the judiciary and judges "are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour" (Montesquieu 1752, 180). The strict application of such a system presented certain inefficiencies. To guard against the potential subjugation of one arm of government by the other and the concentration of power in one arm, systems of checks and balances were created.

Some proponents may choose to construct judicial review as an imperative and valid check on legislative power. After all, a necessary check should be a valid ground of legitimacy regardless of abstract majoritarian argument. Judge Mojapelo makes a similar averment:

> The most conspicuous example of a check is the power of the judiciary to review executive conduct and ordinary laws for the compliance with the Constitution and the Bill of Rights. Judicial review in this case constitutes neither executive nor judicial function; it is a mere check on the exercise of executive and legislative power. It is a power exercised by the judiciary to ensure constitutional compliance and not to exercise the power of another authority … (2013, 40).

I believe this to be a premature and incorrect conclusion. The modification of strict separation to include checks and balances can be traced to arguments made by James Madison:

> [Montesquieu] did not mean that these [branches] ought to have no partial agency in, or no control over, the acts of each other. His meaning … can amount to no more than this, that where the whole power of one [branch] is exercised by the hands that hold the whole power of another, the fundamental principles of a free constitution are subverted. [T]here is not a single instance in which the several [branches] of power have been kept absolutely separate and distinct (Madison 1788, *Federalist* No 47).

> The great security against a gradual concentration of the several powers in the same [branch], consists in giving to those who administer each [branch], the necessary constitutional means, and personal motives, to resist encroachments of the others ... Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place (Madison 1788, *Federalist* No 51).

As envisaged by Madison, a system of checks and balances should be aimed primarily at avoiding the encroachment and concentrations of power. Regardless of the form of Madison's eventual model, it is sufficient to appreciate his rationale in its most basic form. A check should be aimed at guarding against encroachments by one arm of government over another, a safeguard against any arm exercising power beyond its ambit. This is recognised rhetorically by South African courts too.

The principle of separation of powers, on the one hand, recognises the functional independence of the branches of government; on the other, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another … (see *Ex parte Chairperson of the Constitutional Assembly of the Republic of South Africa* para 109[4]).

---

[4] 1996 (4) SA 744 (CC).

Constitutional Principle VII provides a vague construction of checks and balances, providing that "there shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness".

The validity of articulating judicial review as a valid check on the exercise of legislative power is questionable. A check should be a measure to limit the usurpation of power or abuse in an environment where, if left unchecked, such usurpation or abuse may occur as a natural consequence. As such, it is an extraordinary vehicle serving a unique purpose. The case of judicial review acting as a check on legislative power is consequently an uneasy one.

Where inherent checks independent of judicial review are already available, the construction of judicial review as a check should prove insufficient to justify broad-based legislative review, given the exceptional nature of checks on power. The people act as the primary protective vehicle against legislative abuse. Where legislative tyranny results in a disregard of the majority view, the citizenry acts as a vehicle of protection. This check on legislative power is an inherent one: it lies with the people themselves (through their participation in guiding the legislature, the power of elections generally and mass mobilisation in extraordinary cases). Strong judicial review (such as striking down legislation) effectively displaces the power to control legislation from the legislature ("the people") and places this tremendous power squarely in the hands of the judicial elite.

Broad-based judicial review on rights grounds appears to be an unnecessary and counter-democratic encroachment on legislative power and an unfounded encroachment on the will of the majority.

Legislatures and Their Inherent Inefficiencies

There are two primary potential dangers inherent in unfettered legislative power: legislative tyranny and "the tyranny of the majority".

Legislative tyranny may occur where the legislature of its own accord moves to pass some sort of unpopular legislation that infringes rights. This action may constitute a theoretical counter-democratic endeavour. As discussed above, the people themselves may act as the guardian against such abuses (through elections or mass mobilisation in exceptional cases).

The second great danger is that of "the tyranny of the majority". Minority rights are particularly and considerably vulnerable in systems that have no second-line veto defence from legislation which may be deemed a manifestation of "the tyranny of the majority".

Consider a hypothetical scenario where legislation is passed uniformly to ban the wearing of veils as a result of what we will assume are bona-fide safety concerns. This law disproportionately affects members of minority religion X. The legislature and the majority, even after hearing counter-arguments from members of religion X, are unable to appreciate these arguments adequately – owing either to latent prejudice or to an inability to understand the importance members of religion X attach to the wearing of veils.

This scenario is not unimaginable even in strong democracies that maintain a commitment to rights (including minority rights). The legislative process that involved the "active participation of the people, as citizens, in politics and civic life", both directly and through their representatives, can yield a result which infringes on the core human rights of a minority (the third element). Our supposition of good-faith disagreement does not exclude such a scenario. As much as the legislative process is a rational and measured one, it also resonates with emotion and is prone to communal fervour. This is not to suggest that the judiciary or any individual or institution is immune to emotion; but this vulnerability to democratic conflict necessitates some form of further protection which would be hard to find in any structure that would be representative of the majority view in its processes. Any averment otherwise would be majoritarian self-serving posturing. The need for a third-party veto vote in such a case represents a forced and necessary incursion rather than a desired one.

Hypothetical Model

Accepting that true legitimacy lies in populist ratification does not preclude the elucidation of subjective exemplars. A system, one most agreeable with the author's understanding of the competing interests represented in the views discussed above, is proposed below.

The "tyranny of the majority" (by intent or oversight) seems to be the strongest vulnerability in a system that relies solely on legislative power. In this respect, the most basic and fundamental rights of minorities and non-dominant voices, which are most likely to be overlooked and infringed, demand some form of extraordinary protection. Therefore a hierarchical system of review is proposed. "Hard" judicial review should serve as a veto-point in disputes of minority rights (to be interpreted strictly). Beyond these core rights, courts should be conferred with minimal "soft" review powers, with their jurisdiction restricted to allowing only for judicial opinions (which acquire no formal enforcement status) in order to serve as an alternative view. Such an arrangement would enable the strong, engaged legislature and the public to review the contentious pieces of legislation, if need be.

Arguing for a "Hard" Judicial Review of Minority Rights

Above we have dissected aspects of "tyranny of the majority", which may rear its head even in societies that maintain an overwhelming commitment to the protection of rights. Such an inevitable, pervasive vulnerability would argue for the further protection of these potentially compromised rights.

Bellamy's argument that a general, strong form of judicial review is counter-democratic in that its outcomes are not suitably guided by public reasoning – a requirement that is fundamental to democracy – has been accepted. It will be argued, however, that a strong judicial review of minority rights may still be a democratically legitimate infringement of public participation and legislative processes.

Minority rights differentiate themselves from disputes involving the general body of rights in that the latter concerns broader society and is therefore less likely to be infringed upon, given the broad vested interests of the majority. A system without any veto may lead to minority rights being overridden (Fleck and Hannsen 2012, 304), either intentionally or negligently. Where legislative tyranny against the majority may result in the passing of legislation deemed unfair by the majority (eg a draconian governmental invasion of privacy), the mechanism of mass mobilisation is available immediately, as is the less immediate avenue of election. These safeguards are not available to minority or non-dominant groups. Herein lies a tremendous vulnerability to the democratic foundation of rights protection.

At this juncture, we must clarify Waldron's initial supposition: a society that is committed largely to rights and minority rights and where disputes are carried out in good faith. This is a fair assumption when issues addressing the generalist body of rights are concerned. However, this standard of good faith is inevitably a subjective one. This is not an inherent problem with general disputes where we accept that true and "correct" interpretation lies with the view of the majority. On issues concerning minority rights, we must accept that such election by the majority is bound to be tinged with latent prejudice, implicit bias and conditional untruths. In this respect, a democratic society's commitment to the protection of rights necessitates a second-line defence to protect further these vulnerable minority rights from infringement. The need for some form of veto-point (beyond the weak and indefinite presidential veto), exercised by some institution independent of the legislature, is great even if it exists only to afford a veneer of credibility to the democratic system.

While the judiciary's ability to protect minority rights better is inconclusive, it does maintain strong efficiencies and advantages when compared to other prospective institutions capable of exercising such prospective power of veto. The judiciary serves as a convenient and ready institution to exercise this power of veto (for reasons discussed above). In the case of disputes of general rights, a softer form of review is

proposed, one that allows for a mere judicial expression of its opinion on the constitutionality of the relevant legislation, with minimal powers of enforcement attached to this opinion. This would allow for an alternative, strictly legalist view that the legislature and the public may reconsider while it also guards against judicial encroachment on legislative power.

In putting forward this argument, this article adopts as truth Fallon's assumption that legislative action is more likely to result in rights infringement than inaction. This is an assumption that may ostensibly betray the aforementioned support of Hutchinson's majoritarian interpretative approach. This need not be the case, though – particularly where the scenario is not framed as a right or wrong verdict in regard to an infringement but emanates from the point of protecting against an under-appreciation of minority views in the legislative process (safeguarding against a natural inefficiency in the democratic process). A distinction must then be drawn between minority rights and other rights disputes, on the untried assumption that minority rights are most likely to be insufficiently appreciated, understood and protected, even in a society committed to the protection of these rights.

References to minority rights are made to their traditional scope (racial, ethnic, class, religious, linguistic, gender and sexual minorities) and are not given a liberal interpretation that may, for instance, treat an underprivileged criminal class as a marginalised minority. In this regard, see Chaskalson on capital punishment in *S v Makwanyane & Another*:[5]

> [T]he very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.

Conclusion

The enshrinement of judicial review in the Constitution should not preclude debate over its articulation, relevance and political legitimacy. Rather, democracy demands constant review of its structures and political system by "the people", and it is only through criticism of the status quo that a strong democracy can be built.

Judicial review of legislative action on constitutional grounds remains a rarely contended and discussed reality in South Africa. The author has been encouraged by

---

[5] CCT 3/94.

many of the political arguments set out (by Bellamy, Hutchinson, Waldron, etc) to assume a rather minimalist position on the issue. The judiciary possesses no conclusive advantage over the legislature in protecting against rights infringements, nor can it lay claim to superior legitimacy in rights interpretation. Ultimately, such jurisdiction rests with "the people" and such power must be exercised by them together with and through the supreme elected arm of the legislature. Fallon's arguments highlighting a need for veto-points as additional points of protection proves persuasive in exceptional circumstances (where majoritarian tyranny poses a realistic challenge to minority rights).

Reconciling these dissimilar theses leads to a novel model, as proposed in this article: one of restricted review aimed at providing a further veto-point only where the most vulnerable categories of rights are concerned, except where absolutely necessary; and, as a last resort, should such an infringement of legislative power by the judiciary be reluctantly accepted. The democratic truism of majoritarian governance (in this case through representation and engagement) should remain central to the construction of democratic institutions and in designing checks and balances, lest we inadvertently destroy the essence of democracy in attempting to fortify it.

References

Bellamy, Richard. 2008. “The Democratic Qualities of Courts: A Critical Analysis of Three Arguments” Representation 49(3): 333–346. https://doi.org/10.1080/00344893.2013.830485

Bellamy, Richard. 2011. “Political Constitutionalism and the Human Rights Act” International Journal of Constitutional Law 9(1): 86–111. https://doi.org/10.1093/icon/mor024

Boyd, Julian P, Butterfield, Lyman H, Cullen, Charles T, Catanzariti, John and Oberg, Barbara. 1950. *The Papers of Thomas Jefferson.* Princeton: Princeton University Press.

Du Plessis, Lourens. 2011. “The Status and Role of Legislation in South Africa as a Constitutional Democracy: Some Exploratory Observation” Potchefstroomse Elektroniese Regsblad 14(4): 92–102. https://doi.org/10.4314/pelj.v14i4.4

Du Plessis, Max. 2011. “The Legitimacy of Judicial Review in South Africa’s New Constitutional Dispensation: Insights from the Canadian Experience” The Comparative and International Law Journal of Southern Africa 33(2): 227–247.

Fallon, Richard. 2008. “The Core of an Uneasy Case for Judicial Review” Harvard Law Review 121(1): 1693–1736.

Fleck, Robert and Hannsen, F Andrew. 2012. “Judicial Review as a Constraint on Tyranny of the Majority” The Journal of Law, Economics and Organization 29(1): 304–331. https://doi.org/10.1093/jleo/ews034

Hutchinson, Allan. 2008. “A ‘Hard Core’ Case against Judicial Review” Harvard Law Review Forum 121(1): 57–64.

Jay, John, Hamilton, Alexander and Madison, James. 1818. *The Federalist (Gideon ed)*. George W Carrey & James Mclellan (eds). 2001. Liberty Fund.

Locke, John. 1688. *Two Treatises of Government.* Peter Laslett (ed). 1988. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9780511810268

Mahoney, Kathleen. 2015. “Judicial Bias: The Ongoing Challenge” Journal of Dispute Resolution 1(1): 43–69.

Mojapelo, Phineas. 2013. “The Doctrine of Separation of Powers (a South African Perspective)” Advocate 26(1): 37–46.

Baron de Montesquieu, Baron de Charles de Secondat. 1748. *The Spirit of Law*. Thomas Nugent (trans & ed). 1752. J Nourse and P Vaillant.

Pannett, Daniel. 2008. “Judicial Review in New Zealand: A Preference for Deference?” Unpublished thesis, University of Otago.

Rawls, John. 1993. *Political Liberalism.* Columbia University Press.

Raz, Joseph. 1998. “Disagreement in Politics” American Journal of Jurisprudence 43(1): 25–52. https://doi.org/10.1093/ajj/43.1.25

Tribe, Laurence. 1986. “On Reading the Constitution – Tanner Lectures on Human Values delivered at Utah”. Available at <http://tannerlectures.utah.edu/_documents/a-to-z/t/Tribe88.pdf>.

Waldron, Jeremy. 2006. “The Core of the Case against Judicial Review” The Yale Law Journal 115(1): 1346–1406. https://doi.org/10.2307/20455656

Cases

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC).

Middelburg Municipality v Gertzen 1914 AD 544.

S v Makwanyane & Another (CCT 3/94).

Legislation

Constitution of the Republic of South Africa Act 110 of 1983.

Constitution of the Republic of South Africa, 1996.

Promotion of Administrative Justice Act 3 of 2000 (PAJA).