

**THE LEGITIMACY OF JUDICIAL LAW-MAKING AND THE
APPLICATION OF JUDICIAL DISCRETION IN SOUTH AFRICA:
A LEGAL COMPARATIVE STUDY**

by

PETE VUSI MHLANGA

Submitted in accordance with the requirements

for the degree of

DOCTOR OF LAWS

in the subject

Criminal and Procedural Law

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF NINA MOLLEMA

FEBRUARY 2020

Table of Contents

	Page
DECLARATION	i
ACKNOWLEDGEMENTS	ii
DEDICATION	iii
SUMMARY	iv
EXPLANATION OF KEY WORDS.....	vi
CHAPTER ONE	1
INTRODUCTION.....	1
1.1 Background information.....	1
1.2 Research problem	5
1.3 Research questions and hypothesis of the study	12
1.4 Methodology	13
1.5 Literature review	14
1.5.1 The pure view of separation of powers.....	16
1.5.2 The reconstructed view of separation of powers	18
1.5.3 Checks and balances in managing the separation of powers	19
1.5.4 Governing collectively in a shared project	20
1.5.5 Possible encroachment on functions of other branches	22
1.6 Summary	35

CHAPTER TWO.....	38
SEPARATION OF POWERS AND JUDICIAL FUNCTION: ORIGINS AND CHALLENGES.....	38
2.1 Introduction.....	38
2.2 The origins and rationale of the separation of powers doctrine	39
2.2.1 The biblical origins of the separation of powers.....	40
2.2.2 The historical origins and structure of the separation of powers in Britain..	41
2.2.3 The historical origins and structure of the separation of powers in the United States.....	52
2.2.4 The historical origins and structure of the separation of powers in Canada	63
2.2.5 The historical origins and structure of the separation of powers in South Africa	71
2.3 Challenges in the separation of powers doctrine: different perspectives on judicial review	77
2.4 Conclusion.....	97
CHAPTER THREE.....	100
THE ROLE OF COURTS IN DEVELOPING CRIMINAL OFFENCES AND PUBLIC POLICY.....	100
3.1 Introduction.....	100
3.2 Common-law judicial law-making and judicial activism.....	104
3.2.1 Judicial law-making in the United States	104
3.2.2 Judicial law-making in Canada.....	121
3.2.3 Judicial law-making in South Africa	132
3.3 Conclusion.....	154

CHAPTER FOUR	157
JUDICIAL RESTRAINT AND CONSTITUTIONAL DEFERENCE: DETERMINING THE LIMITS OF POWER	157
4.1 Introduction.....	157
4.2 Distinguishing between the concepts of judicial restraint and constitutional deference.....	158
4.2.1 Judicial restraint and deference: The United States' perspective	161
4.2.2 Judicial restraint and deference: The Canadian perspective	178
4.2.3 Judicial restraint and deference: The South African perspective.....	186
4.3 Conclusion.....	200
CHAPTER 5	204
MANDATORY MINIMUM SENTENCES: A NON-JUDICIAL BODY DECIDING APPROPRIATE PUNISHMENTS	204
5.1 Introduction.....	204
5.2 Origins of sentencing judicial discretion.....	207
5.3 Non-judicial bodies deciding appropriate punishments under the common law	211
5.4 A comparative overview of mandatory minimum sentences in Canada, the United States and South Africa.....	215
5.4.1 Mandatory minimum sentences in the United States	216
5.4.2 Mandatory minimum sentences in Canada	223
5.4.3 Mandatory minimum sentences in South Africa	235
5.5 Conclusion.....	253

CHAPTER 6	256
RECOMMENDATIONS AND CONCLUSION	256
6.1 Summary	256
6.2 Recommendations.....	274
6.2.1 Development of the separation of powers doctrine	274
6.2.2 Development of judicial review	275
6.2.3 Determining the nature and content of judicial law-making	275
6.2.4 Regulating the nature and content of judicial restraint and deference ..	276
6.2.5 Abolishment of mandatory minimum sentences	276
6.3 Conclusion	277
BIBLIOGRAPHY	282

DECLARATION

This research is submitted in accordance with the requirements for the degree of Doctor of Laws (LLD) in the subject Criminal and Procedural Law at the University of South Africa.

I declare that **THE LEGITIMACY OF JUDICIAL LAW-MAKING AND THE APPLICATION OF JUDICIAL DISCRETION IN SOUTH AFRICA: A LEGAL COMPARATIVE STUDY** is my own work, and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

Signature: 
Pete Vusi Mhlanga

Date: 2 February 2020

ACKNOWLEDGEMENTS

I would like to thank Professor Nina Mollema, my supervisor for this research, first for agreeing to be my promoter; and second, for her competence, patience and kindness in supervising the study. Without her guidance, advice and comments, I wouldn't have been able to complete this study. I am grateful for her many helpful suggestions. All errors in this study are entirely my own.

I would also like to thank the late Antonin Scalia, Associate Justice of the United States for his insights and unparalleled contribution to judicial deference and administrative interpretations of law and on judicial law-making. I would also like to thank Professors Frederick Schauer of the University of Virginia School of Law and Richard Zeckhauser of the Harvard University John F. Kennedy School of Government for their insights and contributions to the subject matter and have inspired my inquisitiveness to explore and embark on this work.

To my friends and family, thank you for your inspiration and encouragement.

DEDICATION

Dedicated to my family

My siblings

And all my loved ones who supported me throughout this journey.

SUMMARY

The concept of judicial law-making impacts on the extent, meaning and scope relationship between the legislature, the executive and the judiciary. It is an integral function of the courts while its shape, meaning and nature seem to lack sufficient formulation and articulation, which results in an inherent problem regarding its legitimacy. This study examines the legitimacy and the working of the South African constitutional judicial law-making concepts. Its effect on the constitutional relationships between all three branches of government is scrutinized. In order to fully probe this concept, its impact and application on the separation of powers, judicial review, constitutional deference and mandatory minimum sentences becomes inevitable.

The introductory part of this study looks at origins and historical development of the separation of powers doctrine and its application under the 1996 South African Constitution. The latter part focuses on the nature and the scope of judicial review, judicial law-making, constitutional deference and mandatory minimum sentences with a view establishing the impact of these concepts in our judicial law-making. The development of these concepts by South African courts, and what seems to be the lack of formulation and articulation of South African constitutional judicial law-making which raises questions regarding its legitimacy is probed.

This research recommends that it is of the utmost importance that South Africa develops its own unique and comprehensive doctrine of separation of powers. The Constitution further requires reforms in order to clarify the extent to which the courts can go when formulating laws and public policy in the interests of justice, and whether the interests-of-justice test is capable of delivering a well-informed outcome in developing this jurisdiction's laws. South African jurisprudence also needs to be developed in empowering the legislature to make laws which are constitutionally compliant without making the courts the sole expositor of the Constitution. Lastly, the extent to which the legislature can enact certain laws must be redefined, which on face value might seem to be encroaching into the courts' independence and authority.

KEY WORDS: Judicial law-making, judicial review, judicial restraint, judicial independence, separation of powers, mandatory minimum sentences

EXPLANATION OF KEY WORDS

Bill of Rights - also known as a proclamation of rights. It contains an inventory of fundamental rights of the inhabitants of a country.¹

Charter of Rights and Freedoms - is a declaration of rights which are guaranteed in the Constitution of Canada. These rights also form the initial component of the Constitution Act, 1982.²

Common-law constitutionalism - expresses the interpretation of a Constitution which is not only based on its text but also on judicial decisions that were reached by courts over years when applying the Constitution.³

Constitutional dialogue - reflects the interactions amongst the courts and other branches of government in the settlement of constitutional matters.⁴

Constitutional separation of powers - expresses the ideal that a Constitution's objective is to set up a framework which sets out to divide government's powers into three branches, that is, legislature, executive and the court, within certain confines.⁵

Counter-majoritarian - expresses the judicial review powers where unelected and unaccountable courts are empowered by a Constitution to invalidate legislation enacted by the majority-elected legislature.⁶

Judicial activism - judges' decisions which are not inevitably centred on the law, but on judges' personal beliefs, opinions, tenets, philosophy and theoretical views.⁷

¹ Legal Dictionary <https://legal-dictionary.thefreedictionary.com/Bill+of+Rights> (Date of use: 18 June 2019).

² Justice Education Society <http://www.lawlessons.ca/lesson-plans/1.3.overview-of-the-canadian-charter-of-rights-and-freedoms> (Date of use: 18 June 2019).

³ Strauss 1996 *Univ Chicago LR* 877.

⁴ Bateup 2007 *Temple Int Comp LJ* 3.

⁵ Duclos and Roach 1991 *McGill LJ* 4.

⁶ Tremblay 2005 *Int J of Const Law* 617.

⁷ Encyclopaedia Britannica <https://www.britannica.com/topic/judicial-activism> (Date of use: 15 March 2019).

Judicial independence - expresses the idea that the courts have to be unconnected and insulated from the other arms of government, that is, the legislature and the executive.⁸

Judicial monopoly on constitutional interpretation - expresses the position where courts are viewed as “the ultimate arbiters of all constitutional questions”.⁹

Judicial pragmatism - reflects the belief that it is sensible and justifiable that society’s contemporary demands can best be served by changing constitutional standards.¹⁰

Judicial restraint - reflects the belief that judges’ personal thoughts or methods should not be infused into the law, and results in second-guessing the legislature’s intention in enacting that law.¹¹

Judicial review - is a procedure in which the judiciary can re-examine and rethink measures and acts of the legislature and executive.¹²

Judicial supremacy - expresses the principle where the courts are considered to possess progressively exceeding powers than the legislative branch to construe the contents and text of a Constitution.¹³

Legislative intent - expresses the objectives and intention of the legislative arm of government when enacting a legislation.¹⁴

Living Constitution - reflects the thought that a Constitution is a body of laws that develop and transform based on society’s transforming demands.¹⁵

⁸ Encyclopaedia Britannica <https://www.britannica.com/topic/judicial-independence> (Date of use: 21 June 2019).

⁹ Carson <https://fee.org/articles/judicial-monopoly-over-the-constitution-jeffersons-view/> (Date of use: 1 October 2019).

¹⁰ Easterbrook 2008 *Harvard JL and Public Policy* 901.

¹¹ USLegal <https://definitions.uslegal.com/j/judicial-restraint/> (Date of use: 21 June 2019).

¹² *Marbury v Madison* 5 US (1 Cranch) 137 (1803) 352.

¹³ Morton 2003 *Policy Options* 25.

¹⁴ Duclos and Roach 1991 *McGill LJ* 28.

¹⁵ Scalia *A matter of interpretation* 25.

Originalism - reflects the notion that a “Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted, it means now.”¹⁶

Rule of law - reflects the position where the country’s laws are followed, and are supposed to be enforceable against each person.¹⁷

Supremacy of the Constitution - reflects the system of a state where the dominance of the legislature’s legislative role yields to the demands and stipulations of a Constitution.¹⁸

Textualism - reflects the rule that contents and wording of a law means what it was accepted and assumed to signify at the time when the legislature passed that law, and that laws cannot take on new purposes and significance when society’s needs changes.¹⁹

¹⁶ Scalia and Garner *Reading law* 81.

¹⁷ Merriam-Webster <https://www.meriam-webster.com/dictionary/rule/of/law> (Date of use: 21 June 2019).

¹⁸ Duhaime’s Law Dictionary <http://www.duhaime.org/LegalDictionary/C-Page4.aspx> (Date of use: 21 June 2019).

¹⁹ Ring *Scalia’s court* 542.

CHAPTER ONE

INTRODUCTION

1.1 Background information

The South African constitutional state is founded on an unswerving belief that in order for the government system to work and create a clear bridge with our past political dispensation, the separation of powers' doctrine has to be a foundational principle.¹ Although there are different branches of government which all form an integral part of the governing structure, the separation of powers' principle remain a significant tool to distribute authority.² Through this doctrine, it is thought that the nation has safeguards against the abuse of power in that these different branches of government are in charge of distinct functions, that is, judging, legislating and the enforcement of the law.³ Moreover, according to Peabody and Nugent:

Separation of powers ties different functions and traits essential for governance and different kinds of power to distinct institutions in order to promote accountability, effective policymaking and administration, and political legitimacy, amongst other goals.⁴

Separation of powers is thought to enhance a government's answerability, efficient law-making, and at the same time maintain a truly constitutional democratic rule by the people. This interaction within the government's constitutional framework is also enhanced by checks and balances which at the same time give limitations that restrict the powers of every branch of government.⁵ The courts carry out an exceptional and significant duty of determining disputes by making use of the laws enacted by the legislature. They have been enjoined with the remarkable authority of judicial review in looking after the constitutional boundaries between the branches of government.⁶ It is in these latter views that the courts are seen to have the

¹ Constitutional Principle VI, Schedule 4 of the Constitution of the Republic of South Africa, Act 200 of 1993 (hereinafter the Interim Constitution).

² Benedict 2007 *Brooklyn LR* 1265.

³ Benedict 2007 *Brooklyn LR* 1266.

⁴ Peabody and Nugent 2003 *Am Univ LR* 34.

⁵ Peabody and Nugent 2003 *Am Univ LR* 26.

⁶ *Cohen v State of New York* 720 NE 2d 850 (NY1999) 854.

authority to invalidate acts and policies enacted by the legislature. Unfortunately, this latter notion has, according to Carson, resulted in the following state of affairs:

The judges act as if they have a monopoly of interpretation of the Constitution. Members of Congress usually make it clear that they believe the opinions of the Federal courts, especially the Supreme Court, are determinative. Presidents increasingly leave to the courts the questions they may have about the constitutionality of laws that come before them.⁷

Verkuil argues that the maxim 'separation of powers' contains unrealistic facets which circumvents its interpretation.⁸ He adds that the maxim is not a precise account of the working of government, and the expression 'shared powers' would, in his view, be more persuasive. Verkuil furthermore identifies what he considers to be the main factor in this ambiguity, in that: "the maxim has so many historical parents that its lineage is almost impossible to trace."⁹ This latter view is evident in that when Sharp comments on the origin of this doctrine, he argues that it can be followed back to the works of Aristotle.¹⁰ Mojapelo J,¹¹ on the other hand, argues that the doctrine can be traced back to the writings of John Locke, and specifically where Locke observed that:

It may be too great a temptation for the humane frailty, opt to grasp at powers, for the same persons who have power of making laws, to have also in their hands the power of executing them, whereby they may exempt themselves from the law, both in its making and execution to their own private advantage.¹²

Moreover, the prevailing views seem to be that the doctrine of separation of powers is traced back to the text of the French philosopher, Baron de Montesquieu, titled '*De l'esprit des loix*' (The spirit of laws).¹³ In this acclaimed work first published in 1748, Montesquieu, after observing the English system of government, envisioned a similar constitutional system for France which would be built on a basic

⁷ Carson <https://fee.org/articles/judicial-monopoly-over-the-constitution-jeffersons-view/> (Date of use: 1 October 2019).

⁸ Verkuil 1989 *William and Mary LR* 301.

⁹ Verkuil 1989 *William and Mary LR* 301.

¹⁰ Sharp 1935 *Univ of Chicago LR* 385.

¹¹ Mojapelo 2013 *Advocate* 37.

¹² Mojapelo 2013 *Advocate* 37.

¹³ Badenhorst 2015 *De Rebus* 66. One supporter of this viewpoint is Kavanagh who traces the doctrine's origin back to Montesquieu's work, and points out that the separation of powers had been a significant safeguard against the perversion of powers by the state and dictatorship for the past centuries, and that it still occupies a prominent role in modern-day constitutional governments. See Kavanagh *The constitutional separation of powers* 221. Bellamy, however, argues that the origin of this doctrine can be traced back to the writings of United Kingdom (UK) scholars. See Bellamy 2011 *Int J of Const Law* 86.

fundamental rights system. For this ideal to work, he reasoned that the government's powers must be divided into three branches, and that the power should not only be vested in one person, but be shared amongst the government branches. In support of these views, he remarked that:

All would be in vain if the same person, or the same body of officials, be it the nobility of the people, were to exercise these three powers: that of making laws, that of executing the public resolutions, and that of judging crimes or disputes of individuals.¹⁴

Montesquieu argued that freedom and separation of powers are inseparable.¹⁵ He asserted that citizens cannot live in democracy and have their rights guaranteed where there is no separation of powers.¹⁶ Pierce, on the other hand, dismisses out of hand the concept of the separation of powers. He argues that:

...if powers truly were separated so that each branch of government could exercise only a discrete set of powers to the exclusion of the other branches, the Nation would be ungovernable.¹⁷

While this doctrine has been a foundational concept for the survival and existence of constitutional democracies since the eighteenth century, Kavanagh points out that its success is overshadowed by profound popular criticisms, amongst other things as mentioned above, if a state's powers were separated, a country would be unmanageable and anarchy would ensue. She adds that maximising the autonomy of branches of government would counter the application of checks and balances. Because checks and balances, Kavanagh further argues, requires joint oversight from all branches of government, the scope and extent of the doctrine is difficult to ascertain. In addition, she avers that when looking back at the eighteenth century and the developments which confronted the government's functioning, the once-honoured separation of powers doctrine is now considered old-fashioned, obsolete

¹⁴ Montesquieu *The spirit of laws* chapter 6.

¹⁵ Montesquieu *The spirit of laws* chapter 6.

¹⁶ Montesquieu *The spirit of laws* chapter 6.

¹⁷ Pierce 1989 *William and Mary* LR 365. See also Loewenstein *Political power* 35 who argues that "separation of powers doctrine is obsolete and devoid of reality". McKay *American politics* 54 suggests that: "There are more than enough critics who claim that the basic division of power between legislature and executive is inappropriate for the efficient policy making needed to run an economically powerful late 20th century world power."

and bizarre, and fails to account for all structures of government.¹⁸

In South Africa, in the 1990s during the multi-party dialogue, which paved way for the new constitutional dispensation, the Constitutional Principle VI was adopted and appended to the Interim Constitution, which amongst other things, provided 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.¹⁹

Still, the nature of the scope and limitations of this doctrine as well as the extent of its checks and balances remained unclear in the Interim Constitution. The Constitutional Court, when confirming the 1996 Constitution,²⁰ had to determine whether the South African Constitution adhered to this concept, and it was held that:

There is, however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute.²¹

The view of the Court is that separation of powers could not result in conferring the creation of limitations of powers in each branch of government over another. After examining the text and contents of the Constitution, the Court concluded that the Constitution adhered to the Constitutional Principle VI, a view which is also shared by O'Regan where she observes that not only does the doctrine form part of the South African constitutional framework, but the Constitution also contains "appropriate checks and balances"²² which might be required in its development.

The interaction between the courts and legislature as well as the context and text on the scope of this doctrine were the issues for determination in 1996 by the

¹⁸ Kavanagh *The constitutional separation of powers* 221-222. Also see Marshall *Constitutional theory* 307 who suggests that is incomprehensible whether the system of checks and balances "is part of, or a departure from, separation of powers."

¹⁹ Interim Constitution.

²⁰ The Constitution of the Republic of South Africa, 1996 (hereinafter the South African Constitution).

²¹ *In re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) paras 108-109 (hereinafter *Certification of the 1996 Constitution*).

²² O'Regan 2005 *PELJ* 121. See also Ramotsho <http://www.derebus.org.za/separation-power-defines-ethical-boundries-south-africas-law-makers/> (Date of use: 20 June 2019) quoting Mr Kgalema Motlanthe, former President of South Africa, who points out that: "The reason why we have separation of powers, is to make sure that there are checks and balances, so that power is never centralised in the hands of one arm or the other of the state."

Constitution Court in *S v Dodo*.²³ In addition, the Court also had to consider whether or not it was within the legislature's powers to enact the mandatory minimum sentencing statute²⁴ where it was argued that this legislation has encroached into the courts' constitutional perimeters of deciding on the appropriate sentence, that is, the courts' sentencing discretion. When rejecting this argument, Ackermann J pointed out that:

There is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislature and executive on the other.²⁵

In reaching this conclusion, Ackermann J asserted that while the separation of powers doctrine was part of the South African Constitution, the legislature, when enacting the challenged legislation, that is, the Criminal Law Amendment Act,²⁶ did not encroach on the courts' constitutional function in determining crimes' appropriate sentences. In his view, the formulation or development of public policy in the context of mandatory minimum sentences is an area which not only concerns the courts, but also the legislature.²⁷

It is clear from the brief introduction above that a conundrum exists as to the boundaries between the different branches of government, that is, the executive, the legislative, and the judiciary functions. There is furthermore the question as to the necessity of such constitutional separation of powers. These points in issue, as well as several others, will be probed in this study.

1.2 Research problem

The discussion of the research problem will entail an analysis of two distinct statements; which will be examined in separate sections. Firstly, the question will be asked as to whether the South African Constitution provides sufficient safeguards in order to protect judicial authority and independence against encroaching conducts of the other branches of government, or not. The second part of the problem

²³ *S v Dodo* 2001 (3) SA 382 (CC) (hereinafter *Dodo*).

²⁴ Criminal Law Amendment Act 105 of 1997.

²⁵ *Dodo* paras 22, 23.

²⁶ Act 105 of 1997.

²⁷ *Dodo* para 26.

statement, on the other hand, seeks to probe the question: Do the South African courts have absolute powers to rearrange South African laws and public policy to conform to their theoretical and dogmatic standpoints?

The enquiry in the first part of this discussion seems to hinge on the fundamental presupposition that the courts, in carrying out their constitutional function, are unconstrained and autonomous under the control of the Constitution.²⁸ The focal point will be on considering the rationale for the existence of this doctrine, and its place in the South African Constitution. These sentiments seem to stem from the scope and extent of the provisions in the Constitution where the courts are enabled to develop laws by making use of the interests-of-justice framework.²⁹ Section 2 of the Constitution, on the other hand, guarantees the supremacy of the Constitution. This constitutional provision delegates courts with far-reaching powers which are not clearly defined, and seems to provide no forms of restraint in that courts may invalidate laws passed by the citizens' elected majority by making use of the supremacy of the Constitution principle. Hence this research calls for an analysis of the fundamental principles and standards which this doctrine assists to defend. This study will also consider the doctrine's place in present-day constitutional democracies.

The second part of the research, on the other hand, examines whether or not the courts have been faithful in executing its function of policing the constitutional boundaries of the conduct of all branches of government, including its own conduct and deciding cases based on legislature's passed laws. This enquiry will entail examining the extent and perimeters of the courts' constitutional law-making role, and whether the courts have always acted as courts ought to act while being mindful of its main function, which is deciding disputes by making use of the laws enacted by the legislature, while leaving the law-making function to the elected legislature. The latter part of the study will also probe the extent of the courts' powers as an

²⁸ Section 165(1) of the South African Constitution. Section 165(1) provides that: "The judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

²⁹ Section 173 of the South African Constitution provides: "Inherent power - The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

unelected body. Their powers seem to surpass those of the elected legislature in deciding that laws passed by the legislature should be deemed unconstitutional. Moreover, this part of the study will also probe the nature and scope of the latter provisions of the Constitution which seem to be unclear on how far the courts can go in invalidating legislation by making use of the supremacy of the Constitution framework. This conduct seems to ordain the court to be the only arm of government which has the monopoly to the truth in deciding the constitutionality of laws and conduct of the legislature. The investigation will also question which exceptional skills or training the courts have enabling them to make this determination; skills and training which the legislature might lack.

As illustrated above, at the core of the constitutional separation of powers doctrine is the thought that if one of the branches of government is in charge of legislating laws, the implementation of those laws shall not fall within the authority of that same branch's authority and, furthermore, that branch will lack judicial review powers over those laws.³⁰ For this purpose, it is necessary to examine the application of the separation of powers doctrine in selected jurisdictions. For example, similar to the British unwritten constitutional system, under South Africa's written Constitution, members of the executive are also members of parliament, which is the branch commonly known as the legislature.³¹ In other words, there seems not to be clear and distinct arms of government constituted by the legislature, executive and judiciary operating within comprehensively drawn boundaries. As previously stated, section 165 of the South African Constitution only seems to be clear regarding the structure and independence of the courts, its authority, and its role in deciding cases and applying the Constitution. Deciding cases, as it will be shown in the subsequent discussions, includes the trial courts' discretion to decide the appropriate sentence.

The Criminal Law Amendment Act,³² on the other hand, which is a mandatory minimum sentence statute, contains provisions which are unclear on the role, authority and interaction between the courts and the legislature, and whether the courts' sentencing discretion remains a principle of South African law. The

³⁰ Mojapelo 2013 *Advocate* 37, where he also observes that: "The same will be said of the executive authority, it is not supposed to enact law or to administer justice and the judicial authority should not enact or execute laws."

³¹ Pypers *South Africa's parliamentary system* 3.

³² Act 105 of 1997.

constitutional separation of powers doctrine seems obfuscated by section 51 of this legislation which read as follows:

51 Discretionary minimum sentences for certain serious offences

- (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.
- (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in
 - (a) Part II of Schedule 2, in case of –
 - (i) A first offender, to imprisonment for a period of not less than 15 years;
 - (ii) A second offender of any such offence, to imprisonment for a period of not less than 20 years; and
 - (iii) A third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
 - (iv) ...
- (3) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such lesser sentence in respect of an offence referred to in Part I of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.
 - (Aa) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:
 - (i) The complainant's previous sexual history;
 - (ii) An apparent lack of physical injury to the complainant;
 - (iii) An accused person's cultural or religious belief about rape; or
 - (iv) Any relationship between the accused person and the complainant prior to the offence being committed.

Section 51 contains mandatory and minimum sentences for nearly all serious offences. Because the sentences contained in this legislation are mandatory, such course of action was disapproved of by the court because it was found to have “reduced the courts to rubber stamps and violate the independence of the courts and the separation of powers.”³³ In addition, the court in the *Toms* case has also

³³ *S v Toms* 1990 (2) SA 802 (A) paras 806h-807b (hereinafter *Toms*). The relevant passage provides that “the infliction of punishment is a matter for the trial court; mandatory sentences reduce court's normal sentencing function to the level of a rubber stamp”.

remarked that the introduction of mandatory and minimum sentences by the legislature has inevitably been viewed as an unpopular and unhelpful encroachment upon the courts' sentencing duty.³⁴ The courts' disapproval and rejection of these mandatory minimum sentences were also in full display in *S v Mofokeng* where it was stated that:

For the legislature to have imposed minimum sentences ... severely curtailing the discretion of the courts, offends against the fundamental constitutional principles of the separation of powers of the legislature and the judiciary.³⁵

The discretion of the court in sentencing was emphasised by the Appellate Division in *S v Mpetha*, where Corbett JA lamented the prejudice and unfairness caused by legislation which stipulates mandatory minimum sentences because it "takes away from the trial Judge the discretion which he normally enjoys in the imposition of sentences."³⁶ Moreover, Smuts AJ in *S v Budaza*, when disapproving the mandatory sentences legislation, remarked that the Act embodied a:

...a grave tampering with the role and independence of the judiciary. The court should not be party to any injustice - a little bit of injustice to satisfy the legislature is simply not an option.³⁷

Smuts AJ added that "I might well have been constrained to conclude that to implement the provisions of section 51 of the Act would be in conflict with my oath of office".³⁸ However, amongst Smuts AJ's criticisms of the mandatory minimum sentences legislation in the *Budaza* case, was his finding that the legislation was unconstitutional because it infringed upon the constitutional separation of powers doctrine, as well as on the accused person's right to a fair trial because it subjected

³⁴ *Toms* paras 830j-831b.

³⁵ *S v Mofokeng* 1999 (1) SACR 502 (W) 525h (hereinafter *Mofokeng*). At para 526g, the court remarked that: "That the legislature has seen it fit to use the courts as rubber stamps that must apply the legislature's arbitrary sentences ... is an unfortunate breach of the separation of powers. It tends to undermine the independence of the courts, and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases." See also *S v Montgomery* 2000 (2) SACR 318 (N) paras 322f-g where it was remarked that "most judges regard section 51 as disconcerting." In *S v Ibrahim* 1999 (1) SACR 106 (C) paras 114h-l, the court commented about: "the appallingly bad manner in which the sections have been drafted". Also, in *S v Jansen* 1999 (2) SACR 368 (C) paras 371i, 372h (hereinafter *Jansen*), the court referred to what it found to be "uncertainty prevailing in all courts as a result of the poor drafting". Similarly, in *S v Swartz* 1999 (2) SACR 380 (C) para 383b, it is regarded as "appallingly drafted".

³⁶ *S v Mpetha* 1985 (3) SA 702 (A) paras 706d-g.

³⁷ *S v Budaza* 1999 (2) SACR 491 (E) para 502f (hereinafter *Budaza*).

³⁸ *Budaza* para 224e.

an accused to what he considered to be “cruel, inhumane or degrading punishment.”³⁹ While these latter views seem not to be only criticisms by the courts on the constitutionality of the mandatory sentences, and what is considered to be its impact on the separation of powers doctrine, it also became a contentious issue in *S v Jansen* where the court remarked that:

...mandatory sentences *per se* run the risk of being unconstitutional, for it is possible that a mechanistic implementation of a system of mandatory sentences without regard to the individual context could well be considered to be cruel, inhuman and degrading punishment.⁴⁰

The underlying concern by the court in this latter case seems to be legislation’s lack of judicial independence in determining sentences, an area which has been widely accepted to be falling within the core duties of the courts. According to Mahomed CJ, judicial authority and independence form the foundational principle of a sustainable representative government established on the rule of law, and the repercussions of undermining this doctrine would, in his view, be felt by citizens in the implementation of the law.⁴¹ It seems the idea behind this thought is that an independent judiciary is capable of acting as bulwark against the abuse of constitutional rights.

Academics’ standpoints on the courts’ decisions on mandatory and minimum sentences, and whether these sentences limit judicial independence, vary. Terblanche, amongst others, points out that it cannot be questioned that it is the legislature’s core function to make the law. When the legislature enacts legislation which provides minimum and mandatory sentences, the courts’ function, in his view, remains unchanged, in that it has to implement that law. He adds that a single judge’s assenting or dissenting “is almost as irrelevant as agreement or disagreement with the general speed limit of 120 km/h.”⁴²

³⁹ *Budaza* para 502e. See also *S v Makwanyane and Another* 1995 (1) SACR 1 (CC) para 122 (hereinafter *Makwanyane*) where Chaskalson P remarked: “The greatest deterrent to crime is the likelihood that offenders will be apprehended and punished” and not the imposition of harsh judgments or legislature’s pre-ordained sentences.

⁴⁰ *Jansen* para 372i.

⁴¹ Mahomed 1998 *SALJ* 112.

⁴² Terblanche 2001 *SACJ* 4.

When commenting on the separation of powers and mandatory sentencing policy enacted by the legislature in the United States, Munro and Wasik⁴³ argue that mandatory minimum sentences legislation is consistent with the Constitution and the constitutional separation of powers doctrine. They point out that these were also the views of the United States Supreme Court where the constitutionality of mandatory minimum sentences was at issue in *Mistretta v United States*, and where it was held that “the scope of judicial discretion with respect of the sentence is subject to congressional control...”.⁴⁴ These latter views expressed by academics and the United States Supreme Court on the interaction between the legislature and the courts regarding this kind of legislation are also shared by some of our courts.⁴⁵ Sloth-Nielsen and Ehlers, on the other hand, question and reject the efficacy of our minimum sentencing legislation, and argue that while its objectives were to “reduce serious and violent crimes, achieve consistency in sentencing, and satisfy the public that sentences were sufficiently severe, the legislation has achieved little or no significant impact with regard to these goals”.⁴⁶ When commenting on the Prevention and Combating of Trafficking in Persons Act,⁴⁷ which, like the Criminal Law Amendment Act,⁴⁸ also provides mandatory sentences of life imprisonment to numerous conducts, Mollema and Terblanche seem to share these latter views, where they caution against the belief that “all society’s serious problems should be dealt with by the most severe possible sentences.”⁴⁹ As evidenced by these observations, legal researchers, academics and South African courts have given divergent views on the constitutionality of the mandatory minimum sentences, and on whether this legislation encroached upon their judicial independence and authority under the separation of powers doctrine. These differing opinions will be probed in the study in order to consider the place of the separation of powers doctrine in the South African Constitution, and whether the courts have been faithful

⁴³ Munro and Wasik *Sentencing, judicial discretion and training* 13.

⁴⁴ *Mistretta v United States* 488 US 361 (1989).

⁴⁵ See *S v Malgas* 2001 (2) SA 1222 (SCA) (hereinafter *Malgas*) and *S v Matyityi* (695/09) [2010] ZASCA 127 (30 September 2010) (hereinafter *Matyityi*) in succeeding discussions.

⁴⁶ Sloth-Nielsen and Ehlers 2005 *SA Crime Quarterly* 15.

⁴⁷ Act 7 of 2013.

⁴⁸ Act 105 of 1997.

⁴⁹ Mollema and Terblanche 2017 *SACJ* 223.

in executing its function of policing the constitutional boundaries of the conduct of all branches of government.

1.3 Research questions and hypothesis of the study

The following questions are put forward and form part of this study:

- What is the origin of the separation of powers doctrine?
- What was the rationale for the formation of this doctrine?
- Does the original concept of separation of powers still remain relevant in twentieth century democracies?
- Does absolute separation of powers exist?
- How do South African courts interpret and apply the provisions of sections 173 and 39 of the Constitution which give courts the authority to develop laws?
- Has the legislature, when enacting the Criminal Law Amendment Act 105 of 1997, encroached on the courts' constitutional independence and authority?
- Has South Africa succeeded in developing its own distinct separation of powers doctrine since 1994?
- Does the South African Constitution give courts too much power to make laws and public policy?
- Does the current constitutional framework guarantee the original concept of separation of powers?
- How do comparative jurisdictions interpret and apply the separation of powers doctrine?
- What can South Africa learn from the application and practice of other jurisdictions on their separation of powers doctrine?
- Is law reform needed to clarifying the courts' constitutional limitations and its role in developing the laws, and on the other hand, the legislature's powers in enacting laws which diminishes the courts' judicial authority and independence?

The hypotheses essential to the research in this study are the following:

- The separation of powers doctrine has never been fully articulated and incorporated into the South African Constitution.
- The legislative scheme which currently regulates South Africa's separation of powers seems to be incoherent and insufficient; consequently, its implementation and application becomes uncertain and unforeseeable.
- The test for determining whether each branch of government is acting within its constitutional limitations seems to be inadequate and muddled, particularly in constitutional litigations and in the development of social and economic legislative policies.
- The origin and historical development of the separation of powers doctrine in South Africa in the light of the fact that this doctrine cannot be absolute.
- Judicial supremacy under the South African Constitution allows the courts too much power to make laws and public policy. Such a powerful unelected judiciary does not conform to the original concept of separation of powers, which, amongst other things, was aimed at defending citizens against tyranny and give more power to citizens' elected representative, that is, the legislature.
- The manner in which comparative jurisdictions deal with their constitutional separation of powers may assist South Africa to develop a coherent and comprehensible doctrine of separation of powers.

1.4 Methodology

The study will be centred on examining the contents and texts of primary and secondary sources with the objective of understanding the application and scope of the separation of powers doctrine in the South African Constitution. To this end, the study will undertake a comparative and logical-analytical probe of the pertinent legal resources. This enquiry will take the form of a qualitative research study, which is "used to answer questions about experience, meaning and perspective, most often

from the standpoint of the participant.”⁵⁰ An analysis of primary and secondary texts and documents falls under this type of research technique.

A literature study has disclosed that there are sufficient sources to favourably embark on this research. The primary resources are in the form of common law, legislation and case law. There are other secondary resources in the form of textbooks, articles, reports, internet sources, research papers, law reform commissions’ reports that will be made use of.

1.5 Literature review

When describing the constitutional structure of the separation of powers doctrine, Rautenbach argues that the concept consists of three foundational and significant features, that is, the legislative, executive and judiciary branch. In his view, the legislative branch has the authority to pass laws; the executive branch has the power to administer, execute and implement the laws, and the judicial branch has the authority to decide on issues according to the laws, and to use the laws in resolving disputes.⁵¹ O’Regan has pointed out that while the South African Constitution does not use the phrase ‘separation of powers’, the doctrine of separation of powers is part of the South African constitutional system.⁵² This sentiment is also shared by the Constitutional Court in the *Certification of the 1996 Constitution* case.⁵³ While there is no doubt that this doctrine forms part of South African law, it is held that a distinct South African separation of powers jurisprudence still needs to be developed.⁵⁴

Considering the doctrine of separation of powers in England as a feature of the British legal system and its significances, Lord Mustill in *Regina v Secretary of State for the Home Department Ex Parte Fire Brigades Union* has pointed out that:

It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain. Parliament has a legally unchallenged right to make whatever

⁵⁰ Hammarberg *et al Human Reproduction* 499.

⁵¹ Rautenbach *Constitutional law* 78.

⁵² O’Regan 2005 *PELJ* 120.

⁵³ See footnote 21 above.

⁵⁴ *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 108-109.

laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.⁵⁵

The British separation of powers doctrine enjoins parliament with limitless powers to make any laws it considers necessary without any consideration on whether such laws might be unconstitutional. The courts have no power to invalidate laws enacted by the legislature. As England has no written Constitution, there is no statutory provision guaranteeing the supremacy of the Constitution or the constitutional standards to review conducts or legislation passed by the legislature. Unlike South Africa and Canada, the English courts' power to determine disputes making use of the laws enacted by the legislature is seemingly restrained, but they have no authority to invalidate laws enacted by the elected representatives of the citizens.

While the Canadian Charter of Rights and Freedoms does not make use of the concept of separation of powers as a constitutional principle which divides powers between the branches of government,⁵⁶ the 1997 judgment of Lamer CJ makes it clear that this concept does form part of the Charter:

What is at issue here is the character of the relationship between the legislature and executive on the one hand, and the judiciary on the other. These relationships should be depoliticised. When I say that those relationships are depoliticised, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is that the legislature and the executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.⁵⁷

In the United States and in France, on the other hand, the separation of powers doctrine is a concept which has a wide range of explanations and significance. Amongst these are that members of the executive cannot be members of the legislature; one branch of government cannot have the power to regulate the affairs of another branch, and one branch of government cannot be tasked to perform the

⁵⁵ *Regina v Secretary of State for the Home Department Ex Parte Fire Brigades Union* [1995] UKHL 3 (05 April 1995) para 26.

⁵⁶ *Venter Constitutional comparison* 219.

⁵⁷ *Provincial Judges Reference* [1997] 3 SCR 3 para 139.

functions of another branch.⁵⁸ According to Entin, while the expression ‘separation of powers’ is an epitome which constitutes a defining aspect of the American constitutional system, it is also not comprehensively articulated in the United States Constitution.⁵⁹ Moreover, the United States Supreme Court decided in 1803 that the courts have within the concept of the separation of powers the task “to say what the law is.”⁶⁰ This has since been understood by the United States Supreme Court to be founded on the idea that the court has the final, if not the sole authority to determine constitutional construction.⁶¹

Kavanagh distinguishes between what she terms the ‘pure view’ of the separation of powers; and a ‘reconstructed view’. She suggests that separation of labour or personnel of the different government branches cannot constitute a limit of the separation of powers, and checks and balances supplement the separation of powers. Kavanagh argues that in order for the separation of powers doctrine to be effective, it must be supported by concepts of checks and balances, which is based on the principles of “coordinated institutional effort between branches of government”⁶² in the structure of government. The concepts of separation of powers as described by Kavanagh will consequently be discussed.

1.5.1 *The pure view of separation of powers*

Separation of powers can be complete in the way that the constitutional boundaries of the different services of government are fully divided and functions separately. Separation of powers might be limited and permit the government branches to be linked in executing their function.⁶³ Kavanagh seems to agree with the views of Vile on the composition and functioning of the government based on what is considered to be the primary values contained in the pure precept of the separation of powers, which is that:

the government should be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these branches, there is

⁵⁸ Bradley and Ewing *Constitutional and administrative law* 4.

⁵⁹ Entin 1990 *Ohio State LJ* 175.

⁶⁰ *Marbury v Madison* 177.

⁶¹ *Powell v McCormack* 395 US 486 (1969) 549, and *Cooper v Aaron* 358 US 1 (1958) 18.

⁶² Kavanagh *The constitutional separation of powers* 223.

⁶³ Kavanagh *The constitutional separation of powers* 223.

a corresponding identifiable function of government, legislature, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.⁶⁴

The separation of powers doctrine in this form seems to be clearly defined, and members of the executive are disqualified from being members of the legislature, as was touched on earlier in the constitutional structure of the United States and France.⁶⁵ While Vile acknowledges that separation of powers in this form is impractical and cannot be sustained, he seems not to dispute that this pure separation of powers doctrine constitutes what was celebrated to be the yardstick which distinguishes it from other concepts of separation of powers.⁶⁶

Brennan and Hamlin again argue that separation of powers which is absolute and precise based on a government's operational basis can be situated at the core of "the classic doctrine of the separation of powers",⁶⁷ as expressed by Montesquieu.⁶⁸ However, Montesquieu never distinctly expressed a system of ideas embracing an operational separation in its unmixed formation.⁶⁹ Montesquieu's system of ideas contained three branches of government which were broadly disapproved of, all the more during the eighteenth century.⁷⁰ Whatever the accuracy of Montesquieu's system of ideas on the pure view of separation of powers, the pure thought of separation of powers has had a long-lasting impact on the world's common view of the separation of powers doctrine.⁷¹

⁶⁴ Vile *Constitutionalism and the separation of powers* 97.

⁶⁵ Bradley and Ewing *Constitutional and administrative law* 4.

⁶⁶ Vile *Constitutionalism and the separation of powers* 97.

⁶⁷ Brennan and Hamlin 1994 *J of Theoretical Politics* 351.

⁶⁸ Tomkins *Public Law* 36. See also Manin *Checks and balances and boundaries* 30 who remarks that "the question here is not whether or not Montesquieu himself advocated this pure version of the theory of the separation of powers. The fact is that for decades if not centuries, most legal experts and political actors (with the notable exception of the American Federalists) believed and proclaimed that he did".

⁶⁹ Vile *Constitutionalism and the separation of powers* 90.

⁷⁰ Claus 2005 *Oxford JLS* 419.

⁷¹ Corwin *The Constitution of the United States of America* 9-10.

1.5.2 *The reconstructed view of separation of powers*

When arguing for the accuracy of this particular view, Kyritsis articulated Montesquieu's forewarning that "constant experience shows us that every man interested with power is apt to abuse it, and to carry his authority as far as it will go".⁷² Sharing powers amongst different government branches was aimed at guaranteeing that no individual government agency was supreme, and each was entrusted with the power to check and bring to book each other's functions. Restraining the misuse of power and avoiding the concentration of powers in a single government branch were considered as the fundamental justification of the separation of powers doctrine.⁷³

In a justification for the recreated view of the separation of powers doctrine, Kavanagh argues that for a government to function effectively under this doctrine, an unconstrained judiciary is needed to settle disputes regarding the laws. There is furthermore a need for a prudent and elected organisation called a legislative assembly to make laws governing the citizens' affairs.⁷⁴ Ekins further contends that an independent judiciary ensures that disputes are decided and settled objectively and equitably by implementing the laws enacted by the legislature.⁷⁵ Kavanagh suggests that because the legislative and judiciary functions may encroach on each other's functions, their boundaries must be clearly stated, because "if both the courts and the legislature make law, how can we distinguish between them?"⁷⁶ She states that the truth of the matter is that these government branches develop laws on different levels.⁷⁷ The courts develop laws in an unsystematic and supplementary manner,⁷⁸ and must do so within limits even when making laws. The legislature, on the other hand, has the power to develop sweeping and revolutionary laws which are not grounded on present legal values.⁷⁹ Gardner comprehensively expresses these views in the following terms:

⁷² Kyritsis 2007 *Canadian JL and Juris* 386.

⁷³ Albert 2010 *Int J of Const Law* 207.

⁷⁴ Kavanagh *The constitutional separation of powers* 230.

⁷⁵ Ekins *Statutory interpretations* 8.

⁷⁶ Kavanagh *The constitutional separation of powers* 231.

⁷⁷ Kavanagh *The constitutional separation of powers* 231.

⁷⁸ Kavanagh 2004 *Oxford JLS* 270-744.

⁷⁹ Kavanagh *The constitutional separation of powers* 232.

What is really morally important under the heading of the separation of powers is not the separation of law-making powers from law-applying powers, but rather the separation of legislative powers of law-making (i.e. powers to make legally unprecedented laws) from judicial powers of law-making (i.e. powers to develop the law gradually using existing legal resources).⁸⁰

The widely accepted understanding seems to be that the courts and the legislature, despite the constitutionally drawn boundaries, share the law-making function albeit to a limited extent where these lines could become indistinct.

1.5.3 *Checks and balances in managing the separation of powers*

Kavanagh argues that while there is a need to detach employees of the government branches to ensure that each maintains its distinct constitutional role; checks and balances would still remain a key factor in ensuring the sustainability of the doctrine of separation.⁸¹ The importance of checks and balances are articulated by Madison as he maintains that the very first task as regards the separation of powers was “to make some division of the government into distinct and separate departments”.⁸² Joining together separation with an oversight role by both the courts and the legislature, would, in Kavanagh’s view, be an ideal concept as it would be impossible to have an absolute separation of powers.⁸³ Madison also adds that this oversight function alone would not be sufficient, but “the next and most difficult task is to provide some practical security for each, against the invasion of the others”.⁸⁴ Moreover, Madison points out that it would not be:

...sufficient to mark, with precision, the boundaries of these departments [of government], and to trust to the parchment barriers against the encroaching spirit of power.⁸⁵

With a view to preventing the peril of perversion of power, Madison reasons:

...so contrive the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their places.⁸⁶

⁸⁰ Gardner 2001 *Am J of Juris* 217.

⁸¹ Kavanagh *The constitutional separation of powers* 233.

⁸² Madison *No 51* 288.

⁸³ Kavanagh *The constitutional separation of powers* 233.

⁸⁴ Madison *No 48* 276.

⁸⁵ Madison *No 48* 276.

⁸⁶ Madison *No 48* 276-281.

The belief is that government branches cannot be trusted to maintain their constitutional boundaries, but that clear functional safeguarding measures are needed. Kavanagh seems to be in accord with this notion as she argues that checks and balances safeguard the separation of powers, and prevent government branches from overstepping their constitutional functions.⁸⁷

1.5.4 *Governing collectively in a shared project*

Sharing employees and the checks and balances form a core principle of the separation of powers doctrine.⁸⁸ Kavanagh also argues that, for an effective separation of powers amongst government branches, there should be a synchronised “joint enterprise of governing”.⁸⁹ Moreover, Kavanagh questions the ambiguity and mystery embedded into this view of separation of powers: “How can the separation of powers be underpinned by the value of coordinated institutional action as part of a joint enterprise?”⁹⁰ The integration required under this separation of powers concept seems to make it difficult to maintain what was thought to be its original identity when considering its absolute or pure view. This view advocates for separate branches of government, and no form of integration or synchronisation of its services.

The United States Supreme Court seems to have embraced the standpoint that the services of the different branches must be integrated:

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.⁹¹

The Court’s view is that the different branches need each other, and have to function collectively in order to render services. Kavanagh also observes that the government project is sustained by each branch rendering its limited input. Madison again questions why the separation of powers within this format should work, as he envisages that each branch would function separate and unconnected. While he

⁸⁷ Kavanagh *The constitutional separation of powers* 234.

⁸⁸ Kavanagh *The constitutional separation of powers* 234.

⁸⁹ Kavanagh *The constitutional separation of powers* 235.

⁹⁰ Kavanagh *The constitutional separation of powers* 235.

⁹¹ *Youngstown Co v Sawyer* 343 US 579 (1952) 635.

concedes that there should be a separation of powers in this design, he cannot imagine that the legislature, executive and the judiciary would be “wholly unconnected with each other”.⁹²

According to Farina,⁹³ when the different states’ conventions of the United States Constitution were debated, a system of government was recommended where its powers were not only separated, but preferably shared between the different hubs of power:

Sir, when you have divided and nicely balanced the departments of government; when you have strongly connected the virtue of your rulers with their interest; when, in short, you have rendered your system as perfect as human forms can be, - you must place confidence; you must give power. The true principle of government is this - make the system complete in its structure, give a perfect proportion and balance to its parts, and the powers you give it will never affect your security.⁹⁴

While the government’s different branches should function cohesively, it is clear that the courts’ duty, those of the legislature and the executive remain different.⁹⁵ This is confirmed by Sachs J in *Du Plessis v De Klerk*,⁹⁶ in describing the different government branches’ constitutional limitations:

The judicial function simply does not lend itself to the kind of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions which appropriate decision-making on social, economic and political questions requires.

It seems that the overwhelming view articulated by the South Africa Constitutional Court is that the development of public policy such in areas as the social, economic, political remain within the spheres of the political arms of government, namely, the legislature and the executive. The courts, on the other hand, are not without power but are tasked with all other forms of power which causes it to be part of the integrated government’s oversight over the different government branches.

⁹² Madison *No 48* 276-281.

⁹³ Farina 1989 *Columbia LR* 495.

⁹⁴ Elliot *The debates in the several state conventions* 350.

⁹⁵ Kohn *The burgeoning constitutional requirement* 21.

⁹⁶ *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) para 178.

1.5.5 Possible encroachment on functions of other branches

The possible encroachment on the functions of other branches is exemplified in several courts' decisions. In the *Dodo* case, for example, the Constitutional Court attempted to answer the question whether the legislating of mandatory minimum legislation has crossed the separation of powers boundaries, thereby encroaching onto the sphere of judicial sentencing discretion authority. Ackermann J dismissed this argument because, in his view, "both the legislature and the executive share an interest in the punishment to be imposed by the courts, both in regard to its nature and severity."⁹⁷ He added that this was because, in his opinion:

No judicial punishment can take place unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it a punishment. Even here the separation is not complete, because the function of the legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks and balances are enforced through the courts.⁹⁸

In addition, the Constitutional Court's view on the constitutionality of the mandatory sentence legislation is also shared by the Supreme Court of Appeal in *S v Malgas*.⁹⁹ In this case, it was held that the courts' constitutional authority to determine an appropriate sentence is not encroached by the legislature when enacting the minimum sentence legislation. In the court's view:

...if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an unjust would be done by imposing the sentence, it is entitled to impose a lesser sentence.¹⁰⁰

The Supreme Court of Appeal in *Matyityi* once again considered the constitutionality of this legislation in the context of the separation of powers doctrine. In this case, Ponnann JA dismissed the constitutional challenge, and remarked that:

Our Courts derive their power from the Constitution and like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to

⁹⁷ *Dodo* para 23.

⁹⁸ *Dodo* para 22.

⁹⁹ *Malgas* para 25: "If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing the sentence, it is entitled to impose a lesser sentence."

¹⁰⁰ *Malgas* para 25.

properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resorting to vague, ill-defined concepts ... or other equally vague and ill-defined hypothesis that appear to fit the particular sentencing officer's personal notion of fairness.¹⁰¹

This judgment advances the notion of parliamentary supremacy which seems to stand in stark contrast to the values of constitutional supremacy contained in section 2 of the Constitution. Furthermore, Ponnann JA supports the constitutionality of the minimum sentence legislation and the view that it does not encroach on judicial independence. These latter interpretations were also the sentiments of an earlier decision by this court in *S v Jimenez*.¹⁰²

This above state of affairs, Kavanagh argues, could have led to the perception that the separation of powers is not only "fraught with ambiguity" but also that "separation can vary in form and in degree. It can be absolute or partial."¹⁰³ Moreover, this ambiguity seems to be making it challenging for one branch of government to confine its conduct within the constitutional boundaries. While each branch of government is distinguishable according to its core function, the reality is that, what Kavanagh terms the "one-branch - one function"¹⁰⁴ task, forms part of the confusion because in her view the judiciary have to maintain charge in the courts and its resources, but "the courts also exercise legislative functions when they make rules governing court proceedings and the costs of litigation."¹⁰⁵ In addition, she argues

¹⁰¹ *Matyityi* para 23.

¹⁰² *S v Jimenez* 2003 (1) SACR 507 (SCA) paras 30-31: "[30] Finally, section 51 of the Criminal Law Amendment Act 105 of 1997 imposed minimum sentences for certain serious offences including inter alia, dealing in cocaine. The section provides that a regional court or High Court that has convicted a person of such offence may sentence the person, in the case of

- (i) a first offender, to imprisonment for a period not less than 15 years;
- (ii) a second offender, to imprisonment for a period not less than 20 years; and
- (iii) a third or subsequent offender, to imprisonment for a period not less than 25 years.

The maximum sentences imposed by the 1992 Act remain intact.

[31] In my view, it is proper for a court considering sentence to have regard to the legislative policy as expressed in legislation dealing with sentences. If it were not so, legal and social confusion would ensue, leading to a conflict between the legislator and the courts. In imposing sentences for drug-related crimes, courts must take cognisance of the persistent policy of the legislature that these crimes must be viewed in a most serious light and heavy sentences imposed. (See also *S v Gibson* 1974 (4) SA 478 (A) at 481h, per Holmes JA.)"

¹⁰³ Kavanagh *The constitutional separation of powers* 223.

¹⁰⁴ Kavanagh *The constitutional separation of powers* 223.

¹⁰⁵ Kavanagh *The constitutional separation of powers* 225.

that litigation is a form of legislating because in litigation the courts may redefine and rewrite the laws even though it might be within ascertainable boundaries.¹⁰⁶ Gwyn seems to be in accord with the view expressed by Kavanagh as he argues that because of the ambiguity of separation of powers doctrine, the powers assigned to each branch of government are unfixed and distinctly “multifunctional”.¹⁰⁷ In 1880, Folger J of the State Supreme Court of New York advanced that:

Though the Constitution confers upon specified courts general judicial power, there are certain powers of a judicial nature which by the express terms of the same instrument, are given to the legislative body.¹⁰⁸

Brook, on the other hand, seems to be in accord that the fundamental character of the law-making system is in principle a judicial procedure, and that this results in most laws not being produced by the legislature.¹⁰⁹ This ambiguous state of affairs results in the separation of powers doctrine remaining an unsettled issue confronting the South African jurisprudence, especially its scope; context and meaning in the relationship between the courts and the legislature.

The divergent courts’ decisions on the constitutionality of the mandatory minimum sentences legislation is but one classic example of this ambiguity, and shows how far the South African judiciary has come in developing and shaping the separation of powers doctrine. The formation of a manifestly South African version of this doctrine by our courts was the vision of Ackermann J in one of the earliest decisions of the Constitutional Court.¹¹⁰ Ackermann J¹¹¹ acknowledged that developing a unique South African doctrine would be a process that is not only initiated by the courts but that it would take some period of time. Consequently, one of the inquiries of this study will be how far South Africa has come in developing its separation of powers doctrine, as well as probing the challenges that have confronted the relevant branches of government in this area over the past decades. The application, development and meaning of this doctrine - in light of the constitutional judicial independence and judicial authority principle as guaranteed by section 165 of the

¹⁰⁶ Kavanagh *The constitutional separation of powers* 225.

¹⁰⁷ Gwyn 1989 *William and Mary LR* 266.

¹⁰⁸ *People ex rel Hatzel v Hall* 80 NY 117 (1880) 122.

¹⁰⁹ Brook 1956 *Fordham LR* 280.

¹¹⁰ *De Lange v Smuts* 1998 (3) SA 785 (CC) para 60 (hereinafter *De Lange*).

¹¹¹ *De Lange* para 60, where Ackermann emphasizes that South African courts will develop a unique South African model of power of separation over time. See also Chapter 2 footnote 234.

1996 Constitution, and the provisions of the Criminal Law Amendment Act - also remain unclear. These are but some of the innovative legislative policies that still create uncertainty, and remain a mystery on the development of our separation of powers jurisprudence. The separation of powers doctrine is in all probability the most known doctrine that has been a defence against autocratic governments over centuries, and forms the foundational principle of most twentieth century democracies. However, the abovementioned ambiguities surrounding this principle, and its development by our courts attest to the fact that it is still the most frequently misunderstood and misapplied constitutional ideal.

Our new Constitution provides courts with the authority to re-examine and develop laws with the objective of aligning them with the values protected in the Constitution when courts consider such development to be in the interests of justice.¹¹² The question however is whether the interests of justice approach is a useful guide in deciding whether to develop laws? Moreover, the interests of justice test also forms the discretionary framework for the admissibility of hearsay evidence in terms of the Law of Evidence Amendment Act.¹¹³ When developing and reforming the hearsay rule in Hong Kong, the Hong Kong Law Reform Commission rejected adopting a legislative approach which includes the interests of justice discretionary framework, and instead has adopted the submission of Ewaschuk J of Canada, that:

...the test of 'in the interests of justice' for the admissibility of hearsay evidence is too open-ended and too subjective. It permits of personal value-judgement and is often referred to as 'palm-tree justice'.¹¹⁴

Hence, the application of this broad and vague test which enjoins the courts to rearrange and develop South African laws under section 173 of the South African Constitution also seems not to be immune to similar disapproval as shown in the report by the Hong Kong Law Reform Commission.

Moreover, section 39(2) of the Constitution also provides courts with the power to extend and rearrange laws in an ill-defined and obscure language with no further

¹¹² Section 173 of the SA Constitution; see footnote 29 above. See also s 39(2) of the SA Constitution which provides that: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objectives of the Bill of Rights."

¹¹³ Act 45 of 1988.

¹¹⁴ Yan-lung *Hearsay in criminal proceedings* para 8.20.

interpretative requirements when defining the Constitution. This may be done as long as the court, through its personal, economic and ideological views, concludes that such rearrangements of that law would enhance “the spirit, purport and objects of the Bill of Rights.”¹¹⁵ Section 2 of the Constitution, on the other hand, which is widely interpreted as forming part in the application of section 39(2), guarantees the supremacy of the Constitution, and enjoins the courts, amongst other things, to determine and subsequently invalidate contested questions of constitutional law and public policy. The relevant section reads: “This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid...”. According to this provision in the Constitution, the courts are the branch of government that seemingly have unrestrained powers to make the determination whether certain laws are incompatible with the Constitution, and whether certain conduct of the other branches of government should be invalidated.

A brief overview of the South African Constitutional Court’s decisions shows a shift in the authority to make laws, and a notable rearranging of South African laws through courts’ decisions. In *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amicus Curiae)*,¹¹⁶ the accused was convicted of the rape of a minor girl who was nine years old for wrongfully and unlawfully having had anal sexual intercourse with her without her consent. The common-law definition of rape excluded acts non-consensual sexual penetration of the male penis into a female’s anus. The Constitutional Court applied sections 39(2) and 173 of the Constitution, and found it to be in the interests of justice to develop the common-law definition of rape to include acts of non-consensual sexual penetration of the male penis into the anus of another person.¹¹⁷ This was effected “to ensure that it reflects the spirit, purport and objects of the Bill of Rights”.¹¹⁸ However, when considering the language used by the Court in reaching this decision, it becomes apparent that in developing this area of law the Court acted with some measure of restraint. It painstakingly decided to embark on the review of the law being fully aware of its constitutional function and limitations,

¹¹⁵ Section 39(2) of the SA Constitution.

¹¹⁶ 2007 (2) SACR 435 (CC) 465d-g (hereinafter *Masiya*).

¹¹⁷ *Masiya* paras 436b-i.

¹¹⁸ *Masiya* paras 435c-d.

and, moreover, acknowledged that it would be huge setback for victims of rape should the court not intervene to extend the common-law definition of rape.¹¹⁹

The court also embarked on this course as it was aware that the Sexual Offences Amendment Bill 2003 - wherein reforms into the common-law definition of rape was considered - was about to be promulgated.¹²⁰ Snyman has questioned the correctness of the court's decision, because in his view, when reaching this conclusion:

...the court assumed that the term 'developing' included incremental developing. However, it is submitted that 'developing' in s 39(2) does not include any power to extend the scope of existing crimes to encompass situations not covered by the existing definition.¹²¹

Snyman adds that the Constitutional Court not only went beyond the scope of its constitutional function in this case, but it also breached the principle of legality which reflects the notion that courts may not develop offences. This is because, in his view, "the function of a judge is not to create new law, but to interpret existing law."¹²² Consequently, this court's decision has, according to Snyman, resulted in a breach of the separation of powers doctrine.¹²³

In *Satchwell v President of the Republic of South Africa and Another*,¹²⁴ the applicant asked the Court to declare sections 9 and 10 of the Judges' Remuneration and Conditions of Employment Act¹²⁵ unconstitutional on grounds that it constituted

¹¹⁹ *Masiya* paras 461c-f.

¹²⁰ *Masiya* paras 455e-f.

¹²¹ Snyman 2007 SALJ 678.

¹²² Snyman 2007 SALJ 678.

¹²³ Snyman 2007 SALJ 678.

¹²⁴ *Satchwell v President of the Republic of South Africa and Another* CCT48/02 para 14 (hereinafter *Satchwell*).

¹²⁵ Act 47 of 2001. Section 9 provides: "(1) The surviving spouse of a Constitutional Court judge who on or after the fixed date was or is discharged from active service in terms of section 3 or 4 or who died or dies while performing active service, shall be paid with effect from the first day of the month immediately succeeding the month in which he or she dies an amount -

- (a) in the case of a surviving spouse of a Constitutional Court judge or a judge who was so discharged from active service, equal to two thirds of the salary which was in terms of section 5 payable to that Constitutional Court judge or judge; or
 - (b) in the case of a surviving spouse of a Constitutional Court judge or judge who died while performing active service as a Constitutional Court judge or judge, equal to two thirds of the amount to which that Constitutional Court judge or judge would have been entitled in terms of section 5 if he or she was discharged from service in terms of section 3(1)(a) or (2)(a) on the date of his or her death.
- (2) The amount payable to the surviving spouse of a Constitutional Court judge or judge in terms of subsection (1) shall be payable with effect from the first day of the month

an unfair discrimination as it prohibited the provision of benefits to permanent same-sex life partners of judges.¹²⁶ A determination of such nature by the Court would in all likelihood have an impact on the redistribution and administering of funds, and the financial system of the state. The Court did not only declare this legislation to be unconstitutional but it also read-in certain words, a process which would be rearranging and rewriting legislation.¹²⁷ Gibson examined section 52(1)¹²⁸ of the Canadian Charter which contains a similar provision to section 2 of the South African Constitution, in that it provides for the supremacy of the Constitution, and that laws inconsistent with the Constitution must be invalidated. He argued that the questioned laws must be developed instead of being invalidated by the courts. He reached the latter conclusion, because in his view, nullifying laws which benefit certain groups while at the same time seems to discriminate against another group is a 'destructive' redress, because, "courts cannot invalidate legislation when to do so would take away existing benefits that are not in themselves unconstitutional."¹²⁹ Duclos and Roach do not fully agree with the latter view by Gibson. However, they argue that the difficulty when a court strikes down laws it considers unconstitutional is that such decision constitutes an act of overreach. In doing so, the courts encroach onto the conventional function of the legislature, because in their view, such decision fall outside the courts' separation of powers' duty.¹³⁰

According to Macfarlane, the Canadian Supreme Court has, through the provisions of the Charter, reconstructed its role in that it:

immediately succeeding the day on which he or she died, and shall be payable until the death of such spouse."

Section 10 provides:

"If a gratuity referred to in section 6 would have been payable to a Constitutional Court judge or judge who died or dies on or after the fixed date had he or she not died but, on the date of his or her death, was discharged from active service in terms of sections 3 or 4, there shall -

- (a) if such Constitutional Court judge or judge is survived by a surviving spouse, be payable to such surviving spouse, in addition to any amount payable to that spouse in terms of section 9; or
- (b) if such Constitutional Court judge or judge is not survived by a spouse, be payable to the estate of such Constitutional Court judge or judge, a gratuity which shall be equal to the amount of the gratuity which would have been so payable to such Constitutional Court judge or judge had he or she not died but was, on the date of his or her death, discharged from active service as aforesaid."

¹²⁶ *Satchwell* paras 8-9.

¹²⁷ *Satchwell* para 14.

¹²⁸ Section 52(1) provides: "Any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect..."

¹²⁹ Gibson 1989 *Alberta LR* 182.

¹³⁰ Duclos and Roach 1991 *McGill LJ* 13.

...evolved from a largely legal, dispute-resolving body into a policy-making institution whose decisions have far-reaching implications for virtually all areas of Canada's political, social, cultural and economic life.¹³¹

In other words, the supremacy of the Constitution concepts has, amongst other things, resulted in making the courts the most powerful government branch which can no longer only decide disputes between litigants, but also has the power to make public policy.

Moses, on the other hand, questions what she finds to be an intolerable state of affairs displayed in the working of the United States Supreme Court, because the court makes decisions which surpasses the litigants' issue in dispute, and decides its own issues outside those presented by the litigants. In her view, this is a court which acts with no constitutional limits, and is functioning as what is termed the 'least dangerous branch'. When judges are free to invalidate the legislature's policies or legislation while such issues are not forming part of the litigants' cases, the courts' decisions can no longer fall within the courts' constitutional requirements.¹³² Moses further argues that "although the 'Framers'¹³³ recognised that judges would have some leeway of interpretation, they argued that the judiciary was too weak to exercise that leeway to usurp legislative authority."¹³⁴

Tremblay¹³⁵ again suggests that the primary conundrum is that judicial review of the legislature's actions lacks the authority over laws enacted by a legislature, which is elected by the majority and represents the views of the majority, and are as such "democratically legitimate."¹³⁶ Tremblay also argues that judicial review embraces:

...judges who are able to nullify legislation democratically enacted in accordance with the majority rule, and yet these judges neither are the people nor are they elected by them; neither represent the citizens and nor are they held accountable for their decisions.¹³⁷

The latter view on the legitimacy of the legislature in the sphere of governing or making laws in the United States are evident in the reasoning of Marshall CJ in

¹³¹ Macfarlane *The Supreme Court of Canada* 1-4.

¹³² Moses 2011 *Univ Pennsylvania J of Const Law* 163.

¹³³ Kurland 1987 *Saint Louis Univ LJ* 17-18 where Kurland describes the term 'Framers' as "the makers of the United States Constitution."

¹³⁴ Moses 2011 *Univ Pennsylvania J of Const Law* 163.

¹³⁵ Tremblay 2005 *Int J of Const Law* 619.

¹³⁶ Tremblay 2005 *Int J of Const Law* 617, 619.

¹³⁷ Tremblay 2005 *Int J of Const Law* 619-620.

Marbury v Madison.¹³⁸ Marshall reiterates that the legislature derives its legitimacy to rule over citizens from the citizens themselves. It is this constitutional principle that makes the legislature the most powerful branch of government.¹³⁹

In questioning the legitimacy of judicial review, Tremblay confirms that the concept runs counter to the will of the majority, and amounts to what he terms:

...a counter-majoritarian force ... those who claim that this institution is legitimate have the burden of showing that it can be reconciled with the underlying assumptions of democratic governance.¹⁴⁰

Democratic governance, according to Tremblay, recognises the constitutional limitations for each branch of government, and it also contains deference or judicial self-restraint.¹⁴¹ Posner argues that judicial self-restraint has expired, and judges no longer consider themselves “restrained in invalidating legislative action as unconstitutional”,¹⁴² because, amongst other things, the phrase ‘judicial self-restraint’ has numerous meanings. According to Kramer, the termination of judicial self-restraint was caused by the idea that courts were better than the other branches of government to construct and invalidate legislation, and to pronounce on the meaning of constitutional principles enacted by the legislature.¹⁴³ He suggests that judicial supremacy might be the result of constitutional supremacy. This idea is similar to that of Carson (see para 1.1 above) who exclaimed a “judicial monopoly over the constitution”, which, in his view, has contributed to the current state of affairs.¹⁴⁴ After conducting a detailed overview of the United States Supreme Court’s data between 1937 and 2009, Epstein and Landes, however, question whether there was “ever such a thing as judicial self-restraint?”¹⁴⁵ They question the correctness of Posner’s view above, and argue that judges instead seem to have

¹³⁸ *Marbury v Madison* 5 US (1 Cranch) 137 (1803) 176-177 where Marshall CJ stated that “the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness” and that “all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.”

¹³⁹ *Marbury v Marshall* case 176-177.

¹⁴⁰ Tremblay 2003 *Oxford JLS* 525.

¹⁴¹ Tremblay 2003 *Oxford JLS* 526-527.

¹⁴² Posner 2012 *California LR* 519, 520.

¹⁴³ Kramer 2012 *California LR* 612-622, 629-630.

¹⁴⁴ Carson <https://fee.org/articles/judicial-monopoly-over-the-constitution-jeffersons-view/> (Date of use: 1 October 2019).

¹⁴⁵ Epstein and Landes 2012 *California LR* 557.

adopted 'selective' self-restraint, in that they still maintain a certain level of restraint in some cases, and not that the notion of judicial self-restraint has ended, as was claimed by Posner.¹⁴⁶ Moreover, Burton, another advocate of the judicial review doctrine, argues that the constitutional power given to courts to examine and invalidate laws enacted by the legislature are decreed by the rule of law, and helps the electorate to hold their elected representatives answerable to their laws.¹⁴⁷

The above-mentioned decisions of the South African Constitutional Court, that is, the *Masiya* and *Satchwell* cases, make it difficult to comprehend whether judicial deference is part of the South African constitutional law adjudication process, especially in the light of the text and context of section 173 of the Constitution which enjoins the courts to develop laws. Mojapelo J, when examining the doctrine of separation of powers as applied and interpreted by the Constitutional Court, concludes that the principle of judicial deference forms an integral part of the South African constitutional-law adjudication.¹⁴⁸ These sentiments are also evident in the reasoning of Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, where he remarked that:

The other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.¹⁴⁹

Furthermore, the doctrine of judicial deference as part of the constitutional review jurisprudence by the Constitutional Court is also in accord with the views of Chaskalson JP in *Soobramoney v Minister of Health (KwaZulu-Natal)*.¹⁵⁰ Chaskalson remarks that it would be outside the Constitutional Court's constitutional boundary to make an order that the state provides a patient with dialysis treatment

¹⁴⁶ Epstein and Landes 2012 *California LR* 576.

¹⁴⁷ Burton *Striking the right balance* 11.

¹⁴⁸ Mojapelo 2013 *Advocate* 43.

¹⁴⁹ 2000 (2) SA 1 (CC) para 66 (hereinafter *National Coalition for Gay and Lesbian Equality*).

¹⁵⁰ 1998 (1) SA 755 (CC) (hereinafter *Soobramoney*).

which could have been very costly because, in his view, “this was not a judgement a court can make”.¹⁵¹

This attitude is also evident in Chaskalson JP’s reasoning in another decision of the Constitutional Court, that of *Ferreira v Levin NO*.¹⁵² In this case, he pronounced that the courts’ task was not to endorse or reject financial and reallocation of facilities as well as social state benefits policies enacted by the legislature, but to guarantee the carrying out of such decisions and constitutional compliance. Moreover, Chaskalson JP points out that:

In a democratic society the role of the Legislature as a body reflecting the dominant opinion should be acknowledged. It is important that we bear in mind that there are functions that are properly the concern of the Courts and others that are properly the concern of the Legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate.¹⁵³

The determination of the proper boundaries of their constitutional function within which courts can decide public law or constitutional law as regards disputed questions, remain one of the considerable tests confronting courts.¹⁵⁴ Kavanagh concedes that while judges have legal schooling and skills, they occasionally decide cases under questionable circumstances. However, unlike the legislature and the executive, their decisions might lack full consideration of economic and social background.¹⁵⁵ Moreover, Kavanagh also asks the question:

Should their relative lack of democratic legitimacy urge judges to be restrained when reviewing the decisions of the elected branches for compliance with fundamental rights.¹⁵⁶

Amongst the issues raised by Kavanagh with regard to judicial restraint is a question of ‘self-restraint’ which will enable “courts to define the limits of their role in constitutional adjudication and to determine the constitutionally appropriate degree of restraint.”¹⁵⁷ This fundamental notion plays a significant role in constitution

¹⁵¹ *Soobramoney* para 30.

¹⁵² *Ferreira v Levin NO* 1996 (1) SA 984 (CC) (hereinafter *Ferreira v Levin*).

¹⁵³ *Ferreira v Levin* para 180.

¹⁵⁴ Kavanagh 2010 *University of Toronto LJ* 23.

¹⁵⁵ Kavanagh 2010 *University of Toronto LJ* 23.

¹⁵⁶ Kavanagh 2010 *University of Toronto LJ* 23.

¹⁵⁷ Kavanagh 2010 *University of Toronto LJ* 27.

adjudication and judicial review, and seems to be unstable, unpredictable and subjective.

It appears that judicial restraint is not fully entrenched into section 2 of the South African Constitution.¹⁵⁸ This could be the influence of the Canadian courts' interpretation and construction of the Canadian Charter of Rights and Freedoms on the South African constitutional jurisprudence, as Du Toit argues.¹⁵⁹ As discussed earlier, section 52 of the Canadian Constitution contains similar provisions as section 2 of the South African Constitution. Critics argue that it is because of these latter provisions of the Charter that the Supreme Court of Canada has continuously modified and brought up to date rights and freedoms contained in the Charter. Furthermore, the Charter as provided for in the Constitution is considered a 'living tree' by the Supreme Court of Canada, a factor which has led the court to include their own 'adornments' which occurred through modification and construction based on the courts' personal, general, pecuniary and party standards.¹⁶⁰ These authors also contend that because they are not similar to the legislature, the courts lack the facilities, fact-finding processes and the public consultations sessions needed to inform its decisions. Therefore, the argument continues, the courts are also not in a state of preparedness to undertake a full review of the numerous public policies, a position that the legislature can lay claim to.¹⁶¹ In addition, the Supreme Court of Canada's decisions on disputed issues, namely, abortion, euthanasia and lesbian and gay rights were, according to the REAL Women of Canada, not determined according to the law, but very often on judges' theoretical and philosophical views.¹⁶² These outcomes were reached because, amongst other things, the constitutional supremacy of the Constitution principle has created an unrestrained judicial supremacy through its vague and far-reaching terms.

¹⁵⁸ For a discussion of s 2 of the South African Constitution, see para 1.2 above.

¹⁵⁹ Du Toit *et al Commentary on the Criminal Procedure Act* P98N-14. The South African Constitution makes much use of the same language and provisions as the Canadian Charter of Rights and Freedoms.

¹⁶⁰ REAL Women of Canada http://www.realwomenofcanada.ca/wp-content/uploads/2012/06/judiciary_final.pdf (Date of use: 19 March 2019). See also REAL Women of Canada <http://www.realwomenofcanada.ca/who-is-running-canada/> (Date of use: 19 March 2019).

¹⁶¹ REAL Women of Canada http://www.realwomenofcanada.ca/wp-content/uploads/2012/06/judiciary_final.pdf (Date of use: 19 March 2019).

¹⁶² REAL Women of Canada http://www.realwomenofcanada.ca/wp-content/uploads/2012/06/judiciary_final.pdf (Date of use: 19 March 2019).

According to its critics, the Canadian Supreme Court possesses ‘absolute power’ which origin can be traced back to the provisions of section 52 of the Charter. When the Charter was enacted in 1982, it was never the intention of the legislature that the courts would possess such power, but that:

...judges of the Supreme Court of Canada were invited aboard the Ship of State to join with the legislators, both provincial and federal, to co-pilot the Ship through our nation’s perilous waters.¹⁶³

The legislature never contemplated that the courts would be the final adjudicators of the accuracy of the legislature’s policies and decisions. It was envisaged, however, that judges would acknowledge the policies enacted by the elected public representatives, and be part of government.¹⁶⁴ What has caused this change in the court’s thinking? The cause of this state of constitutional dilemma may be described in the following terms:

Once on board the Ship, however, the courts quickly changed this understanding and took over. Judges relegated the legislators to the lower deck to ‘stoke the engines’ of government by passing legislation to move the Ship forward - but only on the basis that the legislation be subjected to the approval of the appointed judges.¹⁶⁵

It has been argued that the belief that only the courts can decide on the correctness of the elected representatives’ decisions must be rejected because judges have no exceptional skills and training better than the legislature to interpret and construct the human rights values contained in the broad and poorly detailed Charter.¹⁶⁶ It is difficult to see how the South African Constitutional Court can be immune from similar attacks because section 2 of the Constitution, as was shown above, enjoins judges, to interpret or know the constitutional values section 2 seek to guarantee. For this task, they need to be equipped with training and skills to decide on the correctness or validity of legislation properly enacted by the elected legislature.

¹⁶³ REAL Women of Canada <http://www.realwomenofcanada.ca/wp-content/uploads/2012/07/CurbingThePowerSCC.pdf> (Date of use: 15 March 2019).

¹⁶⁴ REAL Women of Canada <http://www.realwomenofcanada.ca/wp-content/uploads/2012/07/CurbingThePowerSCC.pdf> (Date of use: 15 March 2019).

¹⁶⁵ REAL Women of Canada <http://www.realwomenofcanada.ca/wp-content/uploads/2012/07/CurbingThePowerSCC.pdf> (Date of use: 15 March 2019).

¹⁶⁶ REAL Women of Canada <http://www.realwomenofcanada.ca/wp-content/uploads/2012/07/CurbingThePowerSCC.pdf> (Date of use: 15 March 2019).

Lincoln's¹⁶⁷ view comprehensively disagrees with the South African Constitutional Court's standpoints in the *Masiya* and *Satchwell* decisions regarding its powers to invalidate laws enacted by the legislature. Lincoln's views also question the nature and constitutionality of our separation of powers doctrine, and what is considered to be the legitimate role of the judiciary.

1.6 Summary

In this chapter, the need for the separation of powers doctrine and its place in South African jurisprudence were outlined. This chapter also put forward an outline of the determined research problem; the hypotheses upon which the questions of the study are based, and the objectives of the study.

The doctrine of separation of powers is a term used to describe a concept where governments' powers are divided amongst three branches, which are the legislature, the executive and the judiciary. However, this doctrine is ambiguous and contains unrealistic features, as discussed especially in paragraphs 1.2 and 1.3 above. One of the ambiguities surrounding this doctrine is, as expressed by Verkuil, that there are so many different origins of the doctrine, that it is difficult to trace its historical lineage.

In South Africa, despite the fact that the term 'separation of powers' does not appear in the Constitution, according to the Constitutional Court in *In re: Certification of the Constitution*, the doctrine forms part of our new constitutional system. This perception is also shared by O'Regan who states that the doctrine not only forms part of the South African constitutional system but the Constitution also provides suitable checks and balances which, according to her, still need to be further developed. Mojapelo J supports the view that the Constitution provides and guarantee the concept of separation of powers. He argues that the doctrine's origin can be traced back to John Locke despite overwhelming evidence that Montesquieu's writings on the doctrine was its origin.

¹⁶⁷ Entin 1990 *Ohio State LJ* 215. See also Chapter 2 footnote 247.

In South African jurisprudence, the concept of separation of powers has been tested in various ways. For example, the Constitutional Court, per Ackermann J in the *Dodo* case, has decided that mandatory minimum sentences which take away the courts' sentencing discretion were compatible with this doctrine, as well as the constitutional judicial independence of the courts as guaranteed by the Constitution. This notion is also shared by the Supreme Court of Appeal in the *Malgas* case, as well as other cases briefly mentioned in paras 1.2 and 1.5.5 above. Nevertheless, South African courts have reached divergent views on the constitutionality of the mandatory minimum sentences, where the mandatory minimum sentencing legislation was criticised as not only overstepping the limits of the political branches, but also because it was articulated that the legislature has reduced the court to be its 'rubber stamps'.

Section 173 of the South African Constitution provides that the courts have the power to develop laws when in the courts' determination such an extension of the law would be in the interests of justice. However, the development of the law by making use of the interests of justice approach has been rejected by the Hong Kong Law Reform Commission as being too open-ended and too subjective, as evidence in paragraph 1.5.5. Moreover, section 2 of the South African Constitution - which guarantees the supremacy of the Constitution - also enjoins the courts to decide the validity of laws enacted by the legislature. Similar provisions in the Canadian Constitution have been disapproved of as giving the courts too much power to invalidate legislation enacted by a majority-elected legislature, and giving the courts the power to readjust Canadian laws so as to suit the judges' own philosophical and ideological views.

In the United States, the Supreme Court in *Marbury v Madison* had decided in 1803 that the courts, as a government branch, have the task to state what the law is. This decision by the court has, according to some critics, created the impression that the Supreme Court is seen as the exclusive interpreter of the Constitution. This view has not been accepted across the board. Similar to the United States, in Canada there has been disapproval of the constitutionality of the courts' powers to invalidate laws enacted by the legislature. According to some advocates of judicial restraint, judges as appointed by the political branch should not have the power to rewrite

laws based on their personal subjective opinions because they do not have any superior or special understanding and insight as to public policy that the elected legislators do not possess.

Section 52 of the Canadian Constitution does not provide that courts, while determining that all laws are compatible with the Charter, should do so with restraint. This ambiguity, it is further argued, was occasioned by what could be the broadly and vaguely drafted ground-breaking constitutional provisions in the Charter, as section 52 had unintendedly put the courts in control of setting public policy – so much so that courts can be regarded as a second-level legislature. These latter criticisms of section 52 can without any doubt also be levelled against our own section 2 of the Constitution which seems to be crudely drafted while providing the courts with far-reaching powers.

This chapter briefly touched on the historical background of the separation of powers doctrine, which will be elaborated on in more detail in the following chapter.

CHAPTER TWO

SEPARATION OF POWERS AND JUDICIAL FUNCTION: ORIGINS AND CHALLENGES

2.1 Introduction

The introductory chapter briefly dealt with the ambiguity of the separation of powers doctrine which divides governmental functions amongst three branches: the legislature, the executive and the judiciary. Amongst these different arms of government, the judiciary is distinct in that it is consciously selected, it is cautiously preserved, and also in that its members are not nominated by majority vote.¹ The unrepresentativeness of the judiciary in a constitutional democracy prescribes its powers and demonstrates its restrictions at the same time.² Given that the judiciary's role is to function as an efficient checker and enforcer of counter-majoritarian constitutional values as opposed to the representative branches, its morality and independence must be protected from being weakened by those branches.³

It is submitted that judges alone seem not to pose any threat to the ideal of freedom, but judges who are not insulated from the other branches of government present a danger to constitutional rights. At the core of what seems to be judges' primary impediment is the fact that, because they are unelected, their powers are limited, resulting in a weakened constitutional role.⁴ However, since the judiciary is an

¹ Redish 1989 *DePaul LR* 302. By 'unrepresentativeness' is meant that the judiciary does not reflect the makeup of society.

² Redish 1989 *DePaul LR* 302. See Redish and Drizin 1987 *NYU LR* 17: "The judiciary is ... obligated to invalidate actions of the majoritarian branches that exceed constitutional limits." Redish and Drizin add that: "The judiciary derives no logical authority to invalidate the actions of the legislative or executive branches on grounds other than inconsistency with constitutional dictates."

³ Redish 1989 *DePaul LR* 302. According to Hamilton *The Federalist Papers No 78* 236: "It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks ... from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches". The warning at 236 is that although the judiciary does not present any threat to the political rights of the constitution, this can only continue if the judiciary remains truly separate from both the legislature and the executive.

⁴ Redish 1989 *DePaul LR* 302.

unrepresentative branch, it is significant that its role and purpose be circumscribed to the performance of the conventional judicial function of adjudication, in order to avoid the judiciary to be in a position to take over the role and authority of the political branches.⁵

The discussion in this chapter will probe the origin, rationale and scope of the separation of powers doctrine, especially focussing on the judicial function. This will firstly necessitate an examination of the values and tenets which this doctrine seeks to safeguard, and its function in the constitutional democratic system of the government that produced it. Furthermore, the chapter will also review the inherent weaknesses and ambiguities which are embedded into this doctrine in the South African jurisprudence, and its scope and meaning in the context of judicial function. The discussion will also examine the extent of the application of this doctrine by South African courts, as well as its development during the past decades. Lastly, this research will investigate whether the judicial functions as provided in the South African Constitution are comprehensible and conclusive, and interpreted correctly. Foreign jurisprudence on this doctrine, and judicial constitutional review will be examined in order to provide a holistic view on the doctrine's role in a constitutional democracy. What follows is a discussion of the historic origins and development of this doctrine, and how this has moulded the South African constitutional interpretation.

2.2 The origins and rationale of the separation of powers doctrine

At the outset, the first question is how and why the notion of separation of powers came about. In this regard, its biblical origins will be considered. Furthermore, three

⁵ Redish 1989 *DePaul LR* 302. Hamilton expressed a concern that the judiciary should not replace the will of the politically accountable legislative and executive branches with its own. He observed that "the courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgement, the consequence would equally be the substitution of their pleasure to that of the legislative body" Hamilton *The Federalist Papers No 78* 236-237. Madison seems to be in accord with these views expressed by Hamilton where he quotes the French philosopher Montesquieu: "When the legislative and executive powers are united in the same person or body ... there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner. ... Were the power of judging with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor" See Madison *The Federalist Papers No 47* 103.

foreign countries, viz. the United States, Canada and Britain will be observed as to the development and formulation of their separation of powers doctrine. Finally, it will also be examined how this doctrine was adopted into the South African legal system as part of British law, as well as the reason for its existence. South Africa, Canada and the United States have historical ties to Britain, and as a result have inherited Britain's common law. Hence the origins and the development of this doctrine in these countries will be examined.

In order to answer the questions above, it is inevitable to deliberate on the major phases of the historical origins of the separation of powers doctrine, and its development which seem to have moulded its contemporary relevance and application.

2.2.1 The biblical origins of the separation of powers

Levinson traces the historical origins of the separation of powers back to the Bible, and argues that the input of the Bible "to law and public debate"⁶ and to the development of this doctrine cannot be disputed. He further points out that the legal premise of the Book of Deuteronomy provides a framework for the administration of the state where separation of powers guarantees the delineation and determination of the different branches of state. He asserts that the legal framework enshrined in Deuteronomy guarantees an independent judiciary, while at the same time determining the legal boundaries within which the monarch's authority can be exercised. Levinson considers this legal framework to be unparalleled in history because:

Two of its cornerstones are fundamental to the modern idea of constitutional government: (1) the clear division of political powers into separate spheres of authority; and (2) the subordination of each branch to the authority of the law. This legislation was so utopian in its own terms that it seems never to have been implemented; instead, idealism rapidly yielded to political pragmatism. Nevertheless, Deuteronomy's draft constitution provides an important corrective to standard accounts of constitutional legal history.⁷

⁶ Levinson 2006 *Cardozo LR* 1854.

⁷ Levinson 2006 *Cardozo LR* 1853. Levinson adds that at 1858: "In literary terms, the core of Deuteronomy is found in the legal corpus of chapters 12-26, which contains a blend of religious, political, civil, and criminal law. That legislation is embedded in a literary frame, in which chapters 1-11 recall events of the exodus, including the revelation at Sinai and the proclamation

Levinson also points out that Moses did not only set out the extent and scope of the idea of constitutional government in this book, but has, in addition, stipulated the attributes of a judicial officer as “men who are wise, discerning, and knowledgeable”.⁸

2.2.2 *The historical origins and structure of the separation of powers in Britain*

The British thought that they have been bequeathed what certain classical Greek and Roman philosophers termed a “mixed regime”.⁹ Vile describes a “mixed regime” as one that incorporates components of monarchy, aristocracy, and democracy with the objective of utilising the “best features of each of those pure regime types while avoiding the worst”.¹⁰ According to the proponents of a mixed regime, rule by a single person had the benefit of presenting strength in foreign policy, in conducting a war, and in resisting influential internal matters.¹¹ However, rule by one person had the drawback that it commonly declined into dictatorship.¹² Rule by a small number of people had the advantage that the most enlightened and high-principled might rule.¹³ At the same time, rule by a small number of people had the disadvantage that it could unquestionably decline into a “self-interested and corrupt oligarchy”.¹⁴ Rule by all of the people had value in that it advanced independence, and at the same maintained sound judgement into policymaking.¹⁵ However, it had the shortcoming that it as well could decline into a mob government, which constitutes a “tyranny of the many”.¹⁶ Aristotle is considered the first constitutional proponent to argue

of the Ten Commandments. Following the legal corpus, Deuteronomy continues with ceremonies to ratify the covenant and to enforce obedience to it (26:16-28:68); the commissioning of Joshua as the successor of Moses with emphasis upon the legislation of Deuteronomy as a covenant equal in importance to that of the Ten Commandments (29:1-32:52); and finally, a poetic blessing of the twelve tribes of Israel as a form of last will and testament by Moses, along with a prose account of the death of Moses (33:1-34:12”).

⁸ Levinson 2006 *Cardozo LR* 1870. See Deuteronomy 1:13 where Moses said: “Choose wise, understanding, and knowledgeable men from among your tribes ...”.

⁹ Calabresi *et al* 2012 *Northwestern Univ LR* 529. See Bederman *The classical foundations of the American Constitution* 220-221; Richard *The founders and the classics* 123-57; Wood *The creation of the American Republic, 1776-1787* 11.

¹⁰ Vile *Constitutionalism* 33-52. See also Calabresi *et al* 2012 *Northwestern Univ LR* 530.

¹¹ Calabresi *et al* 2012 *Northwestern Univ LR* 530.

¹² Calabresi *et al* 2012 *Northwestern Univ LR* 530.

¹³ Calabresi *et al* 2012 *Northwestern Univ LR* 530.

¹⁴ Calabresi *et al* 2012 *Northwestern Univ LR* 530.

¹⁵ Calabresi *et al* 2012 *Northwestern Univ LR* 530.

¹⁶ Calabresi *et al* 2012 *Northwestern Univ LR* 530.

prescriptively for the idea of a mixed regime. He was in favour of a constitutional structure where social class held dominance.¹⁷ Aristotle recognised a mixed regime as the true forms of government where authority was invested in “the one, or the few, or the many, [that] govern with a view to the common interest”¹⁸ as being the best regime that would realistically be obtainable.

The benefit of a mixed regime that incorporates the control of the one, the few, and the many was that the three distinct social groups denoted by the monarch, the aristocrats, and the commoners, could monitor and balance each other, with a view of enhancing the prospects that each social group would govern justifiably.¹⁹ Governing authority was separated in a mixed regime instead of such power being consolidated into the hands of one social group.²⁰ It was for this reason that Aristotle, Polybius, Cicero, Aquinas, and Machiavelli all highly rated the notion of a mixed regime.²¹ The mixed regime, with its components of checks and balances, became the origin of the separation of powers doctrine.²² The separation of powers idea and the mixed regime theory both share a similar proposition that “power tends to corrupt and absolute power corrupts absolutely”.²³

During the seventeenth century, the notion of the mixed regime seemed to be eminent in political beliefs.²⁴ From 1640 and until the eighteenth century, many British thought that Britain was a form of Aristotelian mixed regime. It was believed that the King, the House of Lords, and the House of Commons individually stood for the three huge domains of the British social order – “the one, the few, and the

¹⁷ Aristotle *Politics* 49, 57.

¹⁸ Aristotle *Politics* 61.

¹⁹ Calabresi *et al* 2012 *Northwestern Univ LR* 530.

²⁰ Calabresi *et al* 2012 *Northwestern Univ LR* 530.

²¹ Calabresi *et al* 2012 *Northwestern Univ LR* 530 -531. Classical Sparta, the Roman Republic (509 BC - 44 BC), Venice (697 AD - 1797 AD) were regarded as prime examples of mixed regimes.

²² Calabresi *et al* 2012 *Northwestern Univ LR* 531. Aristotle may have anticipated the separation of powers when he wrote that: “All constitutions have three elements... When they are well-ordered, the constitution is well-ordered, and as they differ from one another, constitutions differ. There is one element which deliberates about public affairs; secondly that concerned with the magistrates – the question being, what they should be, over what they should exercise authority, and what should be the mode of electing to them; and thirdly that which has judicial power” Aristotle *Politics* 100. Aristotle never really develops this insight nor does he talk about the importance of keeping these three functions separate and balanced with one another.

²³ Calabresi *et al* 2012 *Northwestern Univ LR* 531. See also Dalberg-Acton *Essays on freedom and power* xi, xv, xlviii; 364.

²⁴ Calabresi *et al* 2012 *Northwestern Univ LR* 532.

many”.²⁵ All three domains were inferior under the law to the classical constitution of King Edward, the Confessor. Supreme power remained in the ‘king-people’ as a unit which could make decrees.²⁶ It was because of this legal order that the king or his judges had no authority to dispute, to remove or judicially review laws enacted by parliament, as the king-in-parliament had absolute power when laws were accepted.²⁷

It was this government that Montesquieu observed on his visit to Britain in the beginning of the eighteenth century. He based his government constitutional structure, which is built on the rule of law, on this scheme of discerned British government.²⁸ In order to fully appreciate the nature, meaning and development of his doctrine, further discussion is necessitated.

2.2.1.1 Montesquieu’s doctrine of the separation of powers

Montesquieu, in *L’ esprit des lois* (The spirit of laws), illustrates his well-known tripartite codification of power, and theory of checked separation in a section titled ‘Of the Constitution of England’.²⁹ Montesquieu claimed that government’s authority must be partitioned amongst political actors in such a way that the power of these actors to irrefutably determine their own authority is curtailed. The “direct end”³⁰ of such an establishment was distinctly political liberty, through which Montesquieu

²⁵ Aristotle *Politics* 61; Calabresi *et al* 2012 *Northwestern Univ LR* 532.

²⁶ Calabresi *et al* 2012 *Northwestern Univ LR* 532. See Goldsworthy *The sovereignty of parliament* 9, where he argues that the idea is that the King acted together with the aristocracy and the common people. The King-in-Parliament was sovereign because it represented the three great estates of society. Today in Britain, the Monarch is a cipher, as is the House of Lords; the sovereignty of the Queen-in-Parliament means, in practice, the sovereignty of the House of Commons. At 25 Goldsworthy adds that: “The King’s power to make Acts of Parliament, with the assent of the Lords and Commons, is ‘the most sovereign and supreme power above all and controllable by none.’”

²⁷ Calabresi *et al* 2012 *Northwestern Univ LR* 532.

²⁸ Shackleton *Montesquieu: a critical biography* 285: “the inclusion in *L’Esprit des Lois* of the essay on the British constitution involved a physical incorporation of one manuscript, on different paper and in different hands, in the other. ... Most of the chapter as it now stands was written soon after Montesquieu’s return from his travels, and under the immediate inspiration of British political life”.

²⁹ Montesquieu offered the first widely recognised articulation of the separation of powers doctrine as it is understood today.

³⁰ Montesquieu *The spirit of laws* 195-196, 198-199, 212. Montesquieu states that: “...political liberty does not consist in an unlimited freedom” (196) and “The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is a requisite the government be so constituted as one man need not be afraid of another” (198).

signified freedom from the fear that power will be exercised arbitrarily.

Montesquieu inscribed that: “In every government, there are three sorts of power”.³¹ The power to make laws stretched out to all law-making inclusive of initial making of law, reforms, and abrogation. The executive authority consisted of two distinct parts, namely, which he termed the executive under international law (“things dependent on the law of nations”) and the executive under domestic law (“matters that depend on the civil law”).³² The first-mentioned constituted the government’s powers on defence and foreign affairs. The last-mentioned, which was later called the power of judging, permitted decisions on determining punishment for criminals judging disputes.³³ Montesquieu’s identification of executive power talked only of the considerations in which administration and implementation of government’s authority included separate decision-making.³⁴ Consequently, he re-categorised the three types of power as the legislature, the executive, and the judiciary.³⁵

In Britain, during that period in time, the three types of authority were performed largely by various actors. The ruler had no authority to give out unilateral laws or edicts controlling future behaviour.³⁶ Legislative powers rested with the elected representatives of parliament.³⁷ The executive power rested with the monarch.³⁸ The power of adjudicating disputes rested with the juries.³⁹

Montesquieu’s unique discernment, which progressed from Locke’s legislative-

³¹ Montesquieu *The spirit of laws* 198.

³² Montesquieu *The spirit of laws* 198.

³³ Montesquieu *The spirit of laws* 198-199.

³⁴ Montesquieu *The spirit of laws* 200-201, 206-208; Claus 2005 *Oxford Journal of Legal Studies* 421, 422, 424.

³⁵ Montesquieu *The spirit of laws* 198. Though Montesquieu still viewed the legislative and executive powers as the two major branches of the government, he argued for a politically independent judiciary whose personnel would not be drawn from the legislative or executive branches of the government.

³⁶ Blackstone later noted that the monarch’s power of decree (which he called proclamation) was limited to subordinate provision for implementing enacted law. See Blackstone *Commentaries on the laws of England* 271.

³⁷ Montesquieu *The spirit of laws* 205-206. Montesquieu elaborates that: “a representative should be elected by the inhabitants” (202), and: “The legislative power is, therefore, committed to the body of the nobles, and to that which represents the people; each having their assemblies and deliberations apart, each their separate views and interests” (204). The legislative body consists of two houses or parts that “check one another by the mutual privilege of rejecting” (209).

³⁸ Montesquieu *The spirit of laws* 205.

³⁹ Montesquieu *The spirit of laws* 97, 208.

executive dichotomy,⁴⁰ was that judging disputes is a unique forerunner to executing law, and in Britain that forerunner rested in the unattached realm of the juries. It was in these latter customs that the three tasks of legislating, executing and judging were “fundamentally distinguishable”,⁴¹ and Montesquieu could claim that their basic use in Britain had been partitioned.

The representatives or functionaries of the monarch were empowered to administer law, yet in the event of disagreement about facts, the juries were gathered to use their power of adjudicating. Adjudicating did not entail complicated law; it included determining which litigant was truthful. Judging was different from making laws specifically because it did not entail enacting rules for forthcoming cases.⁴²

Montesquieu’s own judging knowledge in France resulted in him not conceding that British courts, as part of their function, might have to decide “disputes about what the law meant”.⁴³ He, however, observed that under monarchies, laws might not be plain and certain, and then judges might be tasked, as part of their function, to investigate their spirit. Yet the “nearer a government approaches towards a republic, the more the manner of judging becomes settled and fixed”.⁴⁴ At the time, the British system of government was transforming from a monarchy “in which a single person governs by fixed and established laws” to a republic “in which the body, or only a part of the people, is possessed of the supreme power”.⁴⁵ Montesquieu pointed out that:

In republics, the very nature of the constitution requires the judges to follow the letter of the law; otherwise, the law might be explained to the prejudice of every citizen, in cases where their honour, property, or life, are concerned. At Rome,

⁴⁰ See Locke *Second treatise of government* 62-71. Locke envisioned a two-fold division of government powers between the executive, which had the executive and foreign affairs powers, and the legislature, which had law-making power. See Locke *The second treatise* 72-73.

⁴¹ Claus 2005 *Oxford Journal of Legal Studies* 422.

⁴² Claus 2005 *Oxford Journal of Legal Studies* 421-422.

⁴³ Claus 2005 *Oxford Journal of Legal Studies* 422. As the *présidents à mortier* of the *Parlement* of Bordeaux, a youthful Montesquieu had adjudicated some disputes, which he found mind-numbing. Unlike the British common law, the French civil law customs provided not much scope for judging inventiveness, and left Montesquieu with the impression that judging is largely fact-finding, and an application of decided and clear rules to the facts so established. See Claus 2005 *Oxford Journal of Legal Studies* 420-421; Shackleton *Montesquieu: a critical biography* 17-19.

⁴⁴ Montesquieu *The spirit of laws* 96-97.

⁴⁵ Montesquieu *The spirit of laws* 9. This transformation ensued because of an already growing disapproval of a system where the same government agent would have various powers which extended beyond what it should be as regards its function within the context of the separation of powers. See Claus 2005 *Oxford Journal of Legal Studies* 424-425.

the judges had no more to do than to declare that the person accused was guilty of a particular crime, and then the punishment was found in the laws, as may be seen in diverse laws still extant. In England, the jury give their verdict, whether the fact, brought under their cognizance, be proved or not; if it be proved, the judge pronounces the punishment inflicted by the law, and for this he needs only to open his eyes.⁴⁶

The British legislator was an elected and delegated body, and in this way “the national judges are no more than a mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour”.⁴⁷

Montesquieu also observed that:

...though the tribunals ought not to be fixed, the judgments ought; and to such a degree, as to ever conformable to the letter of the law. Were they to be the private opinion of the judge, people would then live in society without exactly knowing the nature of their obligations.⁴⁸

The principle of legal certainty, which is a fundamental concept in British law, seems to be part of Montesquieu’s observations of the British legal system. Judges’ decisions were not intended to be premised on judges’ private opinions, but on the “letter of the law”.⁴⁹ This judicial function comprised in determining the facts, and was partitioned from the executive, and given to juries. The employment of the term ‘judge’ to portray the executive agent who administers the law when adjudging contested facts was more a matter of consideration than of characterisation.⁵⁰

For Montesquieu, the brilliance of the British scheme of government rested in integrating separation with monitoring because:

Political liberty is to be found in only moderate governments; and even in these it is not always found. It is there only where there is no abuse of power: but constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say, that virtue itself has need of limits? To prevent this abuse, it is necessary, from the very nature of things, power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits.⁵¹

⁴⁶ Montesquieu *The spirit of laws* 97.

⁴⁷ Montesquieu *The spirit of laws* 208. Claus 2005 *Oxford Journal of Legal Studies* 423 agrees: “This was as it should be”.

⁴⁸ Montesquieu *The spirit of laws* 201.

⁴⁹ Montesquieu *The spirit of laws* 97.

⁵⁰ Claus 2005 *Oxford Journal of Legal Studies* 437-438, 445.

⁵¹ Montesquieu *The spirit of laws* 197.

A scheme of government founded on separate systems engaging in principally distinct governmental activities was preferable, as long as there was only one mechanism available for each of the activities.⁵² There would be no threat of legal confusion if there was only one way of legislating or making laws. So long as there is a single executive authority, the law would be carried out, and effected equally and fairly. In order to show that the British legal system rendered power to various actors directly, and not according to hierarchy, Montesquieu believed that he had to portray the acts of those actors as “essentially different”.⁵³ However, the British separation of powers seemed maintainable because it did not offer more than one conclusive manner for whichever specific type of power to be used. It was solely parliament that had law-making power, even though parliament was monitored by the monarch’s authority to veto legislation, which provided a form of safeguard for the separation of law-making and executive authority.⁵⁴ Only the monarch had the autonomous authority to enforce and administer law, but his executive authority was kept in check by parliament, largely by parliament’s unique authority to tax, and to seize the revenue to finance the executive’s tasks.⁵⁵ The separate and independent power of judging was equally checked, as Montesquieu noted that: “It is possible that the law, which is clear-sighted in one sense, and blind in another, might, in some cases, be too severe”.⁵⁶ The concept of judicial power thus seems to have been subjected to checks and balances by the other branches of government at this time.

Montesquieu commented on the exercise of the core function of judicial power in the context of constitutionally restrained judicial law-making, and its nature within the idea of separation of powers as follows:

There is no liberty if the judiciary power be not separated 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.⁵⁷

⁵² Claus 2005 *Oxford Journal of Legal Studies* 426.

⁵³ Claus 2005 *Oxford Journal of Legal Studies* 426, 442.

⁵⁴ Montesquieu *The spirit of laws*, 198, 204.

⁵⁵ Montesquieu *The spirit of laws* 204, 209-210; Claus 2005 *Oxford Journal of Legal Studies* 426.

⁵⁶ Montesquieu *The spirit of laws* 208; Claus 2005 *Oxford Journal of Legal Studies* 426.

⁵⁷ Montesquieu *The spirit of laws* 199.

In addition, the justification for the partitioning of power was, according to Montesquieu, to safeguard the litigants in the disputes before the courts.⁵⁸ Supposing that the judge can make the law, then the litigants would be subjected to arbitrary control, because the judge or arbitrator “might change the rules of the fight mid-way”.⁵⁹ Supposing that the arbitrator was vested with executive powers, then the litigants in the dispute involving the executive branch of government might be without any remedy. However, these apprehensions seem to have been foreseen and safeguarded against when chapter 39 of the Magna Carta was drafted, providing that the barons would be subjected to a jury system, and forfeitures only by the judgement of peers or the law of the land.⁶⁰

As claimed by Montesquieu, the justification for Britain’s separation of powers in the midst of numerous actors was to optimise freedom.⁶¹ The more impediments that lie in the way of whichever actor’s use of authority, it would not be so probable that the authority will be abused: “*a fortiori* the less likely power is to be exercised badly”.⁶² The separation of powers may consequently restrain any actor from unanswerably extending the scope of his own powers.⁶³ Similarly, the more integrity of an intended use of authority, the more probable that use of authority could be constitutionally valid and incorruptible. The separation of powers may thus enhance sincerity in its use, by finding the solution to disagreements in areas of concern.⁶⁴

There has been much debate over Montesquieu’s doctrine of the separation of powers, especially his so-called misapprehensions, and their current application in modern-day democracies. A short overview on the critique of Montesquieu’s writings on the separation of powers follows below.

2.2.1.2 Critique of Montesquieu’s doctrine of the separation of powers

It has been averred by some critics that Montesquieu misunderstood the British legal

⁵⁸ Claus 2005 *Oxford Journal of Legal Studies* 434.

⁵⁹ Claus 2005 *Oxford Journal of Legal Studies* 431.

⁶⁰ Blackstone *Commentaries on the laws of England* 402.

⁶¹ Montesquieu *The spirit of laws* 198-199.

⁶² Claus 2005 *Oxford Journal of Legal Studies* 425.

⁶³ Claus 2005 *Oxford Journal of Legal Studies* 425.

⁶⁴ Claus 2005 *Oxford Journal of Legal Studies* 443-444.

principles, amongst others, the nature of the common law and “how the English common law had been formed through deference to precedent”.⁶⁵ Montesquieu’s doctrine of separation of powers stems from these misconceptions:

When Montesquieu wrote *L’Esprit des Loix* and articulated the Doctrine of the Separation of Powers, he thought he was describing the British Constitution. He wasn’t. He described what appeared to be its structure, and failed to notice the efficient secret of how the Westminster constitution operated in the real world. The American revolutionaries had read Montesquieu, and when they drew up the Constitution of the United States of America they faithfully followed his constitutional prescription, thinking that it was a guarantee of long term good government.⁶⁶

Claus argues that there is no truth in Montesquieu’s claim that “this constitution could best be achieved, and had been achieved in Britain, by assigning three fundamentally different governmental activities to different actors”.⁶⁷ This misunderstanding seems to be rooted in two flaws. The first was speculative; the second, both speculative and experimental.⁶⁸ Firstly, Montesquieu’s reasoning was influenced by early eighteenth century teaching that no autonomous or independent authority could workably be partitioned. Montesquieu was correct in assuming that freedom from dictatorial use of power would be achieved by separating power among numerous political branches, subject to “supervisory checks designed to protect the primary separation”,⁶⁹ although he believed that the separation of power could be exclusively exercised on essentialist terms.⁷⁰ This, according to Claus, is his biggest flaw. Montesquieu could have more authentically portrayed the British separation of power as follows:

Why did he not simply say that dividing government power among multiple actors might promote liberty, especially if every exercise of power ultimately depended on the approval of multiple actors? In other words, why did he characterize the British model as a checked separation of different kinds of power, rather than simply as power-sharing? Why try to distinguish primary exercise of power from participatory ones?⁷¹

⁶⁵ Claus 2005 *Oxford Journal of Legal Studies* 431.

⁶⁶ Wells *Current challenges for the doctrine* 105. See also Van der Vyver *South African Pub Law* 178 who argues that Montesquieu was a poor observer, since the British constitutional system did not comply then, neither does it today, with the basic norms of the idea of separation of powers.

⁶⁷ Claus 2005 *Oxford Journal of Legal Studies* 419.

⁶⁸ Claus 2005 *Oxford Journal of Legal Studies* 419.

⁶⁹ Claus 2005 *Oxford Journal of Legal Studies* 425.

⁷⁰ Claus 2005 *Oxford Journal of Legal Studies* 420.

⁷¹ Claus 2005 *Oxford Journal of Legal Studies* 425.

Making laws could be divided from executing laws, yet neither of these types of power could internally be permanently separated. There was in Montesquieu's analysis a "protective qualification to a primary essentialist separation",⁷² where government actors in the different branches exercised more than one kind of authority. However, he fell short of appreciating that the involvement of several government officials in all issues of authority, even though some individuals may be involved in more than one kind of power, could constitute "the true protection against arbitrariness".⁷³ The nature of separation of powers in Britain at that time was not along strictly essentialist lines. It was only through checks and balances that different government employees could be restrained "from conclusively determining the reach of their powers",⁷⁴ and not the essentialist separation of activities. The crucial yardstick for separation of powers is not whether there are different kinds of powers, but whether separation will restrain different individuals from decisively establishing the extent of their own power.⁷⁵

Secondly, Montesquieu identified in France's monarchical system of government a considerable danger that the law might be ambivalent, and that courts' decisions could, in turn, subscribe to that state of uncertainty.⁷⁶ However, he failed to understand the character of the British common law which is premised on the belief that at the core of the law, the concept of precedent constituted a foundation for

⁷² Claus 2005 *Oxford Journal of Legal Studies* 420.

⁷³ Claus 2005 *Oxford Journal of Legal Studies* 420.

⁷⁴ Claus 2005 *Oxford Journal of Legal Studies* 420.

⁷⁵ Claus 2005 *Oxford Journal of Legal Studies* 420, 425. It seems that Montesquieu was influenced by the then-prevailing conceptions on the scope of political sovereignty. Montesquieu had revered Bodin, a leading French political theorist, and had read Bodin's *Les Six Livres de la Republique* (1576) in which Bodin branded government's powers as inseparable. The inseparability of power remained an undisputed theory rooted in the learnings of Althusius, Grotius, Hugo, and Von Pufendorf. Von Pufendorf denounced the Hapsburg Holy Roman Empire as an irregular, unsustainable scheme of government in that authority was divided between the emperor and the German princes. See Von Pufendorf *An introduction to the history of the principal kingdoms* 350.

⁷⁶ Montesquieu *The spirit of laws* 93: "In proportion as the decisions of judicature are multiplied in monarchies, the law is loaded with decrees that sometimes contradict one another; either because succeeding judges are of a different way of thinking, or because the same causes are sometimes well, and at other times ill defended; or, in fine, by reason of an infinite number of abuses, to which all human regulations are liable. This is necessary evil, which the legislator redresses from time to time, as contrary even to the spirit of moderate governments. For when people are obliged to have recourse to the courts of judicature, this should come from the nature of the constitution, and not from the contradiction or uncertainty of the law". The difficulty with these sentiments, Claus argues, is that Montesquieu did not notice that the doctrine of precedent had been adopted by the British courts to remedy such contradictions and uncertainties. See Claus 2005 *Oxford JLS* 432.

authoritative judicial interpretation of prevailing law.⁷⁷ This factual misconception has resulted in him differentiating and trifling the “British judicial function as merely the *ad hoc* determination of disputed facts”.⁷⁸ By focusing only on the congregated juries function of fact-finding, and that juries had no authority “beyond the case in which they served,”⁷⁹ Montesquieu floundered in understanding the legislative nature of British judicial interpretation.⁸⁰ In other words, Montesquieu failed to understand that the British common-law principle of precedent meant that judges are bound by previous court decisions when interpreting laws; a process which constitutes law-making in its own right.⁸¹ Judicial law-makers advance their authority demonstrating regard for *stare decisis*.⁸² Methodical regard for this latter doctrine is what moulds judgments into law-making.⁸³

Finally, it is argued that “separation from the legislature does not stop the rules being made up by a judge through exposition. Thus separation of those who adjudicate law from formal law making bodies is pointless”.⁸⁴ Why this distinction is trivial, is because:

In either case the change is retroactive. And either case presents an equal risk of unprincipled discrimination, against which other constitutional safeguards may be necessary. A judge may be as likely to change the rules mid-stream through exposition, and can do so just as readily, whether he also legislates in another way or not.⁸⁵

While the doctrine of precedent does not subject official legislation to its scrutiny, it remains an unsuitable method of adjudication, and informed constitutional commentators will reject its use for that reason.⁸⁶ This doctrine also forms the remnants of what could be the pre-realist goal of “fundamental principles of law;

⁷⁷ Claus 2005 *Oxford JLS* 420, 431.

⁷⁸ Claus 2005 *Oxford JLS* 420, 432.

⁷⁹ Claus 2005 *Oxford JLS* 432.

⁸⁰ Claus 2005 *Oxford JLS* 421-422.

⁸¹ Claus 2005 *Oxford JLS* 433: “If Montesquieu had understood that the British courts decided questions of law, and that their answers to those questions constituted law, how would he have categorised that function within his tripartite schema?”.

⁸² Claus 2005 *Oxford JLS* 435. Claus comments at 435: “Until 1966, the Law Lords did not acknowledge that they might ever overrule prior decisions, in striking contrast to the United States Supreme Court’s wholesale overruling of *Lochner*-era precedent during the preceding decades. And dual-track lawmakers need no less able craftsmen of precedent than are solely-judicial lawmakers”.

⁸³ Claus 2005 *Oxford JLS* 435.

⁸⁴ Claus 2005 *Oxford JLS* 434.

⁸⁵ Claus 2005 *Oxford JLS* 434.

⁸⁶ Claus 2005 *Oxford JLS* 434.

which, though legislators may depart from, yet judges are bound to observe”.⁸⁷ The above misperceptions are reflected in some jurisdictions’ notions about the separation of powers; a prime example being the United States. As such, the historical origins of the doctrine in selected jurisdictions will be focused on next, beginning with the United States.

2.2.3 *The historical origins and structure of the separation of powers in the United States*

According to Calabresi *et al*,⁸⁸ the American idea of the constitutional separation of powers stems from the seventeenth- and eighteenth-century Britain, and colonial American constitutionalism. During these periods, the British and American colonists had much faith in their Constitution, and assumed it to be “world’s best”.⁸⁹ The United States settled on what they thought was a colonial form of the mixed regime. Each area (states) forming the United States had a royal governor who was chosen and assigned by the King of England, who, according to Calabresi *et al*:

represented the interest of the One; a Governor’s Council, usually appointed by the Governor with King’s consent to advise him, who represented the interests of the Few; and a popularly elected lower House of the Colonial Legislature, which represented the interests of the Many and most especially the interests of those who paid taxes.⁹⁰

It was during the period from 1607 to 1776 that the British political system of a mixed regime was replicated in the American colonies.⁹¹ However, the downfall of feudalism ended the notion of the mixed regime here. The American Revolution was grounded on “the idea that all men are created equal”,⁹² and it did not endorse a handed-down monarchy, aristocracy, or any other disparities of social grouping.⁹³

⁸⁷ Blackstone *Commentaries on the laws of England* 269.

⁸⁸ Calabresi *et al* 2012 *Northwestern Univ LR* 529. See also Vile *Constitutionalism* (1967) and Gwyn *The meaning of the separation of powers* (1965).

⁸⁹ Calabresi *et al* 2012 *Northwestern Univ LR* 529.

⁹⁰ Calabresi *et al* 2012 *Northwestern Univ LR* 532.

⁹¹ See Calabresi *et al* 2012 *Northwestern Univ LR* 532-533, where it is stated that “several American colonists praised the British mixed regime government during this period of time and supported efforts to replicate it in the colonies”. According to Vile *Constitutionalism* 125: “By the middle of the eighteenth century the theory of the balanced constitution seemed as impregnably established in America as it was in Britain”.

⁹² The Declaration of Independence of United States (1776) para 2.

⁹³ Calabresi *et al* 2012 *Northwestern Univ LR* 533. Vile *Constitutionalism* 125-126 notes that when the colonies began to move towards revolution; “the theory of mixed government as applied in

All governing powers were to be in the hands of the many. After the Civil War in the 1650s, and up to the period of the writings of Locke and Montesquieu, attempts were made by philosophers to establish a substitute for the mixed regime idea. This idea focused on the many entrusted with power to rule not to be condensed in any one person or institution, which in turn could be easily degenerated.⁹⁴ The notion that emanated was “that it was desirable to separate functionally the legislative, the executive, and the judicial powers”.⁹⁵ Calabresi *et al* confirm that the idea of separation of powers came into being in this jurisdiction as a system to take the place of the “Aristotelian and British Mixed Regime as a way of diffusing power once the fall of feudalism had made the British Mixed Regime unviable in the United States”.⁹⁶

Adams,⁹⁷ a proponent of the British Constitution’s mixed regime, favourably appealed in the 1770s-1780s to bring about the adoption of separation of powers and a bicameral legislature, as he believed it would result in a contemporary democratized form of the mixed regime.⁹⁸ Under Adams’ envisioned system of government, universally chosen presidents and governors would take the place of the King as the representative of the one. The Senate and the Supreme Court would take the place of the House of Lords, the Privy Council, and the Court of Star Chamber as the representatives of the aristocratic or oligarchic few. Lastly, the widely-voted-for House of Representatives would take the place of the House of Commons as the “people’s special branch with the Power of the Purse”.⁹⁹ This

Britain was first criticised on the grounds that corruption had so warped the Constitution that it no longer represented a truly balanced structure but was a disguised tyranny”.

⁹⁴ Calabresi *et al* 2012 *Northwestern Univ LR* 533. In 1648, Dallison argued for a functional separation of powers with different personnel in each branch of the government. See Dallison *The royalist’s defence* 126.

⁹⁵ Calabresi *et al* 2012 *Northwestern Univ LR* 534.

⁹⁶ Calabresi *et al* 2012 *Northwestern Univ LR* 536.

⁹⁷ Adams was the founding father, the first vice president of the United States, and its second president. He was the first United States president to actually live in the White House, having moved in before it was finished. See Biography.com Editors <https://www.biography.com/people/john-adams-37967> (Date of use: 4 February 2019).

⁹⁸ Calabresi *et al* 2012 *Northwestern Univ LR* 534. In 1776, Adams wrote that a bicameral legislature was necessary because, “if the legislative power is wholly in one Assembly, and the executive in another, or in a single person, these two powers oppose and enervate upon each other, until the contest shall end in war.” See Adams *Thoughts on government* 13. In support of the separation of powers, Adams reasoned at 13 that a single Assembly, “possessed of all the powers of government, would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudge all controversies in their own favour”.

⁹⁹ Calabresi *et al* 2012 *Northwestern Univ LR* 534-535.

practical separation of legislative, executive and judicial powers is reflected in the United States Constitution of 1787, which Adams had assisted to draft, although it was complimented by a Madisonian scheme of checks and balances.¹⁰⁰ The President was entrusted with the function of law-making because of his veto power.¹⁰¹ The Senate was entrusted with implementing the law such as the approval of treaties; a power which the British Parliament did not have.¹⁰² The Supreme Court and the other federal courts were entrusted with the administrative authority to “issue writs of mandamus to federal executive officials”,¹⁰³ powers which only the Court of King’s Bench or the Court of Star Chambers performed in Britain. What was deemed the power of the many under the mixed regime has manifested in the United States as citizens directly electing members for the House of Representatives, the Senate and members of the Electoral College, who again elect the President of the United States.¹⁰⁴ These governmental institutions are formed by officials who are chosen at once or indirectly by the people, whereon Calabresi *et al* remark that:

In the United States, the Many rule because the Many get to pick the One and the Few in our democratized version of the British Mixed Regime.¹⁰⁵

The idea of separation of powers was based on the premise of “checked separation”:¹⁰⁶

The powers of government should be divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without

¹⁰⁰ Calabresi *et al* 2012 *Northwestern Univ LR* 535. It is argued that a system of checks and balances is more closely related to the mixed regime; however, the mixed regime theorists were concerned not only with dividing the power of the government generally, but also with ensuring that no single group would possess sole control over an important government function. This concern that no one part of the government should acquire too much power was the driving force behind the system of checks and balances, which ensures that the Supreme Court, each house of Congress, and the President do not have exclusive control over certain important government functions. Also see Diamond 1978 *Publius* 40-41.

¹⁰¹ Paulsen *et al The Constitution of the United States* 197.

¹⁰² Paulsen *et al The Constitution of the United States* 197.

¹⁰³ Calabresi *et al* 2012 *Northwestern Univ LR* 535. See also Dicey *The Privy council* 101: “There is a peculiar feature of the Court of Star Chamber’s constitution – the frequent presidency of the King in person. The legal fiction that the King is present personally in all his courts was here carried into act. ... The part taken by the King was no empty formality. On one occasion James presided for five days, ‘seated on a chair above the rest,’ and terminated the case by pronouncing a sentence, of which, if the annalist is to be believed, the wisdom surpassed that of any judgment before uttered from an English tribunal”.

¹⁰⁴ Calabresi *et al* 2012 *Northwestern Univ LR* 535-536.

¹⁰⁵ Calabresi *et al* 2012 *Northwestern Univ LR* 536.

¹⁰⁶ Claus 2005 *Oxford JLS* 428.

being effectually checked and restrained by the others.¹⁰⁷

The framework of government that materialised from Philadelphia in 1787 when American founders met, was based on Montesquieu's narrative of the British scheme:

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.¹⁰⁸

The Philadelphia document duplicated Montesquieu's doctrine in all systems but one.¹⁰⁹ Montesquieu preferred that the legislative authority be entirely given to a representative branch consisting of two arms, as he envisioned a government structure which will replace the nobility with a more representative system.¹¹⁰ The executive authority was given to a single person, as Montesquieu had preferred,¹¹¹ and in this way the president replaced the king:¹¹²

Montesquieu did not mean that these departments ought to have no partial agency in, or no control over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, namely, Britain, can amount no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted.¹¹³

As to judicial power, the American framers resolved that there would be a grading of courts, with the Supreme Court vested with the authority of being the upper

¹⁰⁷ Wood *The creation of the American Republic, 1776-1787* 453 (quoting Jefferson). Jefferson, a spokesman for democracy, was an American Founding Father, the principal author of the Declaration of Independence (1776), and the third President of the United States (1801-1809) See The White House <https://www.whitehouse.gov/about-the-white-house/presidents/thomas-jefferson/> (Date of use: 11 February 2019). In 1800, he wrote in a private letter: "I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man". See The White House (Date of use: 11 February 2019).

¹⁰⁸ Madison *The Federalist Papers No 47* 20. Madison, America's fourth President (1809-1817), made a major contribution to the ratification of the United States Constitution by writing *The Federalist Papers*, along with Hamilton and Jay. In later years, he was referred to as the "Father of the Constitution". See The White House <https://www.whitehouse.gov/about-the-white-house/presidents/james-madison/> (Date of use: 12 February 2019).

¹⁰⁹ Claus 2005 *Oxford JLS* 428.

¹¹⁰ Montesquieu *The spirit of laws* 204-205. See also United States Constitution s I: "All legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of the Senate and the House of Representatives."

¹¹¹ Montesquieu *The spirit of laws* 205.

¹¹² United States Constitution Art II.

¹¹³ Madison *The Federalist Papers No 47* 102.

court.¹¹⁴ According to Hamilton, judiciary power will have an “important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department ... a complete security”.¹¹⁵

The power of the legislative to monitor the judiciary was not received well by some judicial members. When Congress used its check authority over one member of the judiciary, namely, Chase J of the United States Supreme Court, an agitated Marshall CJ commented:

According to the ancient doctrine a jury finding a verdict against the law of the case was liable to attain; and the amount of the present doctrine seems to be that a Judge giving legal opinion contrary to impeachment. As, for convenience and humanity the old doctrine of attain has yielded to the silent, moderate but not less operative influence of new trials, I think the modern doctrine of impeachment should yield to appellate legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault.¹¹⁶

Marshall CJ was not satisfied with the legislature’s unrestrained power to keep check on the judiciary, that is, to conduct trial proceedings and in convicting Chase. The judicial authority at issue in this context seems to be the judicial power to interpret the Constitution or judicial review. These latter views are also evident in an 1803 judgment, namely, *Marbury v Madison*,¹¹⁷ where it is remarked that: “It is emphatically the province and duty of the judicial department to say what the law is”.¹¹⁸ Hamilton initially recommended that the judiciary:

is beyond comparison the weakest of the three departments of power and can never attack with success either of the two ... though individual oppression may now and then proceed from the court of justice ... the general liberty of the

¹¹⁴ United States Constitution Art III.

¹¹⁵ Hamilton *The Federalist Papers No 81* 251. Hamilton asserts at 237: “A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents”.

¹¹⁶ Beveridge *The life of John Marshall Vol III* 177.

¹¹⁷ 5 US (1 Cranch) 137,177 (1803).

¹¹⁸ 5 US (1 Cranch) 137,177 (1803). On this point Claus 2005 *Oxford JLS* 430 asks: “How was a legislative check on the judiciary any more proximate a violation of the “celebrated” separation principle than was a legislative check on the executive or an executive check on the legislature? Was the judiciary somehow less in need of supervision?”.

people can never be endangered from that quarter, I mean so long as the judiciary remains truly distinct from both the legislature and the executive.¹¹⁹

On this idea, he quotes Montesquieu: “Of the three powers abovementioned, the judiciary is, in some measure, next to nothing”.¹²⁰ However, Montesquieu relied on the scope of juries’ fact-finding function which was politically significant at the time. The use of judicial authority and the power of jury verdicts were for “judiciary matters only to the parties in dispute”,¹²¹ and the decisions only affected the freedom of the litigants in the dispute. Still, Montesquieu believed that even this power warrants to have limits and to be monitored. Hamilton again reasoned that the judging function did not warrant checks because non-litigants were not affected.¹²² It is however submitted that judging, as part of the tripartite doctrine of separation of powers, should have checks and balances among the executive and the legislative branch, but “they require cooperative participation in order for a power to be exercised at all”.¹²³ Participatory checks and balances, the *stare decisis* doctrine and the principle of precedent all advance separation of powers under common law because:

If the adjudicators of disputes between the executive government and the citizens were not separate from the executive government, then that government would conclusively determine the reach of its powers, and could do as it pleased. If the adjudicator of disputes concerning the reach of a legislative body’s powers were the legislative body itself, or some subset of that body, then the legislative body would likewise conclusively determine the reach of its powers, and could do as it pleased.¹²⁴

But how exactly did this particular United States system of separation of powers developed over the centuries into the three branches of government, each with their core functions? Congress - the legislative branch - carries out the function of “overseeing the execution of the law”¹²⁵ or administering the law, instead of law-making. The extent of this constitutional dilemma is outlined as follows:

The congressional committees are, in effect, a shadow of parliamentary

¹¹⁹ Hamilton *The Federalist Papers No 78* 236. In *Plaut v Spendthrift Farm* 514 US 1995 211, 223, Scalia J accurately interpreted Hamilton’s reasoning to be that the judiciary was politically insignificant “because the binding effect of its acts was limited to particular cases and controversies”. However, the doctrine of precedent makes that idea untrue.

¹²⁰ Montesquieu *The spirit of laws* 204.

¹²¹ Claus 2005 *Oxford JLS* 430.

¹²² Claus 2005 *Oxford JLS* 430-431.

¹²³ Claus 2005 *Oxford JLS* 433.

¹²⁴ Claus 2005 *Oxford JLS* 436.

¹²⁵ Calabresi *et al* 2012 *Northwestern Univ LR* 536.

government that duplicates the presidential appointees in every policy area and that competes with the presidential appointees for the loyalty of the career bureaucracy. The only reason members of Congress do not demand that they themselves be appointed to the Cabinet and the sub-Cabinet is because the Incompatibility Clause of Article I, Section 6 forbids members of Congress from holding executive or judicial offices. ... Congress has carved out for itself a huge role in law execution through oversight and appropriations processes. This is nowhere mentioned in the Constitution, which does not specifically provide for legislative committees, and it is in important ways extra-constitutional. Congress has also claimed for itself extensive quasi-executive and quasi-judicial powers to investigate almost anything under the sun, and it claims that it can, in theory, have an officer of either house imprison a contumacious witness with no prosecution being brought by the Executive Branch and with no adjudication by the Judicial Branch.¹²⁶

Congress has delegated its law-making function to the President, who makes laws through “the issuing of executive orders, proclamations, or signing statements”.¹²⁷ The President is assisted in this function by officials of independent agencies, controlled through congressional oversight processes, or, alternatively, to legislative courts. This conduct by the Congress has resulted virtually in a displacement of the separation of powers by concentrating the executive and legislative authority in “a few officials who are under the control of a powerful committee or subcommittee”.¹²⁸

It is telling that these committees and subcommittees are often captured by representatives or senators from districts or states which have a strong local interest in the federal policy in question. Thus, we find members of Congress from farm states on the Senate and House Agriculture Committees and members from Wall Street on the Finance or Ways and Means Committees.¹²⁹

Moreover, the judiciary also carries out functions that go beyond its case adjudication role. The courts’ judicial review power is “broader than is called for to

¹²⁶ Calabresi *et al* 2012 *Northwestern Univ LR* 537: “The question of congressional power to punish first came before the Supreme Court in 1821 when John Anderson attempted to bribe a member of the House of Representatives”. In the subsequent case of *Anderson v Dunn* 19 US (6 Wheat) 204, 215 (1821) 225, Johnson J’s opined that such a power: “If it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers.’ Johnson J cautioned that such the ability to claim such a power “on the plea of necessity ... is unquestionably an evil to be guarded against”, but he felt that rejecting Congress’s claim to the power to punish for contempt would bring about “the total annihilation of the power of the House of Representatives to guard itself from contempt” (228). Johnson J recognised that “there is no power given by the Constitution to either House to punish for contempt, except when committed by their own members” (225).

¹²⁷ Calabresi *et al* 2012 *Northwestern Univ LR* 538.

¹²⁸ Calabresi *et al* 2012 *Northwestern Univ LR* 541-542.

¹²⁹ Calabresi *et al* 2012 *Northwestern Univ LR* 542.

decide the cases or controversies before them”.¹³⁰ Judicial review in its current form may be traced back to the *Marbury v Madison* decision; however, it is argued that this case “established only that the judiciary would play an important role in constitutional interpretation, not that it would play the ultimate role”.¹³¹ It is asserted that Marshall CJ “claimed only that the Court must obey explicit commands of the Constitution in preference to conflicting laws when such commands are directed at the Court itself and not to another branch of government”.¹³² *Marbury* was intended to articulate a judicial review narrative which was limited, and not definitive.

The Supreme Court’s unrestrained judicial review power is however evident in its decision in *Roe v Wade*,¹³³ where the Court, in interpreting abortion legislation, usurped the law-making powers of Congress and the President. This case involved a pregnant single woman who challenged the constitutionality of the Texas criminal abortion laws on the ground that it improperly violated her rights to reproductive choices and privacy.¹³⁴ The Court held that the abortion laws were unconstitutional because it violated the plaintiff’s Fourteenth Amendment rights.¹³⁵ The Court, in this decision, did not only interpret the law, but also created law:

When the Supreme Court issues an opinion mandating measures beyond the minimum requirements of the Constitution, it usurps the policymaking powers of Congress and the President. If the Court crafts its own general remedy for a constitutional violation, rather than simply declaring that a specific law or policy is unconstitutional, it limits the range of options from which Congress and the President may choose their own solution.¹³⁶

In such cases, it is argued that the courts’ judicial powers must be rejected as it is “acting like an oligarchy of the robe”.¹³⁷ It has been suggested that this court usurped a judicial law-making role which has resulted in it becoming a policymaker in matters

¹³⁰ Calabresi *et al* 2012 *Northwestern Univ LR* 543.

¹³¹ Clinton <https://www.firstthings.com/article/1999/01/001-how-the-court-became-supreme> (Date of use: 18 February 2019).

¹³² Clinton <https://www.firstthings.com/article/1999/01/001-how-the-court-became-supreme> (Date of use: 18 February 2019).

¹³³ 410 US 113 (1973).

¹³⁴ *Roe v Wade* 410 US 113 (1973) 113.

¹³⁵ *Roe v Wade* 410 US 113 (1973) 113. The 14th Amendment to the United States Constitution, s 1: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws”. See Constitutional Rights Foundation <http://www.crf-usa.org/images/t2t/pdf/14thAmendmentDredScott.pdf> (Date of use: 26 March 2019).

¹³⁶ Calabresi *et al* 2012 *Northwestern Univ LR* 543.

¹³⁷ Calabresi *et al* 2012 *Northwestern Univ LR* 543-544.

concerning the Fourteenth Amendment and the Bill of Rights, as well as the Federal Rules of Evidence and other common-law rules, a document which the Court has composed.¹³⁸ It cannot be disputed that the United States Constitution has granted judicial power to the courts, however, such power was not intended to entrust courts with law-making authority, as evident in *Roe v Wade*:

The Supreme Court's oligarchic rule exemplified in *Roe v Wade* is, in our opinion, an improper reversion to the Mixed Regime antecedent. The current Supreme Court wields the oligarchic powers of the Privy Council, the Court of Star Chamber, and the House of Lords. This is improper in a true separation of powers regime.¹³⁹

Growing indecision regarding whether qualified judges, who had executive function in the execution of the law, used such law to the facts as determined by the juries was evident in American founders' allowing judges to hold executive function under the Constitution.¹⁴⁰

It seems that over two centuries, all branches of government have drifted away from the ideal Montesquieu envisioned that would enable citizens' liberty, and instead "they all exercised a blend of separation of powers".¹⁴¹ While the United States Constitution was founded on the premise that government powers would be separated amongst the three departments, namely, the executive, the legislature, and the judiciary, because of the fear which existed during the founding period "the people, and not the institutions of government, are sovereign".¹⁴² Troubled by the concentrated authority of the king, the power of government was apportioned. Apportioned power meant "fractured responsibility".¹⁴³

It is immediately apparent that the representatives of the people were to be vested

¹³⁸ Calabresi *et al* 2012 *Northwestern Univ LR* 544. Calabresi *et al* also remarks that: "The Supreme Court has thus revealed itself over the last 220 years to be an institution that favours the rule of social elites". See in this regard *Trs of Dartmouth College v Woodward* 17 US (4 Wheat) 518 (1819); *Dred Scott v Sandford* 60 US (How) 393 (1857); *Hammer v Dagenhart* 247 US 251 (1918); *Roe v Wade* 410 US 113 (1973).

¹³⁹ Calabresi *et al* 2012 *Northwestern Univ LR* 545.

¹⁴⁰ Claus 2005 *Oxford JLS* 423. See Calabresi and Larsen 1994 *Cornell LR* 1131-1132, noting that the United States' first three Chief Justices each also served in other executive capacities. Jay and Ellsworth were ambassadors to Britain and France respectively in an era when that office truly was extraordinary and plenipotentiary, extending to single-handed negotiation of treaties. And Marshall served as Secretary of State during the Adams administration.

¹⁴¹ Calabresi *et al* 2012 *Northwestern Univ LR* 545. See also Montesquieu *The spirit of laws* BK I-XIX. See criticism of Montesquieu's doctrine in para 2.2.1.2.

¹⁴² Levi 1976 *Colum LR* 376.

¹⁴³ Mendelson 1977 *Indiana LJ* 313.

with more authority than any of the other departments - as the Constitution starts with 'We, the People'. It was assumed that not even the legislative institution would have powers which could extend beyond its constitutional powers to make laws.¹⁴⁴ Each branch was vested with specific powers, and each branch, in turn, obtained its "powers from the people, and those powers were subject to the limitation imposed by the constitutional grant of authority":¹⁴⁵

'We the People' are the authority that propagates the Constitution, a master law which in turn establishes other authorities or offices which in turn propagate other laws ... The Constitution distinguishes three great offices, powers or functions: the legislative, the executive, and the judiciary; and to them are assigned respectively three uses of practical reason: making of laws, the executing or administration of laws, and the adjudication of laws. Furthermore, the Constitution not only divides these functions but also separates them by making the institutions equal and independent.¹⁴⁶

All the different functions seem to have originally been vested with distinct comprehensive authority, for example, the judiciary's core function is adjudicating laws, and not making laws. Separation of powers with its consequential checks and balances¹⁴⁷ - as precautionary measures - were intended to safeguard government, and to protect against the misuse of power. Yet it seems that the doctrine "is purely negative, overboard, and non-selective. It blocks or hinders any use of power, however exercised, for whatever end or purpose, wise or unwise, legitimises good or bad".¹⁴⁸ This negativity may be premised on the specific standpoint as regards man and power as "it assumed that power corrupts".¹⁴⁹ Separation of powers consequently demonstrates a "sceptical opinion of people, government and authority which did not completely reconcile with buoyant Utopianism which emerged during 1776 when American Revolution has ended".¹⁵⁰ As expressed by

¹⁴⁴ Levi 1976 *Colum LR* 376.

¹⁴⁵ Levi 1976 *Colum LR* 376. Madison reasoned that "the preservation of liberty requires that the three great departments of power should be separate and distinct". See Madison *The Federalist Papers No 47* 102.

¹⁴⁶ Buchanan *So reason can rule* 10.

¹⁴⁷ According to Nourse 1996 *Texas LR* 484, checks and balances encapsulate the United States' most common ideal of separation of powers because: "When one department exceeds its powers, a rival department will use its specified constitutional authority to bring the first department back into line".

¹⁴⁸ Mendelson 1977 *Indiana LJ* 313.

¹⁴⁹ Levi 1976 *Colum LR* 374: "The doctrine was based upon the sceptical idea that only the division of power among three government institutions – executive, legislative, and judicial – could counteract the inevitable tendency of concentrating authority to overreach and threaten liberty".

¹⁵⁰ Levi 1976 *Colum LR* 374.

Wood:

There was a great discrepancy between the affirmations of the need to separate the several governmental departments and the actual political practice the state governments followed. It seems, as historians have noted, that Americans in 1776 gave only a verbal recognition to the concept of separation of powers in their Revolutionary constitutions, since they were apparently not concerned with a real division of departmental functions.¹⁵¹

It could be asked why the separation of powers is of so much importance. Why is it worth fighting for?¹⁵² Madison regarded the doctrine of vital significance:

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹⁵³

Madison envisioned a government with checks and balances with its origin in what could be termed a mixed regime in which “the King, the Lords, and the Commons all checked and balanced one another”.¹⁵⁴ The framers of the United States Constitution had envisioned to substitute the oligarch and the mixed regime with a democratic government, but they had since changed mainly because of the unelected courts’ supremacy over the other branches of government. On the historical origins of the separation of powers, and the difficulties encountered over the past 200 years in the application of this doctrine, Calabresi *et al* conclude:

Just as the Founding Fathers revolted against hereditary Kings and Lords, so too must present-day Americans revolt against rule by congressional committees, by independent agencies, and by judges. Americans did not fight and die in the Revolutionary War to be governed by an oligarchy. We need to revive the functional separation of powers.¹⁵⁵

The current state of separation of powers that vests judges and congressional committees with unrestrained powers in performing their functions; powers which

¹⁵¹ Wood *The creation of the American Republic, 1776-1787* 153-154.

¹⁵² Calabresi *et al* 2012 *Northwestern Univ LR* 548.

¹⁵³ Madison *The Federalist Papers No 51* 120.

¹⁵⁴ Calabresi *et al* 2012 *Northwestern Univ LR* 548.

¹⁵⁵ Calabresi *et al* 2012 *Northwestern Univ LR* 549.

amount to rule over the people, attests to the flaws within this tripartite ideal. These criticisms levelled against the dysfunctional state of separation of powers in the United States can without any doubt be directed to its application, and the enormous powers given to judges under the South African Constitution, as it will be shown in the paragraph 2.2.5 below. Before the discussion on the separation of powers as found in South Africa, the jurisdiction of Canada will be focussed on.

2.2.4 The historical origins and structure of the separation of powers in Canada

In 1867, the British North American Act - which constituted the basis of the current Canadian Constitution - was passed, establishing the Dominion of Canada as a self-governing part of the British Empire.¹⁵⁶ The Act joined the provinces of Upper and Lower Canada, Nova Scotia, and New Brunswick together into a single federal union. Other provinces would later join the Dominion.¹⁵⁷ The federal legislature was mandated to legislate on all matters not explicitly assigned to the provincial legislatures. The British North America Act was an Act passed by the British Parliament, and could not be amended by the Canadian government - amendments had to be requested from Westminster.¹⁵⁸

On 11 December 1931, after decades of negotiations between Britain and the Dominion, the British Parliament passed the Statute of Westminster, which transformed British rule over the Dominions, and put the Dominion of Canada on equal footing with the British parliament. This Statute put into effect the Balfour declaration of 1926, which affirmed that each dominion was both equal to the United Kingdom, and independent of it.¹⁵⁹ This Statute marked the beginning of full legislative independence for the Dominion of Canada.¹⁶⁰

It took more than 50 years after gaining legislative independence for Canada to finally codify its current Constitution in 1982. The parliament of Canada and the provincial legislatures are able to amend the Constitution. The Constitution of Canada, which is also known as the Canadian Act 1982, codified and affirmed many

¹⁵⁶ Constitutional history of Canada <https://www.constitutional-law.net> (Date of use: 11 May 2020).

¹⁵⁷ Constitutional history of Canada <https://www.constitutional-law.net> (Date of use: 11 May 2020).

¹⁵⁸ Constitutional history of Canada <https://www.constitutional-law.net> (Date of use: 11 May 2020).

¹⁵⁹ Constitutional history of Canada <https://www.constitutional-law.net> (Date of use: 11 May 2020).

¹⁶⁰ Constitutional history of Canada <https://www.constitutional-law.net> (Date of use: 11 May 2020).

common-law rights in the Charter of Rights and Freedoms. This Charter had a pronounced effect in developing the separation of powers principle in Canada, which will be elaborated on below.

Canada is a parliamentary system. According to the Constitution, the Canadian government is responsible to the House of Commons. The executive power is formally vested in the Queen, and is carried out by the Governor-General who is appointed by the Queen on the advice of the Prime Minister.¹⁶¹ The legislative branch (parliament) formally consists of the Queen, the Senate, and the House of Commons. The highest court in Canada is the Supreme Court, which consists of nine justices. The Court was not created by the Canadian Constitution, but established by a separate Act.¹⁶²

The Constitution of Canada was designed on the British tradition of unwritten principles and conventions governing the exercise of legal authority to produce a constitutional monarchy, a parliamentary democracy, and well as the American model of constitutional supremacy embodied in written legislative provisions.¹⁶³ There is “no general separation of powers in the Canadian Constitution Act, 1867”.¹⁶⁴ Yet, in recent years, the Canadian Supreme Court has elevated and developed the separation of powers to the level of a structural constitutional principle.¹⁶⁵ The Court has, however, yet to formulate a comprehensive and sound account of the meaning, scope, and standardising effect of this principle.¹⁶⁶

¹⁶¹ Constitutional history of Canada <https://www.constitutional-law.net> (Date of use: 11 May 2020).

¹⁶² Constitutional history of Canada <https://www.constitutional-law.net> (Date of use: 11 May 2020).

¹⁶³ Newman *The rule of law, separation of powers* 1031.

¹⁶⁴ The Constitution Act, 1867 also known as the British North America Act, 1867. Hogg *Constitutional Law of Canada* chapter 7.3 states: “The Act does not separate the legislative, executive and judicial functions and insists that each branch of government exercise only ‘its own’ function. As between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government, and it is clearly established that the Act does not call for any such separation. As between the judicial and the two political branches, there is likewise no general separation of powers. Either the Parliament or the Legislatures may by appropriate legislation confer non-judicial functions on the courts and (with one important exception [the core jurisdiction of superior courts under section 96]), may confer judicial functions on bodies that are not courts”. See also s 96 of the Constitution Act, 1867: “The Governor-General shall appoint the judges of the superior, and county courts in each Province, except those of the courts of probate in Nova Scotia and New Brunswick”; Mojapelo *Advocate* 2013 45: “there is no separation of powers at either the provincial or the federal level in Canada”.

¹⁶⁵ Newman *The rule of law, the separation of powers* 1039.

¹⁶⁶ Newman *The rule of law, the separation of powers* 1039.

The path of the Supreme Court's jurisprudence has changed direction significantly on the separation of powers issue.¹⁶⁷ In the *Provincial Court Judges Reference*¹⁶⁸ case, Lamer CJ, writing for the majority of the Court, stated that the separation of powers - as a fundamental principle of the Canadian Constitution - "requires, at the very least, that some functions must be exclusively reserved to particular bodies".¹⁶⁹ A year later, in approving its advisory jurisdiction in the case of *Quebec Secession Reference*,¹⁷⁰ the Court maintained that

...the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to section 96 courts.¹⁷¹

In 2001, in *Ocean Port Hotel*, McLachlin CJ declared that the "traditional division between the executive, the legislature and the judiciary ... [and the] ... preservation of this tripartite constitutional structure"¹⁷² did not compel the extension of the constitutional guarantee of judicial independence to administrative tribunals.¹⁷³ Yet, in 2002, in *Babcock v Canada (Attorney General)*,¹⁷⁴ McLachlin CJ found that the principles of rule of law, judicial independence, and the separation of powers had to be balanced with principle of parliamentary sovereignty:

It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.¹⁷⁵

Binnie J, writing for the Court in *Canada (House of Commons) v Vaid*,¹⁷⁶ held that the relationship between the legislature, the executive and the courts is a significant issue in the Canadian constitutional equilibrium.¹⁷⁷ He went on to declare that

¹⁶⁷ Newman *The rule of law, the separation of powers* 1039.

¹⁶⁸ *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 SCR 3. Hereinafter *Provincial Court Judges Reference*.

¹⁶⁹ *Provincial Court Judges Reference* paras 138 and 139.

¹⁷⁰ *Reference re Secession of Quebec* [1998] 2 SCR 217. Hereinafter *Quebec Secession Reference*.

¹⁷¹ *Quebec Secession Reference* para 15.

¹⁷² *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781. Hereinafter *Ocean Port Hotel*.

¹⁷³ *Ocean Port Hotel* para 32.

¹⁷⁴ *Babcock v Canada (Attorney General)* [2002] 3 SCR 3 para 57. Hereinafter *Babcock*.

¹⁷⁵ *Babcock* para 57.

¹⁷⁶ *Canada (House of Commons) v Vaid* [2005] 1 SCR 667. Hereinafter *Vaid*.

¹⁷⁷ *Vaid* para 4.

parliamentary privilege “is one of the ways that the fundamental constitutional separation of powers is respected”.¹⁷⁸

The operation of the principle of responsible government in a parliamentary system constitutes the crux of the view that the separation of powers does not extend to the legislative and executive branches of government in Canada. Any comparison with the United States Constitution is premised not only on the provisions of that Constitution, but also on certain assumptions as to how or how completely the principle of separation of powers operates amongst the three branches of the United States government.¹⁷⁹ The principle of responsible government means that

...the executive can only remain in power and fulfil its agenda while it has the support from a majority of the elected members of Parliament. If that support is lost, the executive falls and a new election is called. The continued operation of the government depends on legislative support of the executive agenda.¹⁸⁰

The question could be asked as to why the separation of powers remains an emerging constitutional principle in the recent jurisprudence of the Canadian Supreme Court. The preamble of the 1867 Canadian Constitution declares that Canada is to have a Constitution which would be similar in principle to that of the United Kingdom, which encompasses the principle of responsible government within the framework of constitutional monarchy and parliamentary democracy.¹⁸¹ During the nineteenth century, Bagehot considered the description of the English Constitution - as dividing the legislative, the executive, and the judicial powers, and vesting each branch “to a separate person or set of persons that no one of these can interfere with the work of the other”¹⁸² – to be erroneous. He went on to declare that the British Constitution could rather be described as “the close union, the nearly complete fusion, of the executive and legislative powers”.¹⁸³ He further added that a cabinet is a combining committee, a hyphen which joins, a buckle which fastens the

¹⁷⁸ Vaid para 21.

¹⁷⁹ Newman *The rule of law, the separation of powers* 1040.

¹⁸⁰ Alberta Civil Liberties Centre *Striking the right balance* 7.

¹⁸¹ Newman *The rule of law, the separation of powers* 1040.

¹⁸² Bagehot *The English Constitution* 70. See Claus 2005 *Oxford Journal of Legal Studies* 419, footnote 67 (Chapter 2), who argued that there is no truth in Montesquieu’s claim that “this constitution could best be achieved, and had been achieved in Britain, by assigning three fundamentally different governmental activities to different actors”. Claus identified some flaws which he believes were the basis for these ‘misunderstanding’.

¹⁸³ Bagehot *The English Constitution* 82.

legislative part of the state to the executive part of the state.¹⁸⁴ In the case of *Canada Assistance Plan Reference*,¹⁸⁵ Sopinka J, writing for an unanimous Supreme Court, expressly quoted Bagehot's 'hyphen-and-buckle' metaphor to underline "the essential role of the executive in the legislative process of which it is integral part".¹⁸⁶ Yet in the *Canada Assistance Plan Reference*¹⁸⁷ case, Dickson CJ stated:

It is of no avail to point to the fusion of powers which characterizes the Westminster system of government. That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes ... is not ... constitutionally cognizable by the judiciary.¹⁸⁸

In another case, that of *Fraser*,¹⁸⁹ Dickson CJ confirmed that the separation of powers between the three branches of Canadian government - the legislature, the executive and the judiciary - does exist.¹⁹⁰ This assertion was acknowledged by Lamer CJ in *Cooper*,¹⁹¹ where he characterized the separation of powers as "one of the defining features of the Canadian Constitution",¹⁹² and also in the case of *Provincial Court Judges Reference*, where the Court described the separation of powers as a fundamental principle that commands, amongst other things, "that the different branches of government only interact, as much as possible, in particular ways".¹⁹³

The 1867 Constitution distinguishes between the 'Executive Power', the 'Legislative Power,' and the 'Judicature'.¹⁹⁴ Yet, whatever the Constitution gives in relation to the

¹⁸⁴ Bagehot *The English Constitution* 82.

¹⁸⁵ *Reference Re Canada Assistance Plan (BC)* [1992] 2 SCR 525 559. Hereinafter *Canada Assistance Plan Reference*.

¹⁸⁶ Bagehot *The English Constitution* 82.

¹⁸⁷ *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)* [1989] 2 SCR 49 103. Hereinafter *Canada (Auditor General)*.

¹⁸⁸ *Canada (Auditor General)* 103.

¹⁸⁹ *Fraser v Public Service Staff Relations Board* [1985] 2 SCR 455 470: "In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy". Hereinafter *Fraser*.

¹⁹⁰ *Fraser* 470.

¹⁹¹ *Cooper v Canada (Human Rights Commission)* [1996] 3 SCR 854. Hereinafter *Cooper*.

¹⁹² *Cooper* 854.

¹⁹³ *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* 139. Hereinafter *Provincial Court Judges Reference*.

¹⁹⁴ Section 9 Executive Power: "The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen". Section 17 Legislative Power: "There shall be one Parliament of Canada, consisting of the Queen, an Upper House, styled the Senate, and the House of Commons". See also section 96 Judicature: "The Governor-General shall appoint the judges of the superior, district, and county courts in each Province, except those of the courts of probate in Nova Scotia and New Brunswick".

separation of powers, it also takes away since the executive power is, by virtue of section 9, entrusted to the Queen. In terms of sections 17 and 91, the Queen is also a significant actor in the exercise of legislative authority.¹⁹⁵ Under these provisions Her Majesty is one of the three bodies forming the Parliament of Canada, and it is the Queen under section 91 who makes laws for the peace, order, and good government of Canada, albeit by and with the advice and consent of the Senate and the House of Commons.¹⁹⁶

Since the advent of a constitutionally-entrenched Charter of Rights, Canadian judges have become more knowledgeable in comparative constitutional law and the separation of powers.¹⁹⁷ Further guidance was also provided by the codification of the 1982 Canadian Constitution, which recognised many common-law rights in the Charter of Rights and Freedoms.¹⁹⁸ McLachlin J (as she then was) stated in 1993 in the *New Brunswick Broadcasting* case that the Canadian government's branches consist of the Crown, the legislature, the executive and the courts:

Our democratic government consists of several branches: The Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.¹⁹⁹

According to her, the Crown and the executive are different branches of government as a matter of constitutional law. The Crown is, in fact, the executive branch. Still, the idea of the separation of powers is clear in that each branch of government is urged to perform its proper function, and not to exceed its boundaries, thereby displaying appropriate deference for the other branches' rightful domain of activity.²⁰⁰ This excerpt demonstrates the necessity of maintaining a delicate balance in a constitutional democracy. That is the fundamental attraction of the principle of the

¹⁹⁵ Newman *The rule of law, the separation of powers* 1042. Section 17 Legislative Power: "There shall be one Parliament for Canada, consisting of the Queen, an Upper House, styled the Senate, and the House of Commons". Section 91 Legislative Authority of Parliament of Canada: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada".

¹⁹⁶ Newman *The rule of law, the separation of powers* 1042.

¹⁹⁷ Newman *The rule of law, the separation of powers* 1042.

¹⁹⁸ Constitutional history of Canada <https://www.constitutional-law.net>. (Date of use: 11 May 2020).

¹⁹⁹ *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319.

²⁰⁰ Newman *The rule of law, the separation of powers* 1043.

separation of powers, and the rationale why it would be useful to develop a more coherent theory of the separation of powers principle as it applies in the context and particularities of the Canadian constitutional system, which is a crossbreed of the United Kingdom's and the United States' models of constitutionalism.²⁰¹

The development of the doctrine of separation powers in Canada after the introduction of the Charter of Rights is also evident in the remarks of Lamer CJ in 1997 where he stated that:

What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. When I say those relationships are depoliticized, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.²⁰²

The de-politicisation of these relationships is very fundamental to the separation of powers. Hence, the provisions of the Canadian Constitution, such as section 11(d) of the Charter, must be interpreted in such a manner as to protect this principle.²⁰³

²⁰¹ Newman *The rule of law, the separation of powers* 1043.

²⁰² *Re Provincial Court Judges* para 139: "The separation of powers requires, at the very least, that some functions must be exclusively reserved to particular bodies: see *Cooper, supra*, at para 13. However, there is also another aspect of the separation of powers – the notion that the principle requires that the different branches of government only interact, as much as possible, in particular ways. In other words, the relationships between the different branches of government should have a particular character. For example, there is a hierarchical relationship between the executive and the legislature, whereby the executive must execute and implement the policies which have been enacted by the legislature in statutory form: see *Cooper, supra*, at paras 23 and 24. In a system of responsible government, once legislatures have made political decisions and embodied those decisions in law, it is the constitutional duty of the executive to implement those choices".

²⁰³ Venter *Constitutional Comparison* 221. See also s 11 of the Charter of Rights and Freedoms: "Any person charged with an offence has the right

- (a) to be informed without unreasonable delay of the specific offence;
- (b) to be tried within a reasonable time;
- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;

The pre-Charter courts were characterised by deference on the part of the judiciary towards elected politicians. On the contrary, the post-Charter courts drastically increased the frequency, scope, and strictness of judicial intervention in the sphere of legislative and executive action.²⁰⁴ The executive and the legislative branches adopted numerous policies that have the effect of hindering certain powers entrusted to the judiciary. The political branches have questioned the judiciary's discretionary power through legislative enactments. Some attempts have been made to confine controversial issues to the executive branch through the expanded application of executive bodies and administrative-law functions. There have been more covert and long-term campaigns to redesign Canada's decision-making bodies by manipulating the process in which decision-makers are appointed.²⁰⁵ These strategies endanger the separation of powers, since they seek to centralise power, and remove what could be limited checks and balances within the Canadian system.²⁰⁶

While separation of powers was not provided for in the British North America Act, 1867; the 1982 Canadian Constitution seems not to have remedied this impasse. Furthermore, the recent development of this principle by the Canadian Supreme Court are somewhat marred by confusion, as the political branches and the Supreme Court have not formulated and articulated a coherent and comprehensive separation of powers' principle. The Court's jurisprudence has also veered significantly on this issue over the past decades. Such confusion is also replicated in the origins of the South African separation of powers, which will be discussed next.

-
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
 - (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
 - (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
 - (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment".

²⁰⁴ Alberta Civil Liberties Centre *Striking the right balance* 13.

²⁰⁵ Alberta Civil Liberties Centre *Striking the right balance* 15-16.

²⁰⁶ Alberta Civil Liberties Centre *Striking the right balance* 16.

2.2.5 *The historical origins and structure of the separation of powers in South Africa*

Montesquieu's doctrine of separation of powers did not form part of the pre-constitutional era in South Africa, despite its British colonial influence.²⁰⁷ Hence, the first stipulation where this doctrine is guaranteed in South Africa is found in Constitutional Principle VI of the South African Interim Constitution:²⁰⁸

The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, 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. In this sense, it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter's words, 'the areas are partly interacting, not wholly disjointed.'²⁰⁹

O'Regan argues that the Constitutional Principle VI not only grants separation of powers between the three government branches, but it also provides "appropriate checks and balances".²¹⁰ The belief that checks and balances can provide sufficient safeguards in the working of the separation of powers doctrine and guarantee an effective government has previously been derided by the United States President Woodrow Wilson:

The trouble with the theory is that government is not a machine, but a living thing ... No living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. Government is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day of specialisation but with a common task and purpose. Their cooperation is

²⁰⁷ Mojapelo 2013 *Advocate* 38. See para 2.2.1.2. Montesquieu's separation of powers doctrine as observed in Britain seems to be premised on critical structural misconceptions as its foundations.

²⁰⁸ Constitution of the Republic of South Africa, Act 200 of 1993. See also Dube *Judicial oversight and the Constitution* 34 where it is argued that "the doctrine of separation of powers is one of the pillars on which constitutional democracy is anchored. It is characterised by the equality of the legislative, executive and judicial organs of state". *Glenister v President of RSA and Others* CCT 41/08 [2008] ZACC 19 (22 October 2008) para 29: it is 'axiomatic' that it is part of the constitutional design.

²⁰⁹ *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) paras 108-109.

²¹⁰ O'Regan 2005 *PELJ* 121.

indispensable, their warfare fatal.²¹¹

It is impossible for a government operating under the separation of powers doctrine with checks and balances to be separated in the carrying out of its functions, and not to cooperate with one another. O'Regan avers that the objective of the separation of powers as envisaged by Montesquieu and Madison was that it would restrain authoritarianism, and safeguard freedom and independence. However, it should be asked whether, in promoting freedom and preventing oppression, "the separation of powers must necessarily cause inefficiency?"²¹² Although the doctrine restrains governments by setting limits to their power, and as such, making it harder for them to act, the system is also positive:

Separation of powers also helps to energise government and to make it more effective, by creating a healthy division of labour ... A system in which the executive does not bear the burden of adjudication may well strengthen the executive by removing from it a task that frequently produces public disapproval. If the president does not adjudicate, he is able to pursue his task unconnected by judicial burdens. Indeed, the entire framework enables rather than constrains democracy, not only by creating an energetic executive but more fundamentally by allowing the sovereign people to pursue a strategy against their government of divide and conquer.²¹³

The Constitution further based its notion of separation of powers on the British parliamentary system (Westminster system), rather than on the presidential scheme put to use in the United States and France.²¹⁴ According to Langa CJ, the South African separation of powers stems from the British system of government because:

The Union of South Africa, founded in 1910, was modelled on the Westminster system of government. There were two Houses of Parliament – the House of Assembly (Lower House) and the Senate (Upper House). The executive was responsible to and formed part of the legislature, while the judiciary occupied an independent position ... Until 1983, the structure of South African government closely resembled that of the United Kingdom, from which it had inherited most of its governmental institutions. Like the United Kingdom, the executive and the legislature were closely linked. The 1993 Constitution, however, brought some changes, one of which was in respect of the position of the President who, as head of state, ceased to be a member of parliament. The interdependence between Executive and the Legislature however continued.²¹⁵

²¹¹ Wilson *Constitutional government in the United States* 32.

²¹² O'Regan 2005 *PELJ* 124.

²¹³ Sunstein *Designing democracy* 98-99.

²¹⁴ O'Regan 2005 *PELJ* 125.

²¹⁵ Langa *A delicate balance* 27.

While there is the widespread view that the South African Constitution provides for the idea of separation of powers, there seems to be uncertainty on whether this idea is adequately formulated and expressed in in the Constitution.²¹⁶ The South African model of separation of powers constitutes government branches which “are not hermetically sealed from one another”.²¹⁷ It is also submitted that “the doctrine is not static but continues to evolve”.²¹⁸ Under the Constitution, the President (the head of the executive), who, according to Montesquieu’s model of separation of powers, forms part of the executive branch, is in actual fact chosen by the National Assembly (one of the two houses of Parliament), which in turn is a legislative branch, in the midst of its members at its first session after an election.²¹⁹ The Chief Justice officiates this election.²²⁰ On the occasion of the President’s election, he or she discontinues being a member of the National Assembly.²²¹ However, it remains the National Assembly’s prerogative to remove the President from office.²²²

The procedure of making law demonstrates an interweaved connection between the executive and the legislature.²²³ Members of the executive (Cabinet) draw up legislation or begin legislative processes,²²⁴ which is at that time presented either into the National Assembly or the National Council of Provinces for consideration and approval. After a legislative bill has been approved by Parliament, it can be signed by the President.²²⁵ The tasks vested on the legislature demonstrate the distinct characteristics of the South African idea of separation of powers.²²⁶ The Constitution draws attention to the fact that the National Assembly’s authority is not only to legislate “but to ensure government by people under the Constitution”,²²⁷ as provided in section 42(3):

The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by

²¹⁶ Naidoo *Does the lack of sufficient formulation and articulation of principles* 8.

²¹⁷ O’Regan 2005 *PELJ* 125. See also Pypers *South Africa’s parliamentary system* 3.

²¹⁸ Mathebula and Munzhedzi 2017 *Bangladesh e-J of Sociology* 8-9.

²¹⁹ Section 86(1) of the Constitution.

²²⁰ Section 86(2) of the Constitution.

²²¹ Section 87 of the Constitution.

²²² Section 89 of the Constitution.

²²³ O’Regan 2005 *PELJ* 126.

²²⁴ Section 85(2)(d) of the Constitution.

²²⁵ Section 79 of the Constitution.

²²⁶ O’Regan 2005 *PELJ* 127.

²²⁷ O’Regan 2005 *PELJ* 127.

passing legislation and by scrutinising and overseeing executive action.

Section 52(2) further holds:

The National Assembly must provide for mechanisms to –

- (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
- (b) to maintain oversight of
 - (i) the exercise of national executive authority, including the implementation of legislation; and
 - (ii) any organ of state.

It is clear from these provisions the legislature's function in administering executive undertakings and holding the executive answerable for the exercise of its duties is a significant feature of the separation of powers under the Constitution.²²⁸ On the other hand, the judiciary's authority under the Constitution is clearly vested in the courts which are:

...independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.²²⁹

In addition, no person or organ of state may encroach on the functions of the courts and:

...organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.²³⁰

When considering the exact tasks of the judiciary under the Constitution, its authority and duties need to be examined. Firstly, the judiciary must defend the Constitution. Secondly, citizens are empowered to look to the courts to safeguard their constitutional rights.²³¹ Section 172 of the Constitution enjoins a court determining constitutional questions to pronounce nugatory any law or conduct incompatible with the Constitution:²³²

- (1) When deciding a constitutional matter within its power, a court –
 - (a) must declare that 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 –

²²⁸ O'Regan 2005 *PELJ* 128.

²²⁹ Section 165(2) of the Constitution.

²³⁰ Section 165(4) of the Constitution.

²³¹ O'Regan 2005 *PELJ* 129.

²³² Section 172(1) of the Constitution.

- (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.
- (2) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
- (a) A court which makes an order of unconstitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of the Act or conduct.
 - (b) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

The court seems to be the only government branch vested with the powers to review the conduct of the other arms of government, and at the same time conclusively establish the constitutional validity of legislation approved by the legislature and conduct of the executive or President. While this is one of the most influential functions given to our courts, the use and application of this power has attracted numerous criticisms in South Africa and in other jurisdictions.

The Constitution, however, does not provide, as is the case with common law, that the separation of powers should be developed by the courts.²³³ Montesquieu's idea of separation of powers, as was discussed in paragraph 2.2.1.1 above, does not provide for such an understanding, nor does it provide any historical evidence that the idea of separation of powers was originally intended to be developed, and its scope be redefined by the courts. The idea that the judiciary is entrusted with the authority to develop a uniquely South African design of separation of powers also forms part of the Constitutional Court's jurisprudence, as is evident in its decision in *De Lange v Smuts*.²³⁴ Ackermann J maintains:

I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on

²³³ Section 173 of the Constitution.

²³⁴ *De Lange v Smuts No and Others* CCT 26/97 (28 May 1998) ZACC paras 60-61 (hereinafter *De Lange v Smuts*).

the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.²³⁵

The judge also acknowledges that the separation of powers doctrine is a difficult “matter which will be developed more fully as cases involving separation of powers issues are decided”.²³⁶ However, the court’s decision can be criticised for the lack of sufficient details regarding the nature and scope of such development of this doctrine by the judiciary, rather than by the legislature:

One of the unfortunate consequences of the decision to slowly and incrementally develop a distinctively South African doctrine of separation of powers ‘over time’ is therefore that its content is not clear to anyone, legal elites included, while, over decades, this process unfolds.²³⁷

Twenty years after this Constitutional Court’s decision, it is questionable whether the vision of developing a South African model of separation of powers was ever realised.²³⁸ There has been inadequate jurisprudential clarity by our courts which has resulted in a state of confusion surrounding this doctrine. Separation of powers still remains a mystery in South African law, which is especially evident in Mogoeng CJ’s dissent in *Economic Freedom Fighters v Speaker of the National Assembly*.²³⁹ In this case, the role of state institutions within the context of the separation of powers doctrine was at issue. This case concerned the lack of rules or mechanisms authorising the legislature to hold the President (a member of the executive) accountable, which was held to be a violation of section 89 of the Constitution.²⁴⁰ It can be reasoned that the Constitutional Court failed not only to articulate a comprehensive separation of powers doctrine, but also to formulate such a doctrine, which has resulted in “the mysteriously appearing and disappearing doctrine of separation of powers”.²⁴¹ This lack of clarification has led to public confusion about

²³⁵ *De Lange v Smuts* para 60.

²³⁶ *De Lange v Smuts* para 61.

²³⁷ Hodgson 2018 SAJHR 58.

²³⁸ Hodgson 2018 SAJHR 57.

²³⁹ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* (CCT76/17) [2017] ZACC 47 223-224 (hereinafter *Economic Freedom Fighters*). Mogoeng CJ dissent characterising the majority of the Court’s decision as “a textbook case of judicial overreach ... at odds with the dictates of separation of powers”. In contrast, Froneman J, writing separately to respond to the Chief Justice’s charges, considered the majority’s decision to be doing ‘nothing more than interpreting the Constitution’.

²⁴⁰ *Economic Freedom Fighters* 283-286. Section 89: “the National Assembly ... may remove a President from office”.

²⁴¹ Hodgson 2018 SAJHR 58.

the doctrine and the role of key state institutions, since “what is not understood and described by judges and lawyers cannot be conveyed to members of the public in simple terms”.²⁴²

The Constitution grants the courts functions and powers which constitutes judicial review. This predicament has provided many challenges to jurisdictions underwriting the separation of powers doctrine. What follows is a discussion of the challenges experienced with the separation of powers and the functions of the judiciary.

2.3 Challenges in the separation of powers doctrine: different perspectives on judicial review

The discussions in paragraph 2.2 above have provided background to the origins and framework of the separation of powers doctrine in Britain, the United States, Canada and South Africa. It was also established that the United States followed Montesquieu’s prescriptions as regards the separation of powers, but these views were somewhat flawed because of misinterpretations Montesquieu made as regards the British separation of powers. The main flaw concerned Montesquieu’s unawareness of the British system of precedents that allowed the judiciary to indirectly make laws. In the United States, this judiciary function is mainly found with judicial review. Judicial review is defined as the authority of a court to determine unconstitutional, and consequently unenforceable, any law, any authoritative undertaking based on the law, or any other action by a government official judged to be inconsistent with the Constitution.²⁴³ This constitutional ideology is believed to have fundamentally granted the Supreme Court a monopoly in United States’ constitutional law. This monopoly stems mainly from two types of reasoning:

The political argument holds that judges must control the Constitution to protect individuals and groups from the tyranny of the majority in the legislature. The legal-historical argument asserts that judicial supremacy in constitutional matters is grounded in American constitutional history and justified in Supreme

²⁴² Amato <https://www.timeslive.co.za/sunday-times/news/2016-11-13-no-resting-the-case-for-adv-tembeka-ngcukaitobi/> (Date of use: 1 November 2019). As pointed out by Adv Ngcukaitobi: “if you can’t explain a legal idea to an eight-year old, then you don’t understand it yourself”.

²⁴³ Marshall CJ in *Marbury v Madison* 5 US (Cranch) 137 2 L Ed 60 (1803) 177.

Court doctrine, especially in the landmark case of *Marbury v Madison* (1803).²⁴⁴

Determining the extent and power of judicial review is an issue which has caused some confusion in this jurisdiction as well as others, as it is not known whether judicial power is measured only by its formal powers; for example:

...a court with the authority to invalidate a constitutional amendment on substantive grounds is ipso facto more powerful than one that may only invalidate statutes, which in turn is more powerful than a court that can do either?²⁴⁵

The considerable scope of judicial supervision has allegedly spread across government's management structures:

This unprecedented use of judicial power is not a response to specific and limited necessity or emergency. The power is exercised in every state and on a wide variety of social issues. Even a relatively "conservative" Supreme Court seems transfixed; recent decisions, such as those dealing with the legislative veto and political gerrymandering, illustrate the Court's continuing insistence that almost no public issue should be excluded from judicial oversight. Heavy reliance on the judiciary – in various ideological directions – is fast becoming an ingrained part of the American system; already it is difficult for many even to imagine any alternative.²⁴⁶

Similar apprehensions were expressed in the November 1996 *First Things* symposium on the United States' democracy and the courts, where it was asserted that the United States' constitutional order was being put at risk so deeply "by judicial usurpation that conscientious citizens may begin to wonder about the extent of their political obligation".²⁴⁷ The objections to this theory seems to be an age-old viewpoint which was already asserted by Lincoln, as discussed in paragraph 1.5.5, as early as 1801 where he resolved:

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government ... At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme

²⁴⁴ Clinton <https://www.firstthings.com/article/1999/01/001-how-the-court-became-supreme> (Date of use: 18 February 2019).

²⁴⁵ Gardbaum 2018 *Duke J Comp and Int L* 1.

²⁴⁶ Clinton <https://www.firstthings.com/article/1999/01/001-how-the-court-became-supreme> (Date of use: 18 February 2019).

²⁴⁷ Clinton <https://www.firstthings.com/article/1999/01/001-how-the-court-became-supreme> (Date of use: 19 February 2019).

Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.²⁴⁸

The primary concern with this constitutional theory seems to be the usurpation of powers by the courts from the elected public representatives; which at the same time disempowers the citizens. In 1804, Jefferson described this constitutional impasse as following:

Nothing in the Constitution has given the judges a right to decide for the executive, more than to the executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them ... The Constitution meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what are not, not only for themselves in their own sphere of action, but for the Legislature and executive also, in their spheres, would make the judiciary a despotic branch.²⁴⁹

Judicial review is also criticised by Waldron on two major grounds, as firstly, “there is no reason to suppose that rights are better protected by this practice than they would be by democratic legislatures. Secondly, quite apart from the outcomes it generates, judicial review is democratically illegitimate”.²⁵⁰ Waldron argues that democratic values take a precarious stand when faced with any ideal that relegated elected representatives to function only in sufferance of unelected judges.²⁵¹ He claims that “legislatures are more legitimate, egalitarian and participatory than courts, so to embody crucial democratic rights and values to an extent that is impossible for the latter to imitate”.²⁵² These are also the views of Bickel,²⁵³ as stated in the phrase “the counter-majoritarian difficulty”.²⁵⁴ Bickel claims that such a ‘difficulty’ can be diminished by demonstrating that current legislative methods do not completely express the popular or majority preference. Nevertheless, he maintains:

...nothing in the further complexities and perplexities of the system, which modern political science has explored with admirable and ingenious industry,

²⁴⁸ Entin 1990 *Ohio State LJ* 215. See also para 1.5.5.

²⁴⁹ Ford (ed) *The writings of Thomas Jefferson* 310.

²⁵⁰ Waldron 2006 *Yale LJ* 1346.

²⁵¹ Waldron 2006 *Yale LJ* 1349.

²⁵² Waldron 2006 *Yale LJ* 1353.

²⁵³ Bickel *The least dangerous branch* 16: “Judicial review is a counter-majoritarian force in our system. ... When the Supreme Court declares unconstitutional a legislative act ... it thwarts the will of the representatives of the actual people of the here and now”.

²⁵⁴ Bickel *The least dangerous branch* 16-17.

and some of which it has tended to multiply with a fertility that passes the mere zeal of the discoverer – nothing in these complexities can alter the essential reality that judicial review is a deviant institution in the American democracy.²⁵⁵

Waldron claims that in countries where the laws do not allow judicial review on this scale, “the people themselves can decide finally”²⁵⁶ through the usual legislative methods. The people can make decisions amongst themselves about the laws they would like to have to punish certain conducts. In the event that they fail to agree on these matters, they can choose their representatives who would consult, debate and make decisions on these issues by voting in the legislature.²⁵⁷ In other words, deliberations on issues the people could not agree on would be best handled by the legislature after following the usual legislative procedures. Waldron concludes that this has taken place, for example, in Britain during the 1960s, when parliament deliberated on the amelioration of abortion law, the decriminalisation of homosexual conduct among consenting adults, and the repealing of the death sentence.²⁵⁸ In each of these issues, extensive legislative debates and public consultations were undertaken by the House of Commons.²⁵⁹ It seems evident that the calibre of those deliberations (and similar debates in other countries) makes absurdity of the standpoint that legislatures are not capable of engaging constructively and sensibly on such issues. Furthermore, the “liberal outcomes of those proceedings”²⁶⁰ throw uncertainty on the widespread idea that majorities are not capable of defending the rights of minorities. By contrast, Waldron claims, the people or their elected representatives in the United States can debate and consult on these issues if they so choose, yet they cannot be certain that their views and resolutions would triumph. In the event that someone disputes the legislative decisions, they could take the matter to the United States Supreme Court; the decision that will ultimately triumph “will be that of judges”.²⁶¹ Waldron finds this strong concept of judicial review to be in accord with Dworkin’s standpoint, an advocate of judicial review, who argued that:

...on intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries [the

²⁵⁵ Bickel *The least dangerous branch* 17-18.

²⁵⁶ Waldron 2006 *Yale LJ* 1349.

²⁵⁷ Waldron 2006 *Yale LJ* 1349.

²⁵⁸ Waldron 2006 *Yale LJ* 1349. See also Abortion Act 1967, chapter 87; Sexual Offences Act 1967 chapter 60; Murder (Abolition of Death Penalty) Act 1965 chapter 71.

²⁵⁹ Waldron 2006 *Yale LJ* 1349.

²⁶⁰ Waldron 2006 *Yale LJ* 1349-1350.

²⁶¹ Waldron 2006 *Yale LJ* 1350.

electorate merely have to] accept the deliverances of a majority of the justices, whose insight into these great issues is not spectacularly special.²⁶²

In sum, Waldron questions the justification for courts in democratic societies to be vested with “the authority to strike down legislation when they are convinced that it violates individual rights”.²⁶³ At the core of Waldron’s concerns against the legitimacy and constitutionality of judicial review is its impact on the will of the majority through usurping the people’s elected representative’s powers, and vesting it with the courts.

Examining the divergent views on the scope and meaning of judicial review, it comes as no surprise that the above criticisms seem to have attracted some discussions for and against judicial review. Gerber finds Waldron’s criticisms on judicial review to be “philosophically indefensible”.²⁶⁴ He comments:

...history and political science make plain that the Constitution establishes a republic, not a democracy. In a republic, decision-makers are elected –or, in the federal judiciary’s case, appointed by those who are elected - to govern the polity. Consequently, Professor Waldron’s “core case” against judicial review is issued against a straw man. Or, as a philosopher might put it, his “core case” is based on an “invalid premise” about the nature of the American constitutional order.²⁶⁵

Kaufman and Runnels argue that because judicial review limits the authority of the majority through institutions that are vested with the power to protect individual rights, its function is “to make democratic self-government possible”.²⁶⁶ Advocates of judicial review, such as Dworkin, for example, argue that judges’ decisions in civil cases should be established by examinations of principles that protect rights, not examinations of procedures that consider outcomes.²⁶⁷ Defending rights is warranted by “notions of autonomy and the common good”,²⁶⁸ and not by the outcome it generates. It is also argued that rights guaranteed in Constitution should be administered by the judiciary because these are ethical rights against the state,

²⁶² Waldron 2006 *Yale LJ* 1350. See also Dworkin *Freedom’s law* 74.

²⁶³ Waldron 2006 *Yale LJ* 1348.

²⁶⁴ Gerber <https://supreme.findlaw.com/legal-commentary/the-legal-professoriates-case-against-judicial-review-why-the-academy-is-wrong-and-why-it-matters.html> (Date of use: 22 February 2019).

²⁶⁵ Gerber <https://supreme.findlaw.com/legal-commentary/the-legal-professoriates-case-against-judicial-review-why-the-academy-is-wrong-and-why-it-matters.html> (Date of use: 22 February 2019).

²⁶⁶ Kaufman and Runnels 2016 *Brooklyn LR* 163.

²⁶⁷ Dworkin *Taking rights seriously* 82-90.

²⁶⁸ Cohen *Deliberative democracy* 68-70.

the justification not being that the judiciary is more probable to defend these rights.²⁶⁹ As seen, the defining standard of democratic government is not absolute loyalty to the predispositions of the majority, but to some extent the part-taking of the people in the “process of self-government”.²⁷⁰ While Kaufman and Runnels concede that Waldron has made out a robust account of the argument against judicial review, they believe that it “focuses on the most abstract elements of this argument”,²⁷¹ and argue that “his case against judicial review is actually a case against constitutional protection of rights”.²⁷² This conclusion is reached as these critics assert that “democracies should assign the power to resolve questions regarding the nature and extent of individual rights to the people’s elected representatives and not to the judiciary”.²⁷³ As such, Waldron’s argument against judicial review fails because of its extremely restricted perception of what protection of rights in democracies actually entails. Contemporary examples of genocide from Eastern Europe and Africa have shown the need for courts to play a role in, amongst other things, the protection of individual rights, an element of democracy.²⁷⁴

It is also not necessary for democracy to be equated with the majority: “democracy is not wholly synonymous with majoritarianism, and judicial review is not inherently counter-majoritarian in the first place”.²⁷⁵ In contemporary political structures, judicial review is only one of numerous veto points. Veto points are unavoidable even in the context of majoritarian democratic political structures because:

No matter how good we make the scheme of representation in a given chamber, no matter how many of our good thoughts about election, representation, and deliberation we have already taken on board, it is always possible to improve things by complementing that scheme of representation with another.²⁷⁶

Judicial review seems though to have a benefit over other veto points:

...a democratic theory that takes power and institutions seriously cannot place its hope in as simple, single institutional fix to the problem of inequitable power relations, as no such ‘bulwark’ can reliably exist.²⁷⁷

²⁶⁹ Fabre 2000 *Brit J Pol Science* 77, 79, 91.

²⁷⁰ Kaufman and Runnels 2016 *Brooklyn LR* 163.

²⁷¹ Kaufman and Runnels 2016 *Brooklyn LR* 167.

²⁷² Kaufman and Runnels 2016 *Brooklyn LR* 166.

²⁷³ Kaufman and Runnels 2016 *Brooklyn LR* 166.

²⁷⁴ Kaufman and Runnels 2016 *Brooklyn LR* 194.

²⁷⁵ Watkins and Lemieux 2015 *Perspectives on Politics* 312.

²⁷⁶ Watkins and Lemieux 2015 *Perspectives on Politics* 319.

²⁷⁷ Watkins and Lemieux 2015 *Perspectives on Politics* 322.

Disputing the justification for judicial review is Bellamy who questions the capability and legitimacy of judicial review as a reinforcement of democratic government.²⁷⁸ It is further argued that established rights must be changeable political processes by the majority to show developmental differences.²⁷⁹ The principles that warrant the protection of rights should also warrant the refusal to protect rights through judicial review.²⁸⁰ In short, giving courts the authority to “strike down legislation enacted by a representative legislature is inconsistent with the democratic idea of government by the people”.²⁸¹ For example, during 2006, the United States Supreme Court in *Rumsfeld v Forum for Academic Institutional Rights, Inc.*²⁸² held that the ruling that law schools and their faculties could not prevent the military from enrolling students from their campuses and remain entitled to receive government funding, was constitutionally sound.²⁸³ This decision by the Forum for Academic Institutional Rights is viewed by some critics as incorrect.

Critics still “insist that judicial review is bad policy”,²⁸⁴ or that judicial review, at least as applied and perceived by the contemporary judiciary system, “is without foundation”.²⁸⁵ A call is made to employ a philosophy of judicial review where courts would be restricted to particular issues raised in a case, and that broad questions such as the legalisation of abortion, for example, should be left to the people and the legislature to decide through a system of “deliberative democracy”.²⁸⁶ Tushnet

²⁷⁸ Bellamy *Political constitutionalism* 26-27.

²⁷⁹ Tully *Strange multiplicity* 6-7. See also Waldron *Law and disagreement* 209-312.

²⁸⁰ Allan 1996 *Oxford JLS* 337, 352.

²⁸¹ Kaufman and Runnels 2016 *Brooklyn LR* 164.

²⁸² 547 US 47 (2006). The 1996 Solomon Amendment is the popular name of the 10 USC s 983, a United States federal law that allows the Secretary of Defence to deny federal grants (including research grants) to institutions of higher education if they prohibit or prevent military recruitment on campus, see The Catholic University of America <http://counsel.cua.edu/fedlaw/Defense.cfm> (Date of use: 22 February 2019).

²⁸³ Gerber <https://supreme.findlaw.com/legal-commentary/the-legal-professoriates-case-against-judicial-review-why-the-academy-is-wrong-and-why-it-matters.html> (Date of use: 22 February 2019).

²⁸⁴ As per Prof Sunstein (University of Chicago) and Prof Tushnet (Harvard Law School). See Gerber <https://supreme.findlaw.com/legal-commentary/the-legal-professoriates-case-against-judicial-review-why-the-academy-is-wrong-and-why-it-matters.html> (Date of use: 22 February 2019).

²⁸⁵ As per Dean Kramer (Stanford Law School) and Dean Treanor (Fordham Law School). See Gerber <https://supreme.findlaw.com/legal-commentary/the-legal-professoriates-case-against-judicial-review-why-the-academy-is-wrong-and-why-it-matters.html> (Date of use: 22 February 2019).

²⁸⁶ The opinion of Sunstein for judicial minimalism. See Gerber <https://supreme.findlaw.com/legal-commentary/the-legal-professoriates-case-against-judicial-review-why-the-academy-is-wrong-and-why-it-matters.html> (Date of use: 22 February 2019).

appeals that the court's power to invalidate any law or conduct of the other branches of government should be comprehensively legislated by the legislature, and not driven by the courts. He proposes a constitutional amendment reigning in and overruling *Marbury*, to be replaced by "populist constitutional law ... a constitutional law that is defined outside of the courts by the people themselves, 'whether we act in the streets, in the voting booths, or in legislatures as representatives of others'".²⁸⁷ In a call to either limit or completely eliminate judicial review, Kramer argues the original perception of judicial review "was to protect the structural integrity of the judicial process and the national political process, rather than to safeguard individual rights".²⁸⁸ Gerber concludes that the independence of the judiciary plays an important role in the preservation of individual rights, and that:

Judicial review is, of course, the ultimate expression of judicial independence - no judge without secure tenure and a salary that can't be diminished would dare to invalidate the decisions of the political actors who control his or her livelihood - and it represents the federal judiciary's only significant check on the power of Congress, the president, the states ... and the people themselves.²⁸⁹

Judges cannot be influenced by the legislature, which accordingly produces efficient judicial review. This argument is, however, not convincing. Vesting judges with secure tenure and salaries might not necessarily translate into judicial reviews that will guarantee constitutional rights, as it will prove later in this discussion.

Levy believes that some form of constitutional review was deliberated on and approved in the American states during the 1770s and 1780s.²⁹⁰ It was during this period that Jefferson was opposed to a Constitution that would bind generations because he believed "no legislature could bind its successor"²⁹¹ and that "the dead have no rights."²⁹² Madison was similarly opposed to constitutional power which

²⁸⁷ Tushnet in Gerber <https://supreme.findlaw.com/legal-commentary/the-legal-professoriates-case-against-judicial-review-why-the-academy-is-wrong-and-why-it-matters.html> (Date of use: 22 February 2019).

²⁸⁸ See Gerber <https://supreme.findlaw.com/legal-commentary/the-legal-professoriates-case-against-judicial-review-why-the-academy-is-wrong-and-why-it-matters.html> (Date of use: 22 February 2019).

²⁸⁹ Gerber <https://supreme.findlaw.com/legal-commentary/the-legal-professoriates-case-against-judicial-review-why-the-academy-is-wrong-and-why-it-matters.html> (Date of use: 22 February 2019).

²⁹⁰ Levy *Federalism and constitutional entrenchment* 3.

²⁹¹ Levy *Federalism and constitutional entrenchment* 11.

²⁹² Levy *Federalism and constitutional entrenchment* 13, 38.

gives the judiciary superiority over the legislature.²⁹³ Because the judiciary was not elected by the majority, Madison believed it lacked legitimacy to decide that legislation enacted by the elected legislature were unconstitutional.

Judicial review which vests the courts not only with power to interpret the Constitution but also to read words into what could be a vaguely drafted Constitution seems to present a problem for the genuine need for judicial review.²⁹⁴ In a rights-orientated judicial review, it is not the legislature or the people deciding the terms of the legislation but rather whichever side has the votes amongst the judges. This is “inappropriate for reasonably democratic societies whose main problem is not that their legislative institutions are dysfunctional but that their members disagree about rights”.²⁹⁵

Johanningmeier maintains that the concept of judicial review “has been the dominant answer in legal scholarship for the danger of majoritarian tyranny in any democratic system”,²⁹⁶ and “the primary counterpoint to democratic majority despotism.”²⁹⁷ However, while judicial review - to a certain extent - might legitimately remain within the sphere of the courts; he insists that politics should be left to the legislature to decide because “the Founders chose representation”.²⁹⁸ In Johanningmeier’s opinion, representative democracy not only includes the legislature but also the courts which were tasked with safeguarding the people from oppression by the majority.²⁹⁹ Judicial review, as a process keeping harmful majority practices in check, can only be appropriate, and would work best if:

...broad formal standards of judicial review actually instructed courts about the degree of substantive deference to give a particular minority in a particular situation – or if we knew what that judicial protection of minorities would actually accomplish relative to the coerced feeling and backlash it generate in the hearts and minds of the majority.³⁰⁰

²⁹³ Levy *Federalism and constitutional entrenchment* 12.

²⁹⁴ See Waldron 2006 *Yale LJ* 1357.

²⁹⁵ Waldron 2006 *Yale LJ* 1346,1406.

²⁹⁶ Johanningmeier 2007 *Indiana LJ* 1125.

²⁹⁷ Johanningmeier 2007 *Indiana LJ* 1126.

²⁹⁸ Johanningmeier 2007 *Indiana LJ* 1127-1129.

²⁹⁹ Johanningmeier 2007 *Indiana LJ* 1126.

³⁰⁰ Johanningmeier 2007 *Indiana LJ* 1135.

Judicial review on certain issues does not always transform public views on those issues, for example, the court's decision in *Romer v Evans*³⁰¹ "did not end anti-gay bias in Colorado".³⁰²

It is conceded that courts are by no means better than the legislature at delineating rights, and doing this accurately, but the critical question is not which system is less likely to get it wrong, "but which kinds of errors are most important to avoid".³⁰³ In this regard, it is argued that Waldron erred as he assumed that "courts may be better than legislatures at resolving disputes about individual rights correctly".³⁰⁴ There is no evidence in support of his assertion, and also no propositions as to the postulation's implementation and checking by institutions. Fallon does not necessarily dispute Waldron's claim, but maintains that both the courts and legislatures must be involved in protecting fundamental rights. It is more moral and better if both institutions concurrently over-enforce these rights instead of under-enforcing them.³⁰⁵ Fallon further asserts that judicial review is based on:

...a number of premises that seem to me likely to be true and that Waldron has not refuted, but would be difficult and in some cases perhaps impossible to establish with knock-down, rationally irresistible arguments.³⁰⁶

There are conceptual and factual suppositions involved in judicial review, however, Waldron's criticisms rest mainly on moral considerations. The most significant but disputed supposition underpinning judicial review is that:

...courts have a perspective that makes them more likely to apprehend serious risks to some kinds of fundamental rights; that errors that result in the violations of fundamental rights are typically more morally disturbing than errors that result in the erroneous overenforcement of fundamental rights.³⁰⁷

Fallon concedes that while some of the grounds applicable in the working of judicial review might be disputed, courts might err in its protection of fundamental rights, but courts - by the nature of its core function - have more understanding that makes them more inclined to perceive grave dangers to some types of basic rights: "judges

³⁰¹ 517 US 620, 632 (1996), invalidating Colorado's Amendment 2.

³⁰² Johanningmeier 2007 *Indiana LJ* 1135.

³⁰³ Fallon 2008 *Harvard LR* 1694.

³⁰⁴ Fallon 2008 *Harvard LR* 1735.

³⁰⁵ Fallon 2008 *Harvard LR* 1735.

³⁰⁶ Fallon 2008 *Harvard LR* 1735.

³⁰⁷ Fallon 2008 *Harvard LR* 1735.

are likely to produce better decisions about rights than legislators”.³⁰⁸ The ideal system of judicial review would as such be one where:

...the total moral costs of the overenforcement of rights that judicial review would likely produce will be lower than the costs that would result from the underenforcement that would occur in the absence of judicial review.³⁰⁹

Waldron’s assumption that judicial review is unjust and unlawful is also incorrect, because:

...the fairness and political legitimacy of procedural mechanisms depend on the ends that they serve. If judicial review is reasonably designed to improve the substantive justice of a society’s political decisions by safeguarding against violations of fundamental rights, then it not ... unfair, nor is it necessarily politically illegitimate.³¹⁰

The legitimacy of political processes can emanate from many sources.³¹¹ Political legitimacy cannot only consist of judicial review which is vested in the legislature. Even if judicial review could be deficient in political legitimacy, this impasse could be resolved in some measure by means of “the democratic character of other elements of a political regime”.³¹² The influence of judicial review can consequently also compensate for any deficiency in political legitimacy in safeguarding fundamental rights.³¹³

Hutchinson disagrees with Fallon’s defence of judicial review which is, according to him, speculative and based on “both outcome-related and process-related arguments to warrant a ‘multiple veto-points’ approach to retaining some form of judicial review”.³¹⁴ The ‘multiple veto-points’ structure suggested is one where both the courts and the legislature are vested with judicial review powers”.³¹⁵ It is Fallon’s conviction that “a well-designed system of judicial review would produce a morally better pattern of outcomes than a political democracy without judicial review”.³¹⁶

³⁰⁸ Lever 2009 *Pub Law* 806.

³⁰⁹ Fallon 2008 *Harvard LR* 1735-1736.

³¹⁰ Fallon 2008 *Harvard LR* 1735.

³¹¹ Fallon 2008 *Harvard LR* 1735.

³¹² Fallon 2008 *Harvard LR* 1735.

³¹³ Fallon 2008 *Harvard LR* 1735.

³¹⁴ Hutchinson 2008 *Harvard LR Forum* 57.

³¹⁵ Fallon 2008 *Harvard LR* 1732.

³¹⁶ Fallon 2008 *Harvard LR* 1715.

Hutchinson questions whether there are “available and reliable epistemological grounds for reaching correct decisions on rights disputes”.³¹⁷ These assumptions are dubious, and have to be rejected as they are “not merely claims about the legal indeterminacy around rights disputes, but about the existence of moral truths and the identity of rights as objective moral entities”.³¹⁸ It is difficult to comprehend how the philosophical “moral truths”³¹⁹ about rights will be determined. There is furthermore no established benchmark to which outcomes can be measured. As there is no yardstick of accountability to measure judicial review against, Hutchinson supports Jefferson’s proposal of a system of democracy:

...whereby every decade all fundamental laws and institutional arrangements could lapse and periodic assemblies could be convened so that each generation had the ‘right to choose for itself the form of government it believes most promotive of its own happiness.’³²⁰

This is the only manner in which citizens can lay claim to the Constitution, and seize accountability for their government structure, and their society. This substantial responsibility is currently vested in the courts’ function of judicial review, and should be entrusted to society themselves: “citizens can govern best when they govern themselves”.³²¹ It is primarily on this premise that Hutchinson finds that democracy bears no such role for judges, and hence he rejects judicial review.

Judicial review does not “as is often claimed, provide a way for society to focus clearly on the real issues at stake when citizens disagree about rights”.³²² It results in a limited and unelected group of judges usurping considerable powers from the elected legislature to determine citizens’ rights. This is against the democratic values of equality and representation. The fact that judges are unelected, is according to Lever not a determinant of judges’ capability to safeguard constitutional rights or their legitimacy to decide on these matters, or that it might weaken judicial review. Lever also questions Waldron’s assumption that because judges are not democratically elected, they are not democratic, and insists that:

³¹⁷ Hutchinson 2008 *Harvard LR Forum* 57.

³¹⁸ Hutchinson 2008 *Harvard LR Forum* 58, 59.

³¹⁹ Hutchinson 2008 *Harvard LR Forum* 58.

³²⁰ Hutchinson 2008 *Harvard LR Forum* 63-64; Ford (ed) *The writings of Thomas Jefferson* 13.

³²¹ Hutchinson 2008 *Harvard LR Forum* 64.

³²² Lever 2009 *Pub Law* 805. See also Waldron 2006 *Yale LJ* 1346.

Waldron overlooks the possibility that courts and legislatures might have ways of being democratic or undemocratic that are distinctive to themselves, given their respective functions and powers, as well as ways that they share. What distinguishes democratic from undemocratic judicial bodies, one might think, is not that the former are elected and the latter are not. Rather, the differences reside in such things as the content, purpose and likely consequences of the rules that bind them, of the rights that they seek to enforce, and of the manner in which they seek to do so.³²³

It is contended that judicial review can be justifiable on the democratic results that it safeguards, and specifically with the capacity of judges to safeguard “core democratic rights”.³²⁴ In this way, the United States Supreme Court “can act democratically by overriding majoritarian decision-making when the core values of democracy are at stake”.³²⁵ It is the aim of judicial review to safeguard democratic outcomes, by especially protecting popular participation in democratic processes;³²⁶ consequently the judiciary manifests the democratic principles, and are, as such, inclined to advance them.³²⁷ Judicial review may be seen as a practical way “to promote non-majoritarian representative democracy; not surprisingly, it is becoming increasingly popular in democratic political systems throughout the world”.³²⁸ These latter views are dismissed by Lever because, in her view, it is not democratic merely on substantive justifications or with regard to the democracy-promoting consequences that it is anticipated to safeguard.

Eisgruber attributes a great deal of significance in democratic procedures to the “democratic pedigree”,³²⁹ which according to him, guarantees that judges, at the very least in the United States, are selected by elected representatives mainly on political, instead of legal justifications. Brettschneider claims that judges are suitably equipped to apply welfare rights.³³⁰ This standpoint is not accepted by all:

There is nothing wrong with the fact that unelected justices decide questions about (for example) federalism or gay rights or economic justice on the basis of

³²³ Lever 2007 *Pub Law* 809.

³²⁴ Brettschneider *Democratic rights* 138. See also Eisgruber *Constitutional self-government* 106.

³²⁵ Brettschneider *Democratic rights* 152.

³²⁶ Brettschneider *Democratic rights* 157.

³²⁷ Lever 2009 *Pub Law* 806.

³²⁸ Eisgruber *Constitutional self-government* 210.

³²⁹ Eisgruber *Constitutional self-government* 64-68.

³³⁰ Brettschneider *Democratic rights* 159. The right to welfare represents an entitlement to the benefits of state welfare, through which poverty may be eradicated.

controversial judgements of moral principles.³³¹

Nonetheless, it is deemed that judges should refer to the legislator issues that need broad deliberate opinions, and limit themselves to their core function, namely, the determination or adjudication of disputes.³³²

Contrary to Brettschneider and Eisgruber, Lever argues that judicial review can be considered democratically legitimate on substantive grounds,³³³ despite the fact that judges may not in any way be better than legislators at safeguarding rights. Bellamy's predisposition toward the legislative branch above the judiciary because it represents commitment to representative political participation in a democracy, or the avoidance of oppression by the majority, is therefore misleading.³³⁴ This is because:

There are many ways to specify the ideal of democratic government, even if one values political participation, because there is no uncontested account of the relative powers of legislatures vis à vis family, churches, trade unions and business associations, or individuals. Hence, democratic concerns for accountability, equality, participation and procedural fairness can all be consistent with judicial review, although judges can be as disappointing as legislators whatever one's ideals.³³⁵

No form of political participation can weaken the legitimacy of the judiciary through judicial review. In other words, the mere fact that judges are unelected, and are not the legislative representatives of the people do not impact on their determination of individual rights within the context of judicial review. Lever's claims seem to be premised on this latter assumption, and she concludes that "the procedural case against judicial review fails".³³⁶

Judicial review may be either strong or weak, but it is the first-mentioned form which is not democratically compatible.³³⁷ This is because judicial review gives embodiment to the power of the citizens to provide added input into the political system. Consequently, the existence or lack of judicial review is not a substitute for peoples' convictions regarding the considerable morality and flaws of legislators and

³³¹ Eisgruber *Constitutional self-government* 210.

³³² Eisgruber *Constitutional self-government* 173, 207.

³³³ See footnote 270 above.

³³⁴ Lever 2009 *Pub Law* 814. See also Bellamy *Political constitutionalism* 163-171.

³³⁵ Lever 2009 *Pub Law* 815.

³³⁶ Lever 2009 *Pub Law* 815.

³³⁷ Lever 2009 *Pub Law* 813-814.

judges.³³⁸ According to Lever, a strong judicial review system may invalidate certain statutes or legislation through the process of *stare decisis*, while weak judicial review constitutes the evaluation of legislation by the courts ex-ante:

...in order to determine whether or not it is unconstitutional, or violates individual rights, but courts may not decline to apply it (or moderate its application) simply because rights would otherwise be violated.³³⁹

After the integration of the European Convention on Human Rights (ECHR) into British law (by means of the Human Rights Act of 1998), Britain adopted a weak form of judicial review.³⁴⁰ Lever adds that even strong judicial review which empowers judges with the authority to invalidate laws is compatible with democratic government systems. Opponents of judicial review have found this “outrageously undemocratic”,³⁴¹ however:

This outrage reflects a picture of electoral and legislative politics in which existing bars to political participation are negligible, and in which there are no obstacles of time, money and political will to refighting old battles. Hence Waldron’s assumption that judicial review is unwarranted except where ‘other channels of political change are blocked’.³⁴²

But one has to remember that blocked access is not similar to unequal access, or no access at all. The last two options were, for example, seen in 1918-1928 in Britain, where men were allowed to vote at a younger age than women.³⁴³ If we are concerned about democratic government, Lever adds, we should be concerned over such unjust political authority, not simply the deficiency of authority itself. The elected legislature, with all its skills and resources, can get it wrong in the application of safeguards to individual rights.³⁴⁴ Lever concludes that:

Judicial review can be justified democratically, even if its benefits are uncertain: for the same might be said of democratic government itself, though we have

³³⁸ Lever 2009 *Pub Law* 807-809.

³³⁹ Lever 2009 *Pub Law* 807; Waldron 2006 *Yale LJ* 1355.

³⁴⁰ Lever 2009 *Pub Law* 807.

³⁴¹ Lever 2009 *Pub Law* 815.

³⁴² Lever 2009 *Pub Law* 815. See also Waldron 2006 *Yale LJ* 1395. In his critique of Tushnet, Sinnott-Armstrong suggests that many of Tushnet’s objections are not really to judicial review, but to a system that makes it so difficult to amend the Constitution and, therefore, to overturn judicial decisions by legislative means. This point applies with as much force to Waldron as it does to Tushnet. See Sinnott-Armstrong 2003 *Law and Philosophy* 387.

³⁴³ The Representation of the People Act of 1918 enfranchised all women over 30; that of 1928 finally ensured equal terms of representation setting the age limit for women to 21, as for men.

³⁴⁴ Lever 2009 *Pub Law* 815.

every reason to cherish that, and to share in the costs of maintaining it.³⁴⁵

It has also been asserted that Waldron's critique of judicial review is premised on a "methodological flaw".³⁴⁶ The primary dispute, according to Roux is:

...that the moral justifiability of judicial review is a mixed normative/empirical question that cannot be satisfactorily answered by confining the empirical component to a set of very broad assumptions and then proceeding in a purely normative vein.³⁴⁷

Waldron believed that strong judicial review subverts and weakens "political values of democratic self-government".³⁴⁸ Democratic self-government seems to be both a joint right that the people put to use collectively, and also the totality of their rights as individuals to take part in decision-making processes that concern them.³⁴⁹ Any political system that vests judges with the power of judicial review weakens democratic self-government, by relegating these rights to a body of unelected individuals.³⁵⁰ Roux argues that:

In an ideal Waldronian world, we would (1) institute a system of judicial review if democratic institutions were not in reasonably good working order, (2) monitor the changing equality of democracy, and (3) dispense with judicial review once democratic institutions reached the required performance threshold.³⁵¹

Waldron's case against judicial review fails to answer the following:

Would democratic institutions be in reasonably good working order if judicial review were not in place? What would happen to the functioning of democratic institutions if judicial review were removed?³⁵²

Roux asserts that the best alternative would be to create a structure where judges could have the capacity to adjust the intensity of their review authority to the transforming functioning of democratic institutions, without the necessity of an all-

³⁴⁵ Lever 2009 *Pub Law* 816.

³⁴⁶ Roux *The Cambridge handbook of deliberative constitutionalism* 203.

³⁴⁷ Roux *The Cambridge handbook of deliberative constitutionalism* 203. This may be applicable to new or young democracies, where representative institutions' problems may make it difficult to assess the judging of rights by either the judiciary or legislature. Roux thinks that judicial review "is not an institution whose moral justifiability can be meaningfully assessed in abstract normative terms" (219).

³⁴⁸ Waldron 2006 *Yale LJ* 1353-1359. Roux *The Cambridge handbook of deliberative constitutionalism* 219 believes whether or not judicial review "impairs the right to democratic self-government is a mixed normative/empirical question that may only be answered in the context of the particular conditions of the society at issue".

³⁴⁹ Waldron 2006 *Yale LJ* 1353.

³⁵⁰ Roux *The Cambridge handbook of deliberative constitutionalism* 207.

³⁵¹ Roux *The Cambridge handbook of deliberative constitutionalism* 215.

³⁵² Roux *The Cambridge handbook of deliberative constitutionalism* 206.

embracing determination of whether those institutions had exceeded a fixed margin level.³⁵³ The primary benefit for vesting judges with judicial review, Roux argues, is that judges, in principle, have the ability to adapt their functions in the democratic process in accordance with the scope of its functioning. In the event that democratic self-government by the people is endangered by the absorption of political authority in one political party or the development of anti-democratic parties, judges may adjust their beliefs to attend to these “pathologies”.³⁵⁴ Judges’ function is to perform some form of check and balance role on the function of the legislatures and executive, and where these latter institutions falter, judges can adjust their principles and control functions in these institutions. While Roux’s proposition seems convincing, he fails to explain the extent of his idea of judicial review, and what kind of special skills or training the legislatures lack which would qualify judges to better protect individual rights without illegitimately usurping the core functions of the legislature. Still, Roux points out that:

Judicial review is also an inherently adaptable institution, the strength of which can be adjusted at the point of application to the actual performance of democratic institutions. Systems of judicial review should be designed so as to support this feature, but the politico-legal dynamics of judicial review in any case encourage the adjustment by judges of their powers in this way.³⁵⁵

Roux’s fails to establish the legal scope of judicial review’s adaptability. The problem is also how this adapted judicial review would be comprehensively assessed and be judged as to whether it remains legitimate within the courts’ core function in a democratically elected government.

The establishment of constitutional courts in various countries has led to a “bullish mood concerning the role and success of judicial review”,³⁵⁶ and has resulted in political backlashes. In Hungary, for example, a new Constitution came into effect in 2012 which removed significant jurisdiction from the constitutional court and severely imperilled the judicial independence in that country.³⁵⁷ At the same time, President Zuma made an announcement that the scope of the authority of South

³⁵³ Roux *The Cambridge handbook of deliberative constitutionalism* 217.

³⁵⁴ Roux *The Cambridge handbook of deliberative constitutionalism* 219.

³⁵⁵ Roux *The Cambridge handbook of deliberative constitutionalism* 219.

³⁵⁶ Gardbaum 2015 *Columbia J of Transn L* 285. This can especially be seen in Hungary and South Africa.

³⁵⁷ Gardbaum 2015 *Columbia J of Transn L* 287.

African Constitutional Court should be re-examined, and how its decisions had influenced social transformations.³⁵⁸ It was the opinion of the Secretary General of the African National Congress (ANC) that some of the Court's members acted as "counter revolutionaries".³⁵⁹ A constitutional court's functions normally consists of three general categories: "formal rules and powers; legal and judicial practice; and the immediate political context in which it operates".³⁶⁰ Each grouping has to interact mutually in order to form the various constituents of the constitutional court's specific powers; which include "the nature, scope, and content of the constitution it enforces, the jurisdictional and remedial amendment, and its composition and tenure".³⁶¹

It is through section 172(1)(b)(ii) of the South African Constitution that the Constitutional Court has been vested with a strong form of judicial review powers which empowers the court to invalidate or suspend legislation or conducts of the other branches of government.³⁶² This power was utilised by the Court in *Minister of Home Affairs v Fourie*,³⁶³ a same-sex marriage case. In this decision, the Court declared the 1961 Marriage Act invalid, giving Parliament one year to pass new legislation re-addressing the breach of the right to equality, or in the absence of legislation, the Court would read words allowing same-sex marriage into the current Marriage Act. The *Fourie* judgment, according to Gardbaum, seems to have generated tension between the Court and the government, and resulted in the making of verbal attacks on the Constitutional Court by the then-deputy president Jacob Zuma, an upfront critic of same-sex marriages.³⁶⁴

³⁵⁸ Gardbaum 2015 *Columbia J of Transn L* 287-288. See also McKaiser <https://latitude.blogs.nytimes.com/2012/03/08/south-africas-governing-party-resents-the-constitutional-courts-fierce-independence/> (Date of use: 11 March 2019).

³⁵⁹ Gardbaum 2015 *Columbia J of Transn L* 298.

³⁶⁰ Gardbaum 2018 *Duke J Comp and Int L* 39.

³⁶¹ Gardbaum 2018 *Duke J Comp and Int L* 40. Various factors will play a role in influencing the conclusion on the strength, extent and substance of the court's jurisdictional powers and influence. Hence, it is difficult to simply conclude that, e.g., because the United States Supreme Court is vested with constitutional review powers which can be used to invalidate legislation and constitutional amendment, "it is the most powerful in the world". See Gardbaum 2018 *Duke J Comp and Int L* 40.

³⁶² Gardbaum 2015 *Columbia J of Transn L* 309. See also Chapter 1 footnote 231.

³⁶³ 2006 (1) SA 524 (CC).

³⁶⁴ Gardbaum 2015 *Columbia J of Transn L* 310. See The New Humanitarian <http://www.thenewhumanitarian.org/news/2006/09/27/zuma-slammed-views-homosexuality-same-sex-marriage> (Date of use 11 March 2019).

Such attacks challenging the independence of the judiciary seem to be more likely to happen when courts exercise a strong-form of judicial review.³⁶⁵ Strong judicial review presents a tension to the “fragility of judicial independence in new democracies”,³⁶⁶ while a weak judicial review may not only lessen the tension between the court and other branches of government, but may also present other advantages:

First, by giving final legal authority to the political institutions, whether exercised or not ... it holds out the promise of lowering the risk of direct political attacks, once instigated; often end in wholesale reductions in judicial independence ... Second, where courts have lesser powers of constitutional review, it is easier to resist the call for the type of indirect democratic accountability that a political appointments process is thought to bestow. In this way, weak-form of review may result in both more impartial and independent judges and judicial reasoning, and more direct democratic accountability for ultimate resolutions of constitutional issues.³⁶⁷

A weak form of judicial review is also in opposition to “politically tinged and, at the time they are made, wholly unaccountable judicial decisions”³⁶⁸ which are absolute under the principle of judicial review. By lessening the power of constitutional review, the elected legislature can be held accountable directly by the electorate while, at the same time, judges’ independence and equity remain intact. Dixon insists that weak judicial review can be advantageous because it bears an unquestionable legitimacy as it vests courts with the ability to “counter legislative blockages”.³⁶⁹ In her view, strong constitutional review seems to suffer from the lack of constitutional legitimacy while a weak form of review could resolve issues which “constitutional institutions and doctrines should still be designed to respond to these legislative blockages in different constitutional systems”.³⁷⁰

Whether one argues for or against judicial review, the problems remains that this principle in either its weak or strong forms still leaves courts with restricted capability to protect constitutional rights, because “the existence of independent courts does

³⁶⁵ Gardbaum 2015 *Columbia J of Transn L* 306.

³⁶⁶ Gardbaum 2015 *Columbia J of Transn L* 309.

³⁶⁷ Gardbaum 2015 *Columbia J of Transn L* 311-312. Gardbaum states at 313: “These two possible benefits of weak-form judicial review are negative: they seek to minimize or reduce the pressures that judicial review places on the independence of the judiciary in the context of transitional democracies”.

³⁶⁸ Gardbaum 2015 *Columbia J of Transn L* 312.

³⁶⁹ Dixon 2017 *Cardozo LR* 2194.

³⁷⁰ Dixon 2017 *Cardozo LR* 2231-2232.

not increase the probability that governments will respect constitutional rights”.³⁷¹ The other problem which may impede the courts’ abilities in this area is that “courts are ill-equipped to deal with certain types of rights violations like torture and social rights”.³⁷² Hence, it is argued that the trust conferred on judicial review as a legitimate process is misplaced because the courts are not better placed to protect constitutional rights than the legislatures.³⁷³

It is also asserted by some critics that judicial review vests courts with limited powers, and it is also a vague and enigmatic concept.³⁷⁴ According to Barron, the United States’ judiciary became so powerful over time as there was a growing sense of futility which resulted in the people losing their trust in the political branches of government. Despite that, he insists that the very inconclusiveness of the judicial procedure has also contributed to the growing power of the judiciary.³⁷⁵ The *Dred Scott* case³⁷⁶ is held as a distinct demonstration of the failings, deficiencies and limitations of judicial review as a constitutional principle. In this case, Taney CJ held that slaves were the property of their owners, and that the provisions of the Fifth Amendment which guaranteed their owners’ rights was constitutionally sound. It was also Taney’s view that slaves, whether freed or not, could not become citizens of the United States. In so finding, Taney CJ made it clear that certain provisions of the United States Constitution were not intended to protect slaves. Not only was the *Dred Scott* case an appalling court decision, it also displays the unpredictability, deficiencies, limitations and erratic nature of judicial review.³⁷⁷ It is in the workings of judicial review of the *Dred Scott* case, amongst others, which cautions against the trust placed in the courts to protect constitutional rights, and at the same time, the resultant uncertainty and limitations embedded into this particular principle.

³⁷¹ Chilton and Versteeg 2018 *Univ of Chicago LR* 299-316.

³⁷² Chilton and Versteeg 2018 *Univ of Chicago LR* 293. See also footnote 265 above.

³⁷³ Kaufman and Runnels 2016 *Brooklyn LR* 178-179.

³⁷⁴ Barron 1970 *Duke LJ* 591.

³⁷⁵ Barron 1970 *Duke LJ* 591.

³⁷⁶ *Dred Scott v Sandford*, 60 US (19 How) 393 (1857).

³⁷⁷ Barron 1970 *Duke LJ* 596-597. See also Jackson *The struggle for judicial supremacy* xi where he points out that “struggles over power that in Europe call out regiments of troops, in America call out battalions of lawyers”. Jackson wrote at 29-30 that Taney CJ “more than any other” had played “the tragic part” in causing the conflict [courts’ decision which failed to support the constitutional rights of slaves]. Jackson believed at 24 that the *Dred Scott* case was a factor in “precipitating the Civil War.”

2.4 Conclusion

This chapter examined the nature and scope of the separation of powers doctrine as well as its historical development. Furthermore, this chapter also highlighted the inherent weaknesses in the current state of the law with a view of establishing the meaning and scope of our doctrine of separation of powers. The doctrine of separation of powers has vested different kinds of functions to the three branches of government, namely, the executive, the legislature and the judiciary. The legislature's core function is to make the law, while the executive is to enforce the law. The judiciary, on the other hand, adjudicate disputes making use of the multiple pieces of legislation which are passed by the legislature. In order to safeguard the people's freedom or their constitutional rights, the judiciary should be independent from the other branches of government. Montesquieu's idea of separation of powers, while it is assumed to be forming the origin of this doctrine, has been disputed by some authors, who trace the origin of this doctrine from the Bible, or to the writings of John Locke. The doctrine is also thought to be originating from the mixed regime, an idea of government that was in place during the seventeenth and eighteenth centuries where social class was thought to hold dominance. The people could not choose the rulers under this government system nor did they have constitutional rights. It is assumed that the American Civil War was fought because of the disgruntlement with the mixed regime's social classes' system and autocratic rule by the monarchy. The people wanted to elect their rulers, and to safeguard their constitutional rights. As a result, the executive powers of the monarch were vested in the president. The legislature as the representatives of the people was vested with powers to make laws, and the judiciary was vested with powers to adjudicate disputes, making use of laws that were enacted by the legislature.

Law-making was not the function of the judiciary in Montesquieu's separation of powers doctrine. Montesquieu argued that if judges were to make laws, these judges could change the laws to suit the particular parties to a court case. This would produce arbitrary outcomes. While Montesquieu based his doctrine on British law, he failed to understand that the British common law vested the judiciary with the powers to make laws under the precedent principle. As a result, Montesquieu's understanding of British law and the correctness of his doctrine have been criticised.

While the separation of powers has vested certain functions to different government branches, accountability was achieved by means of checks and balances on the conduct of the different branches. If one branch exceeded its powers, another branch may use its particular constitutional powers to bring the encroaching branch back into line. While all the branches of government would be empowered to check, it was assumed that it was the judiciary who would be vested with the authority to determine the constitutionality of the other branches' conduct.

While in South Africa the separation of powers doctrine forms part of the constitutional government system, its scope and extent seem not to be fully provided. It is however assumed that it is not absolute, and still needs to be developed. This development seems to be taking place by means of courts' decisions. The South African Constitution not only vests the courts with power to adjudicate disputes, it also enjoins the courts to declare laws passed by the legislature unconstitutional. This constitutional authority amounts to judicial review, a concept that has been criticised for being unlawful and unconstitutional. Critics of judicial review proclaim that the legislature is more appropriate for this task, as the legislature is democratically elected, and more participatory than courts. It has been asserted that judicial review has resulted in the people being ruled by the courts instead of through their elected representatives.

Still, during the adoption of the South African Constitution, it was not stated that the intention was that it would be the courts' duty to develop a distinctly South African model of constitutional separation of powers doctrine, and not the legislature. The decision by the Constitution Court, as per Ackermann J, that this was in fact the original understanding regarding the development of this doctrine is questionable. It has also been determined that the courts have failed to fully explain and develop this principle over the last two decades.

Judicial review is not only also a vague and enigmatic concept, but it also does not specifically safeguard constitutional rights and democracies. There have been many conflicting and constitutionally unsound court decisions produced by means of judicial review, for example, the United States' *Dred Scott* case in 1857. A weak form of judicial review, however, seems to be not too intrusive into the other government branches' core functions.

The courts under British common law, as also in South Africa, have always developed laws through the judicial review precedent principle. Hence, in the succeeding chapter the nature and legitimacy of judicial law-making in the United States, Canada and South Africa will be probed.

CHAPTER THREE

THE ROLE OF COURTS IN DEVELOPING CRIMINAL OFFENCES AND PUBLIC POLICY

3.1 Introduction

The discussion in this chapter will probe the courts' role in developing laws and public policy under the constitutions of the United States, Canada and South Africa. The nature and scope of the constitutional authority vested in the courts to develop laws will be researched in order to fully comprehend the role, rationale, and legitimacy of such powers in a constitutional democracy. In addition, the limits of this constitutional provision will also be explored with a view to fully understand how far a court can go in developing laws and public policy without overstepping its constitutional boundaries within the separation-of-powers doctrine.

In order to better appreciate this latter aspect, the discussion will investigate whether the South African Constitution is comprehensive on the nature and limits of its provisions which guarantee the courts' constitutional authority to develop laws, as well as how our courts have applied this provision. This chapter will also endeavour to also analyse the weaknesses in our current legislation in the area of the courts' law-making role and constitutional interpretation. Conceivable deficiencies in the current state of South African law, namely, sections 39(2) and 173 of the Constitution, will be examined. These provisions do not only provide for the development of South African law by the courts through the interests-of-justice framework,¹ but they also place emphasis on the courts to exercise this role while promoting "the spirit, purport and objects of the Bill of Rights".²

¹ Section 173 provides: "The Constitutional Court, Supreme Court of Appeal and High Court have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice".

² Section 39(2) provides: "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".

Through these constitutional provisions, the courts seem to possess unrestrained powers to develop laws making use of the interests-of-justice test in the promotion of the spirit, purport and objects of the Bill of Rights. The weaknesses of this test will be looked into as to whether it constitutes an effective and reliable framework as legislative tools in the hands of unelected judges. This chapter aims to question how judges can discern what the interests of justice could possibly constitute when developing South African laws, and whether it is a discernment which the other political arms of government might lack? Commenting on this issue, Scalia remarked:

What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years, is in fact unconstitutional? ... The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.³

In most democracies, as in South Africa, judges are former lawyers. This criticism against judges by a United States Supreme Court judge, questioning judges' ability to decide which century-old laws are constitutional or unconstitutional, is the focus in this chapter's discussion, as the South African courts might not escape similar critique.

The chapter will further investigate how judges judge cases and interpret the provisions of the Constitution (or any law) when making law, as provided for by the Constitution. This will be done in a comparative manner, utilising especially common-law legal systems. English common law still permeates a primary part of the South African and the United States' legal systems. The United States law is premised on the assumption that courts, under a common-law tradition, "have engaged in developing the law against the tension of rhetoric and practice".⁴ It has been averred that judges and early English legal philosophers insisted "historicity as the source of authority of the common law"⁵ judicial enterprise. When making

³ *Board of County Commissioners, Wabaunsee County, Kansas v Umbehr* 518 US (1996) 668, 668-689, 711.

⁴ Lehari 2011 *Minnesota LR* 527. See also Meyler 2006 *Stanford LR* 554-558 where the history of the common law tradition is outlined.

⁵ Meyler 2006 *Stanford LR* 581.

decisions, judges take into account ancient laws originating in time immemorial.⁶ As such, judges “read existing law into the remote past”.⁷ On the law-making role of the courts and the common law, Lehari claims:

The common law thus constantly looked both backward to history and precedents, and forward to allow common law rules to develop so as to meet the changing needs of society. The extent to which this backward-forward nature of the common law was authentic or merely a pretext for granting judges more power to design the law remains contested, but it is clear that in practice, English common law courts have been constantly engaged in judicial law-making.⁸

This was the system that also characterised the expansion of common law in the United States’ colonies, and afterwards. While Jefferson and Adams intended to locate the ‘true’ common law to their classic English past, the common law had already advanced and changed amongst the many colonies (later states).⁹ It was only in the writings of Holmes and the twentieth century realists that the idea that judges under common law were making law, and not simply uncovering and determining it, that it became unqualifiedly established in United States’ jurisprudence:¹⁰

...it is only in this century, with the rise of legal realism, that we came to knowledge that judges in fact ‘make’ the common law, and that each state has its own.¹¹

This law-making role has been understood as occurring in a great number of settings, such as when judges develop new principles in the conventional common-law realm, or interpret a principle which seems unclear or not fully defined or inconclusive, or take part in the construction of “capacious”¹² constitutional language. It is maintained that when the United States Constitution was adopted, courts did not have the power to change the common law, but as from the nineteenth

⁶ Lehari 2011 *Minnesota LR* 527.

⁷ Pocock *The ancient constitution* 31.

⁸ Lehari 2011 *Minnesota LR* 527. See also Meyler 2006 *Stanford LR* 588, 592-593.

⁹ Meyler 2006 *Stanford LR* 567-571. Explaining how Jefferson dated the “true” common law to the era before the Magna Carta and how Adams dated the “true” common law to the “ancient constitution”. Lehari at 575 adds that: “The treatment of the common law – and divergences therefrom – in the early states further substantiates further the founding generation’s recognition that regional common law in America deviated in parts significantly from the English model”.

¹⁰ Lehari 2011 *Minnesota LR* 528.

¹¹ Scalia *Common law courts in a civil-law system* 9-12.

¹² Lehari 2011 *Minnesota LR* 528. See also Schauer 2006 *Univ of Chicago LR* 886-888.

century, courts “did assume the power to change the common law”.¹³

While it is acknowledged that courts do make laws, the foundation of the present-day government would be truly weakened if the extent of the legitimacy, procedure and practice of judicial law-making or judicial legislation¹⁴ remain incomprehensible and vague.¹⁵ While courts are seen by some as “the senior partner among the governmental entities in the crafting of the law”,¹⁶ it is less problematic “to leave common law, and the process of developing the common law, where it is”.¹⁷ The exercise of this power by the courts in construing legislation and interrogating constitutional provisions must be questioned. There is much controversy on whether the common dispute-based practice is the appropriate approach to formulate a set of legal rules which predictably and meaningfully prescribe future legal affairs within a particular area of law.¹⁸ Even though courts are conscientiously knowledgeable of the inherent ‘distorting effect’ that particular litigation disputes may present on the wider legal virtues that they are developing,¹⁹ it remains questionable whether courts would or should “be able to perfectly mimic the abstract process and substantive products of statutory law-making”.²⁰

Courts may lack reliable information about society and broader-based facts that might justify a change of law.²¹ Even if courts are given full confidence as policy

¹³ *Stop the Beach Renourishment Inc v Florida Department of Environmental Protection et al* 560 US 702 (2010) 2592, 2606.

¹⁴ O’Scannlain 2015 *Virginia LR Online* 33 describes the term ‘judicial legislation’ as follows: “the phenomenon of judges displacing democratic policy choices in the name of their own policy preferences couched in amorphous constitutional clauses interpreted without the aid of text, structure, and history”.

¹⁵ Lehavi 2011 *Minnesota LR* 529.

¹⁶ Lehavi 2011 *Minnesota LR* 529. See also Barak 2002 *Harvard LR* 33-36.

¹⁷ Lehavi 2011 *Minnesota LR* 529. See also Scalia *Common-law courts in a civil-law system* 12.

¹⁸ Lehavi 2011 *Minnesota LR* 529-530.

¹⁹ Lehavi 2011 *Minnesota LR* 530. See also Schauer 2006 *Univ of Chicago LR* 897-898, discussing such potential distortions, including the fact that judges may be captivated by the way that a certain case is framed.

²⁰ Schauer 2006 *Univ of Chicago LR* 915 considers facial challenges to statutes. A facial challenge (in United States law) occurs where a plaintiff alleges that a statute or legislation is always unconstitutional, and consequently void. This is in contrast to an as-applied challenge, where it is alleged that a particular statute’s application is unconstitutional. Schauer maintains that a facial challenge requires judges to imagine the total array of possibilities as to how the statute could be applied, but these judges’ perceptions are probably skewed by the facts of these cases before them. This does not mean that legislature is free of the influence of special interests. But legislature is generally considered to represent what he terms “abstract reasoning” in norm-making, detached from the details of a specific dispute. See Schauer 2006 *Univ of Chicago LR* 912-913.

²¹ Barak 2002 *Harvard LR* 32-33; Komesar *Law’s limits* 60-70.

makers so that they can incorporate societal values, such as redistribution of resources, or otherwise engage in pushing forward broad-based social reform within the contours of common-law doctrines, courts lack both the ‘purse’ and the organisational mechanisms – that is, governmental bureaucracy or agencies – to guarantee the initial feasibility and the future implementation of the legal reform.²² Most importantly, the ability of the courts to update, revise, or entirely overturn a piece of legislation is dependent on having a case before it.²³ Unlike the legislative agency that can initiate a rule change or control its timing, courts must depend on an exogenous factor – a relevant dispute brought before them.²⁴ Courts’ role in law-making is thus limited, and might not bring about a widespread development or reform of a rule.

These views highlight the seemingly inherent deficiencies embedded in any form of legal development which might be exercised by the courts. Courts are consequently vested with restricted preferences in which they can develop law, and at the same time “remain part of the law-making process”.²⁵ In what follows, an attempt will be made to assess, explain and illustrate the scope and workings of judicial law-making or policy making within the context of the separation of powers.

3.2 Common-law judicial law-making and judicial activism

The power of judges to make laws is a controversial issue, not only in South Africa, but also in the legal systems of foreign jurisdictions. This section will examine the origin and development of judicial law-making in the United States, Canada and South Africa, in order to evaluate the viability and legitimacy of such function.

3.2.1 Judicial law-making in the United States

While writing in 1870, Holmes stated that “it is the merit of common law, that it

²² Rosenberg *The hollow hope* 423 claims that litigation steers activists for change to an institution that is unable to help them, and divert crucial resources away from the realm that matters: politics. See also Abraham 1986 *Political Science Quarterly* 278: “To be sure, like the Pope, the judiciary possesses no armies, and its sole power is the power to persuade”.

²³ Schauer 2006 *Univ of Chicago LR* 913-916.

²⁴ Schauer 2006 *Univ of Chicago LR* 915-916. See also Barak 2002 *Harvard LR* 33-36.

²⁵ Lehari 2011 *Minnesota LR* 531.

decides the case first and determines the principles afterwards”.²⁶ From this statement, it is evident that under common-law there is a law-making process that occurs within the context of judicial judgments. Making law is what Holmes refers to as “determining the principles”,²⁷ and amounts to the hallmark of the common-law concept. Common-law practices and theory were created during the period when common-law judges viewed themselves to be discovering the law instead of making it. Holmes, however, comprehensively understood that common-law judges were making law when deciding cases, and this notion still remains nowadays.²⁸

It is believed that law-making taking place in the context of courts’ judgments results in good quality laws, as real court participants, representing the actual disputes that law must find the solution to, are involved.²⁹ Furthermore, the United States Constitution shelters judges from external influences by securing life tenure and salary protection for judges in Article III, Section 1:

The judiciary, in other words, is specifically designed to be nonresponsive to political pressures; thus, it should not be charged with effectuating broad-based policy change.³⁰

Yet the opposite may also be true: judges can still be influenced, and court cases are more often distorting than enlightening. The use of such actual cases may create “inferior law whenever the concrete case is nonrepresentative of the full array of events that ensuing rule or practice will encompass”.³¹ Common-law judges may hardly appreciate such distortion as:

The distortion of the immediate case may systematically condemn common law lawmaking not only to suboptimal results, but also to results predictably worse than those that would be reached by making law in a less dispute-driven fashion.³²

The reliance in the integrity of what Schauer terms “a crystalized dispute between specific parties”³³ as a method for making law is so great that much trust is still placed in the common law as the preferable method of law-making, but also in the

²⁶ Holmes 1870 *Am LR* 1. See also Menand *The metaphysical club* 338.

²⁷ Schauer 2006 *Univ of Chicago LR* 883.

²⁸ Schauer 2006 *Univ of Chicago LR* 883

²⁹ Schauer 2006 *Univ of Chicago LR* 883

³⁰ O’Scannlain 2015 *Virginia LR Online* 37.

³¹ Schauer 2006 *Univ of Chicago LR* 884

³² Schauer 2006 *Univ of Chicago LR* 884

³³ Schauer 2006 *Univ of Chicago LR* 884.

United States Constitution's "case or controversy" stipulation.³⁴ Owing to the increased reliance on common-law judges to develop the law, Schauer maintains that it no longer remains contentious to suggest that judges create law.³⁵ Yet he proposes that it may perhaps not only be "great cases and hard cases that make bad law, but simply the deciding of cases that makes bad law".³⁶

Law was made in the case of *McPherson v Buick Motor Co*,³⁷ where the court held that a user of a product that was not intrinsically hazardous could bring a claim against the product's maker for negligent construction, in spite of the fact of lack of privity between the product's maker and the user.³⁸ So too when the venue for making law is not only the creation of common-law rules, but the courts' interpretation of a doctrine against the background of indeterminate authorising legislation. Yet, whether in the circumstances of a basic common-law ruling or alternatively in the interpretation of indeterminate language in legislation or the Constitution, it seems to be difficult to deny that judges often or 'always' take part in the procedure of making law.³⁹ As Holmes emphasises, judges develop law in conjunction with judgments of "actual controversies before the lawmaking court".⁴⁰

It is definitely correct that at times a court will settle a firm and established rule, as in the Supreme Court's decision in *Miranda v Arizona*,⁴¹ or the court's numerous anti-trust rules,⁴² and, at times, the courts will make known a wide and not so much determinate principle.⁴³ Courts could consequently develop law by stating a rule or

³⁴ Article III consists of "a preference that law be made in the context of a concrete dispute between genuine adversaries, rather than on the basis of 'abstract' speculation".

³⁵ Schauer 2006 *Univ of Chicago LR* 886. See also Cardozo *The nature of the judicial process* 124-125 who states that: "The theory of the older writers was that judges did not legislate at all. A pre-existing rule was that there, imbedded, if concealed, in the body of the customary law. All that the judges did, was to throw off the wrappings, and expose the statute to our view. Since the days of Bentham and Austin, no one, it is believed, has accepted this theory without deduction or reserve, though even in modern decisions we find traces of its lingering influence".

³⁶ Schauer 2006 *Univ of Chicago LR* 885.

³⁷ *McPherson v Buick Motor Co* 217 NY 382, 111 NE 1050 (1916) 1054-1055.

³⁸ Schauer 2006 *Univ of Chicago LR* 887.

³⁹ Schauer 2006 *Univ of Chicago LR* 887-888. Kennedy 1973 *J Legal Stud* 378 argues that judges employ choice in every decision, even when they are merely applying the law.

⁴⁰ Schauer 2006 *Univ of Chicago LR* 888.

⁴¹ *Miranda v Arizona* 384 US 436 (1966) 467-474.

⁴² *United States v Socony-Vacuum Oil Co* 310 US 150 (1940) 222, holding that price-fixing per se violates anti-trust laws.

⁴³ Schauer 2006 *Univ of Chicago LR* 888.

by proclaiming a standard as the reason for their decisions.⁴⁴ These rules or standards - as established by a court's pronouncement - serve as restraining norms for future disputes: it acts as a precedent for all cases to come as a rule established by the court:

Once a court announces a reason for its decision, and once that stated reason is something that future or lower courts are expected to take seriously as a reason, then the troubling question still arises as to whether the general statement that is the reason is better or worse by virtue of it having been initially announced in the context of a concrete dispute that a court is expected to resolve.⁴⁵

It is clear that in the United States, it is not only courts' decisions that amount to law-making, the rationale and grounds for such decisions also become law. Schauer differentiates between common law-making judges and the official lawmaker, namely, the legislature. He argues that the common-law judge makes law through the lens of a "concrete token type of case"⁴⁶ that presents actual controversies, where the lawmaker can see the direct consequence of making a certain law instead of another. One justification for preferring the common law is that the:

...rulemaking and law-making are better done when the rule maker has before her a live controversy, a controversy that enables her to see all of the real world implications of making one rule rather than another.⁴⁷

The courts craft law specifically to suit the circumstances of the current case, as well as other future similar cases.⁴⁸ On the other hand, the legislature develops rules and law "without hearing before them in the same immediate way a particular token of case-type that the rules encompass".⁴⁹ It is thus argued that this law-making body creates more general law on the basis of how future cases ought to be decided – it is not pressurised to decide such cases instantaneously (as in a court case). Consequently, the argument is that when law is developed without there being real

⁴⁴ Schauer 2006 *Univ of Chicago LR* 888-889. See also Dworkin *Taking rights seriously* 22-28, stating that rules are "all-or-nothing", while principles may not apply in a particular case and yet remain valid. See also Sullivan 1992 *Harvard LR* 22,26-27, and Kennedy 1976 *Harvard LR* 1685, 1776, who argue that Dworkin fostered an inconsiderable amount of confusion by distinguishing rules from principles, and then defining rules as precise and absolute, and principles as vague and revocable.

⁴⁵ Schauer 2006 *Univ of Chicago LR* 890.

⁴⁶ Schauer 2006 *Univ of Chicago LR* 892.

⁴⁷ Schauer 2006 *Univ of Chicago LR* 892.

⁴⁸ Calabresi *A common law for the age of statutes* 165 states that courts' function is to provide "continuity and change by applying the great vague principle of treating like cases alike".

⁴⁹ Schauer 2006 *Univ of Chicago LR* 891.

parties involved in a dispute, the entire law-making process is speculative, and inclined to be misguided as it not premised on “real world events”.⁵⁰ By establishing constitutional norms and rules in the circumstances of real disputes, and not on the premises of theoretical conjectures, it is reasoned that judges are more capable of making better laws and rules.⁵¹

However, both types of lawmakers need to assess as to which future instances their laws need to apply to, and how these cases should be resolved. This process involves projected future decision-making instances, however, the common-law rule-maker faces a substantial risk that the particular case before the court may unduly influence the maker of the rule.⁵² Judicial lawmakers could also consider the case before them as representative of a larger group; whilst it is not. This could lead to making laws for a specific case, and not the larger group. Cases do differ, but judges must make rational and objective decisions, not only suitable to the case before them, but applicable to an entire future group. This is a difficult task, especially as many judges are captivated by the salient case before them, and tend to judge only “a subset of available information, to overweigh that information, and to under weigh unattended information”.⁵³ Deciding on the correct outcome for each distinct case with its specific contextual equities, with the added burden of making law, may produce an unrepresentative ruling.

An example of the above predicament transpired in *New York Times Company v Sullivan*,⁵⁴ a defamation case. The United States Supreme Court had not

⁵⁰ Schauer 2006 *Univ of Chicago LR* 892: “Litigants, after all, are the ones who actually experience the effects of legal rules”. Shavell 1995 *J Legal Stud* 379 states that “appeals courts sometimes can learn about opportunities for law-making only from disappointed litigants”.

⁵¹ Schauer 2006 *Univ of Chicago LR* 893.

⁵² Schauer 2006 *Univ of Chicago LR* 894.

⁵³ Schauer 2006 *Univ of Chicago LR* 896.

⁵⁴ 378 US 254 (1964). Hereinafter *New York Times Company*. Epstein 1986 *Univ of Chicago LR* 786-787 explains this defamation case as follows: The defamation allegedly made by the New York Times was an advertisement sponsored by 64 prominent citizens under the heading “Heed Their Rising Voices”. The ad, which appeared on 29 March 1960, contained a description of events in Montgomery, Alabama, at the height of Alabama’s racial and political unrest. The ad said that the police had surrounded the campus, when in truth they were only deployed nearby. It stated that padlocks had been used to keep all students out of the dining hall, when in fact a few had been excluded because they were not properly registered. Also that students sang “My country ‘tis of thee”, when they actually sang the national anthem. It said that Martin Luther King had been arrested seven times and charged with felony while he had only been arrested four times and charged with a misdemeanour. According to the ad, the police had assisted King’s enemies in bombing his house when in fact they were looking for the perpetrator. The plaintiff, Sullivan, was a Montgomery City Commissioner, whose individual responsibilities included

adjudicated in such a type of case before, and libel was not covered by the First Amendment.⁵⁵ In spite of its lack of experience in this area of common law, the court in *Sullivan* is thought to have been compelled to reach a judgment in the context of the safeguarding the civil-rights movement against “crippling civil judgments”,⁵⁶ lodged by the plaintiff, a powerful public official using litigation to wield his official authority. The court held that the criticism of the government was deemed protected from both private and criminal lawsuits; that the plaintiff must prove that the statement published was false, or that it was made “with reckless disregard whether it was false or not”.⁵⁷ These parameters of the common-law defamation concept were formulated in this specific case, and it was held that:

...the US Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct.⁵⁸

This qualified privilege was made actionable solely in publications containing ‘actual malice’, a rule Epstein regards as “a compromise between the strict liability and no liability positions”.⁵⁹ When interpreting the first amendment to the United States Constitution, the court found that the first amendment was applicable when construing the scope of common-law defamation. The court extended the definition of defamation, and what the plaintiff had to prove in order to succeed with his claim for damages. Still, the political background to the case, as was shown above, captivated the court. The Alabama courts’ verdicts expressed no more than their juries’ desire to punish the so-called Northern Agitators.⁶⁰ Epstein also regards this case as a “fortuitously distorted decision”.⁶¹

...the particular facts of the case produced a rule almost certainly different from what the same justices of the same Court would otherwise have done were they asked simply to make a public figure libel rule, and different from what every

supervision of the Police Department as well as the Fire Department, the Department of Cemetery, and the Department of Scales.

⁵⁵ Schauer 2006 *Univ of Chicago LR* 901. See also *Beauharnais v Illinois* 343 US 250 (1952). First Amendment:

⁵⁶ Schauer 2006 *Univ of Chicago LR* 901. Epstein 1986 *Univ of Chicago LR* 787: “The source of the many of the modern problems with the law of defamation is that the *New York Times* decision was influenced too heavily by the dramatic facts of the underlying dispute that gave the doctrine its birth”.

⁵⁷ *New York Times Company* 280.

⁵⁸ *New York Times Company* 280.

⁵⁹ Epstein 1986 *Univ of Chicago LR* 801.

⁶⁰ Schauer 2006 *Univ of Chicago LR* 901. The ‘Northern Agitators’ were Northern newspapers that reported on the civil rights movement, and were against segregationist policies.

⁶¹ Epstein 1986 *Univ of Chicago LR* 785.

other open libel democracy in the world has subsequently decided to do.

While Epstein concedes that the first amendment does concern common-law defamation, he has an issue with subjecting the common law to constitutional scrutiny by the court.⁶² He maintains that there was nothing wrong with the common-law rule of defamation's balance between speech and reputation, which was shaped over hundreds of years.⁶³ There was also no constitutional duty that the Supreme Court constructs an amended law of defamation. Lastly, the liability required for common-law defamation is strict liability. However, the 'actual malice' rule created by the court lies in-between strict liability and no liability, which begs the question: "what public interest can justify the deviation from these ordinary standards of liability?"⁶⁴ The decision was tactical – in order to save the *Times* from possible financial ruin.⁶⁵ The United States Supreme Court had to show that Alabama had misapplied their law of defamation, and violated a federal constitutional law rule. Accordingly, it became crucial to constitutionalise a part of common-law defamation. Epstein strongly believes that the *New York Times v Sullivan* decision is dubious and wrongly decided:⁶⁶ it "shows that it is as easy to pervert common law rules as it is to pervert direct regulation".⁶⁷

The problem with the *New York Times* case, as well as with many other cases, seems to be embodied in "case-based law-making"⁶⁸ as highlighted in *Immigration and Naturalisation Service v Chadha*, in that the "unrepresentative nature of the particular facts before the Court had produced the wrong result for the larger class"⁶⁹ of cases. In this regard, Epstein comments as follows as regards the *New York Times* case:

It is one thing to condemn the common law of defamation as it was applied in a single case, and it is quite a different thing to condemn the basic set of common law principles in their entirety.⁷⁰

⁶² Epstein 1986 *Univ of Chicago LR* 786.

⁶³ Epstein 1986 *Univ of Chicago LR* 790.

⁶⁴ Epstein 1986 *Univ of Chicago LR* 802.

⁶⁵ Epstein 1986 *Univ of Chicago LR* 791.

⁶⁶ Epstein 1986 *Univ of Chicago LR* 817-818.

⁶⁷ Epstein 1986 *Univ of Chicago LR* 790.

⁶⁸ Schauer 2006 *Univ of Chicago LR* 904.

⁶⁹ *Immigration and Naturalisation Service v Chadha* 462 US 919 (1983) 967.

⁷⁰ Epstein 1986 *Univ of Chicago LR* 790.

Schauer and Zeckhauser question the ability of cases to make laws.⁷¹ The authors acknowledge that “judges serve, at least in part, as law-makers and policy-makers”.⁷² Courts create laws and establish policies all the time, which in their view is:

...an inevitable consequence of the indeterminacy and open-endedness both of the common law and of the vague language in which many constitutional and statutory provisions are drafted.⁷³

Schauer and Zeckhauser argue that courts create laws and policies for future litigants in similar cases where there might not be a distinctly established law or policy, yet their “necessary and usually desirable focus on the particular litigants and their particular actions is a flawed platform for more broad-based policy-making”.⁷⁴

Policies are by nature vague, broad and indefinite, both by definition and necessity.⁷⁵ Policies are vague because policy-making entails framing a policy that will deal with numerous conducts or acts by numerous individuals in numerous places at numerous times.⁷⁶ As “a course of action”,⁷⁷ a policy, in essence, constitutes a total resolution of what ought to be acceptable and agreeable across a variety of occasions.⁷⁸ Yet, in order to make this total resolution, the well-informed policy-maker must be capable of surveying at first what these occasions, in future, are inclined to be. This involves extensive research and resolutions that are usually put in place when the legislature considers law reforms. Courts, however, “are especially structurally ill-equipped to assess the full field of potential applications of

⁷¹ Schauer and Zeckhauser *The trouble with cases* 1.

⁷² Schauer and Zeckhauser *The trouble with cases* 1.

⁷³ Schauer and Zeckhauser *The trouble with cases* 1. Schauer and Zeckhauser at 2 add that: “when the Supreme Court concludes that tying arrangements and resale price maintenance violate the Sherman’s Act’s prohibition on ‘every contract, combination ..., or conspiracy, in restraint of trade or commerce’, for example, the Court is establishing antitrust policy no less than if those prohibitions had been explicitly set forth in the statute or adopted as formal regulations by the Federal Trade Commission. And so too with the determination of which types of searches and seizure will be deemed ‘unreasonable’ and consequently in violation of the Fourth Amendment, of what forms of discrimination constitute denial of ‘the equal protection of the laws’ and of which varieties of non-disclosure to investors will count as ‘device[s], scheme[s], or artifice[s] to defraud’ for purposes of Section 17(a) of the Securities Act 1933 and of Rule 10b-5 issued by the Securities and Exchange Commission”.

⁷⁴ Schauer and Zeckhauser *The trouble with cases* 3.

⁷⁵ Schauer and Zeckhauser *The trouble with cases* 4.

⁷⁶ Schauer and Zeckhauser *The trouble with cases* 4-5.

⁷⁷ Schauer and Zeckhauser *The trouble with cases* 4.

⁷⁸ Schauer and Zeckhasuer *The trouble with cases* 5.

any ruling”.⁷⁹ They are lacking:

...an investigate arm and often even the rudiments of non-case-specific factual research capabilities, can actually go out and find the information it might need to understand the full import of one of its rulings.⁸⁰

The ideal policy-maker is one who surveys a multiplicity of acts from different actors, and predicts how the intended policy can both be relevant and implemented, as well as what the benefits and costs resulting from applying its alternatives could be.⁸¹ The manner in which this survey must take place is legion – there is no one practical survey and prognosis that will be relevant for all policies or to all kinds of policies.⁸² Yet, the objective of each survey is distinct, and that is to ascertain not only what actions are occurring, but also what modification in those actions will be attained by some policy, or even by some transformations in society.⁸³ It is in the light of all these inherent difficulties embedded in policy-making that the dangers of using litigation as a form of policy-making can be highlighted because litigation illustrates notable perils of misrepresentation.⁸⁴

Law-making is evident in appellate judicial interpretation “for to give reasons is to make a claim about a type or category that is necessarily broader than the particular instance that the reason is a reason for”.⁸⁵ The impact of reasons given by courts for their judgments in a specific case extends beyond that case, and has the capability to influence numerous future cases. When an appellate court pronounces what could be deemed a rule, the influence of its decision is even greater:

...than simply giving a reason, for a rule, even more than a reason, necessarily and by reason of its generality encompasses instances other than the one that initially inspired the announcement of the rule.⁸⁶

The difficulty with this kind of rule or policy-making seems to be the unrestrained influence of a court judgment which was reached in one specific case, and the ease with which its scope extends over a multiplicity of cases while it emanated from

⁷⁹ Schauer and Zeckhauser *The trouble with cases* 10.

⁸⁰ Schauer and Zeckhauser *The trouble with cases* 11; 28: “regulating by litigation can at times be unnecessarily complex, costly, unpredictable, and lengthy”.

⁸¹ Schauer and Zeckhauser *The trouble with cases* 6.

⁸² Schauer and Zeckhauser *The trouble with cases* 5.

⁸³ Schauer and Zeckhauser *The trouble with cases* 5-6.

⁸⁴ Schauer and Zeckhauser *The trouble with cases* 7.

⁸⁵ Schauer and Zeckhauser *The trouble with cases* 7; Schauer 1995 *Stanford LR* 633.

⁸⁶ Schauer and Zeckhauser *The trouble with cases* 7; Schauer *Playing by the rules* 135.

different and peculiar circumstances. The problem with making use of a particular case for creating law is the manner in which that specific case, the specific facts and the specific parties of the case are probable to control a judicial survey and consideration of the material landscape. Courts may be too quickly in assuming that a policy created for one case or practice will cover all future cases or practices, as if the current case is similar to and representative of all future disputes.⁸⁷ It is submitted that this assumption is incorrect, and a recipe for distortion, and may lead to “ineffective and perhaps harmful policy”.⁸⁸ The problem is further exacerbated by the fact that many cases where rules are created, are unrepresentative or celebrity (newsworthy) cases, as, for example, the *New York Times* case. Yet, as Schauer and Zeckhauser point out:

Over-emphasis on unrepresentative specific cases in policy-making appears across a wide range of regulatory/ rule-making institutions, and is hardly restricted to litigation-based policy-making.⁸⁹

There is nowadays much rule-making taking place in the United States in response to already completed cases, where bills bear the name of the victim of the particular case, for example, Megan’s Law (requiring all released sex offenders to register with local authorities). These case-generated laws based on celebrity cases can in many instances be considered unrepresentative of the greater group. In such cases, the legislator who enact the law:

...may recognize the case-based law as somewhat misdirected, but feel they have no choice but to respond to public outrage over a heinous act, and a law enshrining a victim, even an uncharacteristic victim, is often the easy path to follow.⁹⁰

It seems that when United States legislators enact laws, they are progressively replicating law-making litigation by relying on specific and mostly unrepresentative examples. This can also be seen in current legislative hearings where victims and case studies are heeded rather than experts on the relevant fields.⁹¹ Wagner also points out that regulating through litigation is inadequate because, amongst other things:

⁸⁷ Schauer and Zeckhauser *The trouble with cases* 11.

⁸⁸ Schauer and Zeckhauser *The trouble with cases* 6.

⁸⁹ Schauer and Zeckhauser *The trouble with cases* 21.

⁹⁰ Schauer and Zeckhauser *The trouble with cases* 22-23.

⁹¹ Schauer and Zeckhauser *The trouble with cases* 23.

...courts lack democratic legitimacy to resolve inherently political issues about the level and appropriateness of government intervention.⁹²

This view is supported by O’Scannlain who argues that judicial law-making is “a troubling trend”⁹³ which is unconstitutional, and threatens constitutional democracy. In particular circumstances of constitutional determination, courts are frequently requested to analyse and judge the legitimacy of generally enacted democratic laws.⁹⁴ As was the finding of the court in *Marbury v Madison*, judicial review forms part of what Marshall CJ termed “the judicial duty”.⁹⁵ However, this understanding of the judicial role is not the original stance expressed by the United States Founding Fathers:

...federal courts were never thought to be a council of revision with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.⁹⁶

While performing their judicial duty, courts are frequently introduced into disputatious diversified social controversies, for example, affirmative action, the abolition of the death penalty, abortion, physician-assisted suicide, same-sex marriage, and so on. It is a worrying fact that some litigants very often take these cases to the courts mainly because they do not want to embark on the democratic process, or because they have previously been unsuccessful in the legislative sphere.⁹⁷ In this regard, “recourse to the courts ... is seen as a natural move for interests disadvantaged in majoritarian legislative politics”.⁹⁸ This shift has resulted in that courts no longer are “outside of the policy process but more typically now constitute just another ... stage in the ... process of policy formation”.⁹⁹ Political and ordinary litigants have noticed that judges have made their courthouses easily

⁹² Wagner 2007 *Georgetown LJ* 694. This seems to accord with Waldron’s perspective (as discussed in Chapter 2) that courts lack democratic legitimacy as its conduct amount to counter-majoritarian when courts make use of constitutional authority to perform judicial review on laws enacted by a legislature elected by the majority. See Waldron 2006 *Yale LJ* 1346-1349.

⁹³ O’Scannlain 2015 *Virginia LR Online* 31.

⁹⁴ O’Scannlain 2015 *Virginia LR Online* 32.

⁹⁵ *Marbury v Madison* 5 US (1 Cranch) 137 2 L Ed (1803) 178.

⁹⁶ Rehnquist 1976 *Texas LR* 695-698.

⁹⁷ O’Scannlain 2015 *Virginia LR Online* 32.

⁹⁸ Gonen *Litigations as lobbying* 4.

⁹⁹ Gonen *Litigations as lobbying* 3. See also Champagne 2001 *Loyola Univ of LA LR* 1393 who states that: “interest groups today often draw no distinction between achieving their goals through the courts or through the political process”.

accessible.¹⁰⁰

Turning to the judiciary in order to accomplish what could be political ends might seem attractive. It could be because - as opposed to having to sway a bicameral legislature, the President, and electorate constituencies, as represented by these elected officials - political litigants can restrict their focal point on one trial judge, or two judges out of a panel of the appeal court, or five judges out of the nine on the High Court; not any of them elected.¹⁰¹ Moreover, in the United States, it is known that the constitutional process decreed for enacting legislation entails 536 political actors, making it formidable and burdensome, yet, that is how the system was designed to govern.¹⁰² As Kavanaugh puts it, “the United States constitutional structure tilts towards liberty”.¹⁰³ The predisposition for liberty and self-rule is weakened and subverted when judges open the courtroom with the objective of making law.

When courts exercise the role of the legislature, “they create perverse incentives for political actors”.¹⁰⁴ As courts show their willingness to legislate, litigants, who are termed ‘political litigants’ and interest groups, find litigation less expensive and easier than involving the democratic process. As such, their focal point became the courts with all their resources.¹⁰⁵ This undermines and devalues democratic responsiveness, and also weakens the electoral system through which the people commonly keep political actors answerable for their acts. Courts should restrict themselves to executing their constitutional function; people who seek policy changes are compelled to engage the country’s democratic processes for change.¹⁰⁶

Where a certain legislative enactment breaches the initial understanding of the Constitution, a judge may strike down such an enactment. If done in this circumstance, the court’s action constitutes “an end run around popular

¹⁰⁰ O’Scannlain 2015 *Virginia LR Online* 32.

¹⁰¹ O’Scannlain 2015 *Virginia LR Online* 33. See also Young 2008 *Okla City Univ LR* 283.

¹⁰² O’Scannlain 2015 *Virginia LR Online* 33.

¹⁰³ Kavanaugh 2014 *Notre Dame LR* 1908.

¹⁰⁴ O’Scannlain 2015 *Virginia LR Online* 34.

¹⁰⁵ O’Scannlain 2015 *Virginia LR Online* 34.

¹⁰⁶ O’Scannlain 2015 *Virginia LR Online* 34-35.

government”.¹⁰⁷ The problem remains how to differentiate between constitutionally sanctioned judicial-law making,¹⁰⁸ and impermissible judicial legislation. In order to safeguard the proper exercise of judicial authority, O’Scannlain advocates grounding the practice “on the Constitution’s text, structure and history as constraining forces”.¹⁰⁹ In the absence of such restrictions:

Judges are nothing more than politicians in robes, free to tackle the social problems of the day based on avant-garde constitutional theory or worse yet, their own personal preferences. While such jurists may often be well meaning, their approach is inconsistent with our government’s history, structure, and framework, and it threatens the ideal of self-rule that we should so dearly cherish.¹¹⁰

Instead of clearing the cautiously constructed ‘veto gates’ that curb and direct the legislative procedure, litigants are required only to prevail in litigation to make their political predisposition the law.¹¹¹ Making use of the courts to develop public policy might seem easier for political standing in the short term, yet it essentially imperils “the foundational premises of our nation and imposes serious long-term costs”¹¹² Not only does judicial legislation breach the constitutional design and adherence to democratic self-rule; in a constitutional sphere it has a tendency to solidify the law in place. On the occasion the judiciary strikes down laws as incompatible with the Constitution, it is virtually not possible to negate and rescind such judicial veto. The legislatures speak for wide and different interests, they possess unrivalled and more extensive fact-finding and data-collecting capabilities, and are “sufficiently numerous to feel all the passions which actuate a multitude”.¹¹³ In contrast, courts must adjudge the questions and facts as formulated simply by the particular litigants before them. In other words, courts lack the conventional capabilities to determine the wide issues of public policy.

Under the United States Constitution, the constitutional separation of powers was originally designed to restrict the role of the courts; assigning the practice of self-rule by the democratic arms of government to the people. This was designed by

¹⁰⁷ Rehnquist 1976 *Texas LR* 706.

¹⁰⁸ O’Scannlain 2015 *Virginia LR Online* 33.

¹⁰⁹ O’Scannlain 2015 *Virginia LR Online* 33.

¹¹⁰ O’Scannlain 2015 *Virginia LR Online* 33.

¹¹¹ O’Scannlain 2015 *Virginia LR Online* 34. See also Clark 2001 *Texas LR* 1345.

¹¹² O’Scannlain 2015 *Virginia LR Online* 34.

¹¹³ Hamilton *The Federalist Papers No 48* 242.

allocating the law-making role to the people and their elected representatives, and not the judiciary.¹¹⁴ The constitutional separation of powers under the United States Constitution vests distinct roles to each government arm:

The Constitution's three "vesting" clauses ... effect a complete division of otherwise unallocated federal governmental authority among the constitutionally specified legislative, executive, and judicial institutions. Any exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three categories thus established or find explicit constitutional authorization for such deviation. The separation of powers principle is violated whenever the categorizations of the exercise of power and the exercising institution do not match and the Constitution does not specifically permit such blending.¹¹⁵

Even though the United States Constitution separates the powers of the three branches of government, its text does "not purport to tell us how strict the resultant separation has to be".¹¹⁶ It is conceded that the separation of powers doctrine does not require that the integrated "departments ought to have no partial agency in, or no control over, the acts of each other".¹¹⁷ This uncertainty about the precise boundaries of government powers has resulted in courts overstepping their assigned functions. Yet the Framers of the United States Constitution "went into great lengths to establish judicial separation from the legislative and executive branches."¹¹⁸ The Constitution places the power to legislate or to make law "in the people's representatives and reserves for the judiciary the power to interpret those laws".¹¹⁹

In *Washington v Glucksberg*, the court had to decide whether there was a constitutionally guaranteed right to physician-assisted suicide (PAS).¹²⁰ The Anglo-

¹¹⁴ O'Scannlain 2015 *Virginia LR Online* 35.

¹¹⁵ Lawson 1990 *California LR* 857-858. See Chapter 2, especially Montesquieu *The spirit of laws* 199: "... there is no liberty if the judiciary power be not separated from the legislative and executive".

¹¹⁶ Manning 2011 *Harvard LR* 2004. See Art I, s 1: "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives". Art III, s 2 extends "the judicial power to certain "cases" or "controversies".

¹¹⁷ Hamilton *The Federalist Papers No 47* 235.

¹¹⁸ O'Scannlain 2015 *Virginia LR Online* 41.

¹¹⁹ O'Scannlain 2015 *Virginia LR Online* 36.

¹²⁰ 521 US 702 (1997) (hereinafter *Glucksberg*). O'Scannlain 2015 *Virginia LR Online* 49. See also Troy <https://www.thedailybeast.com/who-let-supreme-court-make-laws> (Date of use: 13 March 2019). The nine justices of the least democratic branch of government have seesawed back and forth on how far the Bench should reach ruling. Whatever you think of the Court's gay marriage or health care decisions, one thing is clear: this is not the shy, retiring court America's Framers imagined. We have come a long way from President Andrew Johnson's popular but

American common law has punished or condemned assisted suicide for over 700 years,¹²¹ and surveys amongst the Washington voters indicated a rejection of the initiative.¹²² However, during recent decades, much progress has been made in medical technology which has resulted in lengthening life. Some states started examining different procedures in order to protect the dignity and independence of dying persons, which included specific types of PAS.¹²³ In this case, the litigants, a group of doctors, three terminally ill patients, and a non-profit organisation that counsels people considering PAS, turned to the courts for legislative reform. The litigants alleged that Washington state's ban against 'causing' or 'aiding' a suicide breached the United States Constitution:¹²⁴

...the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to perform physician-assisted suicide.¹²⁵

This group was demanding that the courts, and not the legislature, change the preferences of a majority of Washington voters by developing a historically unknown constitutional right.¹²⁶ The district court agreed with the plaintiffs, and found that Washington state's prohibition amounted to a violation of the Constitution.¹²⁷ On appeal to the Ninth Circuit Court, a panel of three judges held that this decision should be reversed as it found that there was no historical premise for the constitutional right claimed by the plaintiffs.¹²⁸ That decision was later heard again by another panel of eleven judges of the Ninth Circuit, who reversed the previous panel's decision, and confirmed the decision of the district court. O'Scannlain contends that this decision confirming the district court's finding was erroneous:

probably apocryphal response to the Chief Justice's defiant decision invalidating state law in *Worcester v Georgia* 31 US 515 (1832): "John Marshall has made his decision: now let him enforce it!" Knowing that they, like the Pope, lack an army, and nine sages appointed for life constitute America's least democratic branch of government, Supreme Court justices traditionally operated with "judicial restraint".

¹²¹ *Glucksberg* 712: "Blackstone emphasised that the law has ... ranked suicide among the highest crimes". Most states made physician-assisted suicide (PAS) a crime when the Fourteenth Amendment was adopted. See *Glucksberg* 715.

¹²² O'Scannlain 2015 *Virginia LR Online* 45.

¹²³ *Glucksberg* 716-717.

¹²⁴ *Glucksberg* 717.

¹²⁵ *Glucksberg* 708.

¹²⁶ O'Scannlain 2015 *Virginia LR Online* 45.

¹²⁷ *Glucksberg* 708, quoting *Compassion in Dying v Washington* 85 F Supp 1454 (WD Wash 1994) 1459.

¹²⁸ *Compassion in Dying v State of Washington* 49 F 3d 586 (9th Cir 1995) 588.

There was no historically-based constitutional right to physician-assisted suicide. The Constitution's structure demanded that the citizens of Washington, not "six men and two women, endowed with life tenure and clocked in judicial robes", decide whether physician-assisted suicide should be permitted in the state. Not only was the *en banc* panel's decision wrong as a matter of constitutional interpretation, but the application of its incorrect analysis resulted in the rejection of the considered policy choice of Washington voters.¹²⁹

Since the contended right, namely, PAS, was not firmly entrenched in the nation's history, customs and constitutional outlook, the practice was not safeguarded under the United States Constitution. To put such right into effect would have "reversed centuries of legal doctrine and practice, and struck down the considered policy choice of almost every State", which is not the function of a federal court.¹³⁰ The eight unelected judges in this case, by means of very broad legislation, and without adequate justification, invalidated the policy preference of Washington voters, and, by constitutionalising the issue, withdrew the question from the public sphere.¹³¹ PAS is an issue of tremendous public significance, and:

...the Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the Judiciary.¹³²

By rejecting the views of the voters, the court destroyed the legitimacy of the judiciary as an establishment, and endangered the "public's confidence in the legitimacy of judicial nullification of the will of the electorate".¹³³ The United States Supreme Court subsequently reversed the *en banc* panel's decision, and "explicitly recognized the dangers inherent in disregarding historically grounded constitutional inquiry and the impermissibility of judicial legislation".¹³⁴ It was up to the citizens of Washington to make their preferences and to decide whether there is such a constitutional right, and not eight judges or the courts.

¹²⁹ O'Scannlain 2015 *Virginia LR Online* 46. See also O'Scannlain J, dissenting from the denial of rehearing *en banc* in *Compassion in Dying v State of Washington* 85 F 3d 1440 (9th Cir 1996) 1440 (hereinafter *Compassion in Dying*).

¹³⁰ *Glucksberg* 723.

¹³¹ *Compassion in Dying* 1441-1442.

¹³² *Compassion in Dying* 1442-1443.

¹³³ *Compassion in Dying* 1441.

¹³⁴ O'Scannlain 2015 *Virginia LR Online* 47.

Recently, the United States Supreme Court in *Obergefell v Hodges*¹³⁵ held that same-sex couples have a fundamental right to marry under the due process clause of the Fourteenth Amendment,¹³⁶ and that as a result, “there is no lawful basis for a State to refuse to recognize”¹³⁷ same-sex marriages. Kennedy J, who delivered the majority judgment, made “absolutely no effort to root the right to same-sex marriage in the original meaning of the Written Constitution”.¹³⁸ Instead, he made his decision by relying on his ‘reasoned judgment’ and a “new insight”,¹³⁹ on his “understanding of what freedom is and must become”,¹⁴⁰ and on “a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our era”.¹⁴¹ According to Roberts CJ, Kennedy J’s decision was premised simply on his personal belief “that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society”.¹⁴²

Yet, Roberts CJ and Scalia J made it clear in their dissent in the *Obergefell* case that the majority’s decision not only breached the rule of law, but that it might be viewed to have resulted in an illegitimate judicial law-making process.¹⁴³ Critics of judicial activism and the United States Supreme Court’s rulings on policy issues do not regard the courts’ proper function to be that of policy making, in that:

If one accepts, along with Churchill, that democracy with all its faults is the best form of Government – and even the most ardent defenders of judicial review purport to accept this – one must reject the notion that some issues of basic social policy are better decided by electorally unaccountable officials.¹⁴⁴

¹³⁵ *Obergefell v Hodges* 135 SC 2584, 2612 (2015) (hereinafter *Obergefell*).

¹³⁶ Due Process Clause of the Fourteenth Amendment: “... no shall any State deprive any person of life, liberty, or property without due process of law...” See also Wills 1926 *Univ Penns LR* 332: “Any such act, therefore, which, in the judgement of the Supreme Court, is not due process of law, is liable to be declared unconstitutional”.

¹³⁷ *Obergefell* 2607-2608.

¹³⁸ Duncan 2016 *Regent Univ LR* 30. See also *Obergefell* 2598.

¹³⁹ *Obergefell* 2598.

¹⁴⁰ *Obergefell* 2603.

¹⁴¹ *Obergefell* 2602.

¹⁴² *Obergefell* 2616. Or to put it another way, at 2619: “The majority’s driving themes are that marriage is desirable and petitioners desire it”.

¹⁴³ *Obergefell* 2617: “We have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean”. (Roberts CJ, dissenting, quoting *Dred Scott v Sandford* 60 US (19 How) 393 621 (1857) (Curtis J, dissenting)). And finally, Scalia J leaves no hint of doubt as to his view that *Obergefell* is not a legitimate part of the rule of law, at 2627: “Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court”.

¹⁴⁴ Bork <https://www.content.csbs.utah.edu/dlevin/jud.../Has-the-supreme-court-gone-too-far.pdf> (Date of use 2 July 2019). See also O’Scannlain 2015 *Virginia LR Online* 41, where it is argued

This view disputes the notion that fundamental social policy issues are to be decided by electorally unaccountable officials, a standpoint that has been supported not only in the United States, but also in Canada, which will be subsequently discussed.

3.2.2 *Judicial law-making in Canada*

The judicial power to effect judicial legislation or invalidate legislation in Canada is embodied in section 52 of the Canadian Constitution Act, which was enacted in 1982.¹⁴⁵ However, like in the United States, in Canada these issues present confusion. There seems to be a lack of a coherent remedy to invalidate laws, as the scope and the extent of the judicial power in this regard remains unpredictable and unclear, as will become evident in this discussion. The 1982 Constitution is also thought to have entrusted the Supreme Court with a new role, namely, policy-making,¹⁴⁶ where “the court was required to resolve issues that would have been regarded as matters of policy for the legislative bodies”.¹⁴⁷

Canadian judges are making decisions that appear to be overstepping onto policy and politics – areas that were - in the past - assumed by many to be restricted to the elected legislature. This judicial role is criticised in Canada because it is considered to be a danger to democracy and good governance.¹⁴⁸ Courts are considered to be undemocratic. Judges are viewed as an unaccountable branch of government because they are appointed, and not elected in the same way politicians are.¹⁴⁹ In addition, when judges review policy, they are deemed to be “going beyond their

that “The Framers were acutely aware of the danger of falling under the rule of a cabal of unelected judicial oligarchs. Because of this, in the constitutional structure they designed, they went to great lengths to establish judicial separation from the legislative and executive branches”.

¹⁴⁵ Section 52(1) of the Canada’s Constitution Act, 1982 provides: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect”.

¹⁴⁶ Hogg 2001 *The Canadian Bar Rev* 171.

¹⁴⁷ Hogg 2001 *The Canadian Bar Rev* 171. See also Anand 2006 *Constitutional Forum* 87: “It is commonly believed that, prior to the enactment of the Canadian Charter of Rights and Freedoms in 1982, judges interpreted the law, and did not take it upon themselves to make law. Thus, many people view the Charter as ushering an era of law-making by the judiciary. While there is truth in the statement that judges play a role in shaping government policy and legislation today than they did prior to 1982, it would be inaccurate to portray the judiciary of the past as not engaging in law-making”.

¹⁴⁸ McLachlin *Judicial power and democracy* 1.

¹⁴⁹ McLachlin *Judicial power and democracy* 1.

proper role”¹⁵⁰ because the role of judges, on this assumption, is to construe the law and apply it. Law-making by judges overstep the conventional boundaries of the judiciary.¹⁵¹ McLachlin, however, questions this criticism of judicial law-making role, and claims that this criticism “rests on a simplistic and outdated view of how a modern democratic state functions”¹⁵² because, she adds, “democracy is a lot more complicated than elected representatives making the law”.¹⁵³ Elected representatives have a role to play, and so do judges. Both these government branches are crucial to effective and just government.¹⁵⁴ The performance of such power by unelected judges, in a democratic society, raises questions of legitimacy.¹⁵⁵ The courts should exercise this role being mindful of the function of the other government’s branch, in that it should:

...do its best to write opinions that leave room for the competent legislative body to enact remedial legislation, so that the democratic process, admittedly influenced by the Court, has the last word.¹⁵⁶

According to McLachlin, courts play an important and complimentary function. This role also entails law-making, albeit in a dissimilar way, and can be illustrated in the following terms.¹⁵⁷ First, under the common law, courts continue to play an essential and significant fundamental role in developing and transforming the law in order to meet society’s changing needs in particular circumstances.¹⁵⁸ Legislation is wide and general, and the elected legislature might not foresee all possible applications. In the event that such unexpected cases are brought to court, judges have to develop the law in order to cover such circumstances.¹⁵⁹ However, this role and authority is under the control of the legislature because it can “intervene either to ‘correct’ what it perceives to be unwise judicial decisions or to enact more general codes of rules in particular areas”.¹⁶⁰ Second, judges are required to give meaning to words or phrases where none appear clear from the legislature’s enacted text of

¹⁵⁰ McLachlin *Judicial power and democracy* 1.

¹⁵¹ McLachlin *Judicial power and democracy* 1.

¹⁵² McLachlin *Judicial power and democracy* 1.

¹⁵³ McLachlin *Judicial power and democracy* 1.

¹⁵⁴ McLachlin *Judicial power and democracy* 1.

¹⁵⁵ Hogg 2001 *Canadian Bar Rev* 179-180.

¹⁵⁶ Hogg 2001 *Canadian Bar Rev* 180.

¹⁵⁷ McLachlin *Judicial power and democracy* 1.

¹⁵⁸ McLachlin *Judicial power and democracy* 2.

¹⁵⁹ McLachlin *Judicial power and democracy* 2.

¹⁶⁰ McLachlin *Judicial power and democracy* 2.

the legislation.¹⁶¹ Not to perform this role would be as ‘activist’ as to do so, and judges have to refrain from developing “a legislative purpose to suit the solution desired by the judge”.¹⁶²

A third function of judges entails law-making relating to the Constitution. Written constitutions place two obligations on the courts; firstly, the courts must construe the constitution when there is uncertainty regarding its application. Second, the courts must, when issues are brought before them, decide whether the legislature had the authority to enact the law, or performing a questioned action by the executive.¹⁶³ When a court construes the Constitution in a manner that some people might not agree with, or strikes down legislation as invalid, this cannot be avoided in a constitutional democracy. This courts’ role is premised on the assumption that:

...there must be a body that determines whether the legislature is acting within its powers under the Constitution. That body must be judicial, since the issue is a legal issue.¹⁶⁴

A fourth judicial function overlaps with the three mentioned above, and entails individual rights.¹⁶⁵ While the legislature is concerned with enacting laws that respect individual rights, it may not foresee that there might be applications that would breach those rights.¹⁶⁶

Finally, rights are described in ‘wide’ and ‘elastic’ terms, which might necessitate a judicial determination of their scope and extent in specific situations. These factors might suggest that courts would inevitably be involved whenever rights are at issue. Courts, while reviewing unforeseen applications and supervising the work of the other branches of government or administrative tribunals, and construing the scope of the rights and freedoms, “necessarily find themselves engaged in law-making. Much of this law-making could not be done by the legislatures, however, much they might wish to do so”.¹⁶⁷

¹⁶¹ McLachlin *Judicial power and democracy* 2.

¹⁶² McLachlin *Judicial power and democracy* 3.

¹⁶³ McLachlin *Judicial power and democracy* 12.

¹⁶⁴ McLachlin *Judicial power and democracy* 12.

¹⁶⁵ McLachlin *Judicial power and democracy* 12.

¹⁶⁶ McLachlin *Judicial power and democracy* 12.

¹⁶⁷ McLachlin *Judicial power and democracy* 12.

While the Canadian Constitution is thought to have entrusted each branch of government with a specific role, there remains confusion regarding the extent of judicial functions, and it is assumed, amongst other things, that “courts are running the country, at the expense of parliament and the executive”.¹⁶⁸ Furthermore, it is argued that it is also incorrect to assume and question whether the Canadian Charter has given the courts too much power, as this, according to McLachlin, amounts to “the wrong question”.¹⁶⁹ Instead, the question should be: “what does the Constitution say the three branches of government should be doing?”¹⁷⁰

McLachlin questions Bickel’s concept¹⁷¹ that alludes to the fact that it is only elected representatives or elected officials that can legitimately exercise authority on behalf of the people they rule. While this claim is powerful and attractive, she adds, “it founders on the rocks of reality”¹⁷² because the Canadian Charter does not create a constitutional democracy which confines authority and entrusts powers totally to the elected representatives, but also to the courts. The Canadian courts’ constitutional role can be defined in the following terms.¹⁷³ First, the courts’ role is to define the boundaries of the separation of the legislative authorities between the federal and provincial governments. Second, the courts determine or rule on questionable legislation or legislation considered to be unconstitutional when viewed in breach of the Charter’s considerations, and in so doing define the scope of constitutional rights and freedoms.¹⁷⁴ Thirdly, the courts’ role is to play an oversight or supervisory role over administrative tribunals created by the legislature.¹⁷⁵ The courts have not gone beyond their proper role because of the role allotted to them by the Constitution:

It is not for judges to set the agendas for social change, or to impose their personal views on society. The role of the judge is to support the rule of law, not the rule of whim. Judges are human beings; but they must strive to judge impartially after considering the facts, the law, and the submissions of parties on all sides of the question.¹⁷⁶

¹⁶⁸ McLachlin 2001 *Constitutional Forum* 15.

¹⁶⁹ McLachlin 2001 *Constitutional Forum* 15.

¹⁷⁰ McLachlin 2001 *Constitutional Forum* 15.

¹⁷¹ Bickel *The least dangerous branch* 16-17.

¹⁷² McLachlin 2001 *Constitutional Forum* 16.

¹⁷³ McLachlin 2001 *Constitutional Forum* 16.

¹⁷⁴ McLachlin 2001 *Constitutional Forum* 17-18.

¹⁷⁵ McLachlin 2001 *Constitutional Forum* 18.

¹⁷⁶ McLachlin 2001 *Constitutional Forum* 18.

When commenting on the Canadian Charter violations and judges' role, Duclos and Roach¹⁷⁷ concur with McLachlin that the Canadian Constitution "sets the boundaries of permitted legislative action, within the courts patrol".¹⁷⁸ The legislature is free to act within it, once these boundaries are determined. The courts are entrusted by the Constitution with some power to safeguard the boundaries, but not to overstep "within the legislative domain and substitute its opinion for that of the legislature".¹⁷⁹ However, courts should be restricted in applying the remedies entrusted to it where the Constitution sets its parameters.¹⁸⁰

Yet, it is argued that the choice of whether to develop or nullify an "underinclusive statute"¹⁸¹ cannot be derived either from the conclusion that the legislation is under-inclusive, or from constitutional provisions such as sections 24(1) and 26 of the Charter, and section 52(1) of the Constitution Act, 1982. In these and other remedial instances, "courts must exercise remedial discretion".¹⁸² However, it is conceded that there are difficulties with remedial discretion which courts can apply in protecting rights, because:

In the Charter context, the remedies can nullify state action which is thought to invade the new boundaries which protect the individual from the state.¹⁸³

In other cases, the remedial discretion might present a problem since the remedy merely follows the court's construction of the Constitution, and the nature of the violated right is assumed to command the remedial outcome.¹⁸⁴ There are three approaches currently applied by the Canadian Supreme Court when determining the unconstitutionality of legislation, namely, courts strike out under-inclusive statutes; courts make an order regarding the remedy the legislature would have

¹⁷⁷ Duclos and Roach 1991 *McGill LJ* 1.

¹⁷⁸ Duclos and Roach 1991 *McGill LJ* 4.

¹⁷⁹ Duclos and Roach 1991 *McGill LJ* 4.

¹⁸⁰ Duclos and Roach 1991 *McGill LJ* 4.

¹⁸¹ Duclos and Roach 1991 *McGill LJ* 1. Section 24(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". Section 26: "The guarantee in the Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada".

¹⁸² Duclos and Roach 1991 *McGill LJ* 1.

¹⁸³ Duclos and Roach 1991 *McGill LJ* 4-5.

¹⁸⁴ Duclos and Roach 1991 *McGill LJ* 6.

desired; and courts make an order which amounts to the “least disruptive remedy”.¹⁸⁵ The first approach is criticised because “it erroneously dictates invalidation as the only remedial choice”.¹⁸⁶ The latter two are criticised because “they force courts to speculate on matters best left to legislatures”.¹⁸⁷ It is unclear which legislature a court would have to look to in order to ascertaining the elusive intention when enacting the questioned legislation:

Should it conduct an historical enquiry into what the enacting legislature would have intended or should it second guess what the current legislature would do if it responded to this new problem? Given that the legislation that the enacting legislature in fact intended is unconstitutional, it is impossible to know what the legislature’s intentions would have been if this had been realized.¹⁸⁸

At times, a court may make use of a remedy which is the least disruptive considering the costs of numerous government policies, however, this approach, like other approaches premised on legislative intention, can be criticised because it “does not guarantee progressive outcomes any more than does an approach based on legislative intention”.¹⁸⁹ In the same way, it is difficult for a court to predict or determine how a court can second-guess a legislature’s policy preferences - it is also burdensome for a court to try to conduct some budget calculations and weigh social costs and benefits.¹⁹⁰ Furthermore, these approaches are unable to present a constructive relationship between the judiciary and the legislature, one which respects the constitutional boundaries and establishment’s roles.¹⁹¹

¹⁸⁵ Duclos and Roach 1991 *McGill LJ* 1.

¹⁸⁶ Duclos and Roach 1991 *McGill LJ* 16.

¹⁸⁷ Duclos and Roach 1991 *McGill LJ* 16-17.

¹⁸⁸ Duclos and Roach 1991 *McGill LJ* 17: “Legislative intention is thus an unsatisfactory remedial approach. It does not encourage courts to enquire into what outcomes would be more or less regressive (and for whom) or to avoid harmful outcomes if the court guesses that the legislature would have desired such a response” At 19. Powell J’s dissent in *Califano v Westcott* 443 US 76 (1979) suggesting that previous legislative history may somehow reflect the remedial wishes of the legislature sitting at the time the classification is before the court for review (96). This view has been criticised by LaFrance: “Divining the reasoning of a past legislature – in itself no easy task - to predict the mood of a present or future is simply an exercise in reading political tea leaves”. LaFrance 1979 *Clearinghouse Rev* 440. But see Ginsburg J in *Califano v Westcott* 443 US 76 (1979) 316, arguing that the probable will of the legislature ought to determine the remedy for unconstitutional under-inclusiveness. See also Miller 1985 *Harvard Civ Rights-Civ Lib LR* 90: “A court asked to divine the remedial intent of a silent legislature cannot expect to find reliable moorings”.

¹⁸⁹ Duclos and Roach 1991 *McGill LJ* 22.

¹⁹⁰ Duclos and Roach 1991 *McGill LJ* 22-23.

¹⁹¹ Duclos and Roach 1991 *McGill LJ* 23.

Yet, when commenting on constitutional remedies, Fish claims there are two conflicting remedies which assist courts in applying the discretion to resolve a conflict between a legislation and the Constitution.¹⁹² He terms the first approach ‘editorial restraint’ where courts are empowered to assume as little power to develop or change legislation as possible. The second approach, called ‘purposive preservation’, focuses on applying a remedy that does the least damage to the legislature’s policy preferences.¹⁹³ In contrast to Duclos and Roach, Fish maintains that it is this latter approach which has been adopted and applied by the Canadian Supreme Court.¹⁹⁴ What follows is a brief juridical overview of how the Canadian Supreme Court has applied these remedial approaches, and defined its law-making role as enunciated by McLachlin and other proponents of this idea.

In *Rosenberg and Another v Attorney General of Canada*,¹⁹⁵ the Income Tax Act permitted the registration of a private pension plan with Revenue Canada; only if the plan restricts survivor benefits to spouses of the opposite sex. Spousal benefits were not available to same-sex couples. In order to be accepted for registration, a proposed plan must conform to certain regulations under this Act. If a plan provided survivor benefits to same-sex couples, it could not be registered, and these persons could not receive tax benefits available to couples of the opposite sex who are either married, or living in a common-law relationship of some permanence.¹⁹⁶ In the Ontario Court of Appeal, Abella JA held that this legislation was unconstitutional because it violates the Charter’s right to equality.¹⁹⁷ She also found this not to be an appropriate case to defer to the legislature, and cited with approval the decision of

¹⁹² Fish 2016 *Univ Cal LA LR* 322. Kovacic 1986 *Wayne LR* 53, writing in the American context, argues that the absence of a coherent, consistent remedial approach not only makes the outcome of litigation a gamble, but can result in a pattern of decisions whereby courts perpetuate discrimination through their remedial orders. In the United States, in cases where benefits are conferred on women but not on men, courts tend to invalidate the benefit, whereas in cases where the benefit complained of is not conferred on women alone, the judicial tendency is to extend it”.

¹⁹³ Fish 2016 *Univ Cal LA LR* 322: “First approach: it posits a sliding scale of judicial interventions”. The other remedy/approach might involve adding language, striking down language, striking down application, or adopting an avoidance interpretation – what matters is the intervention’s substantive effect on the statute and the legislative purpose”.

¹⁹⁴ Fish 2016 *Univ Cal LA LR* 339.

¹⁹⁵ *Nancy Rosenberg and Another v Attorney General of Canada* C22807 (1998) (hereinafter *Rosenberg*).

¹⁹⁶ *Rosenberg 2*.

¹⁹⁷ *Rosenberg 14*: “The limit on equality in excluding same sex cohabiting partners in the definition of ‘spouse’ in section 254(4) of the Income Tax Act cannot be reasonably or demonstrably justified”.

Iacobucci J in *Vriend v Alberta*, where it was stated that:

Parliament has its role ... But the courts also have a role: to determine, objectively and impartially, whether Parliament's choices fall within limiting framework of the Constitution.¹⁹⁸

Consequently, she found that the definition of 'spouse' in the Income Tax Act was unconstitutional, and that such a violation can be remedied through "reading the words 'and same sex' into that section".¹⁹⁹

In *Egan and Another v Canada*,²⁰⁰ the appellants were a same-sex couple who have lived together since 1948 in a relationship similar to that one expects to find in a marriage. Section 19(1) of the Old Age Security Act provides for allowances which are available to spouses between 60 and 65 years whose combined income falls below a fixed level.²⁰¹ Even though these benefits were applicable, the appellant's application was rejected on the ground that the couple's relationship did not fall within the definition of 'spouse' in section 2, which includes:

A person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife.

The Canadian Supreme Court held that the exclusion of same-sex couples from eligibility for the spousal allowance constitutes a violation of the right to equality, because the denial of the allowance was premised in an "irrelevant distinction based upon sexual orientation".²⁰² The court went further to insert the following definition into the legislation:

"spouse", in relation to any person, includes a person who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife or as in an analogous relationship.²⁰³

On 19 December 2002, the Canadian Supreme Court in *Gosselin v Attorney General of Quebec*²⁰⁴ had to determine whether the Charter of Rights included a 'social charter' - requiring that individuals be provided with economic and social

¹⁹⁸ *Vriend v Alberta* [1998] 1 SCR 493 para 126 (hereinafter *Vriend*).

¹⁹⁹ *Rosenberg* 14-15.

²⁰⁰ *James Egan and Another v Canada* [1995] 2 SCR 513 (hereinafter *Egan*).

²⁰¹ *Egan* 518.

²⁰² *Egan* 624.

²⁰³ *Egan* 514.

²⁰⁴ *Gosselin v Attorney General of Quebec* [2002] 4 SCR 429 (hereinafter *Gosselin*).

security.²⁰⁵ The majority of the court decided against this position in a majority of five out of nine judges.²⁰⁶ The case dealt with the Quebec²⁰⁷ social welfare policy, which, in the event it was found to be invalid under the Charter, would have resulted in the Quebec government having to pay millions of dollars in compensation.²⁰⁸ The majority held that Charter Rights (s 7 espousing liberty and security of the person) did not include a 'social charter' requiring that individuals be provided economic and social security.²⁰⁹ Arbour and L'Heureux-Dube JJ, in dissent, concluded that section 7 of the Charter required that the state provides for a person's basic needs, which they found to include social rights.²¹⁰ In reaching this conclusion, Arbour J reasoned that:

The right to a minimum level of social assistance is intimately intertwined with considerations related to one's basic health and, at the limit, even one's survival. These rights can be readily accommodated under the section 7 rights to "life, liberty and security of the person" without the need to constitutionalize "property" rights or interests. Nor should the interest claimed in this case be ruled out because it fails to exhibit the characteristics of a "legal right".²¹¹

In support of her finding, Arbour J went on to decree that "section 7 must be interpreted as protecting something more than merely negative rights",²¹² or the rights embodied in it. This understanding of the Charter is disputed by the majority judgment (McLachlin CJ) in that the Canadian jurisprudence hitherto shows nothing suggesting "that section 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person".²¹³

In the 1992 decision of the Supreme Court of Canada in *Schachter v Canada*,²¹⁴ the respondent's spouse was allowed 15 weeks of maternity benefits under section 30

²⁰⁵ *Gosselin* 430.

²⁰⁶ *Gosselin* 453-454.

²⁰⁷ Quebec is one of Canada's provinces; see Constitution Act, 1867 and Constitution Act, 1982.

²⁰⁸ *Gosselin* 430-431: "Section 29(a) of the Regulation respecting social aid, made under the 1984 Social Aid Act, set the base amount of welfare payable to persons under the age of 30 at roughly one third of the base amount payable to those 30 and over".

²⁰⁹ *Gosselin* 431. Section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental rights".

²¹⁰ *Gosselin* 431.

²¹¹ *Gosselin* 442.

²¹² *Gosselin* 444. See also *Schachter v Canada* [1992] 2 RCS 721: "Negative rights, are for example, the right to life, liberty and security of the person" which merely restrict the government" (hereinafter *Schachter*).

²¹³ *Gosselin* 491.

²¹⁴ *Schachter* 679.

of the Unemployment Insurance Act, 1971.²¹⁵ He had first applied for benefits under section 30 regarding the time he had to take off work, but because section 30 was limited to maternity benefits of three weeks, he changed his application to section 32 benefits, where adoptive parents were allowed 15 weeks' leave after the placement of the child. The respondent's application was denied. The respondent appealed to the Federal Court, and argued that section 32 discriminated between natural and adoptive parents, and violated his rights under section 15 of the Charter.²¹⁶ The trial court found a violation of section 15 of the Charter. The Employment and Immigration Commission appealed this decision to the Canadian Supreme Court. This court confirmed that the differentiation between adoptive and biological parents violates the Constitution, however, the court, when considering the appropriate remedial option, held that:

...without a mandate based on a clear legislative objective, it would be imprudent for the court to take the course of reading the excluded group into the legislation.²¹⁷

Furthermore, Lamer CJ reasoned that the finding against reading-in the remedial course was premised on the type of benefit and the group size to which the benefit seeks to be extended, and this option would have constituted "a substantial intrusion into the legislative domain".²¹⁸ These latter views are also in accord with McClung JA's finding in the Court of Appeal for Alberta in *Vriend v Alberta*,²¹⁹ who suggested that 'reading up' amounts to an intrusion of the judiciary into the legislative domain, which should be prevented whenever possible. In an appeal to the Canadian Supreme Court in *Vriend v Alberta*,²²⁰ this court also seemed to be reluctant to exercise the reading-in option, and also found that the "responsibility of enacting legislation that accords with the rights guaranteed by the Charter rests with legislature".²²¹ Furthermore, it also cautioned that the courts should not "second-

²¹⁵ Section 32(1): "Notwithstanding section 25 but subject to this section, initial benefit is payable to a major attachment claimant who proves that it is reasonable for that claimant to remain at home by reason of the placement with that claimant of one or more children for the purpose of adoption pursuant to the laws governing adoption in the province in which that claimant resides".

²¹⁶ Section 15(1): "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination...".

²¹⁷ *Schachter* 723.

²¹⁸ *Schachter* 723.

²¹⁹ *Vriend v Alberta Court of Appeal* (1996) 181 AR16 116 WAC 29 (hereinafter *Vriend Appeal*).

²²⁰ *Vriend* 493.

²²¹ *Vriend* 587.

guess legislatures and executives”²²² when performing remedial actions on unconstitutional legislation. Yet, the Court found that an appropriate remedial course would be that the declaration of invalidity be suspended for one year in order to allow the legislature time to bring the questionable provisions into line with the Constitution.²²³

Marshall J in *Newfoundland (Treasury Board) v Newfoundland Association of Public Employees (NAPE)*,²²⁴ in an unanimous Court of Appeal decision (of three judges), found that the provincial legislation denying retroactive pay equalization to a group of female employees breached section 15 of the Charter, but it was saved under section 1 since it served what was considered to be “a legitimate deficit-reducing purpose”.²²⁵ When commenting on the role of the judiciary within the context of judicial law-making, Marshall J criticised the Supreme Court of Canada’s jurisprudence of “undue incursions ... into the public domain of the elected branches of government”.²²⁶ He emphasised that courts and legislatures have different roles with regard to public policy, with there being:

...the doctrine of separation of powers accommodates no role in policy making for the judiciary beyond that consequential to passing upon whether executive and legislative measures achieved their intended policy through interpretations of their scope.²²⁷

To do otherwise would violate the separation of powers doctrine.²²⁸ Agreeing with Marshall J’s finding in this case, Choudhry and Hunter have chartered the levels and scope of judicial activism in the Supreme Court of Canada during the period 1984 to 2002, and conclude that while there are instances where the courts’ interference could have been considered to be legitimate and appropriate, still:

²²² *Vriend* 564.

²²³ *Vriend* 588.

²²⁴ *Newfoundland (Treasury Board) v National Association of Public Employees* 2002 NLCA 72 (hereinafter *Newfoundland (Treasury Board)*). Section 1: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in its subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

²²⁵ *Newfoundland (Treasury Board)* para 630.

²²⁶ *Newfoundland (Treasury Board)* para 364. See also Makin <https://www.theglobeandmail.com/new/national/judicial-activism-has-gone-too-far-court-says/article22398248/> (Date of use: 2 July 2019).

²²⁷ *Newfoundland (Treasury Board)* para 349.

²²⁸ *Newfoundland (Treasury Board)* para 349. See also Choudhry and Hunter 2003 *McGill LJ* 525, 546, 553-554.

Because we are not able to distinguish appropriate from inappropriate interferences, we are not able to ascertain whether the levels of appropriate interference stay constant over time, or whether there is significant variation in the levels of appropriate interference.²²⁹

Since it is not possible to establish appropriate or inappropriate incursions, it is also not possible to measure the standards of proper incursions, or whether their standards vary over time. McLachlin's views on the role of Canadian Supreme Court comprehensively present a notion that have been termed 'judicial supremacy' or 'judicial activism' which has been criticised for entrusting the unelected judiciary with more powers than the other branches to determine the constitutionality of laws, or conduct of the elected representatives of the people.²³⁰ Many critics opposing McLachlin's perspectives question and reject the legitimacy of a court bestowed with unrestrained powers to invalidate elected representatives' policies, in line with Bickel's claim that when a court:

...declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the people.²³¹

As seen in Marshall J's reasoning in *Newfoundland (Treasury Board)*, Canadian judges hold divergent views regarding the meaning and scope of judicial law-making or judicial activism as provided by the Canadian Charter and Constitution. These different views reflect the viewpoints of many justices in the United States as well. In the following section, it will be investigated whether South African courts also experience similar predicaments.

3.2.3 *Judicial law-making in South Africa*

During the apartheid regime in South Africa, courts were not allowed to make any laws or extend any definition of crimes, as this function fell solely within the legislature's peripheries. Courts could only interpret laws strictly "within the framework of the words used by the legislature".²³² The adoption of the South African Constitution has changed this role significantly. As a result of the powers

²²⁹ Choudhry and Hunter *McGill LJ* 555.

²³⁰ Lincoln *First inaugural address* 584; McLachlin 2001 *Constitutional Forum* 18-20.

²³¹ Bickel *The least dangerous branch* 16-17.

²³² According to Singh and Bhero 2016 *PELJ* 1, this is an orthodox textual position, in contrast to a purposive interpretation where the legislation's aim and purpose must be considered along with the values of the Constitution.

derived from the Constitution, the South African judiciary in the post-democratic constitutional era has asserted its influence on the development of the law and public policy. This is a situation which, according to many, is worrisome, and demands closer scrutiny.

Section 173²³³ of the Constitution vests the courts with the power to develop the common law when such development is deemed to be in the interests of justice. This constitutional judicial law-making framework presents a difficulty in determining the authority of courts in developing laws or public policy, as its scope, methodology and the limits of this process remains inexplicable in the Constitution. Section 39(2) of the Constitution enjoins the courts to promote the spirit, purport and objects of the Bill of Rights when developing common law or customary law. What follows is a brief overview of how this judicial law-making role has been exercised and defined by the courts, and in South African jurisprudence.

The case of *Masiya v Director of Public Prosecutions, Pretoria and Another*²³⁴ dealt with the constitutional validity of the common-law definition of rape to the extent that it excluded anal penetration, and was gender-specific. The accused (applicant) was convicted in the regional court of the rape of a nine-year-old girl for unlawfully and intentionally having anal intercourse with her, without her consent. The regional court had found the common-law definition of rape to be unconstitutional, and had extended it to include acts of non-consensual sexual penetration of the male penis into the anus of another person. The High Court had agreed with this finding by the regional court, and the matter came before the Constitutional Court for confirmation under section 172(2)(a) of the Constitution.²³⁵ While the Constitutional Court (11 judges sitting) found the common-law definition of rape unconstitutional to the extent that it excluded anal penetration, there was, however, no consensus regarding the constitutional validity of the definition's gender-specific qualifications.²³⁶

²³³ For the contents of s 173, see Chapter 1 footnote 29.

²³⁴ *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (2) SACR 435 (CC) (hereinafter *Masiya*). See also the discussion in para 1.5.5 of this study.

²³⁵ *Masiya* 436-437. Section 172(2)(a): "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament ... but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court".

²³⁶ *Masiya* 454f-455d, 451f-g.

In a judgment delivered by Nkabinde J, the majority of the Constitutional Court (Moseneke DCJ, Kondile J, Madala J, Mokgoro J, O'Regan J, Van der Westhuizen J, Yaccob J and Van Heerden AJ) described the justification for the definition's development in the following terms:

...the extension of the common-law definition of rape to include non-consensual anal penetration of females will be in the interests of justice and will have, as its aim, the proper realisation by the public of the principles, ideals and values underlying the Constitution.

The proficiency of the interests-of-justice test to developing laws remains questionable, and has been disapproved in other jurisdictions. For example, as a test for the development of hearsay evidence,²³⁷ the Hong Kong Law Reform Commission has criticised this test as being open-ended, and prone to contributing to uncertainty in the law. This Law Reform Commission rejected South Africa's response as regards the 'interest of justice' test as being too subjective as: "It permits of personal value-judgement and is often referred to as 'palm-tree justice'".²³⁸ Similar concerns were expressed by the Irish Law Reform

²³⁷ Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 of South Africa: "Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless – the court having regard to –
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice".

²³⁸ Yan-lung *Hearsay in criminal proceedings* para.8.20. At para 8.21, it is noted that "In the result, we thought it was possible to devise a scheme, imbued with the spirit of the South African model, but offering clear signposts in the interests of certainty and consistency in decision-making, protection for the rights of the accused, and respect for the integrity of the trial process." The English hearsay reform model, namely, s 114 of the Criminal Justice Act 2003, also allows for the admission of hearsay evidence through the use of the interests-of-justice test, as noted by the Hong Kong Law Reform Commission at para 8.28: "As with the South African model, in respect of which we summarised our concerns at paragraphs 8.20 and 8.21 above, the open-ended nature of this discretion does not sufficiently safeguard against the dangers of hearsay evidence". The Commission was more concerned with the "uncertainty in the law and inconsistent decisions" which could result from the use of the "interests of justice" test. See para 8.28. Section 114(1) of the Criminal Justice Act 2003 states: "In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if –
(a) any provision of this Chapter or any other statutory provision makes it admissible,
(b) any rule of law preserved by section 118 makes it admissible,
(c) all parties to the proceedings agree to it being admissible, or
(d) the court is satisfied that it is in the interests of justice for it to be admissible".

Commission.²³⁹

In a minority judgment delivered by Langa CJ, (Sachs J concurring), the two judges agreed with the reasoning of the majority that the definition of rape fails to meet the spirit, purport and objects protected in the Bill of Rights, however, they found that the court's development should go "further so that it includes the anal rape of men".²⁴⁰ What is interesting with their reasoning is that while the majority of the court endorsed the application of the interests of justice as a capable framework to develop laws as provided by section 173 of the Constitution, they (the minority) also found that this common-law definition should in addition also be developed through the section 39(2) framework, namely, 'the spirit, purport, and objects of the Bill of Rights'. As discussed earlier, like the interests-of-justice test, the scope and extent of this latter test is not comprehensively defined in the Constitution.

Snyman criticises the Constitutional Court's decision in the *Masiya* case because he finds that the court acted out of its judicial function, and breached the principle of legality when extending the scope of rape to include penile penetration of the anus. The development of the law to this extent constitutes a role which he finds to be within the terrain of the legislature. Secondly, he maintains that the common-law rape definition - which is limited to penile non-consensual penetration of a female into the vagina - had a sound premise, and did not discriminate against females, and in his view, there was no justification for its development.²⁴¹

The Court's judgment did not only violate the common-law principle of legality but also section 35(3)(k) of the Constitution, where this principle is constitutionalised as it provides that every accused person has a right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.²⁴² At the core of this principle is the understanding that "courts may not create crimes".²⁴³ The general principle, Snyman adds, "is *iudis est ius dicere sed nod dare*: the function of a judge is not to create new law, but to

²³⁹ Irish Law Reform Commission *Report Hearsay in civil and criminal cases* para 5.32. See also Mhlanga *An analysis of the impact of the admission of hearsay evidence* 115-118.

²⁴⁰ *Masiya* paras 465h-j.

²⁴¹ Snyman 2007 SALJ 677-678.

²⁴² Snyman 2007 SALJ 678.

²⁴³ Snyman 2007 SALJ 678.

interpret existing law”.²⁴⁴ Otherwise, such conduct of a court breaches the role of the legislature, and also violates the concept that the legislative and judicial roles of the state must be partitioned.²⁴⁵

The Court also premised its power to develop the scope of the crime on the constitutional provisions of section 39(2), which provides that a court must promote the spirit, purport, and objects of the Bill of Rights when developing common law.²⁴⁶ The Court held that this provision of the Constitution has entrusted it with power which included the “incremental”²⁴⁷ development of the law. This understanding of section 39(2), is, however, disputed and it is argued that ‘developing’, as provided by section 39(2), does not entail any authority to expand the definitional elements of any crime to include conditions not covered by the standing definition.²⁴⁸ The principle of legality, it is further contended, is not restricted to a prohibition on the courts against developing new crimes, but “extends further to include a prohibition against extending the legal (abstract) definition or scope of existing crimes”.²⁴⁹

The judgment is also criticised for constituting “an extension by analogy of the scope of a crime”.²⁵⁰ The court has found that penetration per anum should be considered as falling under the same genus as penetration per vaginam, because in the court’s view, it degraded females and violated their rights to dignity, freedom, and bodily security. The problem with this reasoning is that South African law is premised on the principle that a provision of criminal law which defines “the outer limits of liability should not, without very good reason, be extended by means of analogy”.²⁵¹ However, such use of analogy, if it is to the benefit of the accused, “in order to limit the field of operation of a criminal definition, is something different, and may be permissible”.²⁵² It was not this understanding of analogy that was used in the

²⁴⁴ Snyman 2007 SALJ 678.

²⁴⁵ Snyman 2007 SALJ 678. See also Burchell and Milton *Principles of criminal law* 94-106; Snyman *Criminal law* 39-50.

²⁴⁶ See footnote 238 above where the minority judgment is rendered.

²⁴⁷ *Masiya* paras 452d-f.

²⁴⁸ Snyman 2007 SALJ 678.

²⁴⁹ Snyman 2007 SALJ 678-679.

²⁵⁰ Snyman 2007 SALJ 679.

²⁵¹ Snyman 2007 SALJ 679. See also *R v Oberholzer* 1941 OPD 48 60; *S v Smith* 1973 (3) SA 945 (O) 947.

²⁵² Snyman 2007 SALJ 679: “The use of analogy to create a new defence is also admissible”. See also *S v Campher* 1987 (1) SA 940 (A); *S v Wiid* 1990 (1) SACR 561 (A).

judgment, as the use of analogy was to extend the definition of a crime.²⁵³

Continental writers are very doubtful regarding the use of analogy to establish the outer limits of a crime. They have often referred to the prejudice and dishonourable use of analogy by the courts in Nazi Germany to create new types of punishable acts.²⁵⁴

The prohibition of interpretation by way of analogy in criminal law (*Analogieverbot*), which forms part of the principle of legality, means not only a prohibition on the creation of new crimes, but also a prohibition on the extension (*Ausdehnung*) of existing ones.²⁵⁵

The interpreter of the law may not construe a definition in a manner that the interpretation surpasses the scope of the definitional components of the definition. In such cases, the interpreter construes the definition more broadly than is permitted, which is improper as “he may not widen the field of application of the definition of existing crimes”.²⁵⁶ To develop crimes’ definitions by analogy, as the Constitutional Court did in the *Masiya* case, could also result in legal uncertainty.²⁵⁷ What is violated by this kind of interpretation, is the component of the aspect inferred in the principle of legality which provides that:

...law, and more particularly the definitions and elements of a crime, should be as certain as possible (*ius strictum*) and ... the interpretation of criminal provisions should be strict.²⁵⁸

This principle has been accepted by South African courts, as in *R v Sibiyi*, where Schreiner JA held that, if possible, there should be “a high degree of rigidity in the definition of crimes; the more precise the definition the better”.²⁵⁹ Marais J, in *S v Augustine*, found as regards the common-law crime of theft, that one will always find those:

...who invites and favour “extensions” by the Court of the existing principles of the common law to encompass situations which they feel “should” be encompassed, even if they have not hitherto been so encompassed. I do not think the Courts should respond too readily to such invitations. Fundamental innovations of this kind are for the Legislature (if so advised) and not the

²⁵³ Snyman 2007 SALJ 679.

²⁵⁴ Snyman 2007 SALJ 679.

²⁵⁵ Jescheck and Weigend *Lehrbuch des Strafrechts* 134.

²⁵⁶ Jakobs *Strafrecht Allgemeiner Teil* 82.

²⁵⁷ Snyman 2007 SALJ 680.

²⁵⁸ Snyman 2007 SALJ 680.

²⁵⁹ 1955 (4) SA 247 (A) 256.

Courts.²⁶⁰

The view is that the role of the courts does not entail the development of the scope of existing common-law principles, but that the legislature is the proper branch to be involved with such ‘fundamental innovations’. There is another danger in extending the definitions of crimes by analogy, in that judges “may be unduly influenced by emotional considerations, the public media and pressure groups”.²⁶¹ Snyman argues that the undue influence from pressure groups, public and media was apparent in *Masiya* in the “emotionally charged, and therefore vague, words and expressions used by the judges”.²⁶² He provides the following examples from the judgment:

“the crime of rape perpetuates gender stereotypes and discrimination” (para 36); “humiliating” (para 26); “patriarchal stereotypes” (para 29); “the abhorrence with which our society regards these pervasive but outrageous acts” (para 44); “degrading, humiliating and traumatic” (para 30); “gross humiliation and indignity” (para 79); “feeling of righteousness” (para 9).²⁶³

The court also expressly mentioned the role of pressure groups:

Due in no small part to the work of women’s rights activists, there is wider acceptance that rape is criminal because it affects the dignity and personal integrity of women.²⁶⁴

However, the analysis of claims from pressure groups is thought to be the function of parliament, and not that of the courts.²⁶⁵ In other words, the Constitutional Court took into account public opinion in making its decision, a decision-making process that was criticised and cautioned against by Chaskalson CJ in the *Makwanyane* judgment,²⁶⁶ and it now remains unclear how far courts can go in making reliance on public opinion.

There is another ground why courts are not the correct forum to create crimes or extend the scope of an existing one, which is the fact that a court case deals with

²⁶⁰ 1986 (3) SA 294 (C) paras 302i-j.

²⁶¹ Hazelwinkel-Suringa *Inleiding tot de studie van het Nederlandse strafrecht* 487.

²⁶² Snyman 2007 SALJ 680.

²⁶³ Snyman 2007 SALJ 680.

²⁶⁴ *Masiya* paras 451a-b.

²⁶⁵ Snyman 2007 SALJ 680.

²⁶⁶ *Makwanyane* para 88.

the fate of a specific accused and a specific complainant.²⁶⁷ It is understood that the danger is that a court hearing a specific case may be swayed or influenced by emotions which the act of the individual accused, or the ordeal of the individual complainant may generate. Deliberations in parliament, on the other hand, are inclined to be:

...more abstract in that they concentrate on the social evil in general; the temptation to be aroused by the passions generated by what happened in a particular instance with a particular accused or complainant is smaller.²⁶⁸

This latter scepticism surrounding judicial law-making constitutes what O'Scannlain criticises as "judicial legislating".²⁶⁹ There is a difference between the legitimate and vital function of the courts in striking down criminal-law principles which is unconstitutional, and the conduct of developing the scope of existing crimes, which "founders on the principle of legality".²⁷⁰ Hooro concurs with Snyman's criticisms of the Constitutional Court's judgment in *Masiya*, and argues that this was the approach taken by Appellate Division in *Ex parte Minister van Justisie: in re S v Jen S v Von Molendorff*,²⁷¹ by refusing to extend the ambit of the common-law crime of extortion to include non-patrimonial benefit. This court held that it was not the function of the courts to extend the scope of a common-law crime, and it be would a matter for the legislature to consider if there was a need for such development of law.²⁷²

Phelps questions Snyman and Hooro's criticisms of the Constitutional Court's judgment in *Masiya* case, because, in her view, the principle of legality should be seen as having been accounted for in the recognition that courts may develop common law by the constitutional provisions. As society is constantly changing, courts should develop common law in order to keep the law relevant, and to "prevent the common-law definitions of crimes from being relegated into the annals of history".²⁷³ Phelps' second justification for developing common-law crimes is to homogenise the common law with the Constitution, particularly as to the

²⁶⁷ Snyman 2007 SALJ 681. This aspect was also discussed in the paragraphs on the United States and Canadian judicial law-making.

²⁶⁸ Snyman 2007 SALJ 681.

²⁶⁹ O'Scannlain 2015 *Virginia LR Online* 33. See para 3.2.1 above.

²⁷⁰ Hooro 2007 SACJ 86.

²⁷¹ 1989 (4) SA 1028 (A) (hereinafter *Von Molendorff*). See also Hooro 2007 SACJ 82.

²⁷² *Von Molendorff* paras 1041i-1042b.

²⁷³ Phelps 2008 SALJ 652.

fundamental rights in the Bill of Rights.²⁷⁴ Furthermore, the separation of powers doctrine and the principle of legality are not a bar to this court's role because:

In this way the common-law grows, in the spirit of the Constitution, within the existing framework of crimes. If behaviour cannot legitimately fit into an existing common-law crime, and the existing definitions is nonetheless constitutional as it stands, then it is up to the legislature to intervene.²⁷⁵

Developing common law, and bringing it in line with the Constitution should be welcomed, and courts should not:

...pay lip service to this injunction [because] if courts cannot do the latter then the constitutional injunction for the courts to develop the common law in line with the Constitution is rendered meaningless.²⁷⁶

It is difficult to agree with Phelps' reasoning on the scope of the courts' constitutional role to develop common-law crime definitions. As suggested by Snyman, courts' deliberations suffer from a deficiency, in that they are only limited to the particular accused and complainant's issues, and courts can be unduly influenced by the strong feelings generated by pressure groups in the court proceedings, such as in the *Masiya* case. Furthermore, as was argued earlier, courts lack the power and resources to implement its judgments - "like the Pope, the judiciary possesses no armies, and its sole power is the power to persuade".²⁷⁷ Phelps' view also blurs the constitutional boundaries between the courts and the legislature, a worrisome trend as pointed out by Ponnann JA in *S v Matyityi*:

Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power the other arms of State.²⁷⁸

If the courts' role is to interpret laws enacted by the legislature, it seems to be correct to suggest that courts have a limited role to develop the common law because the South African constitutional order will not be able to endure if courts cannot contain and control the boundaries of their own power. Checks and balances forming part of the separation of powers doctrine require courts to ensure that all arms of

²⁷⁴ Phelps 2008 SALJ 652.

²⁷⁵ Phelps 2008 SALJ 654: "It is a division of labour that is in keeping with the conception of the separation of powers in South Africa as a 'constitutional dialogue', with each arm of the state given checking functions over the others".

²⁷⁶ Phelps and Kazee 2007 SACJ 355.

²⁷⁷ Abraham 1986 *Political Science Quarterly* 278. See also footnote 22 in this Chapter.

²⁷⁸ *S v Matyityi* 2011 (1) SACR 40 (SCA) paras 53d-e.

government, including the courts, should act within the Constitution and other laws. Embedded in this concept is the understanding that:

Courts must defer to the appropriate branch of government when they cannot properly decide a matter without invading their terrain. They must not usurp the role of other arms of state and may not compromise their impartiality.²⁷⁹

Because the courts' use of its constitutional power under section 39(2) of the Constitution might be viewed as "thwarting the will of the representatives of the actual people of the here and now",²⁸⁰ courts performing this role would have to be careful not to surpass or misuse these powers as "undue adventurism can be as damaging as excessive judicial timidity".²⁸¹ This "counter-majoritarian difficulty"²⁸² in South African constitutional jurisprudence seems to be "one of the more serious problems the courts face when they engage in judicial activism".²⁸³ This constitutional role, while it ensures that these branches of government perform their role in line with the Constitution, albeit a vital function, does not entrust the judiciary with "greater power than any other branch of government".²⁸⁴

The Constitutional Court's case law show that the Court, in its attempt to perform its law-making role in terms of section 39(2), has in some cases gone against the will of the majority, and at times risked losing public confidence in the courts. In promoting the spirit, purport, and objects of the Bill of Rights, the Court has not only developed the common-law, but also developed policy issues. In *S v Makwanyane and Others*,²⁸⁵ the Court held that section 277(1) of the Criminal Procedure Act,²⁸⁶ which allowed for the imposition of the death penalty for persons charged and convicted of murder, was unconstitutional because it violated, amongst other things, the right to human dignity, the right to life and the right not to be treated or punished

²⁷⁹ Moseneke <https://www.groundup.co.za/article/separation-powers-have-courts-crossed-line-3152/> (Date of use: 18 September 2019).

²⁸⁰ Singh and Bhero 2016 *PELJ* 11. See also Bickel *The least dangerous branch* 16-17.

²⁸¹ Singh and Bhero 2016 *PELJ* 11. As per Sachs J in *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 194 (CC) para 156.

²⁸² A term used by Bickel to describe the role of the United States Supreme Court in declaring unconstitutional a legislative act. See footnote 202 above.

²⁸³ Singh and Bhero 2016 *PELJ* 11.

²⁸⁴ Moseneke <https://www.groundup.co.za/article/separation-powers-have-courts-crossed-line-3152/> (Date of use: 18 September 2019).

²⁸⁵ *Makwanyane* 391.

²⁸⁶ Criminal Procedure Act 51 of 1977.

in a cruel, inhuman or degrading way.²⁸⁷ This Court's finding was reached despite the public outcry (which included a demand for a referendum on this issue), and the crime rate which seemed to be on the rise at that time, yet the death penalty and this legislation were declared unconstitutional. Chaskalson CJ stated that:

...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.²⁸⁸

He added that public opinion cannot be the decisive factor in such enquiries, else "there would be no need for constitutional adjudication".²⁸⁹ It is conceded that courts should not base their judgments solely on public opinion, yet questions can be asked whether due to the magnitude of the policy involved in this specific case, why the nine unelected judges did not leave this policy issue to the more than 56 million South Africans to decide their policy preference. These latter concerns were also expressed by Scalia J in his dissenting judgment in the 2015 United States Supreme Court's decision in *Obergefell*, which declared same-sex marriage constitutional, in that:

Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is the majority of the nine lawyers on the Supreme Court.²⁹⁰

The *Makwanyane* judgment is thought not only to have abolished the death penalty, but Chaskalson JP's reasoning is also understood to have:

...attempted to close the back door to the revival of capital punishment through the popular will by rendering it almost impossible to justify any reinstatement of capital punishment by constitutional amendment.²⁹¹

The legitimacy of such kind of judicial power is criticised by Bickel who finds it to be undemocratic because, according to him, democracy does not denote perpetual reassessments of once-made decisions, however, it does require that "a

²⁸⁷ *Makwanyane* para 95. Section 10: "Everyone has inherent dignity and the right to have their dignity respected and protected". Section 11: "Everyone has the right to life". Section 12(1): "Everyone has the right freedom and security of the person, which includes the right – (e) not to be treated or punished in a cruel, inhuman or degrading way".

²⁸⁸ *Makwanyane* para 88.

²⁸⁹ *Makwanyane* para 88.

²⁹⁰ *Obergefell* 2627. See also footnote 143 above.

²⁹¹ Webb 1998 *J of Const L* 252: "The Court exhaustively analysed the practical, theoretical and constitutional grounds for capital punishment and rejected them leaving open only the unlikely but entirely plausible chance that: (i) the Parliament would amend the Interim Constitution, or (ii) the Constitutional Assembly drafting the new Constitution would reformulate the Bill of Rights to accommodate capital punishment".

representative majority has the power to accomplish a reversal”.²⁹²

In the case of *Fourie*,²⁹³ the Constitutional Court declared section 30(1) of the Marriage Act²⁹⁴ unconstitutional as it failed to recognise the right of same-sex couples to marry. It was contended by the applicants (Fourie and Bonthuys) that their exclusion from marrying each other comes from the common-law definition of marriage which is “a union of one man with one woman, to the exclusion, while it lasts, of all others”.²⁹⁵ In terms of section 30(1), a marriage officer must put to each of the parties the following question:

Do you, A.B., declare that as far as you know there is no impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?’ and thereupon the parties shall give each other right hand and the marriage officer concerned shall declare the marriage solemnised in the following words: I declare that A.B. and C.D. here present have been lawfully married.

The reference to wife or husband was said to have excluded same-sex couples. Sachs J, who delivered the judgment of the majority, held that section 30(1) should be read “as including words ‘or spouse’ after the words ‘or husband’ as they appear in the marriage formula”.²⁹⁶ These decisions were met with reservations by the general public, however, the legitimacy of the court was not weakened because these pronouncements were thought to have assisted in advancing and safeguarding human rights, in particularly the rights of minority groups, and amounted to progressive judicial activism.²⁹⁷

The Constitutional Court in *Carmichele*²⁹⁸ had to adjudicate whether the Court should develop the common law of delict to afford the applicant a right to claim damages against the police or prosecutor’s negligence. It was held that section 39(2), read with section 173 of the Constitution, created an obligation on the courts

²⁹² Bickel *The least dangerous branch* 17. See also O’Scannlain 2015 *Virginia LR Online* 34: “Once the judiciary strike down a law as unconstitutional, it can be nearly impossible to reverse this ‘judicial veto’”.

²⁹³ *Minister of Home Affairs v Fourie and Others* CCT 60/04 (1 December 2005) (hereinafter *Fourie*).

²⁹⁴ Marriage Act 25 of 1961.

²⁹⁵ As stated by Innes CJ in *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 61.

²⁹⁶ *Fourie* para 162.

²⁹⁷ Singh and Bhero 2016 *PELJ* 12. See also Diala 2007 *Judicial activism in South Africa’s Constitutional Court* 15-16.

²⁹⁸ *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) (hereinafter *Carmichele*).

to develop the common law of delict, and the scope of the state's liability for negligence was extended to ensure the duty of the state to protect members of the public.²⁹⁹

In the case of *Stransham-Ford*,³⁰⁰ the applicant, an advocate of the court, Mr Stransham-Ford, a 65-year-old male, was dying of prostate cancer. He instituted litigation asking the court to decide whether a doctor could lawfully and constitutionally assist him to end his life without running the risk of committing murder or any other crime. Fabricius J pointed out that under the current South African law, PAS or voluntary euthanasia was unlawful, and continued to find that section 39(2) of the Constitution has entrusted the courts with the power to determine whether this common-law principle needed to be developed. He also pointed out that "a court must keep in mind that the primary responsibility for law reform rests with the legislature".³⁰¹ Fabricius J approved of the Constitutional Court's judgment in *Masiya* where the provisions of section 39(2) were interpreted to mean that "a court should develop the common law incrementally".³⁰² Consequently, he embarked on the incremental development of the common law. As discussed above, this is an understanding of section 39(2) of the Constitution that is criticised by Snyman because, in his view, 'developing' in section 39(2) does not include any power to widen the bounds of existing crimes to include situations not covered by the established definition.³⁰³ This provision of the Constitution, Fabricius J held, places an obligation on the courts to protect rights, and "does not give the court discretionary powers".³⁰⁴ Fabricius J also considered the extent of this obligation as discussed in the *Carmichele* judgment. He premised his view of the right to life on O'Regan J's reasoning in the *Makwanyane* decision,³⁰⁵ and found

²⁹⁹ *Carmichele* paras 955f-g- 956d, 957a-958c.

³⁰⁰ *Stransham-Ford v Minister of Justice and Constitutional Development and Correctional Services and Others* 2015 (4) SA 50 (GP) (hereinafter *Stransham-Ford*).

³⁰¹ *Stransham-Ford* paras 70a-b.

³⁰² *Stransham-Ford* para 70b.

³⁰³ Snyman 2007 SALJ 678. See also footnote 121 above.

³⁰⁴ *Stransham-Ford* paras 70d-e.

³⁰⁵ *Makwanyane* paras 326-327: "The right to life, in one sense, antecedent to all other rights in the Constitution. Without life, in the sense of existence, it would not be possible to exercise or to be bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of

that a person's right to end his life is "derived from the rights to physical and psychological integrity and dignity".³⁰⁶ The court also found that the constitutional rights to life and dignity implicitly protected a person's right to PAS; a right which existence was not provided for in the Constitution.³⁰⁷ The exercise of this kind of judicial power is problematic, and its justification and legitimacy has been questioned by O'Scannlain J because it amounts to "constitutionalising the question".³⁰⁸ Furthermore, the judgment in *Stransham-Ford* can be criticised for impacting directly on the country's policy regarding PAS, because it withdrew this question from the public's sphere.³⁰⁹ These sentiments were expressed by the then Minister of Justice, Michael Masutha, who stated, in the aftermath of this judgment, that his department (the respondent in the case) remained opposed to the legalising of PAS, because no one under the Constitution has a right to kill another person.³¹⁰ These latter views by an elected representative of the people, a member of the ruling party, also attest to the fact that this is an area of public interest which the public should have been remitted to decide, and not only one judge after hearing arguments in one specific case. As mentioned in the *Stransham-Ford* case, however, in 1998, the South African Law Commission (SALC), after wide consultation with all relevant parties including civil society, recommended that PAS be legalised.³¹¹ Unfortunately, there has not yet been any official response to its proposal, as more pressing issues have since then received attention.

The respondents in the *Stransham-Ford* case appealed to the Supreme Court of Appeal against the decision.³¹² The crucial issue before this court was whether a cause of action still existed at the time that the order was made, since *Stransham-Ford* had in fact died two hours earlier. In a unanimous decision, the court set aside

each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence – it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity".

³⁰⁶ *Stransham-Ford* paras 60d-f.

³⁰⁷ *Stransham-Ford* paras 70e-71h.

³⁰⁸ O'Scannlain 2015 *Virginia LR Online* 47.

³⁰⁹ O'Scannlain 2015 *Virginia LR Online* 47. See also *Compassion in Dying* 85 Fed 1440 (9th Cir 1996) 1441-1442.

³¹⁰ Manyathi-Jele 2015 *De Rebus* 7.

³¹¹ SALC *Euthanasia* (x) – (xi).

³¹² *Minister of Justice and Others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA) (hereinafter *Stransham-Ford SCA*).

the judgment of the High Court based on the reasons that Mr Stransham-Ford's cause of action died with him,³¹³ and that the High Court's order was based on an inadequate consideration, and a misunderstanding of the law.³¹⁴ There was furthermore inadequate evidence on which to decide the constitutional issue.³¹⁵ In setting the High Court's judgment aside, Wallis JA criticised the decision for what he found to be "an order making a profound change to the South African law of murder, without any consideration of applicable principles".³¹⁶ On this point, Jacobs, when commenting on the social significance and magnitude of PAS, questions the justification for one person to make a determination to legalise the conduct as certain other factors should also have been taken into consideration, "such as doctors' (including future doctors') willingness to perform these practices".³¹⁷

In the *Satchwell*³¹⁸ case, the Constitutional Court held that the Judges' Remuneration and Conditions of Employment Act³¹⁹ - which provided for payment of certain financial benefits to the surviving spouse of a deceased judge - was unconstitutional. The provisions were found to be discriminatory because same-sex couples were denied benefits, and consequently in breach of the right to equality before the law.³²⁰ In order to remedy the defect in the legislation, the Constitutional

³¹³ *Stransham-Ford* SCA paras 19-21.

³¹⁴ *Stransham-Ford* SCA paras 28-29, 41, 54, 57, 69-71, 73-74.

³¹⁵ *Stransham-Ford* SCA paras 95, 97 and 100.

³¹⁶ *Stransham-Ford* SCA para 41.

³¹⁷ Jacobs 2018 SA J *Bioethics* L 68: "What would the implications be if PAS were to be legalised, but doctors were unwilling to participate in life-ending interventions, or were completely opposed to the legalisation of PAS? Secondly, how would the public react to having these practices made legal?"

³¹⁸ *Satchwell* 266.

³¹⁹ Judges' Remuneration and Conditions of Employment Act 41 of 2001.

³²⁰ Section 9 of the 2001 Act provides: "(1) The surviving spouse of a Constitutional Court Judge or Judge who on or after the fixed date was or is discharged from active service in terms of section 3 or 4 who dies or dies while performing active service, shall be paid with effect from the first day of the month immediately succeeding the month in which he or she dies an amount –

- (a) in the case of a surviving spouse of a Constitutional Court Judge or Judge who was so discharged from active service, equal to two thirds of the salary which was in terms of section 5 payable to that Constitutional Court Judge or Judge; or
- (b) in the case of a surviving spouse of a Constitutional Court Judge or Judge who died while performing active service as a Constitutional Court Judge or Judge, equal to two thirds of the amount to which that Constitutional Court Judge or Judge would have been entitled in terms of section 5 if he or she was discharged from active service in terms of section 3(1)(a) or (2)(a) on the date of his or her death.

(2) The amount payable to the surviving spouse of a Constitutional Court Judge or Judge in terms of subsection (1) shall be payable with effect from the first day of the month immediately succeeding that day on which he or she died, and shall be payable until the death of such spouse".

Court ordered that sections 9 and 10 of the Act are to be read as though the following words appear therein after the word 'spouse' –

or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support.

The reading-in of words as a remedy in the context of legislation has been found to be inconsistent with fundamental rights, as discussed above. This remedy has been exercised by the Canadian Supreme Court in similar circumstances, and it has been criticised as being a form of policy making by the courts which constitutes “undue incursions by the judiciary into the policy domain of the elected branches of government”.³²¹

Section 27 of the Constitution, which forms part of the Bill of Rights, provides for the constitutional obligation to protect socio-economic rights.³²² During the Constitutional Court’s judgment on the certification of the 1996 Constitution, there was an objection to the inclusion of these rights, in that such inclusion was inconsistent with the separation of powers principle as the judiciary would infringe upon the domain of the executive and legislature, and would dictate to “government how the budget should be allocated”.³²³ The Court held that, even though the enforcement of these rights may result in orders with budgetary implications, the enforcement of other rights, for example, civil and political rights, may also have similar implications. The objectors also argued that these rights are not justiciable.

And s 10 provides: “If a gratuity referred to in section 6 would have been payable to a Constitutional Court Judge or Judge who died or dies on or after the fixed date had he or she not died but, on the date of his or her death, was discharged from active service in terms of section 3 or 4, there shall –

- (a) if such Constitutional Court Judge or Judge is survived by a spouse, be payable to such surviving spouse, in addition to any amount payable to that spouse in terms of section 9; or
- (b) if such Constitutional Court Judge or Judge is not survived by a spouse, be payable to the estate of such Constitutional Court Judge or Judge, a gratuity which shall be equal to the amount of the gratuity which would have been so payable to such Constitutional Court Judge or Judge had he or she not died but was, on the date of his or her death, discharged from active service as aforesaid”.

³²¹ *Newfoundland Association of Public Employees* para 364.

³²² Section 27 provides that “(1) Everyone has the right access to – (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment”.

³²³ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC) para 77.

The Court held that these rights are, at least to some extent, justiciable.³²⁴

In some cases the Constitutional Court not only provided guidelines on how policy issues are to be dealt with but it went as far as to formulate policy issues, for example, in its decisions in the *Treatment Action Campaign*³²⁵ and *Grootboom*.³²⁶ In the *Treatment Action Campaign*, an NGO challenged the constitutionality of a government programme which was put in place to assist with the prevention of mother-to-child human immunodeficiency virus (HIV) transmission. The programme was administered in two areas; one in rural areas, and the other in urban areas. Doctors and patients who were outside these piloted areas could not access Nevirapine, which was the preferred anti-retroviral drug. Furthermore, the court also ordered that the government put in place and develop a comprehensive programme that would assist in preventing mother-to-child transmission.

The government appealed this decision to the Constitutional Court, where the Constitutional Court upheld the High Court's decision, but acknowledged that primary policy should be formulated by parliament and the executive. It was argued on behalf of the government that under the separation of powers, the making of policy is the prerogative of the executive and not the courts, and that courts cannot make orders that have the effect of requiring the executive to pursue a particular policy.³²⁷ In dismissing this argument, the Court held that all government branches should take part in respecting the spheres of their boundaries, however, the respect for this separation "does not mean that Courts cannot or should not make orders that have an impact on policy".³²⁸ In this case, the Court was asked to protect section 27(1) of the Constitution (the right to health care services, food and water and social security). The Court held that the rights which the state is obliged to respect, protect, promote and fulfil include socio-economic rights in the Constitution.³²⁹ While the Court found it to be within its constitutional powers to protect this right, and/or to make a judgment that would direct the executive to carry out a particular policy, it

³²⁴ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) paras 77-78.

³²⁵ *Minister of Health v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) (hereinafter *Treatment Action Campaign*).

³²⁶ *Government of Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (hereinafter *Grootboom*).

³²⁷ *Treatment Action Campaign* paras 755a-b.

³²⁸ *Treatment Action Campaign* para 755c.

³²⁹ *Treatment Action Campaign* paras 756a-b.

also remarked that “there are no bright lines that separate the roles of the Legislature, Executive, and the Courts from one another”.³³⁰ Consequently, the Court made an order which could be seen not only as encroaching on the separation of powers principle, but also dictating to the government how the budget should be allocated:

It is ordered that: Section 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their new-born children to have access to health services to combat mother-to-child transmission of HIV. Government is ordered without delay to: permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics.³³¹

As a result of this judgment, the government’s budget allocation was said to have increased sharply from R618 million in 2003/4 to R2,4 billion in 2006/7, and grew to R3,9 billion in 2009/10.³³² The provision of Nevirapine in hospitals and clinics constituted a policy-making issue which involves budgetary allocations which fell under the government’s terrain.

In the *Grootboom* case, the constitutional right at issue was the right to housing. The Constitutional Court’s judgment also encroached on the terrain of the executive, where the Court directed the government to implement a comprehensive programme within its available resources to progressively achieve the right of access to adequate housing.³³³ This judgment, like in the *Treatment Action Campaign* case, was in contrast to the Court’s decision in *Soobramoney*,³³⁴ where a single petitioner suffered from chronic renal failure required regular renal dialysis to prolong his life. The Court refused lifesaving dialysis treatment to Soobramoney because of budgetary constraints. Chaskalson JP, when delivering the Court’s judgment, stated that:

The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health

³³⁰ *Treatment Action Campaign* para 755b.

³³¹ *Treatment Action Campaign* paras 764h-l, 765d-e.

³³² Heywood 2009 *J Human Rights Practice* 26.

³³³ *Grootboom* paras 86b-h.

³³⁴ *Soobramoney* 765.

budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs medical authorities whose responsibility it is to deal with such matters.³³⁵

As already pointed out above, budgetary allocations fall within government's terrain and the state was found not to have violated the right to health as provided by section 27. It was also held here that any rational *bona fide* decision made by government will not be too readily interfered with by the Court.³³⁶

The Constitutional Court's jurisprudence in the protection of these rights, namely, socio-economic rights in the *Treatment Action Campaign, Grootboom* and *Soobramoney*, has not been consistent and comprehensive in formulating policy in the protection of these rights. It seems, however, to have created certain levels of uncertainty regarding the efficiency of the courts' policy-making role, and the enforcement and realisation of these rights. In the *Treatment Action Campaign* case, for example, part of the government's argument which was premised on budgetary constraints, it is submitted; was correctly dismissed by the Court, because it was held that there was "a pressing need to ensure that where possible loss of life is prevented in the meantime".³³⁷ This line of argument, however, could also have been relevant in Mr Soobramoney's matter "as his life could be prolonged by means of regular renal dialysis".³³⁸ In the *Treatment Action Campaign* case, the Treatment Action Campaign (TAC) NGO mobilised people to campaign for the right to health, and made use of a combination of human-rights education, HIV treatment literacy, demonstration, and litigation. As a result of these campaigns, the TAC achieved the reduction of the medicine price, prevented hundreds of HIV-related deaths, and, in addition, also forced significant additional resources into the health system which was directed towards the poor.³³⁹ Mr Soobramoney, on the other hand, who was a

³³⁵ *Soobramoney* paras 776b-c.

³³⁶ *Soobramoney* para 29.

³³⁷ *Treatment Action Campaign* para 764a. Bollyky 2002 *SAJHR* 171 argues that *Grootboom* is one of the cases "in which the constitutional violation – as a product of its qualitative and quantitative elements – outweighed the quantitative and qualitative interference in budgetary and policy considerations demanded by the relief sought. This result occurs when the remedy requires only a modest interference with the state's budgetary and policy priorities, or where the required shift in those priorities is qualitatively simple and, thus, the relief certain."

³³⁸ *Soobramoney* para 766d.

³³⁹ Heywood 2009 *J Human Rights Practice* 14. Heywood adds that: "Increased budgetary allocations for HIV and health: As a result of the 'natural' pressure of the epidemic on the health system, but driven faster by activists' demands, the allocation in the budget to health in general

single petitioner with no army of demonstrators or no petitioners on his behalf, did not mobilise people to campaign for his right to health. According to Bruhn, there were certain contributory factors that enabled the Court to reach its decision in the *Treatment Action Campaign* decision, in that budgetary concerns were attenuated as the drug was offered for free, the government had already provided funds for mother-to-child-treatment (MTCT) and Nevirapine was already partially part of government's policy.³⁴⁰ This view seems to be contrary to Heywood's claim that the mobilisation of people to campaign, HIV treatment literacy, and human rights education of people to campaign for the right to health played a significant role in the final Court decision.

Pillay compares the differences in the court orders in *Grootboom* and *Treatment Action Campaign*, and their implications on the enforcement of socio-economic rights. He argues that in the *Treatment Action Campaign*, unlike the *Grootboom* matter, the court applied a forceful approach which compelled the government to act, but the judgment "stopped short of compelling the state to act to remove the unconstitutionality inherent in its housing programme".³⁴¹ Compelling the government to act by means of the mandatory court order issued in the *Treatment Action Campaign* has the repercussion that the Court:

...retains jurisdiction over the matter if there is non-compliance with the order. The applicants are accordingly in a position to approach the Court for relief if the various respondents fail to act in the manner in which the order compels them. The relief available includes making an application for the committal of the relevant government officials for failing to abide by the court order.³⁴²

and HIV in particular has witnessed 5 years of expansion. According to the Treasury, 'Spending on HIV and AIDS grew sharply for R618 million in 2003/4 to R2,4 billion in 2006/7 and is budgeted to grow to R3,9 billion by 2009/10' (National Treasury, 2007). In the 2008 budget, expenditure was revised upwards to R6,5 billion a year by 2010/11" 26. See also Lehmann 2006 *Am Univ Int LR* 175-176: "The government had admitted that the provision of Nevirapine was within its available resources, and the court found that the additional costs associated with providing testing, counselling, and breast-feeding were not at all significant".

³⁴⁰ Bruhn 2011 *Michigan J Race & Law* 202.

³⁴¹ Pillay 2009 *Law, Democracy & Development* 275.

³⁴² Pillay 2009 *Law, Democracy & Development* 275. See *Treatment Action Campaign* para 135. See also *Treatment Action Campaign* para 106 where the Court went on to state: "We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a Court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include the issuing of a *mandamus* and the exercise of supervisory jurisdiction".

The South African Constitution has entrusted the judiciary with the power to make policy in furtherance of socio-economic rights, as well as in the area of basic service delivery where the government fails to realise these rights within its terrain. While this type of judicial function might be seen as violating the separation of powers principle, it:

...is a useful and necessary mechanism in instances where the executive fails to meet its constitutional mandate of implementing and formulating reasonable and effective policy measures to ensure the realization of socio-economic rights and thus the delivery of basic services.³⁴³

Thipanyane further adds that this judicial role should be performed “in a very responsible manner”³⁴⁴ because the constitutional separation principle should still be taken into account. The vital question is, however, not whether these socio-economic rights are justiciable but how such verdict can be pronounced as the efficiency of the current adjudication process is being questioned.³⁴⁵ The justification in the reliance being made on the Constitutional Court and other courts’ adjudication, enforcement and realisation of these rights is questioned.³⁴⁶ Instead, the successful enforcement and monitoring of these rights, it is argued, can only be achieved by working together in an interactive process comprising the legislature, the executive, the courts, the South African Human Rights Commission (SAHRC), NGO’s, community-based organisations (CBO), and ordinary South Africans.³⁴⁷

Unlike Thipanyane, who claims that the courts’ role in the protection of these rights is that of a policy maker, Olivier and Jansen van Rensburg argue that the courts’ role is in the form of an enforcement mechanism, because sections 167(4)(e) and 7(2) of the Constitution “can be interpreted as meaning that the courts can enforce social security rights and order state organs to act positively”.³⁴⁸ It is questionable whether a court may compel a legislature to pass legislation that would achieve progressive

³⁴³ Thipanyane www.fcc.co.za/.../48-13-thipanyane-t-the-courts-vs-policy-makers-who-sets-the-pace (Date of use: 10 July 2019).

³⁴⁴ Thipanyane www.fcc.co.za/.../48-13-thipanyane-t-the-courts-vs-policy-makers-who-sets-the-pace (Date of use: 10 July 2019).

³⁴⁵ Olivier and Jansen van Rensburg 2009 *Law, Democracy & Development* 87.

³⁴⁶ Olivier and Jansen van Rensburg 2009 *Law, Democracy & Development* 94-95.

³⁴⁷ Olivier and Jansen van Rensburg 2009 *Law, Democracy & Development* 95.

³⁴⁸ Olivier and Jansen van Rensburg 2009 *Law, Democracy & Development* 93. Section 7(2): “The state must respect, protect, promote and fulfil the rights in the Bill of Rights”. Section 167(4)(e): “Only a Constitutional Court may – (e) decide that Parliament or the President has failed to fulfil a constitutional obligation”.

realisation of these rights against its will. Yet, it has been recommended that courts must simply make a declaration that the legislature is compelled in terms of the Constitution to pass this legislation.³⁴⁹ The court may issue mandatory orders as an enforcement mechanism against the legislature, and against its members personally. In addition, the court may, as a last resort, issue a legislative order prescribing “the rules meant to have been enacted by the legislature required under the Constitution”.³⁵⁰ The significance of a declaratory order, as was made by the Court in the *Grootboom* decision,³⁵¹ forms an integral part of this mechanism, and can be set out as follows:

...it could rule that the legislature’s failure to act positively in the particular circumstances of the case was unreasonable and provide broad guidelines on what is required to fulfil the constitutional obligations. The effect of a declaratory that Parliament has not complied with its constitutional duties should not be underestimated. An order of this nature is in the public interest by promoting accountability, responsiveness and openness in decision-making affecting fundamental social and economic rights.³⁵²

It is against this background that the establishment of a Social Security Tribunal is recommended with the jurisdiction to adjudicate and enforce these rights, and it is thought to be an effective mechanism in the execution and realisation of these rights.³⁵³

Amongst the challenges facing judicial policy-making is that the implementation of judicial decisions that have an impact on policy changes can be delayed by the executive branch of government. This has occurred in the *Grootboom* and the *Treatment Action Campaign* judgments.³⁵⁴ There have been reports that the

³⁴⁹ Olivier and Jansen van Rensburg 2009 *Law, Democracy & Development* 95. See also Trengove 1999 *ESR R* 10-11.

³⁵⁰ Olivier and Jansen van Rensburg 2009 *Law, Democracy & Development* 95.

³⁵¹ *Grootboom* paras 96,99.

³⁵² Davis *et al* *Fundamental rights in the Constitution* 352.

³⁵³ Olivier and Jansen van Rensburg 2009 *Democracy, Law & Development* 96. See also at 95: “It is further clear that, standing as it is, the right to (access to) social security in South Africa is not yet cast in concrete terms. For such a right to fully mature, the state should initiate legislation which must provide for the substantive rights capable of being claimed (what actually should be claimed); the procedure and mechanism for claiming such rights (how the rights should be claimed); and where the rights should be claimed (venue). On the question of how and where the rights should be claimed, we are concerned with the institutions that will hear and determine disputes arising from claims for social security benefits provided for under the relevant legislation”.

³⁵⁴ Thipanyane www.ffc.co.za/.../48-13-thipanyane-t-the-courts-vs-policy-makers-who-sets-the-pace (Date of use: 10 July 2019)

Wallacedene community has seen no significant difference resulting from the *Grootboom* judgment. Furthermore, the *Treatment Action Campaign* judgment's implementation was delayed in many provinces despite the Constitutional Court's order that it should be effected "without delay".³⁵⁵

While Olivier and Jansen van Rensburg seem not to have any issues with the courts dictating on budgetary allocation or formulating government's policy through the adjudication of these rights, they do, however, question how these rights can be adjudicated and realised successfully. They find the courts' adjudication process to be inadequate to successful enforcement and realisation of these rights. Hence, they propose the establishment of the Social Security Tribunal that will be an interactive and collaborative process which will not only adjudicate, but comprehensively enforce these rights. The courts do have a role to play, but not that of policy-making.

3.3 Conclusion

The discussion in this chapter probed the role of the courts in the United States, Canada and South Africa in developing criminal offences and public policy under the provisions of a constitution. Under common law, the courts had the inherent power to develop laws. However, it is disputed that the common law empowers the courts to develop the scope and definitions of common-law crimes. In the United States, this principle has enabled the courts to develop the extent and application of common-law concepts and other policy issues, for example, defamation, PAS, same-sex marriages, abortion, amongst others. There have been contradictory views on whether the United States Constitution has mandated the courts to change public policy preferences on these issues, as these issues are said to be falling within the sphere of elected government officials (legislature and executive), and not

³⁵⁵ Thipanyane www.fcc.co.za/.../48-13-thipanyane-t-the-courts-vs-policy-makers-who-sets-the-pace... (Date of use: 10 July 2019). A report on the Sunday Times, 21 March 2004 entitled "Treated with Contempt" stated: "Grootboom is a part of Wallacedene, a large shantytown on the eastern side of Kraaifontein, a working-class area of 30 km inland from Cape Town along the N1. Grootboom is named after Irene Grootboom, a woman who made legal history and then apparently disappeared. Grootboom and 900 other applicants successfully contested in their 1998 eviction from a site in Wallacedene when the Constitutional Court ruled in their favour in October 2000. Today, all that the site of Grootboom has to show is the smelly ablution block, built in a donga that had served as a latrine for the squatters who went to court".

unelected judges. Judges deciding on these issues have been termed 'judicial legislators', and their legitimacy has been questioned. There were also views which found no fault with judges deciding and formulating these policy issues.

In Canada, the Canadian Constitution also empowers the courts to declare unconstitutional any legislation which it finds not to be in line with the Charter rights, and this power has been used by the courts to develop laws. Judicial law-making has been criticised as courts overstepping its constitutional boundary, and there have been divergent views on the scope and limits of these constitutional powers. As part of judicial law-making, the Canadian Supreme Court has exercised the reading-in of words into legislation which it finds to be unconstitutional. This Court's jurisprudence has been criticised by members of society and judges alike on the ground that it is considered to be amounting to an unwarranted intrusion into the terrain of the elected branches of government. While judicial law-making impacting on public policy has been criticised by some as going too far, there has been fervent supporters of judicial law-making, for example, McLachlin CJ, who finds no fault with the courts' application of judicial law-making because the judiciary, in her view, is the government branch which has supervisory powers over the other branches, and it is not only elected representatives who can legitimately develop public policy issues.

The South African Constitution entrusts the courts with the power to develop the common law while making use of the interests-of-justice test. However, the parameters and scope of this test are not comprehensively defined in the Constitution. The Constitution also provides that the courts, when interpreting any legislation or developing the common law, are required to promote the spirit, purport and objects of the Bill of Rights. However, the meaning and scope of these concepts are also not comprehensively defined and mandated by the Constitution. While the Constitution is clear in that the judiciary is entrusted with these powers, the challenge is that, as the meaning and the scope of these concepts remains unclear, the three branches of government come up with conflicting understandings of these concepts, and also of the constitutional boundary lines. The use of the interests of justice framework in the development of the common law has been criticised in other jurisdictions, and under the South African Constitution it remains worrisome.

In South Africa, judicial law-making not only applies to the development of the common law but section 27 of the Constitution also makes it applicable to socio-economic rights' development, enforcement and realisation. There have also been mixed reactions to the concept of judicial law-making in South Africa which removes policy issues from the public sphere, and makes unelected courts the sole arbiter instead of elected public representatives. There have been divergent views on whether the courts' role regarding socio-economic rights is one of an enforcer or a policy-maker. The effectiveness of the enforcement of these rights through the current courts' judgments and processes is also questionable. Furthermore, there have been conflicting opinions on whether these rights should be included in the Constitution, and also whether these rights are justiciable as they involve budgetary implications, which is an area which falls within the executive and legislative branch of government, and not the judiciary.

There are also challenges facing the implementation of courts' judgments which impact on policy issues where budgetary implications are at issue, as the courts lack control over government's budget to implement its judgments. The limits and effectiveness of judicial policy-making seem not to be consistent and comprehensive as verified from the courts' judgments. In the *Soobramoney* judgment, the court refused lifesaving dialysis treatment to the applicant because of budgetary constraints, after it was argued that the court's obligation to safeguard this right was provided by section 27 of the Constitution. Chaskalson CJ, in dismissing this application, reasoned that determining this decision involves difficult decisions, which should rather be done at a political level. The political organs should fix the health budget, and decide how and when the priorities should be met. As such, courts will be slow to interfere with reasonable *bona fide* resolutions taken by the executive and the legislature. This reasoning seems to be inconsistent with this court's judgment in the *Treatment Action Campaign* case, and exhibits a measure of judicial restraint by the court in the interpretation of its powers. Consequently, the next chapter will examine the concept of judicial restraint, and its application by courts in the United States, Canada and South Africa.

CHAPTER FOUR

JUDICIAL RESTRAINT AND CONSTITUTIONAL DEFERENCE: DETERMINING THE LIMITS OF POWER

4.1 Introduction

The discussion in this chapter will probe whether - and to what extent - judicial restraint is part of South African constitutional jurisprudence, in the light of the constitutional powers which the courts have been provided with to develop laws, as well as the concept of the supremacy of the Constitution. As such, this section will examine the nature and scope of judicial restraint in South African courts, and whether this concept has been comprehensively entrenched by the Constitution, as well as its application by our courts in constitutional review matters. In the pursuit of these latter objectives, this chapter will also probe the weaknesses in the current state of law in this area.

The discussion in this chapter will first examine the concepts of judicial restraint and constitutional deference, which will include their scope and limitations. The grounds for justifying restraint will be probed with a view of establishing whether the South African constitutional jurisprudence provides clear judicial restraint and deference principles. In order to fully appreciate the degree of restraint exercised by our courts; the application, justification and limitations of these principles as applied in other common-law constitutional democracies will also be observed. The United States Supreme Court jurisprudence has studiously articulated the notion of deference, and their concept is thought to have “migrated north to Canada”,¹ and it has also found its way to South Africa. As it will be shown below, South Africa and Canada share similar general limitation clauses which comprise of a two-stage approach.² The commonwealth background and the South African constitutional framework leaned relatively towards the Canadian constitutional design.³

¹ Wallis 2018 *SA Judicial Education Journal* 100.

² Botha 2010 *Penn State Int LR* 536.

³ Simeon <http://www.queensu.ca/iigr/WorkingPapers/Archive/1998/1998-2RichardSimeon.pdf> (Date of use 15 April 2014).

Amongst the enormous challenges confronting courts in the adjudication of public law is to establish the proper limitations of their constitutional function.⁴ In the event that a litigant avers that his fundamental rights have been violated, the question should be asked whether there are any circumstances in which the courts must abstain from safeguarding rights, or refrain from safeguarding them to an optimal level? Should courts' lack of democratic legitimacy prompt judges to exercise restraint when reconsidering the decisions of the elected branches for compatibility with fundamental rights?⁵ The extent of restraint applied by the courts has a direct impact on the degree to which the legislature and the executive are constrained by rights, and the degree to which fundamental rights' claims are upheld by the courts.⁶ It is against this background that judicial restraint presents a dilemma to the courts as "the institutional limitations of the courts sometimes warrant judicial restraint".⁷

Courts have a level of discretion regarding how strictly norms are to be applied - they can include a high-degree of judicial scrutiny for a strict approach; and, on the other hand, they can apply the norms leniently, and be inclined to adopt the wisdom of the legislature or executive that it has complied with the level required by the norm in question.⁸ This level of discretion includes the concept of deference.⁹ In the following paragraphs, these notions will be further investigated against the judicial background in the United States, Canada, and South Africa.

4.2 Distinguishing between the concepts of judicial restraint and constitutional deference

From ancient periods onward, self-restraint has been among the human virtues.¹⁰ Judicial restraint refers "to a judge's duty not to allow his personal views to influence his decision in a case".¹¹ Consequently, judicial self-restraint, as a policy, informs that judges should uphold legislation even when the judge entertains doubts

⁴ Kavanagh 2010 *Univ of Toronto LJ* 1

⁵ Kavanagh 2010 *Univ of Toronto LJ* 1.

⁶ Kavanagh 2010 *Univ of Toronto LJ* 1.

⁷ Kavanagh 2010 *Univ of Toronto LJ* 2.

⁸ McLean *Constitutional deference* 61.

⁹ Naidoo *Does the lack of sufficient formulation and articulation* 28.

¹⁰ Luban 1994 *Duke LR* 450.

¹¹ Prinsloo, Alberts and Mollema *Legal terminology* 159.

regarding its constitutionality, and thus “deferring to the legislature’s implicit judgment that the legislation is constitutional”.¹² Deference, again, is thought to amount to the court’s understanding of its role, and the role of the other branches of government in the process of adjudication.¹³ This notion of deference:

...arises out of the observation of the separation of powers as the separation of powers doctrine requires that the judiciary refrain from intruding unnecessarily into the realm of the other branches of government.¹⁴

Dyzenhaus differentiates between two definitions of deference.¹⁵ The primary definition of deference, which is premised on Dicey’s rule-of-law doctrine, means “submission to authority”.¹⁶ The second definition of deference denotes deference as ‘respect’. This definition:

...provides an ideal which can inform an attempt to rearticulate the relationship between the legislature, the courts and the administration in such a way that the courts retain a legitimate role as ultimate authority on the interpretation of the law.¹⁷

The ordinary meaning of deference, according to New Oxford Dictionary, is -

1. Polite submission and respect;
2. Compliance with the advice or wishes of another.¹⁸

The undertone of subordination and submission is illustrated more effectively in the United States’ dictionaries, for example, the Merriam Webster Dictionary gives the meaning: “Respect and esteem due to a superior or elder”.¹⁹ The Collins English Dictionary gives the meanings in American English as:

1. a yielding in opinion, judgment, or wishes
2. courteous regard or respect.²⁰

¹² Luban 1994 *Duke LR* 450: “This proposition, in turn, has generally been taken to imply that the United States Supreme Court should uphold legislation unless it clearly bears no reasonable relation to a legitimate state end”.

¹³ McLean *Constitutional deference* 62.

¹⁴ Lenta 2004 *SAJHR* 457.

¹⁵ Dyzenhaus *The politics of deference* 279.

¹⁶ Dyzenhaus *The politics of deference* 279.

¹⁷ Dyzenhaus *The politics of deference* 303.

¹⁸ Pearsall and Hanks *New Oxford Dictionary of English* 303. Also see Wallis 2018 *SA Judicial Education J* 99.

¹⁹ Merriam-Webster Dictionary <https://www.merriam-webster.com/dictionary/deference> (Date of use: 26 November 2019).

²⁰ Collins English Dictionary <https://www.collinsdictionary.com/dictionary/english/deference> (Date of use: 26 November 2019).

The Webster's New World College Dictionary has a similar inscription.²¹ The South African Constitutional Court prefers to use the word 'respect', and has adopted Dyzenhaus' second definition of deference.²² However, whichever definition is chosen for use in South Africa, it communicates:

...an image of the court standing back in favour of the decision-maker or administrator that seems inconsistent with the role of the court in review proceedings.²³

The use of the word 'deference' in court proceedings seems to present problems, as it has prompted many explanations as in the *Bato Star* case, where it was stated that the word does not consist of its ordinary meaning, and that it could be understood as respect.²⁴ Deference is, however, a "complex notion relating to the doctrine of separation of powers, justiciability and comity".²⁵ How and when a court decides to defer is established by the court's approach to three considerations; namely, the understanding of the court of its institutional role; "of its institutional competence; and the nature of the matter before the court".²⁶ The notion of deference cannot constitute a bright-line test.²⁷

Moreover, deference must be differentiated from the notion of judicial restraint. While these two concepts may at times overlap, judicial restraint is often contrasted with the concept of judicial activism.²⁸ Judicial activism is understood to be referring to a court that plays an active role in governance; it is seen as having its own political programme, and also making use of its decisions to advance that specific programme.²⁹ Posner differentiates between deference, separation of powers, judicial self-restraint and prudential self-restraint. Judicial deference is understood

²¹ Webster's New World College Dictionary <https://www.yourdictionary.com/deference> (Date of use: 26 November 2019).

²² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 46 (hereafter *Bato Star*).

²³ Wallis 2018 *SA Judicial Education* J 90.

²⁴ *Bato Star* para 46.

²⁵ McLean *Constitutional deference* 64.

²⁶ McLean *Constitutional deference* 63.

²⁷ McLean *Constitutional deference* 64. A bright-line test or rule is in the United States a clearly delineated rule or standard, which leaves almost no room for varying or inconsistent interpretation.

²⁸ McLean *Constitutional deference* 64.

²⁹ McLean *Constitutional deference* 64. See Cilliers *Finding a balance* 11, who argues that: "Unlike the activist approach, judicial deference emphasises the limits of the courts' power by narrowly restricting interpretation of the legislation at issue (e.g. the Constitution) in conformity with the concept of *stare decisis* (obligatory deference to previous decisions)".

by him as referring to judges that are being cautious about putting forward their own views, and restricting their discretion as far as possible.³⁰ The notion of ‘separation of powers judicial self-restraint’ defines judges as restricting the courts’ authority when dealing with the other branches of government, and deferring to the decisions of the other branches of government.³¹ The notion of prudential self-restraint, he contends, requires that judges avoid making decisions that will impact upon their ability to make future decisions.³² Deferent courts have a strong predisposition for judicial restraint when adjudicating cases, unless where the law is evidently unconstitutional.³³ In the following paragraphs, these intricate concepts will be further explained, especially as they are applied by the courts in the United States, Canada and South Africa.

4.2.1 Judicial restraint and deference: The United States’ perspective

As mentioned in paragraph 4.1, the notion of separation of powers forms part of the United States Constitution even though this document does not provide for it explicitly. In this jurisdiction, the recognition by each branch of government of its proper sphere of activity remains a crucial component of the separation of powers principle.³⁴ American courts have acknowledged the proper realm of judicial activity by adopting numerous practices which defer their full judicial power. Courts and academics have termed these deferring practices as judicial restraint.³⁵

In recent years, the proper functions of the three constitutional branches have turned out to be increasingly burdensome to define. Many United States’ judges see themselves as “quasi-legislators” entrusted with “the right to speak out on all issues.”³⁶ It seems that courts are attempting to relinquish judicial restraint, and adjudicate any and all cases litigants may wish to present. This judicial activism leads to “untoward and inappropriate involvement by the courts in political questions and partisan conflicts”.³⁷ This state of affairs has led to the emerging of “a cowboy

³⁰ Posner *The federal courts* 314.

³¹ Posner *The federal courts* 314.

³² Lenta 2004 *SAJHR* 548.

³³ Cilliers *Finding a balance* 11.

³⁴ Talmadge 1999 *Seattle Univ LR* 695.

³⁵ Talmadge 1999 *Seattle Univ LR* 695.

³⁶ Talmadge 1999 *Seattle Univ LR* 695.

³⁷ Talmadge 1999 *Seattle Univ LR* 695-696.

judiciary riding roughshod over separation of powers in its zeal to save every damsel in distress and to right every wrong".³⁸ As a result of these courts' unwillingness or inability to define the boundaries of their judicial role, or to respect the concepts of judicial restraint, citizens in the United States now see the courts as simply another partisan arm of government. As a result of courts acting as a government branch, the aura of judicial impartiality has receded, and people's respect for the courts and the courts' power has eroded.³⁹ Frankfurter J in *Dennis v United States*⁴⁰ expresses this dilemma as follows:

Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgement is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.⁴¹

Dispute resolution is the most significant court function, not only in America, but everywhere else. Courts were designed to resolve disputes presented by litigants so that litigants do not resort to private remedies.⁴² As such, courts should exercise restraint in adjudicating political or social problems because courts are:

...not readily capable of managing the resolution of large-scale political problems ... [and] judges are ill-suited to the role of managers because the courts require deliberation and elaborate process before decisions can be made".⁴³

Talmadge further observes that:

The dictates of due process tend to be inconsistent with the typically more immediate operational needs of a business enterprise, a social services organisation, or a school system. By its nature, the common law process is not the best means for establishing complex societal policies.⁴⁴

³⁸ Talmadge 1999 *Seattle Univ LR* 696.

³⁹ Talmadge 1999 *Seattle Univ LR* 699.

⁴⁰ *Dennis v United States* 341 US 494 525 (1951).

⁴¹ See also Bright 1997 *New York LR* 308, 310 who argues that: "Politicians have long blamed judges for forcing them to take unpopular actions ... but many of those politicians had enough respect for the courts that they were careful not to take their criticism too far. Today, however, politicians criticise judges for the purpose of intimidating them and getting specific results".

⁴² Talmadge 1999 *Seattle Univ LR* 697.

⁴³ Talmadge 1999 *Seattle Univ LR* 698.

⁴⁴ Talmadge 1999 *Seattle Univ LR* 698.

Judges adjudicating cases may have an understanding of the issues which are confined to the court record developed through witnesses' testimony, and, at times, experts retained by the litigants. However, cases are unable to present the whole array of interests which might be underlying many issues.⁴⁵ Courts may be efficient in establishing that a wrong has been committed, yet they are the least effective branch of government at formulating remedies for major political or social issues.⁴⁶

The protection of human rights remain a fundamental function of the courts against the majoritarian inclination to tyranny.⁴⁷ This anti-majoritarian policy remains significant despite a policy of judicial restraint. The individualised decision-making process and 'policy' of the common law is where its power rests.⁴⁸ Courts possess far-reaching powers, and society brings more and more difficult socio-political disputes to the courts for resolution. Yet many court members are unknown to the public, and they make use of a procedure that is not comprehensively understood by the average layperson. Courts may declare legislation adopted by a majority of the legislature, or the people themselves, to be unconstitutional, and this could result in "some people in the body politic undoubtedly be upset".⁴⁹

While activist courts have been criticised, the desire of the United States' courts to resolve all societal ills has been intensified both by unwillingness or inability of the courts (as a partisan branch of government) to deal with difficult societal problems, and the willingness of courts to adjudicate on nearly every imaginable subject matter.⁵⁰ Some litigants approach the courts for an "individualised, case-by-case determination of policy"⁵¹ since they distrust the collective legislature or executive administrative regulations. Yet, in determining policy, a judge faces a difficult choice:

In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution.

⁴⁵ Talmadge 1999 *Seattle Univ LR* 698. See also *Burkhart v Harrod* 110 Wash 2d 381 755 P 2d 759 761 (1988): "We fully concur in the statement that 'of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus'".

⁴⁶ Talmadge 1999 *Seattle Univ LR* 698-699.

⁴⁷ See footnotes 192 and 243 in Chapter 2.

⁴⁸ Talmadge 1999 *Seattle Univ LR* 699.

⁴⁹ Talmadge 1999 *Seattle Univ LR* 700: "While some of the criticism directed at the unelected federal judiciary may be unfairly aimed at an elected judiciary, the institutional remoteness and relative anonymity of elected judges mean the criticism may still be accurate".

⁵⁰ Talmadge 1999 *Seattle Univ LR* 701.

⁵¹ Talmadge 1999 *Seattle Univ LR* 701.

He must then choose between his version of justice and abiding by the American form of government. Yet the desire to do justice, whose nature seems to him obvious, is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels is unsatisfying. To give in to temptation, this one time, solves an urgent human problem, and a faint crack appears in the American foundation. A judge has begun rule where a legislator should.⁵²

Deference, to the other branches of government, is another mechanism that is an embodiment of the principle of constitutional deference.⁵³ However, this concept, which is also termed “prudential constraint”,⁵⁴ is not without controversy, as in the Washington Supreme Court case, *Island County v State*, where a justice of this court argued for the ending of any deference to legislative enactments:

Today’s majority, which regales itself in legislative deference, thereby surrenders at least a portion of that righteous power necessary to check that power exercised by the legislature. Such capitulation in the face of unconstitutional legislative usurpation is no virtue. It eliminates the most important constitutional check upon legislative abuse. It is license for the strong to vanquish the weak. Such surrender, often euphemistically denominated “restraint,” is sometimes falsely glorified as an aspect of the judiciary’s role as a co-equal branch of government; however, in matters of constitutional law, the judiciary is not co-equal, but supreme.⁵⁵

Another member of the court disagreed, and reaffirmed the conventional notion of deference:

The concurrence’s approach is judicial activism in full flower: “By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit” . . . Unlike the concurrence, I do not believe the judiciary has a charter, in the guise of constitutional interpretation, to substitute itself for the executive and legislative branches of government. We do not have a constitutional mandate to roam across the governmental landscape, changing in our discretion decisions by other constitutional branches of government with which we disagree. There is no check, no balance to such unfettered power. The concurrence offers a paean not only to judicial activism, but to judicial supremacy in our government. I do not agree with such a fundamentally flawed notion of judicial power. Our role is to analyse the legislature’s enactments against the overarching principles of the Constitution, and resolve the dispute brought to us, as we did in this case. It decidedly is not our function to express disrespect for coordinate constitutional branches of government by lightly

⁵² Bork *The tempting of America* 1.

⁵³ Talmadge 1999 *Seattle Univ LR* 721.

⁵⁴ *Island County v State* 135 Wash. 2d 141 146-147 955 P 2d 377 380 (1998) (hereinafter *Island County*).

⁵⁵ *Island County* 389 (Sanders J, concurring).

tossing away their decisions with arrogant judicial fiat, as the concurrence would have us do.⁵⁶

The view is that it is not the courts' constitutional role to disrespect the other constitutional branches and to alter their decisions, or to take the place of the executive or legislative branches of government. Courts must be willing to define their fundamental functions to prevent other branches from trampling upon the constitutional imperative of the judiciary. Still, the judiciary must restrain itself from becoming an unnecessary and inappropriate participant in socio-political controversies, which could weaken its respect, as stated above.⁵⁷ Courts should resist the temptation to right all wrongs, undertaking what Kennedy J has termed "power grab in a black robe".⁵⁸

Three arguments are made against courts playing an active role in shaping current society.⁵⁹ Firstly, the illegitimacy of the court to act in this manner is stressed. Courts cannot act until a case is brought before it. Furthermore, a judgment in a specific case binds only the particular litigants, and as a result, the court cannot address a wide range of social issues, or solve it comprehensively.⁶⁰ However, it is conceded that courts have its institutional incapacities, and there may be cases where deference to the legislature might be required. Courts do not have the requisite fact-finding tools, and do not have the pertinent knowledge upon which intelligent social action must be based.⁶¹ It is still averred that where the legislature does not act - or cannot act - to rectify "an unconstitutional status quo, the Court, despite all its incapacities, must finally act to do so".⁶² In the event that the legislature fails to live up to their constitutional duties, and since "nature abhors a political vacuum as much as any other kind",⁶³ the court must act to fill the gap.⁶⁴

The second argument stresses the adverse effect on democratic processes when courts act in this manner. Here, the emphasis is on the incapacitating effects the

⁵⁶ *Island County* 394 (Talmadge J concurring).

⁵⁷ Talmadge 1999 *Seattle Univ LR* 738.

⁵⁸ Talmadge 1999 *Seattle Univ LR* 739.

⁵⁹ Wright 1968 *Cornell LR* 3.

⁶⁰ Wright 1968 *Cornell LR* 3. See also footnote 44 above.

⁶¹ Wright 1968 *Cornell LR* 3.

⁶² Wright 1968 *Cornell LR* 5-6.

⁶³ Brogan *The crises of American federalism* 43.

⁶⁴ Wright 1968 *Cornell LR* 6.

courts' action has on the other branches of government.⁶⁵ The foundation for this argument was laid down over a hundred years ago:

Legislatures are growing accustomed to this judicial distrust and more and more readily inclined to justify it, and to shed the considerations of constitutional restraints ... turning that subject over to the courts. ... The people, all this while, become careless as to whom they send to the legislature ... and come to depend on these few wiser gentlemen on the bench ... to protect them against their more immediate representatives. ... The consequent exercise of the power of judicial review, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency ... is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.⁶⁶

This latter argument is, however, criticised because even if it would be very unfortunate for the legislature to enact legislation which the court would consider unconstitutional, it would be worse if the public and the legislature had come to the point where they expected the courts to do their work for them.⁶⁷ While the courts may be institutionally ill-equipped to drive social reform, if the legislature cannot uphold any substantial rights at stake, it inevitably remains the task of the courts to do so.⁶⁸

The final third argument for judicial restraint goes to the court's legitimacy as a policy maker in a democratic society. Here, the court's self-restraint is said to be the result of the court's undemocratic structure, and that only in exceptional compelling circumstances, "it should allow the representative bodies to act, or not to act, as they choose".⁶⁹ This argument is criticised on two grounds, namely, it remains unclear what is meant by democratic society. Furthermore, the internal practices of "the legislature makes majority control even less likely".⁷⁰ In support of this understanding is noted that, for example, the United States Senate composition whereby the votes of 18 000,000 Californians count no more than those of 180,000 Alaskans, can be hardly suggested to be conducive to majority rule.⁷¹ Despite this

⁶⁵ Wright 1968 *Cornell LR* 6.

⁶⁶ Thayer *John Marshall* 103-104, 106-107.

⁶⁷ Wright 1968 *Cornell LR* 8-9.

⁶⁸ Wright 1968 *Cornell LR* 8-9.

⁶⁹ Wright 1968 *Cornell LR* 9.

⁷⁰ Wright 1968 *Cornell LR* 9-10.

⁷¹ Wright 1968 *Cornell LR* 9-10.

institutional deficiency, namely, the undemocratic and non-representative structure of the courts, this factor cannot determine how courts should play its appropriate function within its boundaries, however, “it does tell us about the limits of the province itself”.⁷²

In *Ashwander v Tennessee Valley Authority*, Brandeis J compiled the “classic rules for ... avoidance”.⁷³ These rules are premised on the understanding that courts should not decide a constitutional issue if there is some plausible way to avoid it.⁷⁴ The canon of statutory interpretation, which is of consequence to this rule, is that “a serious constitutional challenge to a statute should be avoided if the statute can plausibly be construed in a manner that makes the constitutional question disappear”.⁷⁵ The United States Supreme Court continues to use this rule, and has recently held that it is “beyond debate”.⁷⁶

Yet judges⁷⁷ and commentators⁷⁸ give different ideological perspectives, and have often criticised this rule or canon. The primary attack against this rule is that it allows a court, based on vague grounds that a serious constitutional question exists, to rewrite legislation without comprehensive limits on this role.⁷⁹ Scalia J’s idea of judicial restraint is thought to be linked with his argument that the government system makes the democratically accountable branches responsible for making law, and that it was not within the judiciary’s role to make an end run around the democratic process by exercising common-law discretion “to make the law”.⁸⁰ It is understood that judges exercise some discretion when deciding cases, yet Scalia J

⁷² Wright 1968 *Cornell LR* 10-11.

⁷³ *Ashwander v Tennessee Valley Authority* 297 US 288, 341 (1936). See also *County of Sacramento v Lewis* 523 US 833, 861 (1998) and *Rice v Sioux City Memorial Park Cemetery* 349 US 70,74 (1955).

⁷⁴ Frickey 2005 *California LR* 399.

⁷⁵ Frickey 2005 *California LR* 399.

⁷⁶ *Jones v United States* 526 US 227, 240 (1999).

⁷⁷ See *Reno v Flores* 507 US 292, 314 (1993) where Scalia J called the avoidance canon “the last refuge of many an interpretative lost cause”. *Clay v Sun Insurance Office Ltd* 363 US 207 213-214 (1960) where Black J remarked: “I believe this court is carrying the doctrine of avoiding constitutional question to a wholly unjustifiable extreme. ...I believe that there are times when a constitutional question is so important that it should be decided even though the judicial ingenuity would find a way to escape it”. But see *Almendarez-Torres v United States* 523 US 224, 250 (1998) where Scalia J (dissenting) characterised the canon as a “cardinal principle’ which ‘has for so long been applied by this Court that it is beyond debate”.

⁷⁸ Schauer 1995 *Sup Ct Rev* 71, criticising the avoidance canon as disguised judicial activism.

⁷⁹ Frickey 2005 *California LR* 400.

⁸⁰ Scalia *A matter of interpretation* 6,10. See also footnote 3 in Chapter 3; Manning 2017 *Michigan LR* 748.

resists the discretion Dworkin has termed “a strong sense”,⁸¹ which is premised on the understanding that a judge’s decision is not meaningfully bound by standards external to his or her own authority. In other words, it is believed that it is wrong for courts in a constitutional democracy to determine the rights and duties of the people based on “little more than morals, conscience or policy predilections of five unelected, life-tenured justices”.⁸² As a result, Scalia J stresses that the courts should base their decisions in some power external to the judge’s will, namely, in the text, the original meaning, in long-standing legal practices, or widespread social traditions. It is this theory of judicial restraint that is known as the “anti-discretion principle”.⁸³

The concern with judges’ discretion is premised more on limiting “free-form judicial policy-making than upon rooting judicial decisions in legitimate external authority”.⁸⁴ However, this understanding of judicial restraint seems to expose Scalia J as “a judge suspicious of judges” because his:

...theory of interpretation was not motivated solely, or perhaps even primarily, by his felt obligation to the words chosen by democratic lawmakers. His text-based approach also rested on, and sought to implement, his anti-discretion principle. Unless the Constitution or a statute clearly authorised judges to act on their own sense of good, Justice Scalia insisted that they ground decisions in some form of constraint external to the judges’ own preferences.⁸⁵

Unlike the most traditional forms of judicial restraint, Scalia J’s theory was not premised on a call on judges to bend over backwards in avoiding the striking down of legislation. Instead, he placed emphasis on the system of judicial decision-making. He thought it would be prudent that judges base their decisions, statutory or constitutional, on grounds outside their own wills, “to rest their judgements on something other than their personal morality, conscience, or policy preferences”.⁸⁶ The view is furthermore held that judicial restraint is a contestable principle which is

⁸¹ Manning 2017 *Michigan LR* 748-749. See also Dworkin *Taking rights seriously* 31.

⁸² Manning 2017 *Michigan LR* 749.

⁸³ Manning 2017 *Michigan LR* 749.

⁸⁴ Manning 2017 *Michigan LR* 749.

⁸⁵ Manning 2017 *Michigan LR* 750. He elaborates at 18: “When you are told to decide, not on the basis of what the legislature said, but on the basis of what it means, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person should have meant, and that will surely bring you to the conclusion that the law means what you think it ought to mean – which is precisely how judges decide things under the common law”.

⁸⁶ Manning 2017 *Michigan LR* 781.

open to numerous definitions.⁸⁷ This is because:

A restrained judge is simply a highly predictable judge, and this may include being predictably non-deferential to other institutions. ... A restrained judge would reach the same result, even though this involves invalidating a democratically-enacted statute, and hence in this sense entails imposing the judicial will against the wishes of other political institutions.⁸⁸

Nonetheless, judicial restraint is good because legal settlements sought by interest groups in seeking legal change is restricted, and “it protects expectations and reduces retroactivity in legal decision making”.⁸⁹ Judicial restraint is also sound because it advances equal treatment in terms of treating similarly-situated litigants the same. There is thus no surprise in the jurisprudence, because all litigants are treated in the same way.

Finally, related to the last point, judicial restraint assist judges to “resist pressure to bend the rules in ways that operate to the disadvantage of unpopular claimants or minorities”.⁹⁰ This last point is described as follows in the context of problems in emerging democracies:

A restrained judiciary is in a much stronger position to perform these functions [resolving disputes in an impartial manner, and assuring that executive officials adhere to the law], because such a judiciary can claim to be doing no more or less than what it always does – enforcing established legal principles. Moreover, a restrained judiciary will not have dissipated any of its institutional capital through the pursuit of controversial social reforms.⁹¹

Hence, there are three grounds in the United States for rejecting judicial activism, and exercising judicial restraint. First, judicial activism replaces a representative legislature with a group who are not representative or responsible to anyone but itself. Secondly, it undermines the public faith in the objectivity and detachment of the court; and thirdly, the exercise of such power invites a reply in kind from those on whose domain the court is poaching.⁹²

⁸⁷ Merrill 2005 *Constitutional Commentary* 274: “Sometimes judicial restraint is defined to mean fidelity to the original meaning of the Constitution. If this what judicial restraint means, then obviously originalism – and only originalism – promotes judicial restraint. Other times judicial restraint is defined to mean fidelity to prior precedent. If that is what judicial restraint means, then obviously *stare decisis* – and only *stare decisis* – promotes judicial restraint”.

⁸⁸ Merrill 2005 *Constitutional Commentary* 274-275.

⁸⁹ Merrill 2005 *Constitutional Commentary* 275-276.

⁹⁰ Merrill 2005 *Constitutional Commentary* 276-277.

⁹¹ Merrill 2005 *Constitutional Commentary* 277.

⁹² Kurland 1959 Utah LR 465-466.

Judicial restraint and judicial deference are very visible in the case of *Chevron USA Inc v National Resources Defence Council Inc*,⁹³ where the United States Supreme Court reviewed a federal agency's interpretation of a statute, and held that a two-step process must be followed in this regard. First, the court must ask whether the legislature (Congress) has, by means of the statute, comprehensively and directly addressed the precise question at issue. In the event that this question is answered in the affirmative, both the court and the agency are bound by the legislature's comprehensive statutory instruction.⁹⁴ If, however, the statute is "silent or ambiguous"⁹⁵ regarding the particular question at issue, the court, by making use of the second step, questions only whether the agency's interpretation of the statute is permissible.

Under the second step, the court must uphold the agency's interpretation provided it is a reasonable construction of the statute, even if it is not what the court considers to be the best construction.⁹⁶ The ambiguity in the legislation is considered to be an implicit delegation to the agency of the authority to "elucidate"⁹⁷ the legislation. Hence, the concept of the "*Chevron* deference"⁹⁸ came about. The court explicitly gave deference to an agency's interpretation of ambiguous statutes in order to respect the use of powers expressly delegated to the agency:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.⁹⁹

⁹³ *Chevron USA Inc v National Resources Defence Council Inc* 467 US 837 (1984) (hereinafter *Chevron*). See also Siegel 2018 *Vanderbilt LR* 938 where it is argued that the *Chevron* deference is an icon of administrative law. It is the most-cited administrative law case of all time. According to Westlaw databases, federal courts of appeals have cited *Chevron* nearly five thousand times, as have federal district courts. Law review articles have cited the case more than eight thousand times. The Supreme Court itself has cited *Chevron* more than 200 times.

⁹⁴ *Chevron* 842-843.

⁹⁵ *Chevron* 843.

⁹⁶ *Chevron* 843-844.

⁹⁷ *Chevron* 845.

⁹⁸ Siegel 2018 *Vanderbilt LR* 945.

⁹⁹ *Chevron* 843-844.

This court endorsed the idea that ambiguity in an agency statute is deemed to be an “implicit delegation of power to the agency”.¹⁰⁰ Thus, the *Chevron* deference is simply a way of conceiving what Congress is doing when it entrusts an agency with an ambiguous delegation, and it is constitutionally permissible.

The United States courts’ reviews of government federal administrative agencies’ actions have long been questioned on what considerations to be given to the agencies’ own construction of the statutes they administer. It is by necessity that agencies must construct these pieces of legislation.¹⁰¹ The legislation informs the agencies what to do, so the agencies must interpret them in order to know what to do. Administrative law and justiciability principles present a court with an opportunity to encounter such legislation only after the agency has taken certain action under it.¹⁰² Consequently, by the time a statute administered by an agency comes to court, the agency itself would typically have had the opportunity to render an interpretation of the statute.¹⁰³

The *Chevron* deference-doctrine has been criticised by some judges of the United States Supreme Court, and its constitutionality questioned. In the case of *Perez v Mortgage Bankers Association*,¹⁰⁴ Thomas J criticised judicial deference to an agency’s construction of the regulation administered by the agency, and stated that it “amounts to an erosion of the judicial obligation to serve as a ‘check’ on the political branches”.¹⁰⁵ The United States Constitution, Thomas J stated, has entrusted judicial power to the courts, and the Constitution “requires a court to exercise its independent judgement in interpreting and expounding upon the laws”.¹⁰⁶ The Framers of the Constitution were aware that legislation would at times be considered to be unclear or ambiguous, and “the judicial power was understood to include the power to resolve these ambiguities over time”.¹⁰⁷ Judges were insulated by the

¹⁰⁰ Siegel 2018 *Vanderbilt LR* 961.

¹⁰¹ Monaghan 1983 *Columbia LR* 5, 26: “judicial deference to agency ‘interpretation’ of law is simply one way of recognizing a delegation of law-making authority to an agency”.

¹⁰² Siegel 2018 *Vanderbilt LR* 943. See also *Myers v Bethlehem Shipbuilding Corporation* 303 US 41 50-51 (1938): “No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted”.

¹⁰³ Siegel 2018 *Vanderbilt LR* 943.

¹⁰⁴ *Perez v Mortgage Bankers Association* 135 S Ct 1199 (2015) (hereinafter *Perez*).

¹⁰⁵ *Perez* 1217.

¹⁰⁶ *Perez* 1217.

¹⁰⁷ *Perez* 1217.

Constitution from the pressures that might result in courts' bias so as to safeguard judges' ability to exercise independent judgment.¹⁰⁸ The judiciary, Thomas J added, "is duty bound to exercise independent judgement in applying the law".¹⁰⁹

Moreover, Thomas J decried deference itself, and stated that it "amounts to a transfer of the judge's exercise of interpretative judgement to the agency".¹¹⁰ He further asserted that deference "undermines the judicial 'check' on the political branches".¹¹¹ In his view, Congress could not give power to agencies to construct the regulations they administer, and require the courts to defer their interpretations. This was because the Constitution entrusted the power to issue judicially binding construction of laws to the courts, not to the legislature or Congress: "Lacking the power itself, Congress cannot delegate that power to an agency".¹¹²

Three months after *Perez*, the United States Supreme Court once more commented on the *Chevron* deference-doctrine in *Michigan v EPA*,¹¹³ in which the court struck down an Environmental Protection Agency (EPA) rule. Thomas J again applied the principle he set out in *Perez*, and questioned the constitutionality of the *Chevron* deference.¹¹⁴ He repeated that the Constitution's assignment of judicial authority to the courts depended upon the courts exercising "independent judgement"¹¹⁵ when constructing laws. The problem with the *Chevron* deference-doctrine, he observed, is that it makes it impossible for courts to do so. Thus, the *Chevron* deference-doctrine removes the judicial authority to say what the law is from the courts, and gives it to the executive; a removal of constitutional authority that Thomas J found to be unconstitutional because it was "in tension with the Vesting Clause of Article III".¹¹⁶

¹⁰⁸ *Perez* 1217-1219.

¹⁰⁹ *Perez* 1219.

¹¹⁰ *Perez* 1219.

¹¹¹ *Perez* 1220.

¹¹² *Perez* 1224.

¹¹³ *Michigan v EPA* 135 S Ct 2699 (2015) (hereinafter *EPA*).

¹¹⁴ *EPA* 2712.

¹¹⁵ *EPA* 2712.

¹¹⁶ *EPA* 2712. Vesting Clause Art III: Judicial – Section 1 "The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in Office".

Thomas J accepted that the Article III problem might be resolved by regarding an agency's act of interpreting a statute it administers as a "formulation of policy",¹¹⁷ rather than as an interpretation. Nonetheless, Thomas J asserted, although it might solve the Article III problem, it creates an Article I problem, for Article I entrusts Congress, not the executive, with legislative power.¹¹⁸ Thomas J concluded that, either way, the court has strayed "further and further from the Constitution".¹¹⁹

The constitutionality of the *Chevron* deference-doctrine was also questioned in the case of *Gutierrez-Brizuela v Lynch*¹²⁰ by Gorsuch J,¹²¹ while a judge on the United States Court of Appeals for the Tenth Circuit. This case concerned an immigration law question, and the administrative law principle enunciated by the United States Supreme Court in its decision in the case of *National Cable and Telecommunications Association v Brand X Internet Services*.¹²² The principle in *Chevron* was also followed which allowed an agency to overrule a judicial opinion by issuing a new, reasonable construction of a legislation it administers, even if that construction is different from a previous judicial construction.¹²³ Gorsuch J also suggested that *Chevron* makes it more difficult for ordinary citizens to obey the law. He complained that:

Under *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared "ambiguous" (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed "reasonable". Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists?¹²⁴

It is difficult for ordinary citizens to discern the meaning of complex statutes that they are assumed to understand. Yet Gorsuch J offers no evidence that *Chevron* makes things worse on this point.¹²⁵ The deference doctrine as applied in the *Chevron* and *Brand X* cases, Gorsuch J observed:

¹¹⁷ EPA 2712-2713.

¹¹⁸ EPA 2713.

¹¹⁹ EPA 2714.

¹²⁰ *Gutierrez-Brizuela v Lynch* 834 F3d 1142 1152 (10th Cir 2016) (hereinafter *Gutierrez-Brizuela*).

¹²¹ Justice of the United States Supreme Court.

¹²² *National Cable and Telecommunications Association v Brand X Internet Services* 544 US 967 (2005) (hereinafter *Brand X*).

¹²³ *Brand X* 982-984.

¹²⁴ *Gutierrez-Brizuela* 1152.

¹²⁵ Siegel 2018 *Vanderbilt LR* 986.

...permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.¹²⁶

Considering the foundational case of *Marbury v Madison*,¹²⁷ Gorsuch J stated that under that case, the resolution of issues of private legal rights is a judicial function.¹²⁸ He argued that “*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty”.¹²⁹ Gorsuch J also alluded to the implication of the *Marbury v Madison* judicial role, and asked, “Where in all this does a court interpret the law and say what it is?”¹³⁰ Like Thomas J, Gorsuch J stated that although the Article III problem might be solved by suggesting that when an agency interprets and gives content to an ambiguous legislation, it is not interpreting the legislation, but instead exercising delegated authority to make policy; such a solution creates a delegation problem. So even though *Chevron* might not violate Article III, it would likely violate Article I.¹³¹

The criticism of the *Chevron* deference did not only come from the judiciary, but some members of Congress also expressed the view that the doctrine is illegitimate.¹³² Congress adopted the Separation of Powers Restoration Act (SOPRA)¹³³ which amended the current legislation empowering a reviewing court to “decide relevant questions of law, and interpret constitutional and statutory provisions”.¹³⁴ The proposed amendment will result in a provision which makes it clear that a reviewing court must interpret legislation *de novo*, and must not give deference to agency constructions.¹³⁵ The House of Representatives’ Report on the SOPRA found that the *Chevron* deference was inconsistent with the judicial role as

¹²⁶ *Gutierrez-Brizuela* 1149.

¹²⁷ *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

¹²⁸ *Gutierrez-Brizuela* 1151. See also *Marbury v Madison* 5 US (1 Cranch) 137 167 (1803).

¹²⁹ *Gutierrez-Brizuela* 1151.

¹³⁰ *Gutierrez-Brizuela* 1151.

¹³¹ *Gutierrez-Brizuela* 1152-1156.

¹³² Siegel 2018 *Vanderbilt LR* 951.

¹³³ SOPRA passed the House as Title II of the Regulatory Accountability Act of 2017.

¹³⁴ Section 706 of the Administrative Procedure Act.

¹³⁵ Siegel 2018 *Vanderbilt LR* 952. See s 202 House Report 115 Congress (2017): “The reviewing court shall ...decide *de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies. If the reviewing court determines that a statutory or regulatory provision relevant to its decision contains a gap or ambiguity, the court shall not interpret that gap or ambiguity as an implicit delegation to the agency of legislative rule making authority and shall not rely on such gap or ambiguity as a justification either for interpreting agency authority expansively or for deferring to the agency’s interpretation on the question of law”.

declared in *Marbury v Madison*, in that “it is emphatically the province of the Judicial Department to say what the law is”.¹³⁶ The House Report also stated that the *Chevron* principle “is difficult, if not impossible, to square with the Framers’ intent in the Constitution to create a government of definite, limited, and separated powers”.¹³⁷ However, the SOPRA has not become law because it lacked the required votes in Senate.¹³⁸

It should be noted that both Thomas J and Gorsuch J have relied heavily on Hamburger’s administrative work in their judgments where they questioned the constitutionality of the *Chevron* deference.¹³⁹ Hamburger observes that the *Chevron* deference is unconstitutional because it is incompatible with the judicial duty imposed by Article III of the Constitution which entrusts courts with the power to exercise independent judgment when addressing questions of law.¹⁴⁰ Hamburger premised his view on the assumption that judges hold an office, in particular, “an office of judgement, in which they must exercise their own independent judgement”.¹⁴¹ This office, he adds, has the implication that a duty “of a judge to exercise his independent judgement was the very identity of a judge”, and that a judge consequently cannot defer to an administrative agency’s judgment “without abandoning his office as a judge”.¹⁴² Congress’ delegation of such power to an agency is irrelevant because Congress cannot remove a judge’s constitutional duty to exercise independent judgment.¹⁴³

The other ground of criticism is that *Chevron*’s requirement that courts defer to an agency’s interpretation of legislation they administer creates “systematically biased

¹³⁶ House of Representatives Report No 114-622 (2016) 4.

¹³⁷ House of Representative Report No 114-622 (2016) 5.

¹³⁸ Siegel 2018 *Vanderbilt LR* 951.

¹³⁹ Siegel 2018 *Vanderbilt LR* 952. See *Perez* 1218 where Thomas J cited Hamburger *Law and judicial duty* 507-508; and *Gutierrez-Brizuela* 1152 where Gorsuch J cited Hamburger *Is administrative law unlawful?* 287-291.

¹⁴⁰ Hamburger 2016 *George Washington LR* 1206-1210. See also Cooper 2016 *Texas Rev Law & Policy* 310-311: “*Chevron* is an impermissible abdication of judicial duty”. Ginsburg and Menash 2016 *New York Univ J of Law & Liberty* 497-507 attacking *Chevron* as contrary to the Administrative Procedure Act, asserting that an attempt by Congress to enact *Chevron*’s doctrine by statute would raise “a serious constitutional question”, and stating that *Chevron*’s “wholesale transfer of legal interpretation from courts to agencies” violates “the most basic notion of judicial review that is the province of the courts to say what the law is”.

¹⁴¹ Hamburger 2016 *George Washington LR* 1206.

¹⁴² Hamburger 2016 *George Washington LR* 1209.

¹⁴³ Hamburger 2016 *George Washington LR* 1213.

judgement”.¹⁴⁴ These agencies are often litigants in cases where their interpretations are judicially reviewed, and, in such cases, *Chevron* requires courts to defer to the views of one of the parties of the case before them.¹⁴⁵ The bias created by *Chevron* in deferring to one of the litigants constitutes a “brazen violation”¹⁴⁶ of the Fifth Amendment’s Due Process Clause.

Farina is another academic who has questioned the constitutionality of the *Chevron* deference.¹⁴⁷ However, Farina does not see the *Chevron* deference as a violation of Article III, but argues that it threatens to violate the non-delegation doctrine. At the core of her argument is the view that in *Chevron* the Supreme Court failed to consider whether every ambiguity in an agency’s legislation amounts to an implicit delegation of authority to the agency, which would further increase the accumulation of power to the legislature (president) in a way that impedes the balance of powers among the three branches of government.¹⁴⁸

However, these criticisms of the *Chevron* deference are disputed, and its premise is considered to be constitutionally permissible because “it is merely a way of conceiving of what Congress is doing when it gives an agency ambiguous instructions”.¹⁴⁹ Allowing an agency to resolve the ambiguity is “simply one way of recognising a delegation of law-making authority”.¹⁵⁰ There can be no question that the agencies under the control of the executive are authorised to interpret legislation they administer in the “simple sense of the word interpret”¹⁵¹ in order to establish what the legislation mean. Agencies are obliged to do so. At the end, legislation informs agencies what to do. An agency must interpret the legislation it administers in order to know how to act under them.¹⁵² Even when the meaning of a legislation

¹⁴⁴ Hamburger 2016 *George Washington LR* 1211.

¹⁴⁵ Hamburger 2016 *George Washington LR* 1211-1212.

¹⁴⁶ Hamburger 2016 *George Washington LR* 1212-1213. See Fifth Amendment of the United States Constitution or the Due Process Clause: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”.

¹⁴⁷ Farina 1989 *Columbia LR* 452.

¹⁴⁸ Farina 1989 *Columbia LR* 480-482.

¹⁴⁹ Siegel 2018 *Vanderbilt LR* 961.

¹⁵⁰ Monaghan 1983 *Columbia LR* 26.

¹⁵¹ Siegel 2018 *Vanderbilt LR* 957

¹⁵² Siegel 2018 *Vanderbilt LR* 957. See also Monaghan 1983 *Columbia LR* 5.

is clear, an agency is still interpreting the legislation when it looks at the ink marks that makes up the statutory text, comprehend those ink marks as letters, the letters as words, and the words as having meaning.¹⁵³

It would be impractical for an agency to run to court each time it requires to resolve an ambiguity in a statute it administers; and even if the agency intended to do so, the principles of justiciability would prevent the court from providing advice to the agency regarding the legislation's meaning outside of the context of a specific case. This point is also acknowledged by *Chevron's* critics that "other branches of government have the authority and obligation to interpret the law".¹⁵⁴ When it is debated who may interpret the law, the word "interpret" is used in the strong sense by the critics of *Chevron*. The real question is:

When an agency and a court have both undertaken to interpret a statute, in the simple sense, but the interpretations are different, whose interpretation controls?¹⁵⁵

Under the *Chevron* deference, if the legislation is ambiguous, and the agency's construction is reasonable, a reviewing court must uphold it even if the court believes it is not the "best interpretation".¹⁵⁶ The problem is that *Chevron's* critics maintain that when a court reviews an agency's interpretation of a statute, it ought to apply an independent judgment, and must enforce what it believes to be best interpretation.¹⁵⁷

It is incorrect to suggest that the *Chevron* deference permits a court to abdicate its judicial duty to interpret legislation because when a court decides that an ambiguous legislation constitutes a delegation of authority to the agency, it is interpreting the legislation.¹⁵⁸ Gorsuch J queries: "where in the *Chevron* two-step process does a court interpret the law and say what it is?"¹⁵⁹ The court performs its duty of interpreting the laws when it determines that the law delegates power to an

¹⁵³ Siegel 2018 *Vanderbilt LR* 957.

¹⁵⁴ Siegel 2018 *Vanderbilt LR* 957. See *Perez* 1217, Thomas J concurring. See also Hamburger 2016 *George Washington LR* 1196 arguing that: "Agencies must interpret to figure out how to act without violating the law".

¹⁵⁵ Siegel 2018 *Vanderbilt LR* 958.

¹⁵⁶ Siegel 2018 *Vanderbilt LR* 958. See *Chevron* 837, 843.

¹⁵⁷ Siegel 2018 *Vanderbilt LR* 958. See *EPA* 2712, where Thomas J concurred. See also Hamburger 2016 *George Washington LR* 1205-1210.

¹⁵⁸ Siegel 2018 *Vanderbilt LR* 963.

¹⁵⁹ *Gutierrez-Brizuela* 1152. See also footnote 130 above.

administrative agency. Moreover, the “court says what the law is when it says that the law is that an agency is vested with the power to make a certain decision”.¹⁶⁰ Thus, the *Chevron* deference is constitutionally permissible because it does not seize the power to interpret from the courts, and hands it over to the executive. Neither does the deference prevent any court from achieving their function to interpret statutes. As such, it is submitted that the attacks against the doctrine are misdirected.¹⁶¹

Despite the criticism directed against the *Chevron* doctrine, many countries’ courts have been influenced by the United States’ views on judicial restraint and deference. One of these jurisdictions is Canada, which will be subsequently discussed.

4.2.2 *Judicial restraint and deference: The Canadian perspective*

In Canada, the Supreme Court is considered the protector of rights that are enshrined in the Canadian Charter of Rights and Freedoms through the process of judicial review.¹⁶² In order to determine whether any rights have been violated, the Canadian courts undertake a two-stage process.¹⁶³ Firstly, the court interprets the right in order to establish its scope, and then decides whether the Charter safeguards the affected right. In the second stage, the court undertakes a limitation analysis.¹⁶⁴ The Canadian Charter provides that rights enshrined in the Charter may be limited where the limitation is a “reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society”.¹⁶⁵ The state bears the burden of proof on a balance of probabilities to justify the right’s limitation. The application of the limitation analysis advances a “culture of justification”¹⁶⁶ as the legislature and the executive have to justify through showing some grounds in order

¹⁶⁰ Siegel 2018 *Vanderbilt LR* 963.

¹⁶¹ Siegel 2018 *Vanderbilt LR* 992-993.

¹⁶² Hogg *Constitutional Law of Canada* 787.

¹⁶³ This two-stage mode is similar to that adopted by the South African courts. See McLean *Constitutional deference* 87; Naidoo *Does the lack of sufficient formulation* 50.

¹⁶⁴ Naidoo *Does the lack of sufficient formulation* 50.

¹⁶⁵ Section 1: “The Canadian Charter of Rights and Freedoms guarantees the rights 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”. See South African Constitution limitation analysis, s 36(1): “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...”.

¹⁶⁶ McLean *Constitutional deference* 28.

to limit rights safeguarded by the Charter. The court, as the protector of the Canadian Charter, enters into a dialogue with the legislature and executive.¹⁶⁷ There is an understanding that because judges under the Charter:

...who are neither elected into office nor accountable for their actions, are vested with the power to strike down laws that have been made by the duly elected representatives of the people.¹⁶⁸

This makes it easy for critics to suggest that judicial review in a democratic society is illegitimate. It has been stated that because the Canadian Constitution is drafted in “broad, vague language”,¹⁶⁹ judges are entrusted with a measure of discretion in interpreting the Constitution. Despite this deficiency in constitutional interpretation, judges cannot simply strike down laws or impose their own personal construction of the Constitution - they first have to take part in a “dialogue”¹⁷⁰ with the legislative branch, as stated below:

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 component legislative body as a dialogue.¹⁷¹

In the case of *Vriend v Alberta*,¹⁷² the courts advanced the concept of a ‘democratic dialogue’, and stressed its support of respecting the roles of the political branches of government:

In reviewing legislative enactments, the executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. ...most of the legislation held not pass the constitutional muster has been followed by new legislation designed to accomplish similar objectives.... By doing this, the legislature responds to the courts; hence the dialogue among the branches.¹⁷³

The fostering of accountability between the different branches of government, and the promoting of the democratic process were also described by the court as part of this dialogue process:

A great value of judicial review and this dialogue among the branches is that each branch is somewhat accountable to the other. The work of the legislature is reviewed by the courts and the works of courts in its decision can be reacted

¹⁶⁷ Hogg and Bushell 1997 *Osgoode Hall LJ 77*

¹⁶⁸ Hogg and Bushell 1997 *Osgoode Hall LJ 77*.

¹⁶⁹ Hogg and Bushell 1997 *Osgoode Hall LJ 77*.

¹⁷⁰ Hogg and Bushell 1997 *Osgoode Hall LJ 77*.

¹⁷¹ Hogg and Bushell 1997 *Osgoode Hall LJ 79*

¹⁷² *Vriend v Alberta* [1998] 1 SCR 493 (hereinafter *Vriend*).

¹⁷³ *Vriend* para 138.

to by the legislature in the passing of new legislation. ... This dialogue between and accountability of each of the branches has the effect of enhancing the democratic process, not denying it.¹⁷⁴

The legislature will react to courts' decisions by enacting new laws which are aligned to the courts' decisions. Through this dialogue process, the courts ensure they show respect to the legislature and executive, and not to second-guess the decisions of the legislative or executive branches, or to make judgments in areas where the courts are deemed to be ill-equipped to decide upon:

In carrying our duties, courts are not to second guess legislature and the executives; they are not to make value judgements on what they regard as the proper policy choices; this is for the other branches. Rather, the courts are to uphold the Constitution ... respect by the courts for the legislature and the executive role is as important as ensuring that the other branches respect each other's' role and the role of the courts.¹⁷⁵

Four factors exist which make this dialogue possible.¹⁷⁶ Firstly, section 33¹⁷⁷ of the Charter provides the power of legislative override.¹⁷⁸ The authority to strike down legislation permits the legislature to re-enact laws that have been struck down by the courts. The legislature can also insert an "express notwithstanding clause"¹⁷⁹ into a statute which results in protecting the legislation from judicial scrutiny or review. Secondly, under section 1 of the Charter, a right can be limited within reasonable limits. The limitation analysis permits courts to "speculate on how the offending legislation could be remedied".¹⁸⁰ This is done by suggesting that less-curbed means be offered in order to reach the same result.¹⁸¹

¹⁷⁴ *Vriend* para 139.

¹⁷⁵ *Vriend* para 136.

¹⁷⁶ Hogg and Bushell 1997 *Osgoode Hall LJ* 82.

¹⁷⁷ Section 33(1): "Parliament or the legislature of a province may expressly declare in an Act of Parliament 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 sections 7 or 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 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 a legislature of a province may re-enact a declaration made under subsection (1).

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

¹⁷⁸ Hogg and Bushell 1997 *Osgoode Hall LJ* 83.

¹⁷⁹ Hogg and Bushell 1997 *Osgoode Hall LJ* 84. See also McLean *Constitutional deference* 29.

¹⁸⁰ McLean *Constitutional deference* 29.

¹⁸¹ McLean *Constitutional deference* 29.

Thirdly, some rights in the Charter are “internally qualified”,¹⁸² and the courts could second-guess alternative measures that could satisfy constitutional muster. For example, in the case of *RJR-MacDonald Inc v Canada*,¹⁸³ the court had to determine the constitutionality of a total restriction on commercial tobacco advertising, and also whether an unattributed health warning on tobacco products was a violation of the right to freedom of speech. The majority of the court held that deference is context-specific, however, the court was careful as not to be overly deferential:

As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problem within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether parliament’s choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is parliament. To carry judicial deference to the point of accepting parliament’s view simply on the basis that the problem is serious and the solution is difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitutional and our nation is founded.¹⁸⁴

The minority of the court came to the conclusion that different degrees of deference should be applied, which would depend upon the nature of the right and the nature of the legislation before the court.¹⁸⁵ The minority defined the nature of the legislation in this regard as “social engineering”¹⁸⁶ which should be given a high level of deference. The nature of the right was defined as one not worthy of being presented with a level of safeguard, since:

...harm engendered by tobacco, and the profit motive underlying its promotion, place this form of expression as far from the ‘core’ of freedom of expression values as prostitution, hate mongering or pornography.¹⁸⁷

The difference between the majority and the minority judgment is the role that deference should play in determining the nature of the burden of proof which the state bears in the section 1 analysis.¹⁸⁸ The minority adopted a deferential approach

¹⁸² McLean *Constitutional deference* 29.

¹⁸³ *RJR-MacDonald Inc v Canada (AG)* [1995] 3 SCR 199 (hereinafter *RJR-MacDonald*).

¹⁸⁴ *RJR-MacDonald* para 136.

¹⁸⁵ *RJR-MacDonald* para 64.

¹⁸⁶ *RJR-MacDonald* paras 68-70.

¹⁸⁷ *RJR-MacDonald* para 75.

¹⁸⁸ McLean *Constitutional deference* 33.

which meant that the state did not have to meet its burden under the conventional civil standard of proof, but simply had to “demonstrate that it had a reasonable basis for believing that such a rational connection exists”.¹⁸⁹ The majority, while it concluded that a contextual approach should be adopted of the section 1 analysis, reaffirmed that, on a balance of probabilities, such civil standard of proof was “the appropriate standard of proof in all stages of the proportionality analysis”.¹⁹⁰ Moreover, the majority warned against taking the contextual approach of the section 1 analysis too far in a way that would undermine parliament’s obligation to justify any limitations it places on the Charter’s rights, and in doing so “substitute ad hoc judicial discretion for the reasoned demonstration contemplated by the Charter”.¹⁹¹

In *Thomson Newspapers v Canada*,¹⁹² the court considered numerous contextual factors in determining the proper degree of deference. This case dealt with the restriction of free speech regarding opinion survey results during the final three days of the federal election campaign. The majority of the court decided that the means followed by the legislature did not meet the minimum impairment criteria.¹⁹³ Looking at the nature of the expression in issue was necessary in determining the degree of deference.¹⁹⁴ The nature of the expression, the court found, was “at the core of the political process”,¹⁹⁵ and hence a deferential approach by the court would not be proper. The court also stated the factors which it found could militate in favour of a deferential approach, namely, the vulnerability of the group sought to be safeguarded; secondly, the voters’ interests and those opposed to the pollster, and thirdly, the:

...reasonable apprehension of harm test that has been applied where it has been suggested, though not proven, that the very nature of the expression in question undermines the position of groups or individuals as equal participants in society.¹⁹⁶

¹⁸⁹ *RJR-MacDonald* paras 67-68.

¹⁹⁰ *RJR-MacDonald* para 137.

¹⁹¹ *RJR-MacDonald* para 134.

¹⁹² *Thomson Newspapers Co v Canada (AG)* [1988] 1 SCR 877 (hereinafter *Thomson Newspapers*).

¹⁹³ *Thomson Newspapers* para 117.

¹⁹⁴ *Thomson Newspapers* para 93.

¹⁹⁵ *Thomson Newspapers* para 93.

¹⁹⁶ *Thomson Newspapers* paras 112-117.

However, the court concluded that Canadian voters were not a vulnerable group; thus, the government's claim of widespread significant harm to the group could not be sustainable, as the autonomy and dignity of the group was not under attack.¹⁹⁷ Hence the court found that a "significant level of deference"¹⁹⁸ was not required, and that, as a result of these facts, the legislative means taken did not amount to a minimum impairment.

In another case where deference was exercised - *R v Edwards Books*¹⁹⁹ - the constitutionality of the Retail Business Holidays Act was questioned. This Act was drafted in such a manner that it exempted business with less than seven employees from closing on Sunday, whilst restricting retail stores with more than seven employees from opening on a Sunday. The court had to decide whether the manner in which the legislature had formulated this exemption was reasonable. Dickson J maintained that "the legislature is entitled to a measure of leeway on how to achieve its goals".²⁰⁰ Applying deference, he stated that although there could be a better legislative solution to the religious exemption, it was not up to the court to impose such solution. He concluded that the Act was unconstitutional, as it would impose "an excessively high standard on the legislature".²⁰¹ Hence, the court found that the state made a serious effort to balance the rights of those affected, and showed that its legislation was a justifiable violation on the right to freedom of religion.²⁰² La Forest J, in a concurring judgment, also stressed that the needs left to the legislature a reasonable degree of room in formulating its legislation.²⁰³ Yet La Forest J also stressed that there is an obligation on the legislature to formulate legislation that is reasonable, and once this duty is satisfied, the court may go no further.²⁰⁴

The case of *Chaoulli v Quebec*²⁰⁵ concerned the validity of section 15 of the Health Insurance Act, and section 11 of the Hospital Insurance Act of Quebec. These two provisions prohibited Quebec citizens from taking out medical insurance for services

¹⁹⁷ *Thomson Newspapers* paras 112-117.

¹⁹⁸ *Thomson Newspapers* para 117.

¹⁹⁹ *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 (hereinafter *Edwards Books*).

²⁰⁰ *Edwards Books* para 147.

²⁰¹ *Edwards Books* para 149.

²⁰² *Edwards Books* para 151.

²⁰³ *Edwards Books* para 183.

²⁰⁴ *Edwards Books* para 183.

²⁰⁵ *Chaoulli v Quebec* [2005] 1 SCR 791 (hereinafter *Chaoulli*).

in the private sector that are available under the provincial health system. It was the appellants' argument that this prohibition constituted an infringement under section 7 of the Charter.²⁰⁶ The majority of the court concluded that there was an infringement of section 7 of the Charter.²⁰⁷ The court engaged in a debate on how much deference was owed to the legislature. Deschamps J stated that:

It must be possible to base the criteria for judicial intervention on legal principles and not socio-political discourse that is disconnected from reality.²⁰⁸

The majority also noted that, although the democratically elected legislature has the duty of defining and implementing social policy, the courts have the role of holding such policy accountable to the foundational commitments of the people, as enshrined in the Constitution.²⁰⁹ There is a possibility for the court to defer when the legislature provides grounds that can be justified under the terms of democratic principles of the Constitution.²¹⁰ The courts must also be informed of its institutional competence to evaluate the issues at hand. Deschamps J noted that:

Certain factors favour greater deference, such as the prospective nature of the decision, impact on public finances, the multiplicity of competing interests, the difficulty of presenting scientific evidence and the limited time available to the state.²¹¹

Deference is to be exercised depending on the circumstances and evidence before the court.²¹² Subsequently, the ability of the court to decide upon a matter depends on the evidence before the court, "rather than a deeper appreciation of the inherent limitations of the court for adjudication of complex, polycentric matters".²¹³ Lastly, the right to equality, as guaranteed in section 15(1) of the Charter, can also be met through numerous remedies.²¹⁴ This provision of the Charter prohibits laws that discriminate on listed grounds.²¹⁵ A decision by the court under section 15(1) requires that the legislature aligns its laws to accommodate the individual or group

²⁰⁶ Section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

²⁰⁷ *Chaoulli* para 40.

²⁰⁸ *Chaoulli* para 85.

²⁰⁹ *Chaoulli* para 93.

²¹⁰ *Chaoulli* para 93.

²¹¹ *Chaoulli* para 95.

²¹² *Chaoulli* para 96-97.

²¹³ *Chaoulli* paras 96-97. See also McLean *Constitutional deference* 38.

²¹⁴ Hogg and Bushell 1997 *Osgoode Hall LJ* 82, 90.

²¹⁵ These grounds are race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability, or any laws which discriminate on the basis of any ground that is analogous to the listed grounds.

that has been affected.²¹⁶ In spite of this, the legislature still has other options to remedy the exclusion of the affected group or individual.

However, despite these four factors that are understood to be making dialogue possible, questions are raised regarding the “inconsistent application of the reasonableness standard”²¹⁷ by the Canadian Supreme Court. For example, in the case of *Dunsmuir v New Brunswick*²¹⁸ - which involved the constitutionality of the dismissal of public office holders - an employee was not informed of the reasons for his termination of employment, or provided with the opportunity to respond. In this case, the majority of the court found that the respondent was rightfully correct in dismissing the appellant, and that “it was unnecessary to consider any public law duty of procedural fairness”.²¹⁹ Yet, the court had to review the reasonableness of the decision-maker concerned.

The majority decision in this case was criticised as being full of mixed messages in that it “preserves the status quo relabelling, rather than rewriting, the pragmatic and functional approach”.²²⁰ The only difference is that after *Dunsmuir*, the process of determining reasonableness requires one to undertake a procedure of review analysis in situations where current case law has already established that judicial deference is owed regarding a specific issue.²²¹ Nonetheless, Bastarache and LeBelle JJ in *Dunsmuir* noted the dilemma, in that:

Neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years and that judges must not brand as jurisdictional issues that are doubtfully so.²²²

Moreover, the Canadian Supreme Court’s approach to reasonableness review in *Dunsmuir* also amounted to mixed messages while it adopted Dyzenhaus’ notion

²¹⁶ Hogg and Bushell 1997 *Osgoode Hall LJ* 90.

²¹⁷ Lewans 2012 *Queen’s LJ* 59. See also Cavalluzzo 2012 *Canadian Labour & Employment LJ* 369 who states that “in assessing how the Supreme Court of Canada applies the Canadian Charter of Rights and Freedoms, we normally associate judicial deference with judicial restraint. However, I will suggest that in the *Fraser* case (*Fraser v Ontario (AG)* [2011] 2 SCR 3), what purported to be judicial deference really turned out to be judicial activism, both in the majority judgment and in the concurring judgment of Justice Rothstein”.

²¹⁸ *Dunsmuir v New Brunswick* 2008 SCC 9 (hereinafter *Dunsmuir*).

²¹⁹ *Dunsmuir* para 117.

²²⁰ Lewans 2012 *Queen’s LJ* 61.

²²¹ Lewans 2012 *Queen’s LJ* 61

²²² *Dunsmuir* para 59.

that judicial deference requires “respectful attention to the reasons offered”²²³ by an administrative decision-maker. It also builds on that notion by stating that “reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process”.²²⁴ Thus, the Canadian Supreme Court’s application of judicial restraint and deference seems not to have been consistent or sufficiently formulated.

The Canadian Charter of Rights and Freedoms and their courts’ jurisprudence have influenced South African courts to a great extent. In the following section, the South African courts’ perspective on judicial restraint and deference will be investigated.

4.2.3 *Judicial restraint and deference: The South African perspective*

Like the Canadian Supreme Court, the South African Constitutional Court has exercised judicial restraint premised on the separation of powers, and not interfering with the decisions by other government branches when it found such decisions to be in line with the Constitution. The respect of the other government branches’ domains forms a central aspect of the separation of powers doctrine and the idea of judicial restraint.²²⁵ This respect to other government branches’ spheres presents the court with the challenge that:

This Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary. ...The search for an appropriate accommodation in this frontier legal territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism be as damaging as excessive judicial timidity. ...Both extremes need to be avoided.²²⁶

The supremacy of the South African Constitution must be considered to avoid extremes.²²⁷ The boundaries of the judicial terrain have been determined by the constitutional supremacy clause as provided by section 2 of the Constitution:

²²³ Dyzenhaus *The politics of deference* 286.

²²⁴ *Dunsmuir* paras 47-48.

²²⁵ Seedorf and Sibanda *Separation of powers* 56.

²²⁶ *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC) paras 155-156.

²²⁷ Seedorf and Sibanda *Separation of powers* 56.

Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution. ...But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. ... Courts are required by the Constitution to ensure that all branches of government act within the law and fulfil their constitutional obligations.²²⁸

The word 'respect' is not only used within the context of judicial restraint but is also used when referring to deference. As regards the use of the ordinary meaning of the word 'deference', the Court was prompted to explain that:

Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial Function. ... The use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.²²⁹

This practice of constraint is also termed 'due deference', and believed to primarily constitute self-imposed constraint by the courts which is less formal and more intangible than what others may term the "formal rules of restraint".²³⁰ The self-imposed limitations are the result of the "D word":²³¹ deference. As mentioned in paragraph 4.2 above, the concept of deference is to some degree vague and restricting, and has been described as "a highly impressionistic concept which is not open to scientific analysis".²³² It consequently constitutes a flexible counter-weight to a strong-form judicial review, because there is no understandable formula for accurately describing what it entails in all cases, in spite of academic pleas for a "theory of deference"²³³ in order to "guide judicial intervention and non-intervention".²³⁴ As Sachs states:

²²⁸ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) paras 37-38.

²²⁹ *Bato* para 46.

²³⁰ Kohn *The burgeoning constitutional requirement* 36. As seen in the case of *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977 (HL), where Lord Hoffmann observed at paras 75-76 that "the Courts themselves often have to decide the limits of their own decision-making power".

²³¹ Corder 2004 SALJ 441.

²³² Taggart 2008 NZ LJ 454, quoting Beloff.

²³³ See Davis 2006 *Acta Juridica* 23.

²³⁴ Brand 2011 *Stellenbosch LR* 632, quoting Cockrell.

There is a time to be cautious and a time to be bold, a time for discretion to be the better part of valour and a time for valour to be the better part of discretion. And it would appear that there is no logic intrinsic to the judicial function itself that can tell us when the clock strikes for valour and when for caution. The question becomes not one of whether but when; I would love to see a theory of when.²³⁵

The fluctuation in the notion of deference as either strict restraint or simple respect is a result of the “democracy versus juristocracy debate”,²³⁶ and is an inevitable outcome of both South Africa’s legal and socio-political history. O’Regan has observed that during the days of the apartheid state, the courts demonstrated a “supine attitude ... in the face of domineering state power”.²³⁷ This was clearly shown in Rabie CJ’s judgment in the case of *Omar v Minister of Law and Order*²³⁸ on the issue of whether, to the degree in which the regulations restricted consultations between detainees and their legal representatives, the courts were *ultra vires*. He stated that:

This indicates that Parliament contemplated the need to ensure the safety of the public ... might necessitates the taking of extraordinary measures which might make drastic inroads into the rights and privileges normally enjoyed by individuals.²³⁹

As O’Regan observed, this put into motion a “tone for judicial complicity”²⁴⁰ which entailed huge limitations of human rights during the state of emergency era, and eventually resulted in the *UDF* case²⁴¹ which served as the “lowest point of our pre-democratic jurisprudence”.²⁴² Keeping this history in mind, it is not difficult to see why judicial deference has a disastrous reputation for having the same meaning as judicial “passivity”²⁴³ or “complaisance indicative of collusion with the political arms of state”.²⁴⁴ In this context, deference became a concept associated with the political authoritarianism by political government branches, and a concomitant judicial “surrendering to political pressure”.²⁴⁵ The concept of deference as submission or

²³⁵ Cited in Lenta 2004 SAJHR 555.

²³⁶ Kohn *The burgeoning constitutional requirement* 36.

²³⁷ O’Regan 2004 SALJ 424.

²³⁸ *Omar v Minister of Law and Order* 1987 (3) SA 859 (A) (hereinafter *Omar*).

²³⁹ *Omar* para 892a.

²⁴⁰ Hoexter *Administrative law in South Africa* 270.

²⁴¹ *Staatspresident en ‘n Ander v United Democratic Front en ‘n Ander* 1988 (4) SA 830 (A).

²⁴² Hoexter *Administrative law in South Africa* 270.

²⁴³ Davis 2006 SAJHR 319.

²⁴⁴ Kohn *The burgeoning constitutional requirement* 37.

²⁴⁵ Dixon 2009 *Osgoode Hall LJ* 246.

“gracious concession”, thus, is deemed not to be adequate.²⁴⁶

Deference, when not properly exercised, may permit the courts to overreach in ‘no-go areas’ in violation of the separation of powers doctrine, and it needs to avoid being “castigated for overreaching”.²⁴⁷ It is against this background that Bickel mentions the significance of ‘passive virtues’ in constitutional adjudication, for, amongst other things, the task of ‘not deciding’ is just as crucial as that of deciding, and it “demands a subtle acuteness, an ability to know whether, when and how much to decide”.²⁴⁸ This presents the courts with an unenviable position of having to strike the proper balance, of having to ensure that they show neither a “failure of nerve”,²⁴⁹ nor too zealous a practice of judicial activism.²⁵⁰ As a solution to this dilemma, a “theory of deference” or “deference lite”²⁵¹ has been suggested. The specific concept of deference adopted is thus a direct connection of how wide a role the court will play in a given case.²⁵² Moreover, the theory of deference adopted will “animate the drawing of the line between executive action and administrative action”.²⁵³ Deference as ‘respect’ is the notion originally articulated by Dyzenhaus as demanding respectful or deferential attention to the reasons offered in support of a decision, “whether that decision be the statutory decision of the legislature, a judgement of another court, or the decision of an administrative agency”.²⁵⁴

For the development of a South African deference concept, Hoexter endorses Dyzenhaus’ notion of deference as respect, and proposes that this is the “sort of deference we should be aspiring to”²⁵⁵ as requiring:

A judicial willingness to appreciate the constitutionally-ordained province of administrative agencies; to acknowledge the expertise of those agencies in policy-laden or polycentric issues; to give their interpretations of fact and law due

²⁴⁶ Kohn *The burgeoning constitutional requirement* 37.

²⁴⁷ Lenta 2004 *SAJHR* 544.

²⁴⁸ Mendes 2009 *Legisprudence* 198, referring to Bickel.

²⁴⁹ Lenta 2004 *SAJHR* 544.

²⁵⁰ Kohn *The burgeoning constitutional requirement* 37.

²⁵¹ Davis 2006 *SAJHR* 319, where Davis argues that “by making either section 26(2) or section 27(2) do all the work in a case dealing with a socio-economic right, the Court ensures that no direct claim can be made by a litigant against the state for the delivery of a minimum core of rights”. As the court stated in the *TAC* case (para 38): “Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community”.

²⁵² Pillay 2005 *SALJ* 420.

²⁵³ Corder 2004 *SALJ* 442.

²⁵⁴ Dyzenhaus *The politics of deference* 286. See also footnote 17 above.

²⁵⁵ Hoexter 2000 *SALJ* 501.

respect; and to be sensitive in general to the interest legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for-and the consequences of-judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over review to appeal.²⁵⁶

The concept of variability is linked to this perspective of deference.²⁵⁷ This requires the courts to legitimise the intervention in a “candidly and conscious manner”.²⁵⁸ Justifying the courts’ determination on this aspect should not be done in a formalistic manner, or in what could be an all-or-nothing framework.²⁵⁹ In determining whether or not the court should intervene will be premised upon the circumstances of each case.²⁶⁰

Such deference was exemplified in *Bel Porto School Governing Body and Others v Premier Western Cape and Another*.²⁶¹ This case concerned the validity of the policy pursued by the government of the Western Cape in attempting to give effect to the constitutional imperative to introduce equity into its educational system. The schools did not dispute the validity of the goal to which the policy was directed, nor did they dispute the core aspects of that policy which made provision for a programme of rationalisation within the education system, in order to ensure that education in the province was conducted on a fair and proper basis. They did, however, complain that the manner in which the rationalisation programme was to be implemented imposed an unfair burden on them. They also complained that they were neither informed adequately of the details of the rationalisation programme or its impact on them, nor were they consulted in regard to such matters.²⁶² Chaskalson CJ, in the majority judgment, observed that:

...the role of the courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the

²⁵⁶ Hoexter 2000 SALJ 501-502.

²⁵⁷ Hoexter 2000 SALJ 502.

²⁵⁸ Hoexter 2000 SALJ 502.

²⁵⁹ Hoexter 2000 SALJ 504.

²⁶⁰ Hoexter 2000 SALJ 504.

²⁶¹ *Bel Porto School Governing Body and Others v Premier Western Cape and Others* 2002 (3) SA 265 (CC) (hereinafter *Bel Porto School*).

²⁶² *Bel Porto School* para 1.

law and consistently with the requirements of the controlling legislation.²⁶³

If these requirements are met, and if the government's decision is considered to be reasonable, the court will not interfere with such decision.²⁶⁴ In the minority judgment, it was Mokgoro and Sachs JJ's view that while courts should exhibit significant deference towards the administration, and recognise the practical difficulties which the administration faces, it could create a misleading impression that in instances where there is an infringement of a constitutional right, and there are significant practical difficulties in remedying the injustice caused, a decision-maker will not be held accountable.²⁶⁵ This would occur in instances where there is an infringement of a constitutional right, and "there are significant practical difficulties in remedying the injustice caused".²⁶⁶ Thus, "it is the remedy that must adapt itself to the right, not the right to the remedy".²⁶⁷ Mokgoro and Sachs JJ also observed that these latter sentiments were in accord with the Constitutional Court's decision in *Premier Province Mpumalanga*,²⁶⁸ where:

...it was clear that despite the polycentric nature of the issues involved and the budgetary implications of the court order, this Court felt it appropriate and necessary to intervene.²⁶⁹

The Court intervened in *Premier Province Mpumalanga* not simply by setting aside as unlawful a decision relating to a detail of the overall financial administration, but also by finalising the matter in accordance with principles of fundamental fairness.²⁷⁰

This was also evidenced in the case of *Logbro Properties v Bedderson NO and Others*,²⁷¹ where the issue was whether a provincial tender committee, when considering a tender in 1997, was entitled to take into account the fact that property values had increased since 1995, or whether it should have adjudged the tender excluding this and other supervening considerations. The High Court held that the increase could properly be taken into account. This decision was appealed by the

²⁶³ *Bel Porto School* para 87.

²⁶⁴ *Bel Porto School* para 87.

²⁶⁵ *Bel Porto School* para 62.

²⁶⁶ *Bel Porto School* para 62.

²⁶⁷ *Bel Porto School* para 62.

²⁶⁸ *Premier Province of Mpumalanga, and Another v Executive Committee, Association of Governing Bodies of State-Aided Schools Eastern Transvaal* 1999 (2) SA 91 (CC) paras 12-25.

²⁶⁹ *Bel Porto School* para 52.

²⁷⁰ See *Bel Porto School* para 52.

²⁷¹ *Logbro Properties v Bedderson NO and Others* 2003 (2) SA 460 (SCA) (hereinafter *Logbro Properties*).

appellant.²⁷² Cameron JA held that the increase of property values was to be considered by the tender committee as polycentric decision-making which entailed the complex nature of balancing all public interests that its mandate required of it.²⁷³ This “was not a unilinear question involving the assertion of one’s subject’s rights against the administration”.²⁷⁴ The tender committee’s task entailed more than just looking at the appellant’s tender. The task was complex, and required “balancing all the public interests its mandate required it to fulfil”.²⁷⁵ This included fair reconsideration of the appellant’s tender, and not the exclusion of its broader responsibilities, which includes the “public benefit to be derived from obtaining a higher price by re-advertising the property”.²⁷⁶ It was against this background that Cameron JA held that in such situations “a measure of judicial deference is appropriate to the complexity of the task that confronted the committee”.²⁷⁷ He consequently approved of Hoexter’s views on deference.

Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical, or of a kind in which a court lacks a particular proficiency.²⁷⁸ For example, in the case of *Phambili Fisheries*,²⁷⁹ the court observed that the Marine Living Resources Act has entrusted the Chief Director with a wide discretion to strike a balance, in order to achieve the objectives of the Act.²⁸⁰ The decision of the Chief Director “gives effect to government economic policies”,²⁸¹ and was a polycentric one. Phambili, the first respondent, argued that the decision made by the Chief Director was incorrect. Schutz JA noted that “what is really under attack is the substance of the decision, not the procedure by means of which it was arrived at”.²⁸² He added that it was not the function of the court to impose its views on what it believed would be a proper decision, when a decision was made under the

²⁷² *Logbro Properties* para 1.

²⁷³ *Logbro Properties* para 20.

²⁷⁴ *Logbro Properties* para 20.

²⁷⁵ *Logbro Properties* para 20.

²⁷⁶ *Logbro Properties* para 20.

²⁷⁷ *Logbro Properties* para 21.

²⁷⁸ *Logbro properties* para 53.

²⁷⁹ *Minister of Environmental Affairs and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) (hereinafter *Phambili Fisheries*).

²⁸⁰ *Phambili Fisheries* para 47.

²⁸¹ *Phambili Fisheries* paras 47, 53.

²⁸² *Phambili Fisheries* para 52.

provisions of legislation, and was rational.²⁸³ Schutz JA also observed that deference as imparted by the courts does not imply judicial timorousness or not being ready to perform its function, but that it simply recognises that certain administrative conduct must be handled by the executive, and not the judiciary.²⁸⁴

The Supreme Court of Appeal's decision in the *Phambili* case was taken on appeal to the Constitutional Court in *Bato Star*,²⁸⁵ where O'Regan J confirmed Schutz JA's decision in *Phambili* that the notion of judicial deference does not mean that the courts are hesitant or not ready to perform its function.²⁸⁶ However, as explained above, O'Regan disapproved of the word 'deference' because misunderstandings may arise as to a review court's real function.²⁸⁷ She went on to state that if it could be realised that the need for courts to treat decision-makers with the appropriate deference or respect flows not from judicial courtesy or etiquette, but from the fundamental constitutional principle of the separation of powers, this "misunderstanding"²⁸⁸ would be prevented. A court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government.²⁸⁹ Also, a court gives "due weight to finding of fact and policy decisions made by those with special expertise in the field".²⁹⁰

The level of respect that the courts give an administrative agency may depend upon the nature of the decision and the identity of decision-maker.²⁹¹ A decision which requires an equilibrium to be balanced between a range of competing interests, and which is to be taken by a person or institution with specific expertise in that field, must be shown respect by the courts.²⁹² At times, an agency may identify a goal to be achieved, but it will not dictate which route should be followed in order to achieve such goal. It is in such circumstances that a court should show respect to the route selected by the decision-maker.²⁹³ It should be noted that courts must however not

²⁸³ *Phambili Fisheries* para 52.

²⁸⁴ *Phambili Fisheries* para 50. See also footnote 256 above.

²⁸⁵ *Bato Star* para 1.

²⁸⁶ *Bato Star* para 46. See also footnotes 229, 284 above.

²⁸⁷ *Bato Star* para 46. See also footnote 229 above.

²⁸⁸ *Bato Star* para 46.

²⁸⁹ *Bato Star* para 48.

²⁹⁰ *Bato Star* para 48.

²⁹¹ *Bato Star* para 48.

²⁹² *Bato Star* para 48.

²⁹³ *Bato Star* para 48.

“rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker”²⁹⁴.

In his minority judgment in *Bato Star*, Ngcobo J commented as to whether the Minister has complied with his obligation to ensure that the provision giving effect to transformation in the fishing industry was complied with, that the “duty of the courts does not extend to telling the functionaries how to implement transformation”,²⁹⁵ and that this must be left to the functionaries concerned. According to him, transformation can take place in various ways, and how this is to be done is a complex and difficult policy matter.²⁹⁶ Hoexter and O’Regan both established deference as an important topic and concept. In this process, both Hoexter and O’Regan made reliance on Dyzenhaus’ idea of deference as respect.²⁹⁷ This idea of deference as respect is premised on an attempt to address the following questions:

How should judges in common law jurisdictions respond to administrative determinations of the law? Should they defer to such determinations or evaluate them in accordance with their sense of what the right determination should have been?²⁹⁸

O’Regan’s concept of deference as respect is not only associated with, but is understood as to be stemming from the separation of powers doctrine.²⁹⁹ However, this association remains unclear because she does not clarify how deference stems from the doctrine, or “whether the ideas of the separation of powers simply support deference”.³⁰⁰ The link between deference and the separation of powers doctrine is problematic, if not questionable.³⁰¹ If deference simply “consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies”,³⁰² then the concept connotes “recognising the proper role of the Executive within the constitution within the Constitution”,³⁰³ or “manifests the recognition that the law itself places certain administrative actions in the hands of

²⁹⁴ *Bato Star* para 48.

²⁹⁵ *Bato Star* para 103-104.

²⁹⁶ *Bato Star* para 104. See also Maree and Quinot 2016 *TSAR* 447.

²⁹⁷ Hoexter 2000 *SALJ* 501; *Bato Star* para 46. See also footnote 255 above.

²⁹⁸ Dyzenhaus *The politics of deference* 279.

²⁹⁹ *Bato Star* para 46.

³⁰⁰ Maree and Quinot 2016 *TSAR* 452.

³⁰¹ Maree and Quinot 2016 *TSAR* 464.

³⁰² Hoexter 2000 *SALJ* 501.

³⁰³ *Bato Star* para 48.

the executive".³⁰⁴ It is then contended that deference provides nothing beyond the pure separation of powers.³⁰⁵

Unlike the separation of powers doctrine, which covers a broad range of political and legal relationships, deference, on the other hand, focuses on - while not being limited to - the relationship between the public administration and the judiciary.³⁰⁶ Nonetheless, O'Regan's view which links deference to the separation of powers doctrine in the *Bato Star* case, made reliance on Lord Hoffmann's views in the *ProLife Alliance* case, where he observed that:

In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the limits of that power are. That is a question of law and must therefore be decided by the courts. This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are independent branch of government and the legislature and the executive are, directly and indirectly respectively, the elected branches of government. Independence makes courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. ...When a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.³⁰⁷

Lord Hoffmann's view is not that deference is supported by the separation of powers, as stated by O'Regan J, but that "deference is empty in the sense that the allocation of functions by the courts is nothing more than a legal question in terms of the separation of powers and the rule of law".³⁰⁸ This notion of deference which is imported from Canada is not yet contextualised in South Africa, especially within the human-rights sphere.³⁰⁹ Constitutional supremacy within the context of human rights should be understood to imply the separation of powers, and by implication, deference. It must be informed by the administrative justice content premised on the

³⁰⁴ *Phambili Fisheries* para 50.

³⁰⁵ Maree and Quinot 2016 TSAR 453.

³⁰⁶ Maree and Quinot 2016 TSAR 453.

³⁰⁷ *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977 (HL) paras 75-76 (hereinafter *ProLife Alliance*).

³⁰⁸ Maree and Quinot 2016 TSAR 464.

³⁰⁹ Maree and Quinot 2016 TSAR 461.

understanding that “it is not for an undeveloped ‘theory’ of deference to determine the scope of administrative justice”.³¹⁰

Although deference is an undeveloped concept in the South African constitutional review jurisprudence, in Canada (as discussed in paragraph 4.2.2 above), the concept has a long history. Yet the concept remains contested and criticised,³¹¹ similar as in the United States. The United States’ *Chevron* deference has also made its way both to Canada and South Africa.³¹² The question now is whether South African courts should adopt the United States’ deference concept.³¹³ Even though it is stated that “borrowing from another system is the most common source of legal change,”³¹⁴ the difficulty with this aphorism is that “such borrowing may create problems when a rule is torn from its domestic roots and transplanted to foreign soil”.³¹⁵ Kriegler J gave the following warning when considering the role that foreign law can play in South African constitutional jurisprudence:

Nor does the advent of the Constitution, which codifies them, warrant the wholesale importation foreign doctrines or precedents. To be sure we are to promote values not yet rooted in our traditions and we have agreed to applicable public international law. We are also permitted to have regard to foreign public case law. But that does not amount to a wholesale importation of doctrines from foreign jurisdictions³¹⁶

In the case of *Bernstein v Bester*,³¹⁷ Kriegler J again commented on this theme by emphasising that the subtleties of foreign jurisdictions, their practices and terminology require more intensive study. There seem to be differences of much substances between South African practices and those countries. Some countries’ jurisprudence renders ostensible dangerous analogies without thorough understanding of the foreign systems. The frequent resort to foreign authorities should also be discouraged, because:

Far too often one sees citation by counsel of, for instance, an American judgment in support of a proposition relating to our Constitution, without any attempt to explain why it is said to be in point. Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with

³¹⁰ Maree and Quinot 2016 *TSAR* 462.

³¹¹ Maree and Quinot 2016 *TSAR* 465

³¹² Wallis 2018 *SA Judicial Education J* 99-101.

³¹³ Wallis 2018 *SA Judicial Education J* 97.

³¹⁴ Watson *Legal origins and legal change* 73.

³¹⁵ Wallis 2018 *SA Judicial Education J* 97.

³¹⁶ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 144.

³¹⁷ *Bernstein v Bester* NO 1996 (2) SA 751 (CC) paras 132-133.

universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision. The precepts of section 35(1) of the Constitution are also clear: where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign case law. But that is a far cry from blithe adoption of alien concepts or inapposite precedents.³¹⁸

The task of delineating the boundaries between the judiciary and the other branches has resulted in the adoption of the idea of deference from other jurisdictions.³¹⁹ The concept is an immigrant from other jurisdictions,³²⁰ and there have been calls for the construction of an appropriate theory of deference in South Africa.³²¹

In the *Bato Star* case, the use of the word 'deference' has prompted the court to immediately explain that it could be better understood as respect because of possible misunderstandings it may give as to a review court's true function.³²² As was shown above, the ordinary meanings of the word 'deference' varies from one jurisdiction to another, and whichever of these definitions one chooses:

...it conveys an image of the court standing back in favour of the decision-maker or administrator that seems inconsistent with the role of the court in review proceedings.³²³

The answer on whether South Africa should board the deference train lies in the general principle of accountability, responsibility and openness that is a fundamental value enshrined in the Constitution. South African courts do not approach review from the perspective of determining the 'correct' legal position, and assessing the legality of the administrator's actions against that yardstick.³²⁴ It is not an approach that can prevail in the light of the provisions of the Promotion of Administrative Justice Act³²⁵ which provides that a decision is reviewable if it is materially influenced by an error of law.³²⁶ This demands that a review court should decide what the true legal position is; not whether the legal conclusion of the decision-

³¹⁸ *Bernstein v Bester NO* 1996 (2) SA 751 (CC) paras 132-133.

³¹⁹ Wallis 2018 *SA Judicial Education J* 98.

³²⁰ Wallis 2018 *SA Judicial Education J* 98.

³²¹ Hoexter 2000 *SALJ* 501-502.

³²² *Bato Star* para 46. See also footnotes 229, 287-288 above.

³²³ Wallis 2018 *SA Judicial Education J* 99.

³²⁴ Wallis 2018 *SA Judicial Education J* 103-106.

³²⁵ The Promotion of Administrative Justice Act 3 of 2000.

³²⁶ Section 6(2)(a).

maker was one that could reasonably be held and defended.³²⁷

Deference, as it is exercised in the United States and Canada, is mainly an approach that the courts of those countries take in response to the legal decisions of administrative agencies and decision-makers. As a result, “one sees immediately that the imported plant cannot grow in the same way in South African soil”.³²⁸ As with any other decision, the court explains its decision on the basis of the arguments presented to it in the evidential material. A judge who is convinced that a decision is unreasonable will not be deterred from making such pronouncement because of a need for deference. The fundamental role of judges is reasoned decision-making.³²⁹

The use of deference adds nothing to judicial reasons in the absence of expansion and explanation. As is the case with “many alien plants, its extirpation from our society would not seem to be a loss”.³³⁰ As discussed earlier, this understanding regarding the origin of deference is contrary to O’Regan’s view regarding the origin of the South African deference concept which she suggests existed prior to 1994, where the judiciary’s attitude was lethargic in the face of the authoritarian powers of the state.³³¹ Despite these criticisms for the inclusion of deference in South African constitutional jurisprudence, according to O’Regan J in *Bato Star*, deference forms a vital role in South African law.³³²

The other problem presented by deference in South African jurisprudence seems to stem from the fact that its scope and limitations are incomprehensible, and not properly defined. These sentiments are evident in Ackerman J’s reasoning in the case of *National Coalition for Gay and Lesbian Equality*³³³ in that: “it is not possible to formulate in general terms what deference must embrace, for this depends on the facts and circumstances of each case”.³³⁴

³²⁷ Wallis 2018 *SA Judicial Education J* 103.

³²⁸ Wallis 2018 *SA Judicial Education J* 105-106.

³²⁹ Wallis 2018 *SA Judicial Education J* 107.

³³⁰ Wallis 2018 *SA Judicial Education J* 106-107.

³³¹ O’Regan 2004 *SALJ* 424. See also footnote 237 above.

³³² *Bato Star* paras 46-48.

³³³ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (hereinafter *National Coalition for Gay and Lesbian*).

³³⁴ *National Coalition for Gay and Lesbian Equality* para 66. See also Taggart 2008 *NZ LJ* 454.

The following two judgments of the Constitutional Court both involved governments' policy and budgetary implications, yet the application of deference by the Courts raises questions. In the *Soobramoney*,³³⁵ Chaskalson JP, in dismissing Mr Soobramoney's claim for his right not to be refused emergency treatment under section 27(3) of the Constitution, stated that the provincial government was the responsible authority to make health-care policy decisions about the funding that should be made available, and how such funds should be spent. It was stated that courts will be slow to interfere with rational decisions taken in good faith by the political organs.³³⁶ This Court exercised deference, and refused to order the state to provide expensive dialysis treatment because "the cost of doing so would make substantial inroads into the health budget".³³⁷

While the Court exercised deference, its limits and scope were not comprehensively formulated. For example, it seems it did not comprehensively determine the circumstances in which a court would be slow to interfere with decisions by other state organs. In the case of *Treatment Action Campaign*,³³⁸ it was contended by the government that under the separation of powers doctrine the making of policy is the prerogative of the executive and not the courts, and that courts cannot make orders that have the effect of requiring the executive to pursue a particular policy.³³⁹ The Constitutional Court dismissed this argument by noting that while:

...there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other arms of the government and not the others.³⁴⁰

This does not mean that courts cannot or should not make orders that have an impact on policy.³⁴¹ Thus deference played no role in this Court's judgment as it made an order which has a significant impact on the government's health-care

³³⁵ *Soobramoney* 755. See also Chapter 3 footnote 332.

³³⁶ *Soobramoney* para 29. See also *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 180: "Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the Legislature and not the Court. It is not for the Courts to approve or disapprove of such policies. What the Courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution". See also footnote 333-334 in Chapter 3.

³³⁷ *Soobramoney* para 28. See also Mojapelo 2013 *Advocate* 44.

³³⁸ *Treatment Action Campaign* 703. See also Chapter 3 footnote 323.

³³⁹ *Treatment Action Campaign* para 97.

³⁴⁰ *Treatment Action Campaign* para 98.

³⁴¹ *Treatment Action Campaign* para 98.

policy and budgetary implications. It seems that even amongst the South African judiciary, there is still uncertainty as to the meaning and application of judicial deference and restraint.

4.3 Conclusion

In this chapter, it was disclosed that courts have a degree of discretion regarding whether certain practices should be applied. This degree of discretion includes the concept of deference. Deference constitutes the court's understanding of its role, and the role of the other branches of government in the adjudication process. This complex concept also arises out of the observation of the separation of powers doctrine, as it requires that the judiciary refrains from unnecessarily intruding into the domain of the other branches of government. While there are numerous definitions for the word 'deference', the South African Constitutional Court and the Canadian Supreme Court have adopted the understanding of deference as respect.

Deference is also understood as referring to judges that are cautious about putting forward their own views, and restricting their discretion as far as possible. This is termed judicial restraint. How and when a court decides to defer is determined by the court's approach to certain considerations, namely, the court's understanding of its institutional role; the court's understanding of its competence; and the nature of the matter before the court. Judicial restraint governs the extent to which, or the intensity with which the courts are willing to sacrifice a legislative decision, and the justification advanced in support of that decision.

In the United States, courts are criticised for their willingness to adjudicate on nearly every subject, and this has resulted in some litigants distrusting the legislative and executive policy administration. It has been acknowledged that deference to the legislature might be difficult at times. Courts exercising deference have been criticised to have surrendered its power necessary to check on the power exercised by the legislature. Moreover, a judiciary acting without restraint has been criticised as disrespecting the role of the constitutional branches of government. Courts, as the unelected branch of government, should premise their decisions in some power external to a judge's will, namely, in the text's meaning and legal practices.

The United States' *Chevron* deference has been questioned as it removes the authority from the judiciary to the executive to say what the law is. This removal of constitutional power violates the United States Constitution Vesting Clause of Article III. Its constitutionality is also questioned because it allows an agency to overrule a judicial opinion by issuing a new, reasonable interpretation of a legislation it administers, even if that interpretation is different from a previous judicial interpretation. This creates systematically biased judgments, as these agencies are often litigants in cases in which their interpretations are judicially reviewed, and courts are required to defer to the views of one of the parties to the case before them. This bias created is unconstitutional as it is in violation of the Fifth Amendment Due Process. Moreover, the *Chevron* deference allows the executive to appropriate much core judicial and legislative power, and federal power is concentrated in such a way that does not seem compatible with the Constitution of the framers' design. Thus, it is a judge-made doctrine for the abdication of judicial duty.

In Canada, the concepts of judicial restraint and deference are both exercised, and the courts advance the concept of a democratic dialogue to show its respect to the roles of the political branches of government interpreting the Constitution. Deference as respect forms part of the constitutional jurisprudence, however, it has been stated that care must be taken not to extend deference too far, and that deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it imposes on guaranteed rights are reasonable and justifiable. The legislature and the courts have their roles; and courts are not permitted to abdicate their responsibility to parliament. However, the Canadian Supreme Court's approach to the reasonableness review in the light of this notion has at times been criticised as sending mixed messages regarding its scope and limitation. The Canadian Supreme Court's articulation of this notion has also been slated as not being sufficiently formulated and articulated.

It is difficult to understand why under the Canadian jurisprudence it was thought necessary in the *Dunsmuir* judgment - where Dyzenhaus' concept of deference was approved of - that courts must give consideration to the knowledge, experience and determinations of the decision-makers, and to explain the exercise of deference in those circumstances. The problem presented by interpreting deference in this

manner is that if courts, with a little reserve, must only give due consideration to the case before them; this seems an unnecessary exercise which amounts to cautionary tautology. There are additional problems with the Canadian use of deference as it was applied in the *Dunsmuir* judgment, in that it is used to determine the standard of review, whether correctness or reasonableness. Its more significant role appears to lie in determining whether, on a question of law determined by an administrative decision-maker, the standard of review is correct or reasonable.

In South Africa, the Canadian idea of judicial deference by judges to the legislature and the executive which also encompasses respect has been adopted. The need to develop a deference idea which will embrace respect to all government branches has been identified. There has been a mixed response to the application and justification for this doctrine. Deference to agencies' interpretation of statutes they administer, even where these agencies are litigants in courts' review proceedings where their interpretations of the legislation are questioned, has not been found to be creating systematically biased judgments, as suggested by Hamburger.

Moreover, deference has not been considered as creating a doctrine made by judges for abdicating judicial duties, as contended by Gorsuch J and Thomas J. Their views that deference removed the judicial authority to say what the law is from the courts to the executive, are also not shared by South African courts. On the contrary, O'Regan J endorsed the Canadian deference approach under circumstances which result in an unconstitutional removal of judicial power to the executive or the agencies. O'Regan J's views on deference are also shared by Cameron JA in *Logbro Properties*, and Schutz JA in *Phambili Fisheries*. Nonetheless, similar to the United States Supreme Court in the *Chevron* case, Schutz JA deferred to the agency's own interpretation of the legislation they administer, and added that it was not the court's job to impose its views on what it believed would be a proper decision. This decision was later confirmed in an appeal to the Constitutional Court where O'Regan J stated that a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other government branches.

Still, the deference doctrine's application by our courts has not been comprehensively and consistently formulated. In this regard, it has been observed

that it is impossible to articulate what deference means in general terms, as each case's facts and circumstances will determine its particular meaning. The justification, scope and limitations of the courts' exercise of discretion when showing respect to the constitutional domain of the political branches of government has been an issue in the courts' application of the judicial restraint and deference concepts. Hence, the courts' exercise of its discretion in the context of the mandatory minimum sentences, and the scope and the limits of this discretion in the light of the other government branches' role on this aspect will be examined in the subsequent chapter.

CHAPTER 5

MANDATORY MINIMUM SENTENCES: A NON-JUDICIAL BODY DECIDING APPROPRIATE PUNISHMENTS

5.1 Introduction

The punishment for crimes committed is a unique and policy-laden endeavour in any society. Criminal punishment enables a society to deprive individuals of fundamental rights such as life, liberty, and property. Where such essential rights of the individual citizen are affected, punishment must be limited and tailored to certain narrow circumstances.¹ Certain procedures and standards of fairness must be followed before a citizen can be subjected to criminal punishment. One such procedure is the trial of a citizen by a jury of peers in countries such as the United States. Another safeguard of fairness is the separation of powers. This principle safeguards criminal defendants from a tyrannical government by ensuring that the legislative, executive, and judicial arms each perform a unique function in criminal proceedings, and that each has the means to check the authority of the other branches during such proceedings.²

In countries like South Africa and Canada, governments have introduced sweeping substantial amendments to the criminal justice system to numerous offences carrying mandatory minimum terms of imprisonment, for example, the Criminal Law Amendment Act³ in South Africa, and the Controlled Drugs and Substance Act⁴ in Canada. Historically, judges have had a broad discretion to formulate appropriate sentences for criminal offenders. It is argued that minimum sentences encroach on that wide discretion by setting a mandatory floor below which judges cannot sentence, even if to do so would be the proportionate sanction in the particular circumstances.⁵

¹ Riley 2010 *Public Interest LJ* 285

² Riley 2010 *Public Interest LJ* 285

³ Criminal Law Amendment Act 105 of 1997.

⁴ Controlled Drugs and Substance Act (SC 1996 c 19).

⁵ Mangat *More than we can afford* 5.

There are rationales advanced in support of mandatory minimum sentencing which include their effect as a general deterrent, and their role in ensuring that the justice system is more transparent, certain and fair.⁶ Research, however, shows that punitive sentencing does not lead to safer communities.⁷ Instead of deterring potential offenders, mandatory minimum sentences result in excessive, harsh sentences that increase the likelihood of recidivism.⁸ Furthermore, mandatory minimum sentences remove sentencing discretion from judges (whose decisions are public and reviewable), and surrenders it to the legislature or the executive, whose decision-making is mainly beyond review.⁹

Judicial discretion in sentencing has never been unfettered. A trial judge performs the sentencing process not in a vacuum, but exercises his discretion to impose a “fit and fair sentence within statutory and judicially defined limits”.¹⁰ Even in the absence of a mandatory minimum floor, judicially-determined sentencing ranges operate as guidelines; and sentencing decisions may be overturned on appeal if they stray too far. A fit sentence is broadly accepted as one imposed by the court after a consideration of the range of sentences imposed for similar crimes committed reasonably contemporaneously.¹¹

Mandatory minimum sentences feature in the criminal justice systems of Canada, the United States, England, Wales, Scotland, Ireland, Australia, New Zealand, India and South Africa.¹² These common-law jurisdictions’ sentences can be classified into three categories:

- (1) Sentences that are truly mandatory, in that they do not allow the exercise of judicial discretion either above or below the mandated sentence (such as a sentence of life imprisonment for first-degree murder);
- (2) Sentences that set a mandatory floor below which the court cannot sentence an offender, although courts may exercise discretion in sentencing above the mandatory minimum limited only by statutory maxima;

⁶ Mangat *More than we can afford* 5.

⁷ Brooks 2017 *Criminal Justice Ethics* 122.

⁸ Mangat *More than we can afford* 5.

⁹ Mangat *More than we can afford* 5-6. This argument is made despite the fact that the executive and legislative branches are elected by the people as their representatives. See previous chapters.

¹⁰ Mangat *More than we can afford* 11.

¹¹ Mangat *More than we can afford* 11. See also Ruby *et al Sentencing* 788.

¹² Mangat *More than we can afford* 13.

- (3) Presumptively mandatory sentences of custody that permit courts to impose a lesser custodial sentence or non-custodial sentence only in exceptional circumstances.¹³

Regardless of how minimum sentences come to bear on an offender, in all their forms the legislature has predetermined the baseline punishment for a specific act or omission, thereby preventing the court from fully considering the circumstances of the offence and the offender. Without a finding of unconstitutionality, courts are unable to account for any unforeseen factors that may result in the minimum sentence being inappropriate or excessive in the specific circumstances.¹⁴

The discussion in this chapter will examine the history and application of the mandatory minimum sentences, and its effects on the courts' role in deciding an appropriate punishment. The discussion will also probe whether sentencing is a judicial function in the constitutional sense, and, specifically, within the context of the separation-of-powers doctrine. In order to fully appreciate the constitutional role of the courts in the sphere of sentencing, the discussion will examine the extent to which the courts' sentencing discretion can be fully exercised by the courts, and how the mandatory minimum sentences have shifted this discretion from the courts to other branches of government. The justification for this removal of judicial sentencing discretion will also be explored. The constitutionality and the rationale of the sentencing policy which shifts this discretion has been questioned, and will be investigated in order to establish its impact on the courts' discretion to impose sentence, as well as on the separation of powers' principles. This will necessitate an analysis of the historical sentencing principles, and what led to the introduction of the mandatory minimum sentences which are seen by "judges as an expression of a lack of confidence in their ability to dispense justice ... [which] erodes judicial independence".¹⁵ Lastly, the discussion in this chapter will consider how the courts' sentencing discretion can be safeguarded, while the legislature at the same time enact laws which are constitutionally sound and not encroaching onto the courts' independence and authority.

¹³ Mangat *More than we can afford* 13.

¹⁴ Mangat *More than we can afford* 14-15.

¹⁵ Mangat *More than we can afford* 10.

5.2 Origins of sentencing judicial discretion

Sentencing has an ancient history. The idea that the punishment received by the offender must fit the crime committed appears in the Code of Hammurabi, and can be traced back to 1760 BC.¹⁶ This principle of proportionality has Biblical roots in the book of Exodus,¹⁷ and Leviticus.¹⁸ Aristotle already equated inequality with injustice, where he noted that: “What the judge aims at doing is to make the parts equal by the penalty ... imposed”.¹⁹

In feudal England, criminal punishment was arbitrary, and subject to the desires of monarchs or the local nobles who were delegated the monarch’s power to punish.²⁰ This resulted in little to no consideration of the proportionality of the punishment to the offence. Feudal officials imposed capital punishment for almost every violation, for example, murder, treason and minor theft.²¹ As the rule of law developed, trial court judges in England developed a vast degree of discretion in sentencing for misdemeanours.²² On the books, felonies remained capital offences that carried mandatory punishments, but, in practice, judges employed certain mechanisms through which they were able to use their discretion, and avoid the prescribed sentence.²³ In the English legal system, the largest development as regards sentencing judicial discretion was the Magna Carta.²⁴ This set of legal rules was demanded by the barons and granted by the king, and served as the most significant check on the king’s justice.²⁵ The king controlled the royal courts too closely,²⁶ and judicial discretion was limited to such an extent that the barons demanded changes.²⁷ One significant outcome of the Magna Carta was to place the king “below

¹⁶ Fish 2008 *Oxford J Legal Studies* 57.

¹⁷ See *Holy Bible New King James* Exodus 20:23-25: “you are to take life for life, eye for an eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise”.

¹⁸ Leviticus 24:20: “fracture for fracture, eye for eye, tooth for tooth” in *Holy Bible New King James*.

¹⁹ Aristotle *The Nicomachean ethics* 148-149.

²⁰ Riley 2010 *Public Interest LJ* 287.

²¹ Riley 2010 *Public Interest LJ* 287.

²² Mandiberg 2009 *McGeorge LR* 107,108.

²³ Mandiberg 2009 *McGeorge LR* 107,108.

²⁴ Barber 2005 *W Eng LR* 29. The Magna Carta Libertatum (the Great Charter of Liberties) was drawn up on 15 June 1215 by rebel barons who demanded protection against unlawful imprisonment, amongst other concerns.

²⁵ Barber 2005 *W Eng LR* 29; see also Pollock and Maitland *The history of the English law* 181.

²⁶ Pollock and Maitland *The history of the English law* 204: judges on the King’s Bench “were very truly the King’s servants”.

²⁷ Barber 2005 *W Eng LR* 29.

the law”.²⁸ The Magna Carta was the first English statute which wrestled away some of the king’s control over judges and the law. From that point on, judicial discretion would continue to expand in England, and later some of the Magna Carta’s central discretionary principles would be embodied in the constitutions of some countries, for example, the United States.²⁹

Following Aristotle,³⁰ the Magna Carta also refers to sentence proportionality, where, at times, only fines were imposed for certain criminal activities.³¹ Reference to proportionality in sentencing is further made in the case law of the Middle Ages,³² and the seventeenth century, once the modern criminal justice system had been established.³³ Section 10 of the Bill of Rights Act of 1689 (in England) forbid cruel and unusual punishments, shortly afterwards, the House of Lords found that a fine was “excessive and exorbitant, against the Magna Carta, the common right of the subject, and the law of the land”.³⁴

Closely associated with Anglo-Saxon legal traditions is the concept of judicial independence. Today, this concept might be understood as freedom from constraint, or the opportunity to exercise discretion.³⁵ Yet, early English judges were not independent in the way we now understand “independence”.³⁶ Between 1066 and 1215, judges were never truly “independent”.³⁷ Not only was the king “above the law”, but he was above “everyone else, at least until the Magna Carta, and judges were clearly his subjects”.³⁸ Shapiro explains that:

Most of the phenomena we come to call judicial independence, or see as the roots of judicial independence, are closely associated with a long-term English tendency towards extreme political centralization.³⁹

²⁸ Pollock and Maitland *The history of the English law* 181-182.

²⁹ Barber 2005 *W Eng LR* 29.

³⁰ See footnote 19 above.

³¹ Gray 2017 *New Crim LR* 409.

³² *Le Gras v Bailiff of Bishop of Winchester* YB Mich 10 Edw II pl 4 (CP 1316).

³³ Gray 2017 *New Crim LR* 409, see also *Hodges v Humkin* 2 Bulst 139 140 80 ER 1015,1016 (KB 1615): “imprisonment ought always to be according to the quality of the offence”.

³⁴ *Earl of Devon’s Case* II State Tr 133 136 (1689).

³⁵ Barber 2005 *W Eng LR* 29.

³⁶ Shapiro *Courts: a comparative and political analysis* 66.

³⁷ Shapiro *Courts: a comparative and political analysis* 66-67.

³⁸ Pollock and Maitland *The history of the English law* 66-67.

³⁹ Shapiro *Court: a comparative and political analysis* 66.

The courts' "powers and jurisdiction, indeed their very existence, have been determined by the King's commission and/or parliamentary statute".⁴⁰ Even so, just prior to the Norman Conquest, English judges did occasionally exercise discretion when it came to imposing penalties.⁴¹ It was after the Conquest that the Norman kings would understandably be involved in the administration of justice as a mechanism for ruling a foreign land.⁴²

There were four main structural tools that acted to limit judicial discretion in medieval England between 1066 and 1215, or the period until the Magna Carta: (1) the centralisation of the courts, and the accompanying uniformity in the law; (2) the advent of the jury; (3) 'appellate' review; and (4) jurisdictional limitations, including specialisation of courts.⁴³ Centralising courts permitted for the transmission of the king's power through "tentacles running into the countryside".⁴⁴ As litigants discovered that the king's justices were more efficient and less bias, many litigants began to pursue their cases in royal courts. This had the effect of limiting the number of cases in royal courts. Thus, the centralisation permitted the king more control over his own judges' decisions, while, at the same time, structurally limiting the fundamental discretion of local judges by removing more and more types of claims or actions from their courts, and into the control of the king.⁴⁵ The jury was, and would develop further into a body by which primary judicial discretion would be limited. These juries were concerned with factual matters, which reduced discretion. This reduction of judicial discretion was not by accident, as was evidenced by the conflict between secular and canonical law. Juries were employed where there was some disagreement between "the church and state and neither should be judge in their own cause".⁴⁶

The first jury would hear and decide the factual issues, and it did not always have the last word. If the second jury decided that the first jury had perjured itself, the judge would impose stiff penalties on the attained jury. In addition, since the original

⁴⁰ Shapiro *Courts: A comparative and political analysis* 66.

⁴¹ Hurnard *The King's pardon for homicide* 2.

⁴² Turner *The King and his courts* 11.

⁴³ Barber 2005 *W Eng LR* 30.

⁴⁴ Shapiro *Courts: A comparative and political analysis* 78.

⁴⁵ Barber 2005 *W Eng LR* 31.

⁴⁶ Pollock and Maitland *The history of English law* 144-145.

party to the case was a party along with the suspect jury, the original party also had to pay a fine. Just the threat of an attainder meant that the judge was entrusted with significant amount of power in shaping the outcome of a case. While the writ of attainder was initially only granted by permission of the king, its use was later given to the discretion of the judges.⁴⁷

Appellate review did not exist for medieval judges as it is understood today. An 'appeal' in medieval England was in fact a charge against the judge, personally, for the decision he had reached in a case.⁴⁸ There was no right to appeal and no formalised system. Only in certain circumstances did appealing act as a tool for righting a "miscarriage of justice".⁴⁹ Appeals hardly constituted the same kind of mechanism that would affect judicial decision-making as they are now conceived. Nevertheless, appellate review, as it existed in medieval England, still formed a primary and secondary discretion-limiting mechanism.⁵⁰

Jurisdiction was then, as currently understood, a significant limitation on judicial discretion. In some cases, the limitations were structural. As the court system was centralised, the king was able to divide up the work between the different types of courts.⁵¹ Turner suggests that judges also knew there were limits on which cases they should be deciding, and which ones were best left to the king.⁵² These types of procedures, while not necessarily instituted by the king, acted as a limitation on those judges' discretion to decide certain types of cases, or make certain types of rulings.⁵³

The Normans kings used both structural tools and specific measures to limit both the primary and secondary discretion of judges.⁵⁴ The creation of uniform laws vesting in one system of courts, the jury, the appellate process, and jurisdiction, all functioned then, as they do now, to restrict judicial discretion. The sentencing discretion of judges was also limited as more judges were reined in by legislature to

⁴⁷ Barber 2005 *W Eng LR* 34.

⁴⁸ Barber 2005 *W Eng LR* 35.

⁴⁹ Harding *The law courts of medieval England* 38-39.

⁵⁰ Barber 2005 *W Eng LR* 35.

⁵¹ Barber 2005 *W Eng LR* 35.

⁵² Turner *The King and his courts* 39.

⁵³ Barber 2005 *W Eng LR* 36.

⁵⁴ Barber 2005 *W Eng LR* 39.

resemble the king's justices.⁵⁵

During the eighteenth century, judges in England and the United States used their power under the common law to create complex rules and procedures that permitted them to circumvent convicting those defendants whom they did not consider fit for punishment.⁵⁶ Three of these methods focused on the sentencing phase: the benefit of clergy, the suspension of the imposition of sentences, and the recommendation of executive pardons.⁵⁷

The benefit of the clergy began as a judicial power to grant clemency from the death penalty to convicted clergymen. Over time, it developed into a safety valve measure in which a judge could eliminate capital punishment for any defendant who was able to read.⁵⁸ Suspension of sentences was another method through which a judge could avoid a mandatory sentence he deemed to be too harsh.⁵⁹ Suspension of sentences eventually led to the creation of the probation system, and by the mid-1900s suspended sentences combined with probation were common.⁶⁰

It is clear that the origin of sentencing discretion lay in the ancient principle of proportionality in order to advance a fair and just sanction. This principle was waylaid in feudal England where judges conceded to the wishes of the monarch. Although the Magna Carta created progressive transformation, judges' discretion was still limited by procedural measures instituted by the king. Although not expressly stated, it appears that judges' discretion has - in one way or another - always been limited by non-judicial bodies. This topic will be explored below.

5.3 Non-judicial bodies deciding appropriate punishments under the common law

The common-law understanding regarding the imposition of sentences is that "the determination of a sentence in a criminal matter is pre-eminently a matter for the

⁵⁵ Barber 2005 *W Eng LR* 39.

⁵⁶ Mandiberg 2009 *McGeorge LR* 119.

⁵⁷ Mandiberg 2009 *McGeorge LR* 119-122.

⁵⁸ Riley 2010 *Public Interest LJ* 287, see also Mandiberg 2009 *McGeorge LR* 119-120.

⁵⁹ Mandiberg 2009 *McGeorge LR* 120-121.

⁶⁰ Riley 2010 *Public Interest LJ* 288.

discretion of the trial court".⁶¹ In exercising this function, the trial court has a broad discretion in:

- (a) Deciding which factors should be allowed to influence the court in determining the measure of punishment and
- (b) in determining the value to attach to each factor taken into account.⁶²

Part of the courts' considerations in exercising its sentencing discretion is determining proportionality in sentencing. Proportionality in how an individual defendant is treated, and forbidding cruel and unusual punishments remain significant legal principles under the common law.

Yet there seems to always have been cases where this function of the courts has been usurped by non-judicial bodies. Many such cases are found in the jurisprudence of the United Kingdom and the European Court for Human Rights (European Court), which will be utilised in this section for further illustration. For example, in the case of *Liyanage v The Queen*,⁶³ Lord Pearce, for the Privy Council, found that the Ceylonese (Sri Lankan) legislation violated the separation-of-powers principle enshrined in that country's constitution. The impugned legislation provided for the imposition of a minimum mandatory jail term of ten years' imprisonment on those involved in an aborted coup. In finding the legislation unconstitutional, the court discussed the minimum mandatory sentencing aspect:

Their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as regards appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment ... even though his part in the conspiracy might have been trivial ... if such Acts as these are valid, the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges.⁶⁴

In the case of *Reyes v The Queen*, the Privy Council construed a provision of the Belize Constitution preventing the imposition of inhumane or degrading punishment, or other treatment, to prohibit the mandatory minimum imposition of the death

⁶¹ *S v Kibido* 1998 (2) SACR 213 (SCA) para 217g. See also *S v Kruger* 2012 (1) SACR 369 (SCA) para 8: "the settled principle of law that sentencing is pre-eminently a matter for the discretion of the trial court".

⁶² *S v Fazzie and Others* 1964 (4) SA 673 (A) paras 684a-b; *S v Pillay* 1977 (4) SA 531 (A) paras 535a-b.

⁶³ *Liyanage v The Queen* [1967] AC 259 291 (UK Privy Council).

⁶⁴ *Liyanage v The Queen* [1967] AC 259 291.

penalty. The Council concluded that it is not the function of a non-judicial body to “decide the appropriate measure of punishment to be visited on a defendant for a crime they have committed”.⁶⁵

Some challenges to minimum mandatory sentencing in the United Kingdom have involved articles of the European Convention on Human Rights (ECHR), given the reflection of the ECHR in the United Kingdom’s Human Rights Act 1998,⁶⁶ especially Article 6⁶⁷ which preserves the right to a fair hearing before an independent and impartial tribunal, and Article 3⁶⁸ prohibiting the use of torture, inhumane or degrading treatment or punishment.

A violation of Article 6 was exemplified in the case of *R (Anderson) v Home Secretary*,⁶⁹ where the appellant had been sentenced to mandatory life jail terms for murder. The legislation allowed the Home Secretary to set a minimum time to be served by such offenders, known as the ‘tariff’, in consultation with judges and departmental officials. The Home Secretary fixed a tariff period greater than that recommended to him, and the appellant challenged the consistency of the practice with the ECHR. The House of Lords found in favour of the appellant. Lord Bingham held that the practice amounted to a member of the executive determining the minimum sentence that a particular prisoner should serve, and, as this was a judicial task, Article 6 had been violated.⁷⁰ Lord Steyn agreed, and stated that only a court could determine the punishment of a convicted person, which had been the position since at least 1688, and was required by the rule of law.⁷¹ Lord Hutton further added that the Home Secretary’s power was difficult to reconcile with the separation-of-

⁶⁵ *Reyes v The Queen* [2002] 2 AC 235 258 (UK Privy Council). In several cases, the Inter-American Commission on Human Rights has indicated that the imposition of a mandatory life sentence is inconsistent with the American Declaration on Human Rights: *Edwards v Bahamas* 4/4/2001, Report 48/01; *Downer and Tracey v Jamaica* 4/13/2000, Report 41/00. The Privy Council has found that a mandatory life sentence was manifestly disproportionate, arbitrary and unconstitutional in *de Boucherville v State of Mauritius* [2008] UKPC.

⁶⁶ As a former EU member, the UK was bound by the ECHR and its decisions until 2 Feb 2020. The UK’s Human Rights Act 1998 has brought the ECHR within British law; as such, human rights cases are now decided within the domestic judicial system.

⁶⁷ ECHR art 6: “Right to a fair trial”.

⁶⁸ ECHR art 3: “No person shall be subjected to torture or to inhuman or degrading treatment or punishment”.

⁶⁹ *R (Anderson) v Home Secretary* [2003] 1 AC 837 (hereinafter *Anderson*).

⁷⁰ Lord Bingham (*Anderson* 880), and agreed with by Lord Nicholls (*Anderson* 883), Lord Hobhouse (*Anderson* 901), Lord Scott (*Anderson* 902), Lord Rodger (*Anderson* 902).

⁷¹ *Anderson* 890-891.

powers principles.⁷²

As regards Article 3 of the ECHR, in *R v Offen*,⁷³ the Court of Appeal indicated that a provision mandating the imposition of a life sentence on a repeat offender might offend this article by being arbitrary and disproportionate. It was asserted that in this case, the European Court applied a “gross disproportionate”⁷⁴ test to determine whether a sentence amounted to inhumane or degrading punishment contrary to Article 3. It was also argued that continued imprisonment may be problematic where it no longer effectively serves any legitimate penological purpose,⁷⁵ bearing in mind that rehabilitation is reflected in international norms, and has become more important.⁷⁶

The European Court has expressed negative sentiments about mandatory sentencing regimes, acknowledging that they deprive the defendant of placing mitigating or special circumstances before the Court, and, for that reason, they are “much more likely”⁷⁷ to be grossly disproportionate. Life imprisonment without the possibility of parole is likely to violate Articles 3 (prohibition against torture) and 5⁷⁸ (guaranteeing the right to liberty and security of the person) of the ECHR as being arbitrary and disproportionate.⁷⁹ If release from life imprisonment is based on evidence that the person detained has been rehabilitated, the state must provide the treatment necessary for rehabilitation to take place; failure to do so breaches Article 3.⁸⁰

⁷² *Anderson* 899.

⁷³ *R v Offen* [2001] 1 WLR 253, 276-277.

⁷⁴ *Harkins and Edwards v United Kingdom* [2012] ECHR 45 [133]; *Vinter v United Kingdom* [2013] ECHR 645 [102] (Grand Chamber); *Murray v Netherlands* [2016] ECHR 408 [99] (Grand Chamber).

⁷⁵ *Harkins and Edwards* [2012] ECHR 45 [138], *Vinter v United Kingdom* [2013] ECHR 645 [111], and *Murray v Netherlands* [2016] ECHR 408 [100] (Grand Chamber).

⁷⁶ *Murray v Netherlands* [2016] ECHR 408 [102] (Grand Chamber).

⁷⁷ *Harkins and Edwards v United Kingdom* [2012] ECHR 45 [138].

⁷⁸ Article 5: “Everyone has the right to liberty and security of the person”.

⁷⁹ *R v Lichniak* [2003] 1 AC 903 909, see also *R (Wellington) v Secretary of State for the Home Department* [2009] 1 AC 335. See footnote 68 above for ECHR art 3.

⁸⁰ *Murray v Netherlands* [2016] ECHR 408. Courts have found minimum mandatory sentencing provision to be unconstitutional in, e.g., India in the case of *Mithu v State of Punjab* [1983] 2 SCR 690 where it was held that “a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair”.(704) (Articles 14 and 21 of the Indian Constitution regarding equality of treatment and punishment according to law. In Sri Lanka in the case *Re Supreme Court Special Determination Nos 6 and 7 of the 1998* [1999] 2 LCR 579,

On the African continent, the Botswana High Court in the case of *Matomela and Another v The State*⁸¹ held that determining the appropriate sentence is a function reserved for the judiciary, and mandatory minimum sentences erode judicial sentencing discretion. The court explained that:

The practice of enacting mandatory minimum sentences for certain types of offences constitutes a threat to the independence of the courts as envisaged by the Constitution and the practice by the legislature of arrogating to itself the functions reserved for the judiciary by the Constitution is clearly undesirable and should be discouraged or discontinued as it erodes the discretionary powers of the courts in sentencing offenders. There is real danger that the often resorted to practice of prescribing mandatory minimum sentences may in the future bring very unhealthy conflict between the legislature and the judiciary.⁸²

These views seem to be aligned with common-law sentencing jurisdictions' understanding of judicial sentencing powers, and appear to be prevalent. Yet, as disclosed above in paragraph 5.1, there are many jurisdictions that do have non-judicial bodies deciding appropriate punishment under the common law, mainly in the form of mandatory minimum sentences. In the following paragraphs, these non-judicial sentences will be elaborated on as utilised in Canada, the United States and South Africa.

5.4 A comparative overview of mandatory minimum sentences in Canada, the United States and South Africa

Sentencing is the most exacting of judicial duties because it takes into account the interests of the community, the victim, and the offender when just penalty is imposed. The judiciary should be entitled to employ their professional expertise and jurisdiction over all matters concerning an accused's conviction and sentence, including the power to decide whether such conviction and sentence are compatible

the court found that minimum mandatory punishment was cruel, inhuman and degrading. In Mauritius, in the case of *State v Philibert* [2007] SCJ 274, where the Supreme Court of Mauritius found a mandatory 45-year jail term for murder was disproportionate and invalid. In Papua New Guinea in the case of *Special Constitutional Reference No 1 of 1984: Re Minimum Penalties Legislation* [1985] LRC (Const) 984 PNGLR 314, three judges said such provisions amounted to cruel punishment and or arbitrary decision making, contrary to constitutional bars on cruel, inhuman and degrading punishment in *The State v Vries* [1997] 4 LRC 1 and *The State v Likuwa* [2000] 1 LRC 600.

⁸¹ *Matomela and Another v The State* 2000 (1) BLR 396 (HC) 396.

⁸² *Matomela and Another v The State* 2000 (1) BLR 396 (HC) 396.

with the sentencing principles and due process.⁸³ Article 7 of the International Covenant on Civil and Political Rights (ICCPR)⁸⁴ provides that: “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment”.⁸⁵ This creates a potential constitutional argument against mandatory minimum sentences as being contrary to constitutional constraints. In certain jurisdictions, for example, Papua New Guinea⁸⁶ and Sri Lanka, the court found that mandatory minimum sentences were cruel, inhumane, and degrading.⁸⁷

What follows is a comparative overview of the application of mandatory minimum sentences and the courts’ sentencing discretion, as well as the broader questions regarding the determination of appropriate sentences by non-judicial bodies in the United States, Canada and South Africa. The discussion will briefly consider how mandatory minimum sentences respond to penological objectives, the impact of removing discretion from judges to other criminal-justice actors, and the impact of mandatory minimum sentences on the principles of fundamental justice.

5.4.1 *Mandatory minimum sentences in the United States*

The United States is one of the countries in the Western civilisation that has no system of sentencing review, and that places no constraints on sentencing discretion; other than maximum punishments set by the legislature.⁸⁸ Due to sentencing disparities inherent in the indeterminate framework, the early 1960s witnessed a shift in the sentencing debate. Rather than arguing the justification of discretion, the issue became how to shape discretion in a practical and politically acceptable manner.⁸⁹ A Sentencing Commission was established to reform the national sentencing guidelines in 1976 and 1977.⁹⁰ Under the new sentencing guidelines model, the legislature retained its traditional function of defining criminal conduct, and imposing maximum sentences. A guideline created by the legislature

⁸³ O’Mahoney *The compatibility of mandatory minimum sentences with ICCPR* 46.

⁸⁴ International Covenant on Civil and Political Rights (ICCPR), adopted by the UN’s General Assembly on 16 December 1966.

⁸⁵ Similar wording is used in Art 3 of the ECHR, save the word “cruel”. See footnote 68 above.

⁸⁶ *The State v Vries* [1997] 4 LRC 1 and *The State v Likuwa* [2000] LRC 600 (Papua New Guinea).

⁸⁷ *Re Supreme Court Special Determination Nos 6 and 7 of 1998* [1999] 2 LRC 579.

⁸⁸ Frankel *Criminal sentences* 75-78.

⁸⁹ Tyler 1978 *Hofstra LR* 14.

⁹⁰ Tyler 1978 *Hofstra LR* 14.

would have three main functions, namely; it would classify offences defined by the legislature into categories based on factors such as the seriousness of the offence, and the existence of aggravating or mitigating circumstances. It would further stipulate guideline sentences for each offence or category of offence. In addition, it would monitor operation of its guidelines and alter them.⁹¹

Despite these reforms, the current criminal-law system in the United States is an unbalanced framework in which the legislative and executive branches share incentives and cooperate with each other, to the exclusion of the judiciary.⁹² In the area of criminal sentencing, the legislature has created statutes that establish terms of punishment for certain crimes by mandating minimum prison terms for the violation of those statutes. These mandatory minimum sentences grant plenary decision-making powers to prosecutors of the executive branch, while restricting the judiciary's discretion.⁹³ Bowman explains that:

The combination of complex Guidelines, overlaid on a system of statutory minimum mandates and fact-based enhancements has turned prosecutors into primary decision-makers whose choices can, to a far greater extent than was ever before possible, unilaterally constrain the judge's discretion.⁹⁴

Mandatory minimum sentences restrict a judge's ability to set a sentence lower than that mandated in the applicable statute.⁹⁵ Statutory mandatory minimum sentences enable the legislature to improperly use their authority to establish definitive sanctions for crimes; to improperly grant the executive arm wide power to impose that punishment, and to relegate the role of the judiciary to bureaucratic affirmation of the process.⁹⁶ For this reason, such statutes violate the separation of powers doctrine.⁹⁷

In the United States, both legislators and prosecutors seek to win public favour by prosecuting crimes the public wants prosecuted, and by obtaining convictions in those cases.⁹⁸ The United States Congress has an incentive to enact statutes that

⁹¹ Tyler 1978 *Hofstra LR* 13.

⁹² Riley 2010 *Public Interest LJ* 286.

⁹³ Riley 2010 *Public Interest LJ* 286.

⁹⁴ Bowman 2015 *Stanford LR* 235, 248.

⁹⁵ Riley 2010 *Public Interest LJ* 286.

⁹⁶ Riley 2010 *Public Interest LJ* 302.

⁹⁷ Riley 2010 *Public Interest LJ* 302.

⁹⁸ Stuntz 2001 *Michigan LR* 534.

make it easier for prosecutors to convict and punish criminals.⁹⁹ Being soft on crime cannot win votes for legislators. Federal prosecutors are appointed and not elected, but gaining public favour through prominent convictions can be a great career boost.¹⁰⁰ This politicisation of the criminal law results in ever-growing and harsher sentences, as individual justice is left behind.¹⁰¹

On the other hand, federal judges - who serve for life - are impartial in their duty, and are likely to consider narrower criminal rules instead of broader ones.¹⁰² This position of judges should act as a check on the power of the other branches. However, this does not happen, as judges lack sentencing discretion due to statutory mandatory sentences, which disproportionately place the sentencing power in the hands of other government branches.¹⁰³

The United States Supreme Court precedent illustrates one similarity between all sentencing systems that the court has considered unconstitutional, and this is their lack of judicial discretion.¹⁰⁴ In the same breath, sentencing frameworks deemed valid by the court have permitted judges to exercise their discretion, and to rely on sentencing factors when making their decisions.¹⁰⁵ The Supreme Court seems to have recognised circumstances when judges are not playing a sufficient part in sentencing, and has found those situations to be unconstitutional.¹⁰⁶

Under the Federal Rules of Criminal Procedure,¹⁰⁷ every defendant receives a sentencing hearing after his conviction. This hearing provides more insight into the legislative and executive encroachment onto judges' sentencing power by showing the judicial nature of the criminal sentencing process.¹⁰⁸ At the hearing, the judge considers the facts and evidence in order to create a fair sentence. Mandatory minimum sentences prevent the judiciary from fully undertaking one primary task, namely; "weighing the evidence in individual cases in order to produce just

⁹⁹ Stuntz 2001 *Michigan LR* 531.

¹⁰⁰ Stuntz 2001 *Michigan LR* 543-544.

¹⁰¹ Riley 2010 *Public Interest LJ* 302.

¹⁰² Stuntz 2001 *Michigan LR* 510.

¹⁰³ Stuntz 2001 *Michigan LR* 302-303. See also footnote 94 above.

¹⁰⁴ Mandiberg 2009 *McGeorge LR* 113.

¹⁰⁵ Mandiberg 2009 *McGeorge LR* 113.

¹⁰⁶ Riley 2010 *Public Interest LJ* 303.

¹⁰⁷ As amended 1 December 2019.

¹⁰⁸ Riley 2010 *Public Interest LJ* 303.

outcomes”.¹⁰⁹ In other words, mandatory minimum sentences prevent judges from individualising each sentence according to each defendant’s unique personal circumstances. While defendants facing statutory mandatory minimum sentences still receive a sentence hearing, the discretion of the sentencing judge in applying the proper sentence is, at times, curtailed through the inability to impose a less severe sentence than that mandated by the legislature.¹¹⁰ The legislature, with no knowledge of what might be just and fair in individual cases, is seen overstepping its power by mandating blanket minimum sentences.¹¹¹

There are numerous examples of cases where federal judges have felt constrained by the necessity, under law, to impose mandatory minimum sentences. One such case is *United States v Angelos*.¹¹² Weldon Angelos was convicted of selling bags of marijuana to an undercover police officer on three occasions. He was also carrying a gun strapped to his ankle on those occasions. Angelos never threatened anyone with that gun, nor showed anyone the gun, or even removed it from his ankle.¹¹³ Nonetheless, his mere possession of the gun resulted in the application of the mandatory minimum sentence of fifty-five years in prison.¹¹⁴ Cassell J was forced to impose this sentence on Mr Angelos, and observed that Angelos’ fifty-five year prison term is a longer sentence than Angelos would have received if he had hijacked a plane, attacked someone to death in a flight, detonated a bomb in an aircraft, or supplied weapons to support a foreign terrorist group.¹¹⁵ The maximum sentence for all these crimes added together is less than the mandatory minimum sentence under federal sentencing rules for a small drug dealer carrying a gun.¹¹⁶ Cassell J criticised the statutory mandatory minimum sentences, noting that the sentence imposed was “unjust, cruel, and irrational”.¹¹⁷ Furthermore, he regretted that he had no way out, and had to follow the law as it was written. Yet Cassell J recommended that the-then President George W. Bush commute Mr Angelos’

¹⁰⁹ Riley 2010 *Public Interest LJ* 303.

¹¹⁰ Riley 2010 *Public Interest LJ* 303.

¹¹¹ Riley 2010 *Public Interest LJ* 302.

¹¹² *United States v Angelos* 345 F Supp 2d 1227 (D Utah 2004) (hereinafter *Angelos*).

¹¹³ *Angelos* 1227.

¹¹⁴ *Angelos* 1227.

¹¹⁵ *Angelos* 1227.

¹¹⁶ *Angelos* 1246.

¹¹⁷ *Angelos* 1263.

imprisonment term, and urged the legislature (Congress) to reform the law.¹¹⁸

Another similar example is *United States v Powell*.¹¹⁹ In this case, it seems that Hurd J was “forced to sentence a thirty-two-year old small-time drug dealer with an IQ of seventy-two to serve life in prison”.¹²⁰ The reason was that the defendant had two very minor drug sales when he was a juvenile, which were over ten years prior to the present case.¹²¹ Hurd J noted that:

...this is what occurs when Congress sets a mandatory minimum sentence which distorts the entire judicial process ... As a result, I am obliged to and will now impose this unfair and, more important, this unjust sentence.¹²²

A third example is *United States v Farley*,¹²³ where the defendant Kelly Brenton Farley was convicted for crossing a state line with the intent to engage in a sexual act with a person under twelve years old, for which he faced a mandatory minimum sentence of thirty years to life in prison. This sentence was mandatory even though the defendant did not engage in any sexual act with a minor. He was facing thirty years to life in prison for an intention crime. The district court judge refused to apply the mandatory minimum sentence on the grounds that this statute was unconstitutional since it infringed the Eighth Amendment’s guarantee against cruel and unusual punishment.¹²⁴

While there are disputes as to whether this statute is unconstitutional, it is clear that federal sentencing judges have questioned its constitutionality, and are “unhappily locked into applying statutory mandatory minimums”.¹²⁵ Thomas Jefferson predicted this outcome more than a century ago: “if the legislature assumes ... judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual”.¹²⁶ Federal courts have begun opposing mandatory sentencing laws, as seen in the cases of *Booker* and *Farley*, yet this opposition has so far had little effect on the

¹¹⁸ *Angelos* 1263.

¹¹⁹ *United States v Powell* 404 F 3d 678 (2nd Cir 2005) (hereinafter *Powell*).

¹²⁰ Riley 2010 *Public Interest LJ* 307.

¹²¹ *Powell* 678.

¹²² Caher <http://www.law.com/jsp/article.jsp?id=113766511108> (Date of use: 23 October 2019).

¹²³ *United States v Farley* No 1:07-CR-196-BBM (10th Cir 2 September 2008) (hereinafter *Farley*).

¹²⁴ *Farley* 2.

¹²⁵ Riley 2010 *Public Interest LJ* 307.

¹²⁶ Jefferson *Notes on the state of Virginia* 127.

imposition of statutory mandatory minimum sentences in the United States.¹²⁷

Mandatory minimum sentences are also thought to be forcing the courts to impose a standardised sentence onto juveniles based on the crime committed, and not based on their individual culpability, or other factors.¹²⁸ The United States Supreme Court acknowledged this issue in *Miller v Alabama*:

Such mandatory penalties, by their nature, preclude a sentences from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other -the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one and worse, each juvenile ... will receive the same sentences as the vast majority of adults committing similar ... offences.¹²⁹

It is not only the lower federal judges who have increasingly expressed their frustrations with statutory mandatory minimum sentences.¹³⁰ President Obama has echoed his opposition against mandatory minimum sentences, and the separation of powers argument, stating that:

...we have a system that locks away too many young, first-time, non-violent offenders for the better part of their lives – a decision that's made not by a judge in a courtroom, but all too often by politicians in Washington.¹³¹

Judicial criticism of mandatory minimum sentences crosses party lines, as is evidenced by remarks of both former United States Supreme Court Rehnquist CJ and current Kennedy J. Rehnquist CJ noted that, according to him, the best argument against any future and existing mandatory minimum sentences “is that they frustrate the careful calibration of sentences”.¹³² This is interpreted by Brickey as meaning that the “incautious federalization of the criminal law threatens to overwhelm the federal justice system”.¹³³ Kennedy CJ has also spoken out against mandatory minimum sentences, stating that the jail terms mandated by these sentences are responsible for the current state of overcrowding and overpopulation

¹²⁷ Riley 2010 *Public Interest LJ* 307-308.

¹²⁸ Krause 2015 *Law and Inequality* 502.

¹²⁹ *Miller v Alabama* 132 S Ct 2455 (2012) 2467-2468.

¹³⁰ Riley 2010 *Public Interest LJ* 308.

¹³¹ President Obama's remarks at Howard University Convocation on 28 September 2007. See O'Hear *The failed promise of sentencing reform* 123.

¹³² Rehnquist 1994 *Am J of Trial Advocacy* 4-5.

¹³³ Brickey 1995 *Hastings LJ* 1136.

of prisons in the United States.¹³⁴ More than eighty percent of the increase in the prison population between 1985 and 1995 was as a result of drug convictions that carried statutory mandatory minimum sentences.¹³⁵ This state of affairs highlights another difficulty with mandatory minimum sentences, in that “they disproportionality affect drug and gun possession offences”.¹³⁶ Statutory mandatory minimum sentences are imprisoning non-violent offenders for long terms, whereas violent offenders often serve less time.¹³⁷

Recent studies have shown that the United States’ taxpayers’ support for mandatory minimum sentences is on the decline.¹³⁸ Polls conducted by the Christian Science Monitor report that sixty percent of Americans oppose statutory mandatory minimum sentences; and Families Against Mandatory Minimums, an organisation which cites a 2014 survey showed that seventy-seven percent of adults favour the elimination of mandatory minimum sentencing laws for non-violent offences in favour of letting judges decide the appropriate sentence on a case-by-case basis.¹³⁹

Most United States’ citizens support judicial discretion and individualisation in criminal sentencing, and are opposed to the blanket application of mandatory minimum sentences.¹⁴⁰ These laws are criticised as depriving “the judiciary of its basic constitutional function, which is weighing facts in each case to ensure a just outcome for each criminal defendant”.¹⁴¹

¹³⁴ Wright <http://edition.cnn.com/2003/LAW/04/09/kennedy.congress/> (Date of use: 6 November 2019).

¹³⁵ Drug Policy Alliance Network, *Mandatory minimum sentences 2009* <http://www.drugpolicy.org/drugwar/mandatorymin> (Date of use: 23 October 2019).

¹³⁶ Riley 2010 *Public Interest LJ* 308. Cassell J testified at a hearing on mandatory minimum sentencing legislation before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, and stated: “It is hard to explain why a federal judge is required to give a longer sentence to a first offender who carried a gun to several marijuana deals than to a man who murdered an elderly woman ... Section 924(c) punishes [the defendant] more harshly for crimes that threaten potential violence than for crimes that conclude in actual violence to victims”. See Jones <https://thelawofficeofbrianjones.com/2014/11/17/with-liberty-and-justice-for-some-against-mandatory-minimum-sentencing/> (Date of use: 6 November 2019). Sending parents to prison also has detrimental and cyclical outcome on their children, and children of parents in prison often ending up in prison themselves.

¹³⁷ Riley 2010 *Public Interest LJ* 308.

¹³⁸ Riley 2010 *Public Interest LJ* 309.

¹³⁹ FAMM <https://famm.org/new-poll-finds-77-of-americans-support-eliminating-mandatory-minimums-for-non-violent-drug-offenses/> (Date of use: 6 November 2019).

¹⁴⁰ See footnote 139 above; Riley 2010 *Public Interest LJ* 309.

¹⁴¹ Riley 2010 *Public Interest LJ* 310.

The Federal Sentencing Guidelines continuously advance the laudable objective of formulating reasonable and fair criminal sentencing in the United States.¹⁴² Despite this commendable goal, the Guidelines remain flawed because they often usurp power from the main judicial actors, namely, the judge and the jury. In *United States v Booker*,¹⁴³ the court held that the mandatory Guidelines violate the right to a fair trial as provided by the Sixth Amendment¹⁴⁴ because whenever a judge assigns a sentence that takes into account facts beyond those reflected in the jury verdict or admitted by the defendant, the Sixth Amendment is implicated.¹⁴⁵ Hence, the Guidelines violate the Sixth Amendment to the extent that they provide for judicial fact-finding of sentencing-enhancing facts.¹⁴⁶

To effect a remedy, the court transformed the Guidelines into an interim advisory sentencing framework.¹⁴⁷ However, Tyler argues that the:

Guidelines, by structuring discretion, offer reasonable expectations of certain punishment ... [but] mandatory minimum sentences fail to anticipate the incredible diversity of facts of given offences and of the nature of offenders.¹⁴⁸

The view seems to be that while the Guidelines provide certainty regarding the application of discretion, mandatory minimum sentences are criticised for failing to take into account the individualisation principle of sentencing.¹⁴⁹ This seems to be the same reason why mandatory minimum sentences are disapproved of in Canada and South Africa, as will be discussed below.

5.4.2 *Mandatory minimum sentences in Canada*

Mandatory minimum sentences have been a feature of the Canadian criminal justice

¹⁴² Walter 2005-2006 *Cleveland State LR* 686.

¹⁴³ *United States v Booker* 125 S Ct 738 (2005). Hereinafter *Booker*.

¹⁴⁴ Sixth Amendment to the Constitution of the United States: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence".

¹⁴⁵ *Booker* 749.

¹⁴⁶ *Booker* 756.

¹⁴⁷ Walter 2005-2006 *Cleveland State LR* 686.

¹⁴⁸ Tyler 1978 *Hofstra LR* 24, 28.

¹⁴⁹ Lowenthal 1993 *California LR* 61: "the goals of determining sentencing, consistent punishment for like crimes and proportional punishment for different crimes are greatly undermined by mandatory sentencing".

system since 1892, when the first Canadian Criminal Code¹⁵⁰ (Criminal Code) was enacted.¹⁵¹ At that time, there were six offences carrying mandatory minimum terms of imprisonment, of which the most severe was a five-year sentence for “stopping the mail with intent to rob”.¹⁵² Today, there are about 50 offences carrying a mandatory minimum sentence of imprisonment in the Criminal Code; the majority of which came into force since 1995. Notwithstanding the opposition to mandatory minimum sentences in Bill C-10,¹⁵³ the government continues to introduce new legislation featuring mandatory minimum sentences, and two of these are the Tackling Contraband Tobacco Act,¹⁵⁴ and the Tougher Penalties for Child Predators Act.¹⁵⁵ The former added new mandatory minimum sentences of imprisonment, and the latter increased the existing mandatory minimum sentences for a number of offences in the Criminal Code.¹⁵⁶

Mandatory minimum sentences in Canada arise in one of three general circumstances. Firstly, when an offence provides for a minimum sentence in all circumstances leading to the commission of the offence. Secondly, where a mandatory minimum sentence applies to a second, third or subsequent offence. Thirdly, for hybrid offences.¹⁵⁷ The Crown Prosecutor decides the mode of proceeding, where a mandatory minimum sentence or a greater minimum sentence applies when the Crown elects to proceed by way of indictment.¹⁵⁸ However, in such case, the court is prevented from fully considering the circumstances of the offence and the offender, as the legislature has predetermined the mandatory minimum sentences in all their forms, as well as the baseline punishment for a specific act or

¹⁵⁰ Bill C-41: An Act to Amend the Criminal Code and Other Acts in Consequence Thereof, SC 1995 c 22.

¹⁵¹ Mangat *More than we can afford* 9.

¹⁵² Mangat *More than we can afford* 9.

¹⁵³ Bill C-10: An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts (2011).

¹⁵⁴ An Act to Amend the Criminal Code (Trafficking in Contraband Tobacco), 2nd Sess, 41st Parliament 2013.

¹⁵⁵ Bill C-26: An Act to Amend the Criminal Code, the Canada Evidence Act and the Sex Offender Information Registration Act, to Enact the High Risk Child Sex Offender Database Act and to Make Consequential Amendment to Other Acts, 2nd Sess, 41st Parliament 2014.

¹⁵⁶ Mangat *More than we can afford* 9.

¹⁵⁷ A hybrid offence is an offence that may be pursued as either a summary conviction offence or an indictable offence, see Mangat *More than we can afford* 14.

¹⁵⁸ Mangat *More than we can afford* 14.

omission.¹⁵⁹ Absent of a finding of unconstitutionality, judges are unable to account for any circumstances that may result in the minimum sentence being inappropriate or excessive in the specific case or circumstances.¹⁶⁰

Section 718 of the Criminal Code sets out the primary purpose of sentencing in the jurisdiction, which are “to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions”. These sanctions have to meet one or more of six objectives: (a) denunciation, (b) specific and general deterrence, (c) incapacitation, (d) rehabilitation, (e) reparation, and (f) promoting a sense of responsibility in offenders. None of these sentencing objectives is valued higher than any other.¹⁶¹ Among the sentencing principles listed in the Code is the parity principle that like offenders be treated alike (s 718.2(b)); the totality principle that when combined, consecutive sentences not be unduly long or harsh (s 718.2(c)); and principles of restraint in sentencing, that there should be no deprivation of liberty if less restrictive sanctions are appropriate in the circumstances (s 718.2(d)). Lastly, all available sanctions other than imprisonment for all offenders, especially Aboriginal offenders, must be considered.¹⁶²

The Criminal Code identifies the fundamental principle of sentencing as proportionality between the gravity of the offence, and the degree of responsibility of the offender.¹⁶³ The principle of proportionality has two significant dimensions:¹⁶⁴ A sentence that encompasses both the gravity of the offence and the level of responsibility of the offender is believed to enhance public confidence in the criminal justice system, and ensures that the sentence is no more than what is deemed appropriate.¹⁶⁵ These latter views were also expressed by the Supreme Court of Canada in the case of *R v Ipeelee; R v Ladue*, where it was stated: “a just sanction is one that reflects both perspectives on proportionality and does not elevate one at

¹⁵⁹ Mangat *More than we can afford* 14.

¹⁶⁰ Mangat *More than we can afford* 14-15.

¹⁶¹ Section 718 of the Code.

¹⁶² Section 718.2(c) of the Code.

¹⁶³ Section 718.1 of the Code.

¹⁶⁴ Section 718.1 of the Code.

¹⁶⁵ Mangat *More than we can afford* 18.

the expense of the other”.¹⁶⁶

Proportionality in sentencing is so important to the Canadian criminal justice system that it can be suggested to be having a constitutional dimension, and may itself amount to a principle of fundamental justice.¹⁶⁷ The Supreme Court of Canada in *R v Nur*,¹⁶⁸ when describing the contrasting objectives between proportionality in sentencing and mandatory minimum sentences, noted that:

Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is fit sentence for the gravity of the offence, blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principles of proportionality.

In the case of *R v Oakes*,¹⁶⁹ the Canadian Supreme Court adopted a two-stage approach to a challenge to laws that prima facie violated the Charter. Firstly, once it is established that there was such a violation of a Charter-protected right, it was for the authorities to explain an objective that the legislation was designed to serve, and which is sufficient to override the constitutionally safeguarded right. Secondly, the authorities would have to show that the means chosen were reasonable and demonstrably justified. A proportionality approach can be used in balancing the societal, group and individual interests. In other words, there should be proportionality between the effects of the measures restricting the right, and the intended or designed policy goal.¹⁷⁰ The legislature’s intention with legislation or policy where fundamental rights are alleged to be violated is assessed together with the measure chosen by the authorities showing that it was reasonable or justifiable.

In Canada, it has long been accepted that proportionality in sentencing is achieved through individualised decision-making by the courts having regard to both the

¹⁶⁶ *R v Ipeelee; R v Ladue* 2012 SCC 13 para 37.

¹⁶⁷ *Mangat More than we can afford* 19, see also the Supreme Court of Canada decision in *R v Smith* [1987] 1 SCR 1075-1076; *Reference Re B.C. Motor Vehicle Act* [1985] 2 SCR 486 533.

¹⁶⁸ *R v Nur* [2015] 1 SCR 773 para 44. It was against this background in this case, that the Canadian Supreme Court also answered one of the contested questions, and found that sentencing is exclusively a judicial function. See para 816.

¹⁶⁹ *R v Oakes* [1986] 1 SCR 103 138-139.

¹⁷⁰ *R v Oakes* [1986] 1 SCR 103 138-139.

nature and circumstances of the particular offence and of the particular offender.¹⁷¹ In the case of *R v Proulx*, the Canadian Supreme Court confirmed this notion, and stated that although the punishment must fit the crime, such individualised approach will inevitably lead to different sentences being imposed for certain crimes.¹⁷² More recently in the case of *R v Nasogaluak*, the Canadian Supreme Court held that the individualised approach in determining an appropriate sentence entails a process whereby judges, subject to statutory regulations, “weigh the objectives of sentencing in a manner that best reflects the circumstances of the case”.¹⁷³ These latter sentiments were also expressed in *R v Ipeelee* that: “Sentencing judges must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender”.¹⁷⁴ Situating proportionality at the core of the sentencing principle enhances the legitimacy and justness of a particular sentence by connecting the offender’s punishment to the blameworthiness of his conduct. It is in this way that proportionality functions as a mechanism of restraint, such that:

A fit sentence will impose no more coercion than is reasonably necessary to realize the relevant objectives as supported by the evidence concerning the offence and the offender.¹⁷⁵

While proportionality is used as a gauge to measure the justness of sentences precluding the imposition of unduly harsh or improper punishment, it is suggested that “the experience of the last decade shows that it is out of alignment”.¹⁷⁶ Since 1995, there has been a proliferation of pieces of legislation which restrict the alternatives to incarceration straining against, what was assumed to be, settled sentencing principles. Sentencing judges are placed right at the centre of these contradictory developments.¹⁷⁷ The view that mandatory sentences are restraining judicial sentencing powers from judges, and negatively impacts on judges’ ability to assess a proportionate sentence is disputed by Caylor and Beaulne. They argue that instead of removing judges’ ability to assess a proportionate sentence, mandatory minimum sentences establish a fixed sentencing range for certain crimes, which will allow “citizens to know in advance the severity of the

¹⁷¹ Mangat *More than we can afford* 19.

¹⁷² *R v Proulx* 2000 SCC para 82.

¹⁷³ *R v Nasogaluak* 2010 SCC 6 para 43.

¹⁷⁴ *R v Ipeelee* para 38.

¹⁷⁵ Healy 2013 *Canadian Criminal LR* 293.

¹⁷⁶ Mangat *More than we can afford* 19.

¹⁷⁷ Mangat *More than we can afford* 19-20.

consequences that attend the commission of that offence.”¹⁷⁸ However, this view seems to be flawed because:

Mandatory sentencing is a process which cannot be described as judicial, since it lacks any form of justification, which it is the purpose of the judicial involvement to bestow. It is not retribution. It is not deterrence. It is not rehabilitation. It bears no relationship to any sentencing principles outlined by the courts.¹⁷⁹

Yet, it is thought that as policy considerations;

...mandatory penalties are a bad idea. They often result in injustice to individual offenders. They undermine the legitimacy of the courts and the prosecution system by fostering circumventions that are wilful and subterranean. They undermine achievement of equality before the law when they cause comparably culpable offenders to be treated radically differently when one benefits from practitioners’ circumventions and another receives a mandated penalty that everyone immediately involved considers too severe. There is insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects.¹⁸⁰

Mandatory minimum sentences violate the right to equality before the law because some litigants might lack the benefit of legal practitioners who could circumvent its application, resulting in these litigants receiving a mandated penalty that might be deemed to be too severe.

Mandatory minimum sentences are, however, not new to the Canadian criminal justice system, and the opposition to their imposition is also longstanding.¹⁸¹ Minimum penalties and their concomitant fettering of courts’ discretion were considered to be “inadvisable”¹⁸² as long ago as 1938, in the first Royal Commission to address mandatory minimum sentences. It was almost 20 years after an extensive revision of the Criminal Code that another review of the criminal justice system concluded that the “question of the amount of punishment to be imposed upon a convicted offender is one exclusively for the courts”.¹⁸³ More than a decade after this statement, the Canadian Committee on Corrections went further and recommended that the mandatory minimum penalties for all offences, except murder, be replaced because they “constitute an unwarranted restriction on the

¹⁷⁸ Caylor and Beaulne *A defence of mandatory minimum sentences* 3.

¹⁷⁹ Manderson and Sharp 200 *Sydney LR* 612.

¹⁸⁰ Tonry 2009 *Crime and Justice* 100.

¹⁸¹ Mangat *More than we can afford* 21.

¹⁸² Archambault *Report of the Royal Commission to investigate the penal system of Canada* 170.

¹⁸³ Fauteaux *et al Report of a committee appointed to inquire into the principles* 36.

sentencing discretion of the court".¹⁸⁴

In 1987, the Canadian Sentencing Commission was also granted a wide-ranging mandate to review the overall structure and sentencing process in Canada. A chapter in the Commission's report highlight the need for principles of proportionality and equity to guide sentencing judges, in that:

...each criminal offence is uniquely defined by its own set of circumstances and the notion of a judge pre-determining a sentence before hearing the facts seems abhorrent to our notions of justice. If the punishment is to fit the crime, then there can be no pre-determined sentences since criminal events are not themselves pre-determined.¹⁸⁵

Yet, one of the issues concerning mandatory minimum sentences seems to be that they pre-determine a sentence before the hearing of the case facts. Despite its detractors, however, the history of minimum sentencing in Canada reveals strong and enduring support among legislators and policy makers. Justifications for mandatory sentences are premised around the certainty of punishment, their effect on deterring, denouncing and incapacitating offenders, and their role in enhancing public confidence in the justice system. It is thought that this outcome is achieved by making the process of sentencing more transparent.¹⁸⁶ Mandatory minimum sentences in criminal offences are also supported as sound exercises of legislative power. They are viewed as setting a stable sentencing floor in an appropriate exercise of the policy- and law-making authority of legislators to sanction certain conduct in ways they consider fit.¹⁸⁷

Furthermore, the argument in support of mandatory minimum sentences also points out that, if properly used, mandatory minimum sentences are an important tool for ensuring, not inhibiting, justice in sentencing. This notion is premised on the understanding that:

...the rule of law lies at the root of Canada's system of government. It requires that laws exhibit five important qualities: certainty, accessibility, intelligibility, clarity, and predictability ... Canadians must know what the law is in advance so that they can govern their conduct accordingly.¹⁸⁸

¹⁸⁴ Ouimet *Towards unity* 210.

¹⁸⁵ Canadian Sentencing Commission *Sentencing reform: A Canadian approach* 186.

¹⁸⁶ Mangat *More than we can afford* 23.

¹⁸⁷ Mangat *More than we can afford* 23.

¹⁸⁸ Caylor and Beulne *A defence of mandatory sentences* 3.

Nonetheless, the Canadian Supreme Court in *Smith v The Queen*¹⁸⁹ held that a conviction for drugs which attracted a minimum of seven years was contrary to the Canadian Charter, specifically section 9 forbidding arbitrary detention and punishment, and section 12 forbidding cruel and unusual punishment.¹⁹⁰ The Court found that although the minimum mandatory sentences did not always breach section 12, there was a breach on this occasion because the offence applied to numerous different substances involving various degrees of dangerousness, and did not take into account the quantity of drug imported.¹⁹¹

It has been assumed that deterrence can be achieved through tougher sentencing because “if sentences are increased in severity and duration, potential offenders will choose not to offend”.¹⁹² However, this belief is deeply flawed since countless studies have established that there is no evidentiary basis to support such supposition.¹⁹³ In other words, deterrence through sentencing does not work, and mandatory minimum sentences do not deter any more than proportionate sentences reached through the exercise of wide judicial discretion.¹⁹⁴

The reason mandatory minimum sentences do not deter offenders is that, for this sentencing framework to deter, they must first be known. It is axiomatic that if potential offenders do not know that penalties upon conviction are harsh, or have become harsher, they will not be deterred.¹⁹⁵ So is the immediate consequence of offending, which also matters. If offenders do not believe that they will be caught, the harsher penalty becomes irrelevant, regardless of how harsh it may be. Countless studies have concluded that the public is largely unaware of sentencing

¹⁸⁹ *Smith v The Queen* [1987] 1 SCR 1045.

¹⁹⁰ Section 12: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment”.

¹⁹¹ *Smith v The Queen* [1987] 1 SCR 1078.

¹⁹² *Mangat More than we can afford* 23.

¹⁹³ Doob, Webster and Gartner *Issues related to harsh sentences and mandatory minimum sentences* A-2 – A-3. In the United States, e.g., the state of California was obliged to pass reforms that ended the system of sending convicted criminals back to prison for technical parole violations. It is estimated that approximately 20 000 convicts who otherwise would have been sent to prison remained free. The study found that there was no effect on violent crime. In other words, they found that the severity in sentencing frequently “results in prison spells that cannot be justified by the risk posed by the offender”.

¹⁹⁴ *Mangat More than we can afford* 23. See also Webster and Doob *Searching for Sasquatch* 173, 175.

¹⁹⁵ Doob and Webster 2003 *Crime and Justice* 181-184.

in general, let alone which offence carries mandatory minimum sentences.¹⁹⁶

Support for mandatory minimum sentences is greatest when the issue is raised in the abstract. A lack of public confidence in the criminal justice system is also advanced as a justification for imposing harsher penalties on offenders. However, this appears to be exaggerated, and is without any evidentiary basis since public opinion research suggests that the public is concerned that offenders receive an appropriate sentence, not just more of it.¹⁹⁷

The great threat to public confidence in the justice system will come from the erosion of judges' ability to impose proportional sentences with regard to all the relevant circumstances of a case.¹⁹⁸ Long sentences of imprisonment are a recipe for recidivism as the Canadian Department of Justice observed in 1990:

We instinctively look to long sentences to punish offenders, yet the evidence shows that long periods served in prison increase the chance that the offender will offend again. ... In the end, public security is diminished rather than increased if we 'throw away the key' and then return offenders to the streets at sentence expiry, unreformed and unsupervised.¹⁹⁹

The mistaken belief that harsh sentencing laws will reduce crime also serves as a costly distraction which obviates the need to look at underlying causes of criminal behaviour, and for recourse to evidence-based approaches to reducing crime.²⁰⁰ It is argued that mandatory minimum sentences are not making things better but worse.

Historically, Canadian courts have exercised broad discretion in sentencing. Canada has been in favour of courts retaining sufficient judicial discretion to ensure individualised sentences aimed at proportionality between the gravity of the offence and the culpability of the offender.²⁰¹ The increasing use of mandatory minimum sentences are breaking with this tradition. The criminal justice system cannot

¹⁹⁶ Mangat *More than we can afford* 24. See also Roberts *et al Canadian J Crime and Criminal Justice* 75.

¹⁹⁷ Sprott *et al* 2013 *Canadian J Crime and Criminal Justice* 279 conclude that there is essentially no relationship between the punitiveness of a province's courts and public confidence in its criminal justice system.

¹⁹⁸ Mangat *More than we can afford* 25.

¹⁹⁹ Bill C-9 (39-1): An Act to amend the Criminal Code (conditional sentence of imprisonment) 2.

²⁰⁰ Mangat *More than we can afford* 25-26.

²⁰¹ Mangat *More than we can afford* 26.

function without discretion operating at all levels. A system that tries to do away with discretion would be “unworkably complex and rigid”.²⁰²

It is a mistake to believe that removing discretion from judges will not have wider, more invidious consequences for the criminal justice system. Experience has shown that “discretion removed from judges is discretion added to prosecutors”.²⁰³ Restricting the exercise of judicial discretion makes the consequences of discretion exercised by other criminal justice actors much more significant. This development is worrisome to all who value transparency and fairness in criminal proceedings. The public interest is better served when wider sentencing discretion remains with judges, since their decisions are public, and subject to review on appeal. Prosecutorial discretion - shifting discretion from judges to prosecutors - lacks transparency, and increases the likelihood that individuals charged with offences carrying mandatory minimum sentences will be under great pressure to plead guilty to charges without minimum sentences, regardless of their culpability.²⁰⁴ This possibility was recently discussed by Pomerance where he noted that:

...mandatory minimums may create a coercive environment that encourages false pleas of guilt – pleas entered by persons who are not guilty of the offence. This may happen where the Crown offers to take a plea to a lesser offence, one that does not carry a minimum penalty. The disparity between the sentence offered on a plea and that guaranteed on conviction may create an unhealthy inducement...²⁰⁵

Plea bargains, while they are accepted practice, have become coercive in a system where mandatory minimum sentences are increasingly normalised.²⁰⁶ This practice and the implications inherent thereof seems to transgress the principles of fundamental justice, as contained in the Canadian Charter of Rights and Freedoms.

Section 7 of the Canadian Charter of Rights and Freedoms²⁰⁷ preserves the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Mandatory minimum

²⁰² *R v Beare; R v Higgins* [1988] 2 SCR 387 410.

²⁰³ *Mangat More than we can afford* 27.

²⁰⁴ *Mangat More than we can afford* 27-28.

²⁰⁵ Pomerance 2012 *Canadian Criminal LR* 312.

²⁰⁶ *Mangat More than we can afford* 28.

²⁰⁷ Section 7 of the Charter: “Everyone has the right to liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.

imprisonment clearly constitutes a deprivation of liberty.²⁰⁸ The question is whether mandatory minimum sentences can be challenged substantively under section 7 as contrary to the principles of fundamental justice? The Canadian legal system recognises four generally applicable substantive principles of fundamental justice, namely, the law must not be vague, overboard, or arbitrary, nor must it be grossly disproportionate in its effects.²⁰⁹ The underlying issue, when assessing law against one of these principles, is to consider whether:

...there is a mismatch between the legislature's objective and the means chosen to achieve it: the law is inadequately connected to its objective or in some sense goes too far in seeking to attain it.²¹⁰

Apart from being grossly disproportionate, mandatory minimum sentences are arguably also arbitrary or overly broad.²¹¹ Gross disproportionality, apart from being the standard upon which a cruel and unusual punishment is found under section 12 of the Charter, is also indicative of a transgression of fundamental justice. Where the "effect of the law is grossly disproportionate to the state's objective",²¹² the law will not be in accordance with the principle of fundamental justice. The threshold for such a finding is high: it will be met where the "seriousness of the deprivation is totally out of sync with the objective of the measure".²¹³

A challenged law will be contrary to the principles of fundamental justice where the law "bears no relation to, or is inconsistent with, its legislative objective".²¹⁴ In the case of *Chaoulli v Quebec (Attorney-General)*, it was observed that: "The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair".²¹⁵ In other words, there must be a rational connection between the object of the measure that causes the deprivation of section 7, and the limits it imposes on the life, liberty, or security of

²⁰⁸ Mangat *More than we can afford* 58-59.

²⁰⁹ Mangat *More than we can afford* 61. See the Canadian Supreme Court's decision in *Bedford v Canada* 2013 SCC 72, where it was stated that each is a distinct principle of fundamental justice. See also footnote 105 above.

²¹⁰ Stewart *Fundamental justice* 151.

²¹¹ Mangat *More than we can afford* 61.

²¹² Mangat *More than we can afford* 61.

²¹³ Supreme Court of Canada in *Bedford v Canada* 2013 SCC 72 paras 103, 120.

²¹⁴ *AC v Manitoba* 2009 SCC 30 para 140. See also *Chaoulli v Quebec (Attorney-General)* 2005 SCC 35 para 131.

²¹⁵ *Chaoulli v Quebec (Attorney-General)* 2005 SCC 35 para 131.

the person.²¹⁶

In the case of *R v Nur*,²¹⁷ a two-year sentencing ‘gap’ in section 95 of the Criminal Code created between cases where the Crown proceeds summarily, and where the Crown proceeds by indictment was challenged on the ground that it is substantively arbitrary. Section 95 provided that if the Crown proceeds summarily, the maximum sentence is one-year imprisonment, but if the Crown proceeds by indictment, the minimum sentence is three years, creating a two-year gap. At the lower court, the gap was found to breach section 7. It was found that the two-year gap hindered the valid legislative purpose of hybrid offences in providing for flexibility in procedure. The gap in the law between the one-year maximum and three-year minimum sentences provides no rational sense from a sentencing perspective.²¹⁸

As a principle of fundamental justice, over-breadth takes place “where the law goes too far and interferes with some conduct that bears no connection to its objective”.²¹⁹ Together with the norm against arbitrariness, over-breadth is “directed at the absence of a connection between the infringement of rights and what the law seeks to achieve”.²²⁰ Over-breadth applies to a law that is so broad in its application that while it may be rationally connected in some cases, it will overreach in others. A law that mandates minimum sentences for everyone who commits the offence would *ad hoc* seem to be over broad.²²¹ A successful over-breadth challenge to section 95 of the Code was brought in *R v Adamo*, where the court framed the question by asking:

Whether Parliament, in deciding to imprison everyone who commits this offence (and is prosecuted by indictment) for a minimum of three years, has gone further than necessary to achieve its objective of combating gun violence and possessing prohibited and restricted weapons.²²²

The Court found that the provision had a grossly disproportionate impact under a section 12 analysis, and that it served no general deterrent purpose; the provision was also found to be overbroad and violating section 7.²²³

²¹⁶ *Bedford v Canada* 2013 SCC 72 para 111.

²¹⁷ *R v Nur* 2011 ONSC (Ont SCJ).

²¹⁸ *R v Nur* 2011 ONSC paras 126-127.

²¹⁹ *Bedford v Canada* 2013 SCC 72 para 101.

²²⁰ *Bedford v Canada* 2013 SCC 72 para 108.

²²¹ *Mangat More than we can afford* 63.

²²² *R v Adamo* 2013 MBQB 225 para 122. Hereinafter *Adamo*.

²²³ *Adamo* para 122.

According to the Supreme Court of Canada, sentencing is exclusively a judicial function.²²⁴ There is a potential constitutional perspective created by this view against mandatory minimum sentences in jurisdictions that recognise the separation of powers doctrine between the legislature, executive and the judiciary.²²⁵ This results in the argument that a legislature that mandates to the judiciary what the punishment must be for a person convicted of a specific offence violates the separation of powers, “because it purports in effect to exercise what is a judicial function, namely, that of sentencing”.²²⁶ A judiciary that is directed as to what punishment to impose does not function as a check-and-balance on legislative overreach. This, in turn, undermines the fundamental constitutional idea of checks and balances between the different government branches. The judiciary does not exist to rubber stamp legislative or executive decisions of punishment, but have to fulfil a “substantive role, not a decorative role in the constitutional design”.²²⁷ Similar conclusions were reached in South African courts, as will be evidenced below.

5.4.3 *Mandatory minimum sentences in South Africa*

In South Africa, section 51 of the Criminal Law Amendment Act²²⁸ (CLAA) contains mandatory minimum sentences for most of the more serious crimes, and was intended to alleviate serious crimes. This legislation strictly curtailed the authority of judges to determine the length of imprisonment periods for offenders, and for certain offences.²²⁹ The provisions of this Act put in place certain categories of imprisonment terms as follows:

51 Discretionary minimum sentences for certain offences

- (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.
- (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in

²²⁴ *R v Nur* [2015] 1 RSC 773 816.

²²⁵ Gray 2017 *New Crim LR* 427.

²²⁶ Gray 2017 *New Crim LR* 427.

²²⁷ Gray 2017 *New Crim LR* 427.

²²⁸ Criminal Law Amendment Act 105 of 1997.

²²⁹ Cameron *Imprisoning the nation* 3.

(a) Part II of Schedule 2, in case of –

- (i) A first offender, to imprisonment for a period of not less than 15 years;
- (ii) A second offender of any such offence, to imprisonment for a period not less than 20 years;
- (iii) A third offender of any such offence, to imprisonment for a period not less than a period not less than 25 years; ...

(3)(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such lesser sentence in respect of an offence referred to in Part I of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

Under section 51(3), judges are permitted to depart from the mandatory minimum sentences only if they are “satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence”. There has been a wide range of interpretations of the words “substantial and compelling”.²³⁰ Stegmann J in *S v Mofokeng*²³¹ was of the view that these words allowed the sentencing court virtually no discretion. He explained:

...for ‘substantial and compelling circumstances’ to be found, the facts of the particular case must present some circumstance that is so exceptional in nature, and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case that it could be described as ‘compelling’ the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified.²³²

As evidenced above, the courts disapproved of mandatory minimum sentences, a stance which is mainly premised on the assumption that they weaken the courts’ normal sentencing function to the level of a rubber stamp.²³³ The effect of mandatory minimum sentences on judicial sentencing discretion is also that it undermines it, and “creates the perception that judges and magistrates lack the ability to arrive at appropriate sentences on their own”.²³⁴ As echoed in both Canada and the United States, it is argued in South Africa that the imposition of sentence is a matter for the

²³⁰ SALRC *Sentencing* para 1.24.

²³¹ *S v Mofokeng* 1999 (1) SACR 502 (W) (hereinafter *Mofokeng*).

²³² *Mofokeng* para 523c.

²³³ *S v Toms* 1990 (2) SA 802 (A) paras 806h-807b; see also footnote 234 below.

²³⁴ Fagan *Advocate* 35.

discretion of the trial court. The imposition of mandatory minimum sentences by the legislature has always been considered as an undesirable intrusion upon the sentencing function of the courts.²³⁵ In *S v Mofokeng*, it was explained that:

For the legislature to have imposed minimum sentences ... severely curtailing the discretion of the courts, offends against the fundamental constitutional principles of the separation of powers of the legislature and the judiciary. ... That the legislature has seen it fit to use courts as rubber stamps that must apply the legislature's arbitrary sentences... is an unfortunate breach of the separation of powers. It tends to undermine the independence of the courts, and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases.²³⁶

Terblanche questions the accuracy of the idea that sentencing is a judicial function in the constitutional sense, while conceding that sentencing is a function of the trial court.²³⁷ Terblanche advocates the view that an overview of the judicial function does not provide support for the suggestion that sentencing has to be a judicial task.²³⁸ He asserts that these latter views are also supported by Munro and Wasik who suggest that it is premised on Montesquieu's doctrine of separation of powers:

In England, juries decide whether the accused is guilty or not ... and, if he is declared guilty the judge pronounces the punishment that the law inflicts for that act, and, for this, he needs only to open his eyes.²³⁹

As a result of this statement, the assumption is formed that there is no historical evidence for supporting the idea that sentencing belongs to the judiciary alone.²⁴⁰ The availability of a judicial discretion in sentencing is considered a relatively modern phenomenon.²⁴¹ Yet, in justifying these sentiments, it is observed that:

...one may understand why judges might resent the curtailment of their discretion, especially against the earlier background of discretion at large. But, as we have seen, the legislative limitation of sentencing discretion was by no means unprecedented. Nor can it be said to be unconstitutional. In the United States, there has been a constitutional challenge to the federal sentencing guidelines formulated by the US Sentencing Commission pursuant to the Sentencing Reform Act of 1984. The Supreme Court rebutted it by a majority of eight to one (*Misretta v United States* 488 US 361 (1989)), ruling that "scope of

²³⁵ *S v Toms* 1990 (2) SA 802 (A) paras 822c-d.

²³⁶ *Mofokeng* paras 525g-h.

²³⁷ Terblanche 2001 SACJ 3.

²³⁸ Terblanche 2001 SACJ 4.

²³⁹ Munro and Wasik *Sentencing* 27, quoting *L'Esprit des Lois* (translation by Nugent 1949).

²⁴⁰ Terblanche 2001 SACJ 4.

²⁴¹ Terblanche 2001 SACJ 4.

judicial discretion with respect of the sentence is subject to congressional control...”.²⁴²

Parliament is entitled to formulate the law, and when parliament states the law in legislation, for example, when it declares life imprisonment for premeditated murder, or laws mandating mandatory minimum sentences, the courts have to impose such laws.²⁴³ The difficulty with such legislation, the argument continues, is not only that it violates the independence of the courts, or messes with the constitutional doctrine of the separation of powers. More importantly, the problem is that it cannot make sufficient provisions for an appropriate sentence in every case or in most cases.²⁴⁴ In other words, it seems that the issue with the laws mandating mandatory minimum sentences is that they undermine the concept of individualisation in sentencing, or the appropriateness principle, and not that they encroach on the courts’ constitutional role regarding sentencing. These sentiments were also articulated in the case of *S v Mofokeng*,²⁴⁵ that courts have worked out the principles according to which fair and balanced sentences are arrived at. They take into account the nature and the seriousness of the particular crime, including its effect upon the victim. The legislature has passed these minimum sentences on future offenders without knowing the nature and circumstances of the particular crime, or of the victim, or of the criminal. This practice precludes a balanced judicial approach.

As emphasised above, prescribing sentences has the effect of generalising sentences instead of individualising it.²⁴⁶ In the *Mofokeng* case, the criticisms for mandatory minimum sentences seem to be related to the idea that it contains pre-determined sentences before the hearing of the actual facts and circumstances in a case, as also determined under Canadian jurisprudence. While all violent crimes should be punished, “minimum sentences are a poorly-thought out, misdirected, hugely costly and above all ineffective way of punishing criminals”.²⁴⁷

The question can be asked why mandatory minimum sentences were introduced in South Africa? The answer is thought to be found in certain events that took place as

²⁴² Munro and Wasik *Sentencing* 29.

²⁴³ Terblanche 2001 *SACJ* 4.

²⁴⁴ Terblanche 2001 *SACJ* 5.

²⁴⁵ *Mofokeng* 525.

²⁴⁶ Fagan *Advocate* 35.

²⁴⁷ Cameron *Imprisoning the nation* 5.

the country was becoming democratic. As South Africa was coming “out of the pernicious and degrading horrors of apartheid and started moving to democracy, there seemed to be an explosion of violent crimes”.²⁴⁸ In *S v Makwanyane*,²⁴⁹ a 1995 decision of the Constitutional Court that declared the mandatory minimum sentence provision mandating the death penalty unconstitutional, Chaskalson CJ noted this “unfortunate reality”,²⁵⁰ and stated:

The level of violence crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution.²⁵¹

In *Makwanyane*, the Constitutional Court referred to proportionality as an important factor to be taken into account when deciding that “a penalty is cruel, inhuman and degrading”.²⁵² Section 217 of the Criminal Procedure Act²⁵³ imposed the death penalty as a competent sentence for murder. In a new democracy, the state needed to respond to an outcry about crimes which forced politicians to act, and “they felt compelled to be seen to act”.²⁵⁴ Parliament acted in haste, and the 1997 mandatory minimum sentences was adopted even though, just a year before, the Minister of Justice, Mr Dullah Omar, had appointed a committee of the South African Law Reform Commission (SALRC) to review sentencing policy, and before the Committee could report back to him.²⁵⁵ The SALRC’s report did eventually get to Parliament, but it came too late for consideration.²⁵⁶

The SALRC’s report included more sensible, just measures such as presumptive sentencing guidelines, voluntary sentencing guidelines, and legislative guidelines.²⁵⁷ It also cautioned that, although it was too early to gauge the long-term

²⁴⁸ Cameron *Imprisoning the nation* 5.

²⁴⁹ *Makwanyane* 391.

²⁵⁰ Cameron *Imprisoning the nation* 5.

²⁵¹ *Makwanyane* para 117.

²⁵² *Makwanyane* 433.

²⁵³ Criminal Procedure Act 51 of 1977.

²⁵⁴ Cameron *Imprisoning the nation* 8.

²⁵⁵ Cameron *Imprisoning the nation* 8.

²⁵⁶ See *S v Vilakazi* 2012 (6) SA 353 (SCA) para 10, where Nugent JA noted that a sophisticated system to construct guidelines to secure consistency in sentencing was subsequently recommended by the South African Law Reform Commission (SALRC) in December 2000 – a recommendation made after a comprehensive review of sentencing practice in this country and abroad. But the sophisticated guidelines-system the SALRC recommended, which “would have been welcome to many judges who face the difficult task of sentencing”, was never introduced. Instead, the “temporary regime” in the 1997 statute became permanent.

²⁵⁷ Cameron *Imprisoning the nation* 10.

effects, the new sentencing regime would “produce an intolerable burden for an already overloaded system”.²⁵⁸ Parliament selected the harshest sentencing option without the benefit of mature law reform consultative processes. In adopting the new sentences, the South African government looked into the experiences of the United Kingdom and the United States with mandatory minimums, and it “hurriedly incorporated them”.²⁵⁹

Politically, this sentencing regime provided benefits, namely, harsh compulsory sentences eroding the risk of judges as supposedly being ‘soft on crime’. The mandatory sentences also avoided the risk of inconsistent sentencing, and provided politicians with a pay-off as it created the appearance of a state-coordinated and purposeful effort in addressing crime, which is responsive to public anxiety and fears.²⁶⁰ Disappointingly, the outcome - though very beguiling - was considered by some as “...fraud. Minimum sentences achieve almost nothing in reducing crime”.²⁶¹ It was during that time, that there was a widespread assumption that crime had its roots in apartheid, and the struggle against it.²⁶² Van Zyl Smit explains this assumption:

Violent crime in particular was attributed to the dislocation caused by the struggle against apartheid. The belief was that in a democratic South Africa, the crime rate would gradually decline and that the remaining crime could be dealt with by a fair criminal justice system, following the precepts of the new Constitution and imposing relatively moderate punishments.²⁶³

The author states that this attitude was reflected in the ‘Alternative White Paper’ on penal reform by the Penal Reform Lobby Group in 1995.²⁶⁴ This state of affairs - had it been known and understood - might have assisted parliament to provide for a more insightful approach. Between 1991 and 2000, before the 1997 legislation came into effect, the number of prosecutions dropped, and “there was a decline in the number offenders recorded as being guilty of crime”.²⁶⁵ These statistics could have pointed to a decrease in the effectiveness of the criminal justice system, yet

²⁵⁸ SALRC *Project 82* 16.

²⁵⁹ Cameron *Imprisoning the nation* 10.

²⁶⁰ Cameron *Imprisoning the nation* 10.

²⁶¹ Cameron *Imprisoning the nation* 10.

²⁶² Cameron *Imprisoning the nation* 11.

²⁶³ Van Zyl Smit 2004 *Modern LR* 231.

²⁶⁴ Van Zyl Smit 2004 *Modern LR* 231.

²⁶⁵ Cameron *Imprisoning the nation* 12.

they may also be indicative of a decrease in actual crime.²⁶⁶ Instead, parliament committed itself to the new sentencing regime, and intended to extend it every second year until 2007.²⁶⁷ In 2005, some years after the CLAA's enactment and extensions, pertinent issues were raised regarding this legislation's application, and its impact in South African prisons:

Minimum sentence legislation should not be extended beyond 30 April 2005 for the following reasons: The legislation was brought in as a temporary measure because of the perception that crime was getting out of control and the belief that the remedy lay harsh sentencing. The increase in the number of prisoners due to the minimum sentence legislation has made our prisons terribly overcrowded. There is no evidence that the increase in the length of sentences has had a deterrent effect on would-be offenders.²⁶⁸

The question should be asked as to how mandatory minimum sentences are justified in South Africa. The state's moral authority to put people behind bars is premised on the understanding that there is some objective behind punishment, some underlying practice that justifies the use of state power to sanction individuals for their criminal conduct.²⁶⁹ If the mandatory minimum sentence is to be justified, it could be because it advances some defensible objective.²⁷⁰ Thus, these rationales might have been at the core of the government's sentencing policy when enacting this sentencing regime. Yet, there are four possible justifications for incarceration:

First, the threat of incarceration deters individuals from engaging in criminal activity. Second, incarceration incapacitated offenders while they are in prison, it prevents them from committing more crimes. Third, putting people in prison can rehabilitate them better, and it makes them better members of society when they get out. And fourth, prison is retributive. It is a vindication of justice, for victims and for society as a whole.²⁷¹

In the case of *S v RO and Another*,²⁷² Heher JA articulated the object of punishment in the following terms:

²⁶⁶ Cameron *Imprisoning the nation* 11-12.

²⁶⁷ Cameron *Imprisoning the nation* 12.

²⁶⁸ Fagan *Advocate* 35.

²⁶⁹ Cameron *Imprisoning the nation* 13.

²⁷⁰ Cameron *Imprisoning the nation* 13.

²⁷¹ Cameron *Imprisoning the nation* 13. See also *S v Khumalo and Others* 1984 (3) 27 (A) 28: "In the assessment of an appropriate sentence, regard must be had inter alia to the main purposes of punishment mentioned by Davis AJA in *R v Swanepoel* 1945 AD 444 455, namely, deterrent, preventive, reformatory and retributive. See also *S v Whitehead* 1970 (4) SA 424 (A) paras 436e-f; *S v Rabie* 1975 (4) SA 855 (A) paras 852a-b: "The main purposes of punishment are deterrent, preventive, reformatory and retributive".

²⁷² *S v RO and Another* 2010 (2) SACR 248 (SCA) paras 30, 20.

Sentencing is about achieving the right balance (or, in more high-flown terms, proportionality). The elements at play are the crime, the offender and the interests of society or, with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific; even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions.

The proportionality approach as adopted by the courts in the United States and in Canada was found in the case of *S v Dodo*,²⁷³ to be “compatible with and supportive of the analysis employed by under our Constitution”. However, the imposition of mandatory sentences contradicts the application of a discretion.²⁷⁴ The mandatory minimum sentences that parliament adopted cannot be adequately justified by any of these grounds.²⁷⁵ There is a further perception that mandatory minimum sentences deter crime. The theory of deterrence is that punishment is justified, because it deters people from committing crime.²⁷⁶ Deterrence has been described as the “essential”, “all important”, “paramount” and “universally admitted”²⁷⁷ object of punishment. Yet, it is believed that “the other objects are accessory”.²⁷⁸ It is the government’s argument that mandatory minimum sentences stop people from harming others. This assumption is based on the premise that criminals consider both the severity of the punishment, and the probability of getting caught before they commit a specific crime.²⁷⁹ Mandatory minimums result in making the punishment clear and well-known to the public. It is argued that they deter through increasing the severity of the impending punishment.²⁸⁰ While this argument is intellectually appealing, it is not supported by evidence.²⁸¹ It is believed that they make “little or no significant impact”²⁸² in reducing serious and violent crime. Though punishment does have a deterrent effect, “it is the certainty of punishment rather than the severity of the sentence that is likely to have the greatest deterrent impact”.²⁸³ In the

²⁷³ *Dodo* para 39.

²⁷⁴ Deziel *The effectiveness of mandatory minimum sentences* 38.

²⁷⁵ Cameron *Imprisoning the nation* 14.

²⁷⁶ Mollema and Terblanche 2017 *SACJ* 216.

²⁷⁷ *R v Swanepoel* 1945 AD 444 455.

²⁷⁸ *S v Khumalo and Others* 24/83 AV (A) (28 March 1984) 10. In Canada, as discussed in para 5.4.2 above, none of these sentencing objectives is valued higher than any other.

²⁷⁹ Cameron *Imprisoning the nation* 14.

²⁸⁰ Cameron *Imprisoning the nation* 14.

²⁸¹ Cameron *Imprisoning the nation* 14.

²⁸² Sloth-Nielsen and Ehlers 2005 *SA Crime Quarterly* 20.

²⁸³ Van Zyl Smit and Ashworth *Modern LR* 248: “There is certainly no evidence, empirical or even anecdotal, to suggest that increasing sentences from, say, six to 11 years for rape or robbery

case of *Makwanyane*, it was argued on behalf of the state that the mandatory death sentence would have some deterrent effects.²⁸⁴ Chaskalson CJ disagreed with this view, and noted that:

...we would be deluding ourselves if we were to believe that the execution of the few persons sentenced to death during this period, ... will provide the solution to the unacceptably high rate of crime.²⁸⁵

He added that “the greatest deterrent to crime is the likelihood that offenders will be apprehended”.²⁸⁶ A report from the American National Academy of Sciences in 2004 endorsed these latter views.²⁸⁷ In themselves, mandated long sentences have no known deterrent effect.

Yet in South Africa, there is still a perception that mandatory minimum sentences deter crime. On the contrary, there is clear and substantial evidence that mandatory minimum sentences have “either no deterrent effect or a modest deterrent effect that soon wastes away”.²⁸⁸ Doob *et al* explain that they do not know of any reliable criminologist who posits that the crime rates will be lessened through deterrence if the severity of the sentence is raised.²⁸⁹ Harsher sentences have little impact on the offenders since they do not consider the severity of the sentence they may face prior to committing the crime.²⁹⁰ The deterrence justification in criminal law is the most significant of all the rationales. Mandatory minimum sentences play no role or an insignificant role in deterring crime.²⁹¹

There is another justification that longer prison sentences reduce crime by incapacitating individuals who are prone to commit crimes.²⁹² Yet, this does not help explain mandatory minimum sentences, and how they are applied in South Africa.

deters rapists or robbers generally, or even discourages them individually from committing a crime that otherwise they would not have risked”.

²⁸⁴ *Makwanyane* para 118.

²⁸⁵ *Makwanyane* para 121.

²⁸⁶ *Makwanyane* para 122.

²⁸⁷ Hofer *et al Fifteen years of guideline sentencing* 41-45.

²⁸⁸ Cameron *Imprisoning the nation* 15.

²⁸⁹ Doob, Webster and Gartner *Issues related to harsh sentences and mandatory minimum sentences* A-3.

²⁹⁰ Anderson 2002 *American Law and Economics Rev* 293-313.

²⁹¹ Cameron *Imprisoning the nation* 16: “studies that show that most active and violent offenders either don’t think that they will be caught, or if they were to be caught they don’t have any idea what punishment to expect from their crimes”; Cameron *Imprisoning the nation* 15: the “enactment of mandatory penalty laws has either no deterrent effect”.

²⁹² Travis and Western (eds) *The growth of incarceration in the United States* 155.

It is mainly because the 'incapacitation effect' is weakened as the incarceration rate increases.²⁹³ Offenders should be locked up, but putting numerous less dangerous persons in jail "for long periods simply does not help very much to further reduce crime".²⁹⁴ There is another equally important consideration. The idea of locking away and incapacitating violent offenders is usually fully achieved by the time they reach the age of 50 or 60. This is the age where it is believed that they are not likely to commit such crimes again.²⁹⁵ However, statistical evidence also shows that higher number of incapacitation and longer sentences may not reduce crime.²⁹⁶

Rehabilitation is the third justification for imprisoning offenders.²⁹⁷ The South African Correctional Services Act²⁹⁸ provides that the purpose of the correctional system is to contribute to maintaining a just, peaceful and safe society by "promoting the social responsibility of human development of all sentenced offenders".²⁹⁹ Yet mandatory minimum sentences apply perversely against such laudable goal. This is because:

An offender serving a long-term or life sentence, becomes a different type of prisoner with generally loss of hopes and shorn ties of community kinship, suffering the uncertainty of indeterminate release. These prisoners are generally more susceptible to social and psychological problems than shorter-term prisoners.³⁰⁰

The issue is that some offenders should not be imprisoned for long; this includes indeterminate sentences, but this has happened because the government has "engaged in sweepingly counter-productive overkill in forcing the courts to apply these sentences".³⁰¹ Correctional officers state that extremely long prison sentences leave offenders with no hope, and release is so long off that they are not amenable to rehabilitation.³⁰² Considering the known effect of long-term sentences on rehabilitation, the South African mandatory minimum sentences regime is in fact

²⁹³ Cameron *Imprisoning the nation* 17.

²⁹⁴ Cameron *Imprisoning the nation* 17. See also Raphael and Stoll *A new approach to reducing incarceration* 14-16.

²⁹⁵ Cameron *Imprisoning the nation* 17; Raphael and Stoll *A new approach to reducing incarceration* 13.

²⁹⁶ Cameron *Imprisoning the nation* 17. See also Roeder, Eisen, and Bowling *What caused the crime decline?* 5-7.

²⁹⁷ Cameron *Imprisoning the nation* 18.

²⁹⁸ Correctional Services Act 111 of 1998.

²⁹⁹ Correctional Services Act s 2(c).

³⁰⁰ Cameron *Imprisoning the nation* 19.

³⁰¹ Cameron *Imprisoning the nation* 19.

³⁰² Sloth-Nielsen and Ehlers 2005 *SA Crime Quarterly* 17.

primarily at odds with the Correctional Services Act's objectives, which makes it clear that incarceration is to create a more socially responsible society.³⁰³

Furthermore, rehabilitation is lacking in many South African prisons. Altbeker points out that overcrowding in prisons have made implementing rehabilitation (an unproven science) impracticable and impossible.³⁰⁴ He adds that "our overcrowded prisons will rehabilitate no-one ... They are also a potential time bomb that needs to be defused".³⁰⁵ More than a decade ago, Fagan J also warned that overcrowding "precludes proper rehabilitation [and] turns prisons into places where criminality is nurtured".³⁰⁶ Neither the facilities nor the personnel exist to facilitate rehabilitation programs.³⁰⁷ There is furthermore not sufficient funds for rehabilitation. Cameron J imparts a personal experience as regards rehabilitation facilities. He discloses that in June 2017, he visited the Devon Correctional facility some kilometres from Johannesburg, which is a training facility for rehabilitation. He was informed that the training was stopped due to budgetary constraints as the Department did not have money for rehabilitation training, which he described as "a very major tragedy".³⁰⁸

The fourth ground for justifying the mandatory minimum sentences is retribution. The idea is that severe sentences should be imposed upon offenders engaged in the most severe of crimes,³⁰⁹ as a wrongdoer is "morally blameworthy and deserves to be punished".³¹⁰ Retribution is certainly the only sensible rationale for the death penalty, that someone who commits a serious crime against another should die an "unspeakable death at the hands of the state, when his spinal column is broken at the end of a rope round his neck after a two-metre fall".³¹¹ Yet, that same emotion and hunger for revenge result in a terrible logic in that a terrible crime deserves a "horrific enough punishment to slake our thirst for vengeance."³¹² This impulse has been responsible for the cruellest of punishments in history. While mandatory minimum sentences can be criticised for promoting the notion of revenge as an

³⁰³ Cameron *Imprisoning the nation* 19.

³⁰⁴ Cameron *Imprisoning the nation* 19.

³⁰⁵ Altbeker *A country at war with itself* 146, 150.

³⁰⁶ Fagan *Advocate* April 2005.

³⁰⁷ Cameron *Imprisoning the nation* 19.

³⁰⁸ Cameron *Imprisoning the nation* 20.

³⁰⁹ Cameron *Imprisoning the nation* 20.

³¹⁰ Cameron *Imprisoning the nation* 20.

³¹¹ Cameron *Imprisoning the nation* 20.

³¹² Cameron *Imprisoning the nation* 21.

object of punishment, Shongwe JA in *S v Kruger* discouraged such a view, and emphasised that “punishing a convicted person should not be likened to revenge”.³¹³

The question can be asked as to “whether the state that represents our aspirations to just order, should be the instrument of horrific punishment?”.³¹⁴ Most societies have answered this question in the negative.³¹⁵ Under the South African Constitution, retribution alone cannot be justified as the principle upon which our criminal punishment is premised.³¹⁶ So why are minimum sentences justified? This sentencing regime is regarded as:

...a product of misshapen history, the wish of our politicians to be seen to be doing something about crime, and their desire to seem tough on crime.³¹⁷

Even though mandatory minimum sentences carry no proven benefit under any practice of punishment, they were nonetheless enacted as a hurriedly-passed, temporary measure to respond to the fears of a new democratic post-apartheid society. As with President Mbeki’s policies on AIDS, the mandatory minimum sentences were not a policy which was the result of well-informed research or sensible policy-making.³¹⁸ This law was formulated to respond to past fears, and is misdirected and ineffective. It also continues to impose an enormous economic and human toll upon our democracy.³¹⁹

The Bill of Rights guarantees the rights of all people in our country, and affirms the democratic values of human dignity, equality and freedom.³²⁰ The Bill of Rights safeguards the right to equality and the right to dignity before the law.³²¹ In addition, the Constitution specifically provides that detainees and sentenced prisoners have the right to “conditions of detention that are consistent with human dignity”.³²² This provision requires that, at a minimum, detainees and prisoners should have access

³¹³ *S v Kruger* 2012 (1) SACR 369 (SCA) para 11.

³¹⁴ Fagan 2005 *Advocate* 35.

³¹⁵ Cameron *Imprisoning the nation* 21.

³¹⁶ Cameron *Imprisoning the nation* 21.

³¹⁷ Cameron *Imprisoning the nation* 21.

³¹⁸ Cameron *Imprisoning the nation* 21.

³¹⁹ Cameron *Imprisoning the nation* 22.

³²⁰ Cameron *Imprisoning the nation* 24.

³²¹ Section 9 of the Constitution: “Everyone is equal before the law and has the right to equal protection and benefit of the law”. Section 10: “Everyone has inherent right to have their dignity respected and protected”.

³²² Section 35(2)(e) of the Constitution.

to exercise, adequate accommodation, nutrition, reading material,³²³ and medical treatment.³²⁴ The Bill of Rights further protects the right to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause.³²⁵ The Constitution also protects prisoners and detainees from cruel, inhuman, or degrading treatment or punishment.³²⁶ In the case of *Lee v Minister of Correctional Services*, the Constitutional Court observed that “prisoners are amongst the most vulnerable in our society to the failure of the state to meet its constitutional and statutory obligations”,³²⁷ and that:

...a civilized and humane society demands that when the state takes away the autonomy of an individual by imprisonments it must assume the obligation ... inherent in the right ... to conditions of detention that are consistent with human dignity.³²⁸

In a dissenting judgment, Cameron J concurred that prisoners are a “vulnerable group to whom our system of constitutional protection owes particular solitude”.³²⁹

In assessing the government’s policy or political acts, the principle of rationality has been applied by our courts.³³⁰ In the case of *Albutt v Centre for the Study of Violence and Reconciliation*,³³¹ the court noted that the executive has a wide discretion in selecting the means it chooses to achieve its constitutionally permissible objectives. In this case, it was held that the court may not interfere and impose the means that it feels would be more appropriate, however, when these means are being challenged on the ground of rationality, the court has a duty to examine these means in order to ensure that it rationally related to the objective that it seeks to achieve. The court further elaborated on this approach:

What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And it objectively speaking they are not, they will fall short of the standard

³²³ Section 18(1) of the Correctional Services Act gives every prisoner a right to reading material of choice, unless it “constitutes a security risk or is not conducive to his or her rehabilitation”.

³²⁴ Cameron *Imprisoning the nation* 24.

³²⁵ Section 12(1) of the Constitution.

³²⁶ Section 12(1): “Everyone has the right to freedom and security of the person, which includes the right (e) not to be treated or punished in a cruel, inhuman or degrading way”.

³²⁷ *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) para 113 (hereinafter *Lee*).

³²⁸ *Lee* para 65.

³²⁹ *Lee* para 113.

³³⁰ Naidoo *Does the lack of sufficient formulation* 43.

³³¹ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 51.

demanded by the Constitution.

Rationality was also applied in *Democratic Alliance v The President of the Republic of South Africa*,³³² a case which dealt with the appointment of the National Director of Public Prosecutions by the President. It was argued by the applicants that the decision of the President to appoint Mr Menzi Simelane as the National Director of Public Prosecutions was irrational as he was not a fit and proper person, which was required by the National Prosecutions Act.³³³ Yacoob ACDJ observed that a rationality review is concerned with the “relationship between means and ends”.³³⁴ Yacoob ACDJ relied on the cases of *Albutt*,³³⁵ *Bato Star*³³⁶ and *Affordable Medicines Trust v Minister of Health*,³³⁷ for finding that executive decisions may only be set aside if they are irrational, and may not ordinarily be set aside if procedurally unfair or unreasonable. The rationality standard to be applied to the review of executive decisions thus prescribes the lowest possible threshold.³³⁸ He went on to further note that the separation of powers has no concern with a rationality review, and was not of particular importance in this case.³³⁹ The conclusion reached by Yacoob ADCJ is puzzling, as it does not follow why he relied on the decisions in *Albutt*, *Bato Star* and *Affordable Medicines*, which are believed to have highlighted the fact that although all public power is reviewable; there should be respect for the decision-making of the legislature and executive branch if it is rational.³⁴⁰ It is suggested that:

This overarching rationality (or reasonableness) can surely be argued to be an intrusion on the separation of powers. It is speculated that Yacoob stretched rationality review as a matter of judicial pragmatism.³⁴¹

The South African courts have not interpreted the constitutionality of our mandatory minimum sentences through section 7 (principles of fundamental justice) of the Canadian Charter or the rationality review approach. Yet, the *Makwanyane* court’s reasoning in concluding that the death penalty was unconstitutional was premised

³³² *Democratic Alliance v The President of the Republic of South Africa* 2012 ZACC 24 (hereinafter *Democratic Alliance*).

³³³ Sections 179 of the Constitution.

³³⁴ *Democratic Alliance* para 32.

³³⁵ *Albutt* para 44.

³³⁶ *Bato Star* 490.

³³⁷ *Affordable Medicines Trust v Minister of Health* 2005 ZACC 3.

³³⁸ Naidoo *Does the lack of sufficient formulation* 46.

³³⁹ *Albutt* para 44.

³⁴⁰ Naidoo *Does the lack of sufficient formulation* 48

³⁴¹ Naidoo *Does the lack of sufficient formulation* 48.

on the understanding that “proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading”.³⁴² Section 39(1) of the Constitution provides a proper approach for the interpretation of the Constitution:

- When interpreting the Bill of Rights, a court, tribunal or forum
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law”.

The South African Constitution provides in section 2 that it is “the supreme law of the Republic; law or conduct inconsistent with it is invalid...”, and the Canadian Constitution in section 52 states in similar terms that it is the supreme law of the country, and “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”. Both these Constitutions enshrine the concept that these statutes are the supreme law, and that laws which are inconsistent with its provisions have no force. It will be difficult for our courts not to pay attention to the constitutionality of the mandatory minimum sentences in other jurisdictions in the light of what seems to be the sentencing regime’s violation of fundamental rights.

In the case of *S v Dodo*,³⁴³ the constitutionality of this penal law was questioned. Dodo was convicted on one count of murder and one count of rape. In respect of the count of murder, the provisions of Part I of Schedule 2 of the CLAA were applicable, and the minimum sentence of life imprisonment had to be imposed in terms of section 51 of the Act. The counsel for the accused argued that the provisions of section 51(1) were unconstitutional on the grounds that they do not only offend against the provisions of the Constitution, and in particular section 35(3)(c) (the right to a public trial before an ordinary court) and section 35(3)(i) (the right to adduce and challenge evidence), but they also offended against the constitutional requirement of the separation of powers (sections 301f-h). The court held that the right to a trial in an ordinary court as provided by section 35(3)(c) of the Constitution was limited by the provisions of CLAA section 51(1) in that the imposition of sentence was governed by the dictates of the legislature. In addition,

³⁴² *Makwanyane* para 94.

³⁴³ *Dodo* 301.

there was no evidence to suggest that the limitation of the right to a fair trial in an ordinary country would meet the purpose for which the limitation was introduced. The extent of the infringement was significant, and there was no apparent legitimate relation between the limitation and its purpose. In the court's view, there was less restrictive means to combat the crime wave which was plaguing the country. In addition, the court held that whatever the boundaries of separation of powers eventually are determined to be, the imposition of the most severe penalty open to the High Court had to fall within the exclusive prerogative and discretion of the court. The provisions of section 51(1) undermined the doctrine of separation of powers and the independence of the judiciary as required by the Constitution.³⁴⁴

In this case, it was held that individual criminal offenders need to be protected against "the occasional excesses of the popular will".³⁴⁵ It is the duty of the court to protect and uphold the constitutional system of check and balances that is "precisely designed to inhibit swift and complete accomplishment of that popular will".³⁴⁶ This is also the view held by the South African Constitutional Court.³⁴⁷ The Constitutional Court has held that: "The primary duty of the courts is to the Constitution and the law".³⁴⁸ This does not happen when judges lack sentencing discretion as a result of statutory mandatory minimum sentences, which disproportionately shift sentencing powers into the hands of the legislature and the executive.³⁴⁹

The High Court's decision in *Dodo* was appealed to the Constitutional Court,³⁵⁰ where it was held that the statement in the High Court that the imposition of the most severe punishment fell within the exclusive prerogative and discretion of a High Court did not correctly reflect the law. In addition, it was also held that the separation of powers under the Constitution, although not intended as a means of controlling government by separating or diffusing power, was not strict. There was no absolute separation of powers under the South African Constitution:

When the nature and process of punishment was considered in its totality, it was apparent that all three branches of the state played a functional role and

³⁴⁴ *Dodo* paras 301d-302d.

³⁴⁵ Scalia 1989 *Univ of Chicago LR* 1175, 1180.

³⁴⁶ Scalia 1989 *Univ of Chicago LR* 1175, 1180.

³⁴⁷ *Treatment Action Campaign* para 99.

³⁴⁸ *Treatment Action Campaign* para 99.

³⁴⁹ Riley 2010 *Public Interest LJ* 303. See also Bowman 2005 *Stanford LR* 236.

³⁵⁰ *Dodo* para 594.

necessarily had to do. No judicial punishment could take place unless the person to be punished had been convicted of an offence which either under the common law or statute carried with it a punishment. It was pre-eminently the function of the legislature to determine what conduct should be criminalised and punished. Even here the separation of powers was not complete, because this function of the legislature was checked by the Constitution in general and by the Bill of Rights in particular, and such checks were enforced through the courts.³⁵¹

The Court's view is that sentencing is not exclusively the function of the judiciary, but that "all three branches of the state played a functional role".³⁵² Both the legislature and the executive share an interest in the punishment to be imposed by the courts.³⁵³ Yet, it is difficult to reconcile this decision of the Court with the historical rationales for the separation of powers and a court's sentencing role.³⁵⁴ This Constitutional Court decision lacks historical evidence in that the courts should have sentencing discretion, and that deciding sentencing was intended to be the role of a judicial body, as evidenced above. This Court's decision is also in contrast to our own post-1994 sentencing jurisprudence as held in *S v Kibido* that "the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court".³⁵⁵ The decision can also not be supported by common-law sentencing jurisprudence, as discussed in the paragraphs above.

There has also consistently been a lack of support for mandatory minimum sentences in South Africa. Even in the pre-Constitutional era, it was realised that mandatory minimum sentences need to be abolished from South African law. In the mid-1970s, Mr Justice Viljoen, the then president of The Commission of Inquiry into Penal System,³⁵⁶ helped develop the pragmatic argument that judges hold a unique position, and are the most suited to impose appropriate sentences.³⁵⁷ At the time, there was no South African Constitution that provided for the accused's right against cruel and unusual punishment. Yet Mr Justice Viljoen firmly rejected the imposition of the mandatory minimum sentences, premising his argument on the appreciation of the general purposes of sentencing, where he suggested that using deterrent

³⁵¹ *Dodo* paras 596a-h.

³⁵² Stewart *Fundamental justice* 151.

³⁵³ *Dodo* paras 596g-i.

³⁵⁴ Riley 2010 *Public Interest LJ* 307.

³⁵⁵ *S v Kibido* 1998 (2) SACR 213 (SCA) para 217g.

³⁵⁶ Viljoen Commission *Report of enquiry into the penal system* 5.1.4.1.7.

³⁵⁷ See also Deziel *The effectiveness of mandatory minimum sentences* 38.

sentences to stamp out the use of drugs was “from a retributive point of view, outrageously unreasonable.”³⁵⁸

The second argument put forward in favour of judicial sentencing discretion in South Africa was based on the principle of the separation of powers. This argument is believed to have gained prominence from the 1960s onwards as the government sought to severely criminalise any form of political resistance to its power.³⁵⁹ The primary pragmatic arguments for judicial independence were consequently supported by political opposing groups, which maintained that judges were not only in a unique position to select the appropriate sentence, but were also constitutionally required to do so.³⁶⁰ Judges further supported this approach to sentencing, as it was in the context of political cases that the imposition of mandatory sentences sparked the most controversy.³⁶¹ Against this background, where mandatory minimum sentences were closely associated with ruthlessly punishing political opposition, the Constitutional Court’s decision in *Dodo* is strange. This judgment is difficult to be reconciled not only with foreign or international sentencing jurisprudence, but mostly with our own. On the contrary, the High Court’s decision in *Dodo* is historically supported, not only by the Viljoen Commission report, but also by the medieval England’s judicial sentencing discretion approach, and the common law.

Even though the South African Constitutional Court has found in *Dodo* that mandatory minimum sentences are constitutional, the criticisms of Cameron J should be heeded. It is submitted that these penal laws are unconstitutional, and do not serve any legitimate purpose because they cannot deter crime, but result in more persons being jailed. This again results in overcrowding in prisons, with the domino effect of no or little rehabilitation occurring. Taking into consideration the Canadian principles of fundamental justice as to whether a disparity exists between the legislature’s objective and the means chosen to achieve it; it is deemed that the South African mandatory minimum sentences are inadequately connected to its objective, or it goes too far in seeking to attain its objective. Consequently, it can be concluded that our sentencing statute is unconstitutional for violating the principles

³⁵⁸ Viljoen Commission *Report of enquiry into the penal system* 5.1.4.1.7.

³⁵⁹ Van Zyl Smit *Mandatory sentences* 199.

³⁶⁰ Van Zyl Smit *Mandatory sentences* 199.

³⁶¹ Deziel *The effectiveness of mandatory minimum sentences* 39.

of fundamental justice as it bears no relation to, or is inconsistent with its legislative objective.

5.5 Conclusion

In this chapter, it was evidenced that the punishment for crimes committed is a unique and policy-laden exercise in many societies. Criminal punishments enable a society to deprive individuals of fundamental rights, such as life, liberty, and property. Certain standards and procedures of fairness must be followed before citizens can be subjected to such sentences. A trial by a jury and the separation of powers safeguard citizens against tyrannical governments by ensuring that the legislative, executive, and the judicial branch each perform a unique function in criminal proceedings, and that each has the means to check the authority of the other branches during such proceedings.

Historically, judges have had a broad discretion to formulate appropriate sentences for criminal offenders. This is also the position in common-law. However, in some countries, like in South Africa, the government has introduced mandatory minimum sentences. These sentences encroach on judicial discretion by setting a mandatory floor below which judges cannot sentence, even if to do so would be the appropriate sanction in the specific circumstances. Mandatory minimum sentences have, however, been supported for numerous rationales, for example, that they act as a general deterrent, and their role in ensuring that the justice system is more transparent, certain and fair. Yet, research shows that these punitive sentences have no deterrent effect nor do they reduce crime, instead they may increase the likelihood of recidivism.

As stated above, mandatory minimum sentences remove discretion from judges - whose decisions are public and reviewable - to prosecutors or the executive, whose decision-making is mainly beyond review. A fit sentence is accepted as one where the court, after considering a range of sentences imposed for similar crimes committed reasonably contemporaneously, pass a comparable type of sentence, depending on the individual circumstances of the case. Mandatory minimum sentences have pre-determined the baseline punishment, thereby preventing a

court from fully considering the contexts of the offence and the particular offender. These penal laws have been criticised for not being reconcilable with the principles of sentencing in countries such as Canada, the United States, the United Kingdom, India, Sri Lanka, Mauritius, and Papua New Guinea.

In the United Kingdom, the House of Lords has emphasised that only a court could determine the punishment of a convicted person, and this has been the position since 1688, as was required by the rule of law. Similarly, the Privy Council has also concluded, when interpreting the common law, that a non-judicial body cannot determine an appropriate punishment for a particular crime. In the United States, mandatory minimum sentences are criticised for preventing the judiciary from fully undertaking one primary task, namely, the weighing of evidence and the unique circumstance of the offender in each individual case with the purpose of producing just outcomes. Federal judges have criticised the mandatory minimum sentences as cruel, irrational and unjust. The United States Supreme Court Chief Justices and President Obama have disapproved of these sentences, and their effects on offenders.

In Canada, mandatory minimum sentences are also criticised for preventing the court from fully considering the circumstances of the offence and the offender. These pre-determined sentences have the potential to depart from the principle of proportionality in sentencing, as they underscore denunciation, general deterrence and retribution at the expense of a fit and proper sentence for the gravity of the offence. Supporters of mandatory minimums, conversely, state that these sentences set a stable range of sentences for an offence, which will permit people to know in advance that if a certain offence is committed, what the severity of the consequences will be. It has been submitted that this view is flawed as countless studies have shown no evidentiary basis to support it.

The Canadian Supreme Court has found that sentencing is exclusively a judicial function, and that mandatory minimum sentences violate the principles of fundamental justice. These penal laws are inconsistent with its legislative objective, and results in over-breadth. This view creates a potential constitutional argument against mandatory minimum sentences in jurisdictions where the separation of powers doctrine is recognised. It can be argued that a legislature that mandates to

the judiciary what the sentence must be for offenders convicted for particular offence violates the separation of powers. It is because a judiciary that is directed as to what punishment to impose fails to act as a check and balance on legislative overreach.

The South African courts, like the Canadian Supreme Court, have found that sentencing is pre-eminently a matter for the discretion of the trial courts. In South Africa, prior to 1994, mandatory minimum sentences have been criticised by the courts mainly on the premise that they weaken the courts' sentencing function to the level of a rubber stamp. After 1994, this view was confirmed by our courts and these types of pre-determined sentences were also found to offend against the fundamental principles of the separation of powers of the legislature and the judiciary. It has been suggested that sentencing is not exclusively a judicial task, but that the executive and the legislature also have an interest in the punishment of an offender. However, it has been shown that historically courts' control over the sentencing function has been wrestled away by the monarch. The development of the rule of law, and the creation of a system where each division of government would check on the powers exercised by the other branches specifically safeguard citizens against any abuse of power by their rulers or governments. The adoption of laws mandating mandatory minimum sentences has had severe effects in South Africa, not only in the unreasonable sentences mandated, and in the spiralling outcomes of overcrowding, no rehabilitation, and high recidivism, but also as these sentences affect judges' unique position to impose appropriate sentences. This, of course, muddles the separation of powers as well.

CHAPTER 6

RECOMMENDATIONS AND CONCLUSION

6.1 Summary

This chapter will draw some conclusions and attempt to put forward some answers to the research questions of this study. An endeavour will also be made to proffer proposals for comprehensive and extensive reforms on the doctrine of separation of powers, while addressing its current state and its weaknesses.

Chapter one of this thesis presented the background information to the research. The separation of powers' doctrine traced back to Montesquieu's work is premised on the reasoning that the government's powers, in order to safeguard citizens and their rights, must be divided into three branches. The idea was that the power should not only be focused in one person, but be shared amongst the government branches (as in paragraph 1.1 above). The research problem constitutes two distinct statements. The first question probes whether the South African Constitution provides sufficient safeguards in order to protect judicial authority and independence against encroaching conducts of the other government's branches. The second part of the research problem focuses on the question whether South African courts have absolute powers to rearrange South African laws and public policy to conform to their theoretical and dogmatic views (as in paragraph 1.2 above). It was seen that, amongst the different branches of government, the judiciary is unique, in that judges are selected, their powers' carefully upheld, but also in the fact that the judiciary is not elected by the citizens of a country. The fact that the judiciary is unrepresentative simultaneously stipulates and limits their power.

Chapter two presented the origins of the separation of powers doctrine, as well as the challenges experienced in its application. It was illustrated that as the role of the judiciary is to efficiently check and to enforce constitutional values that are counter-majoritarian, the courts' independence and morality must be protected, especially against the intrusion of the other two representative branches. This is corroborated by Hamilton (as in paragraph 2.2.1.1 above) who emphasizes that the power of

judging must be kept separate from the legislative and the executive; otherwise there will be no liberty.

The historical origin of the separation of powers doctrine revealed that the idea of rule by all of the people had merit, as independence and sound policymaking were promoted. This notion was first found in the mixed regime concept, where the governing power was separated instead of such power being consolidated into the hands of one social class. It was for this reason that Aristotle, Polybius, Cicero, Aquinas, and Machiavelli all highly rated the concept of a mixed regime. It was also in this concept of a mixed regime - with its components of checks and balances - where the separation of powers doctrine originated from (as seen in paragraph 2.2.2). These two concepts both share a common assertion that power corrupts, and absolute power tends to corrupt absolutely.

It was especially during the political beliefs of the seventeenth century that the notion of the mixed regime seemed to become prominent. In England, for example, many Englishmen thought that English system constituted a form of Aristotelian mixed regime. The three huge domains of the English social order were believed to be the King ('the one'), the House of Lords ('the few'), and the House of Commons ('the many'). All three domains were subject under the law to the constitution of King Edward, the Confessor. The 'king-people' unit was vested with supreme power, which included the power to make decrees. When these laws were accepted and enacted by Parliament, the King or his judges no longer had the authority to dispute, to remove or judicially review the laws.

Montesquieu, on his first visit to England, observed this governmental system, and consequently based his government constitutional structure, which is built on the rule of law, there upon. In his *The spirit of laws*, he illustrates the well-known three government branches, and states that government's authority must be divided amongst these political actors so that it would not be possible for any one section to determine its own authority. This would ensure political liberty, in that power will not be exercised arbitrarily, which constituted the ultimate purpose of his scheme. The justification for the separation of powers between different actors was to optimise freedom.

Because of his own background as a judge in France, Montesquieu did not acknowledge that part of English courts' function consists of deciding what legislation specifically may entail. He did concede that, under monarchies, laws might not be straight-forward and precise, and that judges consequently may be tasked with determining their true essence. Yet according to him, in more republican types of governments, judging is more fixed and certain. This idea has resulted in the principle of legal certainty, which is still a fundamental concept in British law. Legal certainty contains the notion that legal decisions are based on the letter of the law in determining the facts, and not on judges' private opinions.

Montesquieu's doctrine of separation of powers has been much debated, specifically his misinterpretation of the nature of the English common law, and how his doctrine is currently applied in modern-day democracies. It has been asserted that Montesquieu failed to take into consideration the concept of precedent in English jurisprudence. As stated in paragraph 2.2.1.2, Montesquieu – when composing his doctrine of separation of powers - failed to notice how the Westminster constitution really operated. When the Constitution of the United States of America was drafted, they faithfully followed Montesquieu's prescriptions of good government, without realising his mistake.

In the United States, the English mixed regime political system was replicated in the colonies from 1607 to 1776. However, the notion of the mixed regime ended with the end of feudalism. As the American Revolution advocated the equality of all people, it consequently rejected bequeathed aristocracy or class divisions. As shown in paragraph 2.2.3, all powers to govern were to be in the hands of the majority. After the English Civil War in the 1650s, attempts were made to find a suitable replacement for the mixed regime idea. The most important requirement was that the majority rule not be concentrated in only one person or institution, as a single entity could easily be influenced and corrupted. The resulting concept constituted the desirability to separate the legislative, the executive and the judicial powers as to their function. Jefferson fully supported this model of divided and balanced powers, and proposed that these governmental bodies should not go beyond their legal powers, and that they should check and restrain each other.

Courts were also to be graded, with the Supreme Court placed at the apex of all courts.

In paragraph 2.2.4, the Canadian separation of powers was discussed. The constitutional historical origin of this ideal in Canada has disclosed that the 1867 British North America Act (the founding Constitution for Canada) as well as the 1982 Constitution provided no sufficiently formulated and articulated separation of power doctrine. In spite of this impasse, Lamer CJ in the *Provincial Court Judges Reference* case, found that the separation of powers is a fundamental principle of the Canadian Constitution (as in paragraph 2.2.4). It was also the views of McLachlin J in the *New Brunswick Broadcasting* case, that this doctrine forms an integral part of Canada's constitutional jurisprudence. Albeit, the Crown and the executive were described as different branches of government, while the Crown is in fact, the executive branch. The development of the separation of powers by the Canadian Supreme Court has been marred by confusion since the Court's jurisprudence has not been consistent and comprehensive. Like in the South African jurisprudence, the development of this principle in Canada was left to the courts and not the legislature or the executive (as in paragraph 2.2.4).

In paragraph 2.2.5, the South African separation of powers – as found in Principle VI of the South African Interim Constitution – was discussed. In describing the nature of the South African constitutional separation of powers, the Constitution Court in the *Certification of the Constitution of the Republic of South Africa* case confirmed that this doctrine values the functional independence of the branches of government. Built into this principle are checks and balances in order to safeguard the branches from arrogating power from one another. It could therefore be said that the separation of powers doctrine actually foresees the possibility that one branch may intrude on the terrain of another. As such, there is in reality no complete or absolute separation of powers, only partial separation. Even against this background, this provision of the Constitution remains insufficiently formulated in its content and nature. In the Constitutional Court's decision of *De Lange v Smuts*, Ackerman J stated that the courts will cultivate a South African version of this principle as provided for in the Constitution, yet, until now, there has been no indication as to how this doctrine will be developed.

The doctrine of the separation of powers remains somewhat of a mystery in South African law. Though frequently cited by courts, and having clear and practical effect on the Constitutional Court's judgments, little or no explicit, concrete, distinctively South African content has yet been given to this concept. This has resulted in unpredictability in its application, and vigorous, at times, acerbic disagreement between judges on its application in specific cases. The confusion in the application of the doctrine was recently observed in the scathing dissent of Mogoeng CJ in the case of *Economic Freedom Fighters*, where the court's majority judgment was characterised as judicial overreach, and against the prescriptions of the separation of powers. In contradistinction, Froneman J deemed the majority's decision to be simply that of interpreting the Constitution, and providing parliament guidance in order to achieve its constitutional duty. Competing perspectives on the application of this doctrine have, in this way, frequently dictated the outcomes of courts' decisions.

The lack of jurisprudence clarifying this doctrine has resulted in public confusion of the role of key state institutions. It is held that if the judiciary cannot fully comprehend the concept, or convey its application in simple and clear terms, members of the public will certainly not understand its meaning and use. One of the unfortunate consequences of the Constitutional Court's decision to slowly and incrementally develop a distinctively South African separation of powers doctrine over a period of time is therefore that its content is not clear to anyone - legal elites included - while, in the course of time, this process unfolds. Without a degree of clarity on the content of this doctrine and its conceptual basis, the public is without any guidance as to whether Mogoeng CJ's assertion that his colleagues' decision constitutes an overreach, and an undemocratic encroachment on the functional sphere of parliament, is correct or not. Lack of clarity on the content of this doctrine routinely leaves crucial state institutions, for example, the judiciary, the Public Protector and the Human Rights Commission vulnerable to critiques of overreach or interfering in the affairs of parliament. Instead of assisting in clarifying the separation of powers doctrine, courts often play a role to perpetuating confusion about it. As stated at the end of paragraph 2.2.5, this doctrine seems to appear and disappear in South African courts' jurisprudence at their convenience, and to satisfy their whims.

This state of uncertainty and lack of clarity surrounding our separation of powers doctrine may also undermine the court's exercise of its judicial review role under section 172 of the Constitution. Similar to the puzzlement regarding the nature and content of the separation of powers; the nature and content of judicial review also remains unpredictable and undecided, not only to the courts, but to other state institutions as well. These doubts occur mainly as a result of the insufficiently formulated separation of powers doctrine in the Constitution. The South African constitutional separation of powers scheme entrusts the judiciary with the role to defend the Constitution, and citizens are empowered to look to the courts to protect their constitutional rights. The Constitution also entrusts the courts with constitutional powers to decide on constitutional matters, and to declare law or conduct of other government branches inconsistent with the Constitution invalid. The courts seem to be the only government branch vested with the powers to review conducts and laws enacted by the other branches of government, and to determine their constitutional validity. While this is the most influential role vested on the courts; the nature, content and the application of this power within the context of the separation of powers doctrine as illustrated in the *Economic Freedom Fighters* case, still remains unclear in South African jurisprudence.

Such challenges in the separation of powers doctrine are not only experienced in South Africa, but also in other jurisdictions, as pointed out in paragraph 2.3. In the United States, Marshall CJ stated in the United States Supreme Court case of *Marbury v Madison* (1803) that it is unequivocally the jurisdiction and duty of the judiciary to say what the law is. This is termed judicial review, which he defines as the authority of a court to determine whether any law, any authoritative law-based undertaking, or any other government official's action is unconstitutional, and thus unenforceable. Judicial review is objected to by many critics as it entrusts unlimited power to the courts to change laws. These laws were enacted by the elected representatives of the people; thereby indirectly nullifying the choice of the majority.

Judicial review has also been criticised on two main grounds, namely, firstly, that judicial review does not protect rights better than democratic legislatures. The second reason is based on the assertion that judicial review is democratically unlawful. Supporters of judicial review again argue that the authority of the majority

is limited through courts that consigned with the power to protect individual rights, so as to make democratic self-government possible. Chilton and Versteeg maintains in paragraph 2.3 that whether one is for or against judicial review –whether weak or strong - the challenge still is that courts have limited capacity to protect constitutional rights, as there is no guarantee that governments will continually respect constitutional rights. As illustrated in Chapter two, the application of judicial review in the *Dred Scott* case led to some doubts being raised against the trust placed in the courts to truly protect constitutional rights, and at the same time, the resultant uncertainty and limitations embedded in this principle. These doubts also raise concern in South Africa as regards judicial review, as its nature and content are not adequately outlined in section 172 of the Constitution. The question to be asked is whether South Africa - with its past political history – should not learn from the *Dred Scott* decision. Should the courts be entrusted with the power to interpret and apply a principle which has not been sufficiently formulated by the people’s elected representatives in the Constitution?

In Chapter three, the role of courts in developing public policy and criminal offences were probed. Sections 39(2) and 173 of the Constitution provide for the development of South African law by the courts through the interests-of-justice framework. These constitutional provisions not only assign the courts with judicial law-making powers, but they further provided courts with unrestrained and not fully formulated judicial law-making powers, as the content and nature of the separation of powers doctrine remain unclear. It is difficult to discern whether certain laws or conducts are invalid, and are in need of the courts’ reform or development through the interest of justice framework when the text of the Constitution does not clearly proscribe this function, and does not provide the nature and content of the interest-of-justice framework. Scalia questions (in paragraph 3.1) how judges are able to discern what the interest of justice could possibly constitute when developing the laws, and whether this is an ability which the other political arms of government lack – a secret sort of knowledge?

While it is acknowledged that courts do make laws, the foundation of the present-day governments would be truly weakened if the extent of the legitimacy and procedure of judicial law-making remain incomprehensible and vague. While the

courts are acknowledged by some as the major entity amongst the government departments in making law, it is more desirable to leave the process of developing the common law in the hands of the legislature. There is much controversy on whether the development of the common law by means of dispute-based practice is the appropriate approach to formulate legal rules which predictably and meaningfully prescribe future legal affairs within a particular area of law. It is submitted that courts may lack reliable information about the broader-based facts of society that might justify a change of law.

While there are views in support of judicial law-making in the United States, O'Scannlain argues in paragraph 3.2.1 that judicial law making is a trend that is troubling, unconstitutional and threatens constitutional democracy. Litigants tend to increasingly turn to the judiciary in order to achieve political ends. This is done because, instead of persuading a bicameral legislature and other elected officials such as the President and the electorate constituencies, these litigants must only focus on one judge in a trial, or two appeal court judges, or five High Court judges – of which not one of them are democratically elected.

It is argued that when courts exercise the role of the legislature, they encourage the unreasonable acts of political litigants. In showing their willingness to legislate, courts open up the floodgates for these litigants and interest groups to initiate law suits, as litigation is less costly and easier than involving the democratic process, as explained above. In this manner, democracy is undermined and denigrated. While political actors can be held answerable for their acts by the electorate, judges cannot be held responsible for their decisions. Consequently, it is of the utmost importance that when policy changes are sought after, the country's democratic processes should be engaged. Courts should restrict themselves to performing their allocated constitutional function. Furthermore, as seen in the United States Supreme Court case of *Obergefell v Hodges*, the personal opinions of judges should not feature in the judicial law-making process. Such decisions based on an individual's beliefs are not only in breach of the rule of law, but is also illegitimate.

In Canada, the judicial power to effect judicial legislation or invalidate legislation is embodied in section 52 of the Canadian Constitution Act. Similar to the situation in the United States, these issues present confusion in Canada. There seems to be a

lack of a coherent remedy to invalidate laws, as the nature and content of judicial law-making remain unpredictable and unclear. McLachlin argues in paragraph 3.2.2 above that Canadian courts continue to perform an essential and fundamental role in developing and transforming the law - which entails law-making - under the common law. It is not only the elected representatives that can legitimately exercise power on behalf of the people, since the Canadian Charter does not create a constitutional democracy that confines total power to the elected representatives. Courts find its judicial law-making role within this context.

The Canadian Supreme Court has, as a result of these constitutional powers, changed the legal definition of, for example, the word 'spouse', and legalised same-sex marriages, a role that could have been accomplished by the legislature. However, in the *Newfoundland (Treasury Board)* case, in a unanimous decision, judicial law-making as applied by the Canadian Supreme Court was criticised as amounting to unwarranted intrusions onto the sphere of government's elected branches. Hence, the Canadian jurisprudence shows that Canadian judges hold divergent views regarding the nature and the content of the Canadian judicial law-making jurisprudence as provided in section 52 of the Canadian Constitution, as lacking sufficient details in its nature and content. This section contains similar wording to that found in section 173 of the South African Constitution, consequently, it is expected that a parallel problem will surface in this jurisdiction.

Section 173 of the South African Constitution provides for the development of laws through the interest-of-justice framework. This framework is stipulated as a discretion used in regulating the admission of hearsay evidence under the Law of Evidence Amendment Act. According to the Law Reform Commission of Hong Kong, this open-ended discretion in South African law (i.e. admitted in the interest of justice) is a point of great concern. Apprehension was also expressed regarding the United Kingdom's Criminal Justice Act, which also makes use of the interest-of-justice test in the admission of hearsay evidence. These tests are not regarded as a sufficient safeguard against the dangers of hearsay, for, as in the South African model, this discretion is too subjective and open-ended to guard against the perils of hearsay evidence. It can thus be argued that the interests-of-justice framework as a tool used to develop laws under the South African Constitution lacks sufficient

formulation as to its content and its scope. It also permits the use of open-ended personal value-judgments, and may thus result in unpredictability and uncertainty in South African law.

This contention was confirmed in paragraph 3.2.3, where it was shown that judicial law-making in South Africa has resulted in the development of the definitions of criminal-law offences, same-sex marriages legalisation, as well as providing how policy issues are to be protected and formulated by the courts. For example, in the *Treatment Action Campaign*, it was held that there are no clear boundaries that separate the roles of the legislature, the executive, and the courts from one another as regards policy making. Courts, in this case, were allowed to amend a policy. However, in the *Soobramoney* case, which also dealt with government policy and budgetary implications, it was stated that government was the appropriate branch to handle such policy issues; and that courts will be hesitant to intervene in government's *bona fide* decisions.

The Constitutional Court's jurisprudence in the protection of socio-economic rights, and its judicial-law making role in the *Treatment Action Campaign* and *Soobramoney*, has not been consistent in formulating policy in the protection of these rights. In the *Treatment Action Campaign* case, for example, part of the government's argument was premised on budgetary constraints. This, it is submitted; was correctly dismissed by the Court, because, as tendered, there was an urgent need to prevent any possible loss of further lives. This same line of argument could also have been relevant in Mr Soobramoney's matter in order to prolong his life through renal dialysis. Yet, as he had no organised public campaign demonstrating on his behalf as in the *Treatment Action Campaign* case, the Court arrived at a different decision.

In Chapter four, the concepts of judicial deference and judicial restraint were elucidated. In paragraph 4.2, judicial deference was explained as constituting either respect or submission to authority. Most courts, even in South Africa, prefer an interpretation of deference as respect. Judicial restraint, again, basically entails the non-interference of personal views in judging cases.

The courts in the United States follow a two-step process (as described in paragraph

4.2.1) in reviewing a federal agency's interpretation of statutes, the so-called *Chevron* deference-doctrine. Courts must first examine whether the question at issue was distinctly addressed in the statute, as drawn up by the legislature. If this is found to be so, both institutions are bound by the legislature's statutory directive. If the specific question at issue is not directly addressed in the statute, the second step must be followed; where the court merely asks if the interpretation of the statute by the agency is acceptable. If the agency's interpretation of the statute is reasonable (although perhaps not the best interpretation), the court must uphold this interpretation.

It is as regards this second phase of the test that the constitutionality of the *Chevron* deference has been queried. Most critics in the United States disapprove of the *Chevron* deference practice, as it is believed to undermine the courts' obligation to check on the political branches, and hands judges' ability to interpret judgments to other agencies. This was also the conclusion of Thomas J in *Perez v Mortgage Bankers Association*. According to him, the Framers of the Constitution took into consideration that legislation may sometimes be ambiguous, and that judges then had the power to resolve these ambiguities. Judicial deference permits executive bureaucracies to consume much core judicial power, to be concentrated in federal power which is unconstitutional. It is also argued that because the legislature does not have the power to allocate to agencies the right to interpret their regulations, they consequently need the courts to defer to their interpretations.

It is also a challenge for the United States' courts to establish appropriate boundaries as to their constitutional function. Some critics maintain that the courts' lack of democratic legitimacy should pressure judges into exercising restraint when dealing with the elected branches' decisions on fundamental rights. The manner in which restraint is exercised by the courts directly impacts on the degree to which the political branches are restricted by these rights, and the extent to which the rights' claims are recognised by the courts. In this regard, judicial restraint presents a quandary to the courts as their institutional limitations at times necessitate judicial restraint. Courts have a level of discretion as to their application of norms. They can apply these norms strictly or leniently. It is mainly by means of the lenient approach that the legislature's statutes are approved of as complying with the level required

by the norm in question. The concept of deference falls under this level of discretion. While there are divergent views questioning *Chevron* deference, this decision has not been overruled by the United States Supreme Court, and still provides the authority in the United States deference jurisprudence.

Paragraph 4.2.2 considered the Canadian perspective on judicial restraint and deference. The Canadian Constitution is broadly drafted in - what is considered by some – as vague language. This has resulted in judges being entrusted with a measure of discretion in its interpretation. Still, although judges have much leeway in the constitutional interpretation, they do not possess the power to arbitrarily strike down laws, or to subject the Constitution to their personal views. Judges are obliged to first to take part in a ‘dialogue’ with the legislative branch. This notion of a democratic dialogue demonstrates the necessary respect the judiciary must show in respecting the roles of the other government branches. This process was exemplified in *Vriend v Alberta*, where it was held that courts are required to speak to the legislative and executive branches when reviewing legislative enactments and the executive decisions to safeguard constitutional validity. The response of the legislature to the courts constitutes a dialogue amongst the different branches. By means of this dialogue, the courts ensure that they do not to second-guess their judgments in areas where they might be ill-equipped to decide upon.

Some factors make this dialogue possible, namely, section 33 of the Charter provides the power of legislative override. The legislature is empowered to re-enact laws that has been struck down by the courts. The legislature can also include an ‘express notwithstanding clause’ into a statute, which would result in shielding the legislation from judicial scrutiny. Furthermore, section 1 of the Charter provides that a right can be limited with reasonable limits. By means of this limitation analysis courts are permitted to contemplate as to on how the affected legislation could be improved. There are also some rights in the Charter that are internally qualified, which allow the courts to work out other measures that could fulfil the constitutional requirements. Lastly, the right to equality as guaranteed in section 15(1) of the Charter can be satisfied by way of numerous remedies.

Yet, despite these factors listed above which are believed to be making dialogue possible, concerns are raised regarding the inconsistent application of the

reasonableness standard by the Canadian Supreme Court. In the *Dunsmuir* case, the Supreme Court applied the reasonableness review, but it conveyed mixed messages. The court adopted Dyzenhaus's principle of judicial deference which requires the court to give respectful consideration of the reasons offered by an administrative decision-maker. But the court also added to this principle by insisting that reasonableness is by and large depended on the existence of intelligibility, transparency and justification within the decision-making process. While judicial deference is exercised by the Canadian Supreme Court through the concept of dialogue between government branches, its limits and content remain unclear and contradictory, and this seems to result in an uncertain and inconsistent jurisprudence.

Similar to the Canadian Supreme Court, the South African Constitutional Court (as in paragraph 4.2.3 above), has exercised both judicial restraint and deference as premised on the separation of powers. This has included not interfering with decisions by other government branches, when it found such decisions to be in line with the Constitution. The respect shown for the domains of other government branches reflects a central characteristic of the separation of powers doctrine, as well as the idea of judicial restraint. The content and nature of South Africa's deference doctrine is still unclear, which has led to O'Regan J in the *Bato Star* case to employ Dyzenhaus's notion of deference as respect. Her conclusion in this case thus was that our deference jurisprudence would entail that the courts give respect to an administrative agency's decision, depending upon the nature and the identity of the decision-maker. There are, however, many contradictory views on the origins of South Africa's deference idea. According to O'Regan J, the courts exercised deference during apartheid, and consequently they exhibited a passive attitude under the authoritarian state powers. O'Regan J also made it clear in *Bato Star* that deference, although not clearly articulated in the Constitution, does form part of the South African constitutional jurisprudence. It is generally accepted that the South African notion of judicial deference emanated from Canada. Yet some critics, such as Wallis, still have reservations as to whether we need such a foreign concept, as it adds nothing to our judicial system. The borrowing of foreign concepts may also create problems when a rule is torn from its domestic roots and transplanted into foreign soil.

The other problem presented by the application of deference in South Africa seems to stem from the fact that its nature, scope, content and limitations are not clearly formulated or defined. These sentiments are evident in Ackermann J's reasoning in the case of *National Coalition for Gay and Lesbian Equality* where he states that it is impossible to formulate the concept in general terms, as deference will be determined by the facts and circumstances of each case. Inconsistency in the application of deference has also led to different outcomes in judgments, as seen in the *Soobramoney* and *Treatment Action Campaign* cases. Both these cases involved government's policy and budgetary implications, yet in *Soobramoney*, Chaskalson JP dismissed Mr Soobramoney's claim for his right not to be refused emergency treatment under section 27(3) of the Constitution, while the claim in *Treatment Action Campaign* was successful. In *Soobramoney*, Chaskalson justified his decision by stating that health care policy and funding decisions should be made by the responsible provincial government, and that courts will be 'be slow to interfere' with government's decisions if they are *bona fide*. While the court exercised deference, its limits and content were not comprehensively formulated or defined by the court. For example, it can be argued that it did not comprehensively articulated or determined the circumstances in which a court would 'be slow to interfere'. Conversely, in *Treatment Action Campaign*, it was contended that courts can or should make orders that have an impact on government's policy. The court, in this case, did not consider the making of policy as the prerogative of the executive only. The view was advocated that courts can make orders that have the effect of requiring the executive to pursue a particular policy, as there are no clear lines that separate the roles of each of the branches of government. Thus, deference played no role in this court's decision, as the court ordered government to provide health care, which had a significant impact on the government's health care policy and budgetary implications. It is against this background that deference and judicial restraint as exercised by South African courts remain unclear, and impossible to put into words, which may result in undermining the courts' constitutional role in its application.

The last chapter of this thesis, Chapter five, contemplated mandatory minimum sentences. In paragraph 5.1, it was explained that the separation of powers act as a safeguard to ensure fairness in sentencing. Historically, judges deciding a

punishment had been regulated through a broad judicial discretion. However, mandatory minimum sentences create a floor below which judges cannot sentence. It is believed that mandatory minimum sentences encroach on judge's sentencing discretion by the creation of this mandatory floor. The origins of judicial discretion in sentencing was shown in paragraph 5.2 to be the Magna Carta, which was the first English statute which limited the king's control over judges and the law, and, thereby resulted in judges exercising judicial discretion during sentencing. However, the concept of proportionality in sentencing has ancient Biblical roots, which is also referred to in the Magna Carta. In feudal England, sentencing was arbitrary, and judges employed certain mechanisms through which they were able to use their discretion in order to avoid the prescribed sentence.

The determination of sentence in criminal matters has always been deemed as pre-eminently a matter for the discretion of the court, after taking into account certain factors when imposing sentence. However, it seems that there have always been cases where attempts to usurp this function of the courts has been made by non-judicial bodies, as illustrated in paragraph 5.3. In *Liyanage v The Queen*, for example, the United Kingdom's Privy Council found that legislation forcing judges to sentence persons convicted in an aborted coup to a minimum mandatory jail term of 10 years' imprisonment was unconstitutional. The court reasoned that such type of legislation will allow the legislature to wholly absorb the judiciary's power. This reasoning continued when, in 2003, the House of Lords questioned the constitutionality of mandatory minimum sentences. It was held that this sentencing practice violated Article 6 of the European Convention (guaranteeing the right to a fair hearing before an independent and impartial tribunal), because sentencing was the court's duty. Such sentencing practice was difficult to be reconciled with the separation of powers principle and the rule of law, because only a court can decide the appropriate punishment of a convicted person. Similarly, the European Court has held that mandatory minimum sentences deprive defendants of the opportunity to place mitigating factors before the court, and consequently, these sentences are much more likely to be grossly disproportionate.

In the United States, a sentencing commission was specifically established in 1976 in order to formulate national sentencing guidelines, as seen in paragraph 5.4.1.

Although the legislature retained its role of defining criminal conduct, this branch could now also create statutes that establish pre-determined terms of punishment for certain criminal offences. These mandatory minimum sentences furnished prosecutors with the decision-making role, while at the same time restricting the judiciary's discretion. Mandatory minimum sentences disqualify judges from imposing sentences lower than that mandated in the relevant statute.

These sentences are criticised in the United States because they enable the legislature to improperly use their power to establish definitive sanctions for crimes, and relegate the courts' role to an affirmation of the process. This has been described as a trial by legislature. It is submitted that such statutes violate the separation of powers doctrine. These sentences are seen to benefit only the prosecutors, the executive and the legislature - to the exclusion of the judiciary. Sentencing regimes that are not harsh on crime cannot win votes for legislators. This politicisation of the criminal law results in individual justice being discarded. Federal judges have felt obliged to enforce the standardised mandatory minimum sentences in many cases. There has especially been a backlash by judges when imposing these sentences on juveniles based on the crime, and not on their culpability or other factors. For example, in the United States Supreme Court case of *Miller v Alabama*, it was noted that under this type of sentencing regime, every juvenile will receive the same sentence, whether the child is the shooter or the accomplice, and irrespective of whether the child is from a stable household, or from a chaotic and abusive one.

While many judges disapprove of these sentences, the United States Supreme Court, in its decision in *Misretta v United States*, held that the portion of the Sentencing Reform Act of 1984 establishing the Sentencing Commission did not violate the separation of powers. The Sentencing Commission was entrusted with the power to decide and formulate sentencing, even though these powers were historically considered a judicial task. Consequently, according to United States Supreme Court's jurisprudence, these sentences are valid and do not violate the separation of powers doctrine.

In Canada, mandatory minimum sentences are imposed for numerous offences (as shown in paragraph 5.4.2). In justifying the practice of mandatory minimum

sentences, it is argued that these sentences create certainty in punishment, they have deterrent effect, they condemn and incapacitate offenders, and enhance public confidence in the criminal justice system. Contrary to these optimistic views, it is submitted that these sentences do not deter offenders. This mistaken belief serves as a costly distraction which circumvents the need to examine the underlying causes of criminal behaviour.

Similar to public opinion in the United States, it is alleged that mandatory minimum sentences remove any discretion from courts in imposing sentence, and transpose this discretion to prosecutors who lack transparency in their decisions. This is discouraging as judges' decisions are public, and subject to review on appeal. It is also argued that these sentences breach the four principles of fundamental justice in Canada, namely, laws must not be vague, overbroad, arbitrary, or grossly disproportionate in its effects. The first issue concerning mandatory minimum sentences is whether there is mismatch between the legislature's objective and the means chosen to achieve it. It is also asserted that these sentences are arbitrary or overly broad. A law will be overbroad when the law goes too far, and interferes with conduct that bears no connection to its objective. Legislation that directs the judiciary as to what punishment to impose undermines the fundamental constitutional idea of checks and balances between the political branches. It is not the function of the judiciary to merely rubber-stamp the decisions of the political branches on punishment. A legal system wherein a judge is a prescribed pre-determined sentence before hearing the facts is generally criticised as not forming part of Canadian criminal justice system. Despite these criticisms, mandatory minimum sentences remain an integral part of Canadian law, as justified by the government.

In paragraph 5.4.3, mandatory minimum sentences as applied in South Africa are discussed. Section 51 of the Criminal Law Amendment Act provides mandatory minimum sentences for the more serious crimes. The intention of such sentences is to alleviate serious crimes. This legislation strictly prohibits judges to determine the length of imprisonment period for offenders for certain offences. Section 51(3) permits judges to depart from the mandatory minimum sentences only if there are 'substantial and compelling' reasons why a lesser sentence should be imposed. The

words 'substantial and compelling' have been subjected to many interpretations, however, Stegmann J holds that they afford the sentencing court no discretion. Courts have disapproved of mandatory minimum sentences mainly on the assumption that they weaken the courts' normal sentencing function to the level of a rubber stamp. However, it has also been claimed that no historical evidence exists supporting the idea that sentencing belongs to the judiciary alone.

Mandatory minimum sentences are justified in South Africa based on four possible rationales, namely, the threat of incarceration deters potential criminals from committing crimes; incarceration incapacitates offenders; incarceration can rehabilitate offenders, and incarceration is retributive, as imprisonment is seen as proof of justice being done. The objectives of this sentencing regime are disputed on numerous grounds. For example, in the decision of *Makwanyane*, the court held that mandatory minimum sentences do not have a deterrent effect. It is also assumed that longer prison sentences reduce crime by incapacitating criminal offenders. Still, it has been shown in this section that statistics show that higher number of incapacitation and longer sentences may not reduce crime.

The third justification of rehabilitation, as also outlined in the Correctional Services Act, is also disputable as the objectives of mandatory minimum sentences apply contrarily against such laudable goal. This is because an offender serving a long-term sentence or life imprisonment becomes a prisoner who experiences a loss of hope, and who is cut off from all community ties and relationships. These types of prisoners suffer from insecurities, and are more susceptible than shorter-term prisoners to social and psychological problems, exacerbated by an unspecified date of release. As observed by Fagan, proper rehabilitation is lacking in South African prisons. These institutions are too overcrowded, which makes it impracticable to have rehabilitation programs. Instead, prisons turn into places where criminality is nurtured.

Retribution, as the final rationale for justifying incarceration, dates from the Old Testament principle of an eye for an eye. Criminals who commit crimes are morally blameworthy, and deserve to be punished. This hunger for revenge has been responsible for the cruellest of punishments in history. Mandatory minimum sentences can thus be criticised for promoting revenge as an ideal of sentencing.

Shongwe JA in *Kruger* discouraged such notion, and declared that the punishment of a convicted felon should not be equated to revenge. According to the South African Constitution, the idea of retribution can also not be justified as the ideal on which to premise our criminal punishments. It can also be queried whether retribution as justification for incarceration under the mandatory minimum sentences is an adequately connected law to its constitutionally permissible objective, or does it go too far in some sense in seeking to attain it? It is submitted that it will be difficult to find reasons in support of such law.

The constitutionality of mandatory minimum sentences was questioned in *S v Dodo*, as to whether this sentencing regime violates the separation of powers doctrine. Many other similar cases, such as that of the House of Lords and the Privy Council, have previously judged that sentencing is the task of the judiciary, and that mandatory minimum sentences cannot be reconciled with the separation of powers doctrine. The same cannot be said regarding the Constitutional Court's decision in *Dodo* where this sentencing regime was found to be constitutional.

Hence, in this study serious challenges have been highlighted in the content and nature of our judicial law-making which makes use of the interest-of-justice test. The shortcomings and deficiencies of this test have been revealed, and the lack of clarity which contributes to this state of confusion in the application of our separation of powers doctrine has also been shown. Questions have also been raised regarding the rationales and constitutionality of the mandatory minimum sentences, especially in South Africa, where a non-judicial body decides appropriate punishments.

6.2 Recommendations

After researching the interpretation and application of judicial law-making in South African courts, and comparing how this principle is treated in jurisdictions such as the United States and Canada, the following recommendations can be made:

6.2.1 Development of the separation of powers doctrine

The separation of powers doctrine – its nature and content – must be developed through constitutional amendment of the Constitution by the legislature since the

“over time” development by the courts has failed, and resulted in lack of clarity and uncertainty on the application and content of this principle. As shown above, the South African separation of powers notion - because of South Africa’s British colonial history - is based on the British system (Westminster system), where there is no distinct separation between members of the executive and the legislature. The Canadian Constitution which also has strong roots in the Westminster parliamentary system has also adopted this system. In the United States, the Incompatibility Clause of the United States Constitution, Article 1, Section 6 forbids members of Congress (legislature) from holding any executive or judicial offices. This latter model is recommended for South Africa because it creates a comprehensive and distinct composition of the three agencies of government.

6.2.2 Development of judicial review

The nature and content of judicial review as in section 172 of the Constitution must be developed in order to give more clarity as regards courts’ powers. The concept must fully account for the separation of powers doctrine and the rule by the majority, and outline the extent of this judicial authority. It should also be emphasized on that it should be exercised very rarely, and in most instances, courts should refer challenged legislation to the legislature to correct. There is the understanding that when a court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the people.

6.2.3 Determining the nature and content of judicial law-making

The nature and content of sections 173 and 39(2) (judicial law-making) must be set out through a constitutional amendment. It should not be the norm that courts exercise this power. Legislation must be clear on the use of this power as a last resort after questioned legislation was referred to the legislature to correct. Its scope should be sufficiently formulated, taking into account that the legislature is the government branch that is entrusted with law-making. The Canadian Supreme Court in *Newfoundland (Treasury Board)* found that judicial law-making amounts to undue incursions into the public domain of the elected branches of government. The interest-of-justice test was rejected by the Hong Kong Law Reform Commission as

a tool to develop laws. This should also be abandoned through constitutional amendment. Instead, a more reliable and predictable tool must be developed that would be used to effect judicial law-making. The nature and content of this new tool should be sufficiently formulated by the legislature.

6.2.4 Regulating the nature and content of judicial restraint and deference

Constitutional amendments must be considered regulating the nature and content of judicial restraint and judicial deference. The meaning and extent of these principles must be clearly formulated by the legislature. There is confusion on whether these concepts, especially judicial deference, form part of the South African constitutional jurisprudence, and there is also lack of clarity on their application. Ackermann J's view that it is difficult to establish when deference could be applicable, and the effect of this lack of clarity or sufficient formulation of this principle has been evident in the discussion of the South African jurisprudence in this thesis.

6.2.5 Abolishment of mandatory minimum sentences

It is disputed that mandatory minimum sentences are well-informed governmental policies. It can be argued that they are not a rational government's policy since they seem to amount to a law that is inadequately connected to its objective, or in some sense goes too far in seeking to attain it. When measured against the Canadian principles of fundamental justice, it cannot be said that it is a law that does not go too far and not interfere with some conduct that bears no connection to its objective. All the four grounds for our justification for these sentences have been questioned for being legal principles that goes too far in seeking to attain its objective. There were also questions raised on the constitutionality of a sentencing regime that mandates a non-judicial body to decide punishment. These mandatory minimum sentences were questioned as not to being reconcilable with the separation of powers doctrine as they violate this doctrine in that they permit a member of the executive to decide the minimum sentence that a specific offender has to serve, which is the task of the judiciary, and has been the case since at least 1688. Cameron and Fagan' views on these aspects should be heeded and the mandatory

minimum sentences be abolished. This legislation should be replaced by the legislature after comprehensive public reviews that would be tough on crime, and yet still leave the trial court with a broad discretion to decide punishment. Such discretion would be exercised in public, and can be subject to review.

6.3 Conclusion

This study on the legitimacy of judicial law-making in South Africa strived to answer pertinent research questions raised under Chapter one. A comparative evaluation was employed intending to provide more and different perspectives on the concept of judicial law-making in order to appropriately appreciate its interpretation and application in South African criminal law. In conclusion, it can be stated that the research questions of this thesis have been answered, and the hypotheses proved.

- While the origins of the separation of powers can be traced back to the Bible, Montesquieu's work titled *The spirit of the laws*, is widely accepted as this doctrine's origin in most modern democracies, including South Africa, (as in paragraph 2.2).
- The protection of citizens' rights and political liberty were the core factors warranting the formation of this doctrine (as in paragraph 2.2.1.1). While stressing the rationale for this doctrine, Madison noted that it would be a device necessary to control abuses of government and that "if men were angels, no government would be necessary" (see paragraph 2.2.3).
- Separation of powers connotes the idea that government's powers must be divided into three branches, namely, the executive, the legislature, and the judiciary. Furthermore, the power should not be entrusted in one person, but be shared amongst government's branches in order to safeguard the citizens against tyranny and also ensure that their rights are protected (see paragraph 1.1).
- The main objectives of this ideal were the safeguarding of citizens' basic fundamental rights since it divides powers between different government's

branches. Montesquieu and Madison thought that the separation of powers' main objective was to restrain authoritarianism and to protect freedom and independence (as in paragraph 2.2.5). This assumption was partly premised on the belief that power entrusted to one person might lead to tyranny (paragraph 1.1).

- The origin concept of separation of powers was intended to safeguard basic fundamental rights and ensure a system where there would be checks and balances which at the same time would ensure that the ruler is held accountable to the citizens. While this doctrine remains ill-defined and its scope remains not clearly formulated, the doctrine remains relevant during this century because it can assist in ensuring that governments are held accountable to the electorate, and its checks and balances can also assist in preventing one government branch from usurping power from another. This was the understanding of this doctrine in the Constitutional Principle VI of the South African Interim Constitution (as in paragraph 2.2.5).
- According to Ackermann J in the *Dodo* case, separation of powers cannot be absolute, this were also the views articulated in the Constitutional Principle VI of the South African Interim Constitution where it was noted that no constitutional scheme can reflect a complete separation of powers (see paragraph 2.2.5).
- South African apply the interests of justice test when developing laws under the provisions of section 39(2) and 173 of the Constitution. This is a legal framework for the development of law which is used the admission of hearsay evidence under the Law of Evidence Amendment Act in South Africa and the Criminal Justice Act in the United Kingdom. This test has been found to be open-ended and prone to contributing to uncertainty in the law by the Hong Kong Law Reform Commission and the Irish Law Reform Commission, as in paragraph 3.2.3). Amongst the concern regarding this test, is the fact that its scope and its boundaries are not sufficiently formulated in the Constitution. Hence, the current South African legal judicial law-making framework seems to lend support to the criticism raised by some critics of an unrestrained separation of powers doctrine, namely, that "if both the courts and the

legislature make law, how can we distinguish between them?” (see paragraph 1.5.2). Furthermore, it was determined that fundamental social policy and law-making processes are not to be decided by the electorally unaccountable officials since it results in illegitimate judicial law-making processes (as in paragraph 3.2.1).

- Under the common law, the court had the power to determine the punishment of a convicted person. The CLAA is criticised in removing the courts’ sentencing discretion, and giving it to prosecutors whose decisions are not subject to review. The CLAA is also criticised for pre-determining a sentence before the judge could hear the facts. It is assumed that if a punishment is to fit a crime, there can be no pre-determined sentences since criminal events are not pre-determined (as in paragraph 5.4.2). It should be noted that the United States Supreme Court in the *Booker* case has found that the mandatory minimum sentencing guidelines were unconstitutional as they violate the accused’s right to a fair trial as provided by the Sixth Amendment because they allow a court to take into account facts beyond those reflected in the jury verdict or admitted by the defendant (as in paragraph 5.4.1).
- Ackerman J’s vision that over time South Africa’s courts will develop a distinctively South African model of separation of powers is doubted since it remains questionable whether it has been or will be realised. There is still confusion surrounding the scope and the meaning of this doctrine, and its application by our courts, as was evident in Constitutional Court’s decision in the *Economic Freedom Fighters* case (as in paragraph 2.2.5).
- The South African Constitution under sections 39(2) and 173 seems to give courts unrestrained and ill-formulated powers to make laws by making use of what has been found to be an open-ended unpredictable test, namely, the interests of justice test (paragraph 3.2.3). There are divergent views on the scope and boundaries of this constitutional power, and its application by the courts has been unpredictable and uncertain.
- As was disclosed in paragraph 2.2.5, our current constitutional framework fails to guarantee the original concept of separation of powers. For example,

members of the executive are also members of the legislature (Parliament), see section 86 of the Constitution. It is also thought that South Africa's concept of separation of powers constitutes government branches that are not hermetically sealed from one another. According to Vile, under the original concept of separation of powers, persons who composed the three branches of government must be kept separate and distinct; no individual should be allowed to be a member of more than one branch at the same time (as in paragraph 1.5.1).

- In the United States, while the overwhelming view seems to be the belief that this doctrine forms part of the country's constitutional jurisprudence, there remain challenges regarding the extent of the courts' application of this doctrine and its current understanding by the political arms of government is criticised for drifting away from the country's founding principles, as Calabresi points out in paragraph 2.2.3. In Canada, while this doctrine is not sufficiently articulated and formulated in both Canadian Constitutions, its application by the courts has created confusion since its scope and perimeters remain unclear. The view held is that there is no separation of powers in Canada. The lack of formulation and articulation of this doctrine also forms part of its jurisprudence in South Africa. South Africa, as was discussed above, does not have a comprehensive separation of powers doctrine. Hence the interpretation and application of this doctrine remains a challenge in most jurisdictions and not only in South Africa. Britain, which shares historical ties with the United States, Canada and South Africa, also does not have a comprehensive and fully articulated separation of powers principle but has what has been termed a close union, with nearly a complete fusion of the executive and the legislature (as in paragraph 2.2.4).
- South Africa can learn from these jurisdictions, that in order for this doctrine to be achieved what it was thought to represent, its scope and meaning has to be well-defined through legislation. In the United States and in Canada, this doctrine is sufficiently articulated and formulated in the Constitutions (as in paragraphs 4.2.1 and 2.2.4 above). In South Africa, the doctrine only appears

in Constitutional Principle VI of the Constitution where its scope and limitations are not fully articulated and formulated.

- Law reform is needed to clarify the courts' constitutional limitations and role in developing the laws. The legislatures' powers in enacting legislation which seem to usurp courts' judicial authority and independence also need to be comprehensively formulated.
- The separation of powers has not been fully articulated and applied in South African law, as was seen in Mogoeng CJ's dissent in the *Economic Freedom Fighters* case in paragraph 2.2.5 above.
- Judicial supremacy and judicial review, as provided by sections 2 and 172 of the Constitution (as discussed in paragraph 2.3) are not comprehensive and fully formulated, and a more extensive legislative framework is required to define the scope and meaning of these principles.

BIBLIOGRAPHY

Books

Adams J *Thoughts on government*

Adams J *Thoughts on government: applicable to the present state of the American colonies. In a letter from a gentleman to his friend* (John Dunlap Philadelphia 1776)

Altbeker A *A country at war with itself*

Altbeker A *A country at war with itself: South Africa's crisis of crime* (Jonathan Ball Publishers Johannesburg 2010)

Aristotle *Politics*

Aristotle *Politics* (translation B Jowett) (Batoche Books Kitchener 1999)

Aristotle *The Nicomachean ethics*

Aristotle *The Nicomachean ethics* (translated by HH Joachim) (Clarendon Press Oxford 1955)

Baumgarth and Regan (eds) *Thomas Aquinas on law, morality and politics*

Baumgarth WP and Regan RJ (eds) *Thomas Aquinas on law, morality and politics* (Hackett Publishing Co Indianapolis 1988)

Bagehot *The English Constitution*

Bagehot W *The English Constitution* (Chapman & Hall London 1867)

Bederman *The classic foundation of the American Constitution*

Bederman DJ *The classic foundation of the American Constitution: prevailing wisdom* (2008) 220-21

Bellamy *Political constitutionalism*

Bellamy R *Political constitutionalism: A republican defence of the constitutionality of democracy* (Cambridge University Press Cambridge 2007)

Beveridge *The life of John Marshall Vol III*

Beveridge AJ *The life of John Marshall Vol III* (Houghton Mifflin Company Boston 1919)

Bickel *The least dangerous branch*

Bickel AM *The least dangerous branch: The Supreme Court at the Bar of Politics* 2 ed (Yale University Press New Haven 1986)

Blackstone *Commentaries of the laws of England*

Blackstone W *Commentaries on the laws of England* (JB Lippencott Company Philadelphia 1765)

- Bork *The tempting of America*
Bork RH *The tempting of America: The political seduction of the law* (Free Press New York 1990)
- Bradley and Ewing *Constitutional and administrative law*
Bradley AW and Ewing KD *Constitutional and administrative law* 15 ed (Pearson London 2011)
- Brettschneider *Democratic rights*
Brettschneider C *Democratic rights: the substance of self-government* (Princeton University Press Princeton 2007)
- Brogan *The crisis of American federalism*
Brogan DW *The crisis of American federalism* (University of Glasgow Press Glasgow 1944)
- Buchanan *So reason can rule*
Buchanan SM *So reason can rule: The Constitution revisited* (Center for the Study of Democratic Institutions Annapolis 1968)
- Burchell *Principles of criminal law*
Burchell JM *Principles of criminal law* 5 ed (Juta & Co Ltd Cape Town 2016)
- Burt *The constitution in conflict*
Burt RA *The constitution in conflict* (Harvard University Press Cambridge 1992)
- Calabresi *A common law for the age of statutes*
Calabresi G *A common law for the age of statutes* (Harvard University Press Cambridge 1982)
- Cardozo *The nature of the judicial process*
Cardozo BN *The nature of the judicial process* (Yale University Press New Haven 1921)
- Cohen *Deliberative democracy*
Cohen J "Deliberation and democratic legitimacy" in Bohman J and Rehg W (eds) *Deliberative democracy: Essays on reason and politics* (MIT Press Cambridge 1997) 67-92
- Collins *English Dictionary*
Collins *English Dictionary* (HarperCollins Publishers Limited Glasgow UK 2015)
- Corwin *The Constitution of the United States of America*
Corwin ES *The Constitution of the United States of America: Analysis and interpretation* (Government Printing Office Washington DC 1953)

- Dalberg-Acton *Essays on freedom and power*
 Dalberg-Acton JEE *Essays on freedom and power* (The Beacon Press Boston 1949)
- Dallison *The royalist's defence*
 Dallison C *The royalist's defence: vindicating the King's proceedings in the late Warre made against him* (Fairfax of Cameron London 1648)
- Davis *et al Fundamental rights*
 Davis D, Cheadle H and Haysom N (eds) *Fundamental rights in the Constitution – Commentary and cases* (Juta & Co Ltd Cape Town 1997)
- Dicey *Introduction to the study of the law*
 Dicey AV *Introduction to the study of the law of the Constitution* 10 ed (Macmillan Basingstoke 1959)
- Dicey *The privy council*
 Dicey AV *The privy council* (Macmillan & Company London 1887)
- Du Toit *et al Commentary on the Criminal Procedure Act*
 Du Toit E, De Jager FJ, Paizes A and Van der Merwe SE *Commentary on the Criminal Procedure Act* RS 51 (Juta Claremont 2013)
- Dworkin *A matter of principle*
 Dworkin R *A matter of principle* (Harvard University Press Cambridge 1985)
- Dworkin *Freedom's law*
 Dworkin R *Freedom's law: the moral reading of the American Constitution* (Oxford University Press Oxford 1996)
- Dworkin *Taking rights seriously*
 Dworkin R *Taking rights seriously* (Bloomsbury London 1978)
- Dyzenhaus *The politics of deference*
 Dyzenhaus D "The politics of deference: judicial review and democracy" in M Taggart (ed) *The province of administrative law* (Hart Publishing Oxford 1997)
- Elliot *The debates in the several state conventions*
 Elliot J *The debates in the several state conventions on the adoption of the federal Constitution* (Liberty Fund Washington 1866)
- Eisenberg *The nature of common law*
 Eisenberg MA *The nature of common law* (Harvard University Press Cambridge 1988)

- Eisgruber *Constitutional self-government*
 Eisgruber CL *Constitutional self-government* (Harvard University Press Boston 2001)
- Ford (ed) *The writings of Thomas Jefferson*
 Ford PL (ed) *The writings of Thomas Jefferson* (Putnam New York 1897)
- Frankel *Criminal sentences*
 Frankel ME *Criminal sentences: Law without order* (Hill and Wang New York 1977)
- Gardbaum *The new commonwealth model of constitutionalism*
 Gardbaum S *The new commonwealth model of constitutionalism: Theory and practice* (Cambridge University Press Cambridge 2013)
- Goldsworthy *The sovereignty of parliament*
 Goldsworthy J *The sovereignty of parliament: history and philosophy* (Oxford University Press Oxford 2001)
- Gonen *Litigations as lobbying*
 Gonen JS *Litigations as lobbying: Reproductive hazards and interest aggregation* (Ohio State University Press Columbus 2003)
- Gwyn *The meaning of the separation of powers*
 Gwyn WB *The meaning of the separation of powers: an analysis of the doctrine from its origin to the adoption of the United States Constitution* (1965)
- Hall and Hall (eds) *Collected works of James Wilson*
 Hall KL and Hall MD (eds) *Collected works of James Wilson* (Liberty Fund Indianapolis 2007)
- Hamburger *Is administrative law unlawful?*
 Hamburger P *Is administrative law unlawful?* (University of Chicago Press Chicago 2014)
- Hamburger *Law and judicial duty*
 Hamburger P *Law and judicial duty* (University of Harvard Press Cambridge 2008)
- Hamilton *The Federalist papers no 47*
 Hamilton A *The Federalist papers no 47* in Miller J (ed) (Dover Publications Inc New York 2014) 235-240
- Hamilton *The Federalist papers no 48*
 Hamilton A *The Federalist papers no 48* in Miller J (ed) (Dover Publications Inc New York 2014) 241-245

- Hamilton *The Federalist Papers no 78*
Hamilton A *The Federalist Papers No 78* in Miller J (ed) (Dover Publications Inc New York 2014) 378-384
- Harding *The law courts of Medieval England*
Harding A *The law courts of Medieval England* (George Allen & Unwin Ltd London 1973)
- Hazewinkel-Suringa *Inleiding tot de studie van het Nederlandse strafrecht*
Hazewinkel-Suringa R *Inleiding tot de studie van het Nederlandse strafrecht* 14 ed (Gouda Quint Deventer 1995)
- Hogg *Constitutional law of Canada*
Hogg PW *Constitutional law of Canada* 5th ed (Thomson Carswell Scarborough 2007)
- Holy Bible New King James*
Holy Bible New King James Version (Thomas Nelson Inc Nashville 1982)
- Hurnard *The King's pardon*
Hurnard ND *The King's pardon for homicide before AD 1307* (Clarendon Press Oxford 1969)
- Jackson *The struggle for judicial supremacy*
Jackson RH *The struggle for judicial supremacy: a study of a crisis in American power politics* (AA Knopf Inc. New York 1941)
- Jakobs *Strafrecht Allgemeiner Teil*
Jakobs G *Strafrecht Allgemeiner Teil* 2 ed (De Gruyter Berlin 1991)
- Jefferson *Notes on the state of Virginia*
Jefferson T *Notes on the state of Virginia* 4 ed (Prichard and Hall Philadelphia 2006)
- Jescheck and Weigend *Lehrbuch des Strafrechts*
Jescheck H and Weigend T *Lehrbuch des Strafrechts* 5 ed (Duncker & Humblot Berlin 1996)
- Kavanagh *The constitutional separation of powers*
Kavanagh A "The constitutional separation of powers" in Dyzenhaus D and Thorburn M (eds) *Philosophical foundations of Constitutional law* (Oxford University Press Oxford 2016) 221-239
- Komesar *Law's limits*
Komesar NK *Law's limits: The rule of law and the supply and demand of rights* (Cambridge University Press Cambridge 2001)

Langa *A delicate balance*

Langa CJ "The separation of powers" in Klaaren J (ed) *A delicate balance: the place of the judiciary in a constitutional democracy* (Siber Ink Cape Town 2006) 27-34

Lincoln *First inaugural address*

Lincoln A "First inaugural address, March 4, 1861" in Basler RP (ed) *Abraham Lincoln: His speeches and writings* (Da Capo Press Cleveland 2001) 579-589

Locke J *Second treatise*

Locke J *Second treatise of government: an essay concerning the true original, extent, and end of civil government* (CreateSpace Independent Publishing Scotts Valley 2014)

Locke *The second treatise*

Locke J *The second treatise of civil government and a letter concerning toleration* in Gough JW (ed) (Basil Blackwell Oxford 1948)

Loewenstein *Political power*

Loewenstein K *Political power and the governmental process* 2 ed (University of Chicago Press Chicago 1965)

Madison *No 48*

Madison J "No 48" in Rossiter C (ed) *The Federalist papers* (Penguin Putnam New York 1999) 276-281

Madison *No 51*

Madison J "No 51" in Rossiter C (ed) *The Federalist papers* (Penguin Putnam New York 1999) 288-293

Madison *The Federalist Papers No 37*

Madison A *The Federalist Papers No 37* in Miller J (ed) (Dover Publications Inc New York 2014) 169-175

Madison *The Federalist Papers No 47*

Madison J *The Federalist Papers No 47* in Genovese MA (ed) (Palgrave Macmillan New York 2009)

Madison *The Federalist Papers No 51*

Madison J *The Federalist Papers No 51* in Genovese MA (ed) (Palgrave Macmillan New York 2009)

Madison *The Federalist Papers No 81*

Madison J *The Federalist Papers No 81* in Genovese MA (ed) (Palgrave Macmillan New York 2009)

Manin *Checks and balances and boundaries*

Manin B “Checks and balances and boundaries: The separation of powers in the constitutional debate of 1787” in Fontana B (ed) *The invention of the modern republic* (Cambridge University Press Cambridge 1994) 27-62

Marshall *Constitutional theory*

Marshall G *Constitutional theory* (Clarendon Press Oxford 2005)

Martin *The most dangerous branch*

Martin RI *The most dangerous branch – How the Supreme Court of Canada has undermined our law and our democracy* (McGill-Queen’s University Press Montreal 2005)

McCormick *Carl Schmitt’s critique of liberalism*

McCormick JP *Carl Schmitt’s critique of liberalism: Against politics as technology* (Cambridge University Press Cambridge 1997)

McKay *American politics and society*

McKay D *American politics and society* 9 ed (Wiley-Blackwell New Jersey 2017)

McLean (ed) *Constitutional deference*

McLean K (ed) *Constitutional deference, courts and socio-economic rights in South Africa* (Pretoria University Press 2009)

Menand *The metaphysical club*

Menand L *The metaphysical club - A story of ideas in America* (Farrar, Strauss and Giroux New York 2001)

Merriam-Webster Dictionary

Merriam-Webster Dictionary (Merriam-Webster Incorporated 2019)

Montesquieu *The spirit of laws*

Montesquieu C *Complete works. The spirit of laws* (T Evans London 1777)

Munro and Wasik *Sentencing, judicial discretion and training*

Munro C and Wasik M (eds) *Sentencing, judicial discretion and training* (Sweet & Maxwell Andover 1992)

Newman *The rule of law, the separation of powers*

Newman WJ “The rule of law, the separation of powers and judicial independence in Canada” in Oliver P, Macklem P and Des Rosiers N (eds) *The Oxford Handbook of the Canadian Constitution* (Oxford University Press Oxford 2017) 1031-1057

- O'Hear *The failed promise of sentencing reform*
O'Hear M *The failed promise of sentencing reform* (Praeger Santa Barbara 2017)
- Oxford English Dictionary*
Oxford English Dictionary (Oxford University Press Oxford 2019)
- Paulsen *et al The Constitution of the United States*
Paulsen M, Calabresi S, McConnell M, Bray S, and Baude W *The Constitution of the United States* 3 ed (Foundation Press St Paul 2017)
- Pearsall and Hanks *New Oxford Dictionary of English*
Pearsall J and Hanks P *New Oxford Dictionary of English* (Oxford University Press Oxford 1998)
- Plato *The Republic*
Plato *The Republic: The influential classic* (Capstone Publishing Ltd West Sussex 2012)
- Pocock *The ancient constitution*
Pocock JGA *The ancient constitution and the feudal law: A study of English historical thought in the seventeenth century* (Cambridge University Press Cambridge 1957)
- Pollock and Maitland *The history of English law*
Pollock F and Maitland FW *The history of English law before the time of Edward I* 2 rev ed (Cambridge University Press Cambridge 1968)
- Posner *The federal courts: Challenge and reform*
Posner RA *The federal courts: Challenge and reform* (Harvard University Press Cambridge 1996)
- Posner *The federal courts: Crisis and reform*
Posner RA *The federal courts: Crisis and reform* (Harvard University Press Cambridge 1985)
- Prinsloo, Alberts and Mollema *Legal terminology*
Prinsloo MW, Alberts A and Mollema N *Legal terminology: Criminal law, procedure and evidence* (Juta Cape Town 2015)
- Rautenbach *Constitutional law*
Rautenbach IM *Constitutional law* 6 ed (LexisNexis Durban 2013)
- Richard *The founders and the classics*
Richard CJ *The founders and the classics: Greece, Rome, and the American enlightenment* (Harvard University Press Cambridge 1994)

- Richardson *A compilation of the messages and papers*
Richardson JD *A compilation of the messages and papers of the presidents, 1789-1897* (Bureau of National Literature Inc Washington 1897)
- Ring *Scalia's court*
Ring KA (ed) *Scalia's court: A legacy of landmark opinions and dissents* 2 ed (Regnery Publishing Washington DC 2016)
- Rosenberg *The hollow hope*
Rosenberg GN *The hollow hope: Can courts bring about social change?* 2 ed (University of Chicago Press Chicago 2008)
- Roux *The Cambridge handbook of deliberative constitutionalism*
Roux TR "In defence of empirical entanglement: The methodological flaw in Waldron's case against judicial review" in Levy R, Kong H, Orr G, and King J (eds) *The Cambridge handbook of deliberative constitutionalism* (Cambridge University Press Cambridge 2018) 203-219
- Ruby *et al Sentencing*
Ruby CC, Chan GJ and Hasan NR *Sentencing* 8 ed (LexisNexis Markham 2012)
- Shapiro *Courts: A comparative and political analysis*
Shapiro M *Courts: A comparative and political analysis* (University of Chicago Press Chicago 1981)
- Scalia *A matter of interpretation*
Scalia A *A matter of interpretation: Federal courts and the law* (Princeton University Press Princeton 1997)
- Scalia *Common law courts in civil-law system*
Scalia A "Common law courts in civil-law system: The role of the United States federal courts in interpreting the Constitution and laws" in Gutmann A (ed) *A matter of interpretation: Federal courts and the law* (Princeton University Press Princeton 1997) 3-48
- Scalia and Garner *Reading law*
Scalia A and Garner BA *Reading law: The interpretation of legal texts* (Thomson West Eagan 2012)
- Schauer *Playing by the rules*
Schauer F *Playing by the rules: A philosophical examination of rule-based decision-making in law and in life* (Clarendon Press Oxford 1991)

Schauer *Thinking like a lawyer*

Schauer F *Thinking like a lawyer: A new introduction to legal reasoning* (Harvard University Press Cambridge 2009)

Seedorf and Sibanda *Separation of powers*

Seedorf S and Sibanda S "Separation of powers" in Woolman S *et al* (eds) *Constitutional law of South Africa* 2 ed (ed) (Juta Cape Town 2008)

Shackleton *Montesquieu: a critical bibliography*

Shackleton R *Montesquieu: a critical bibliography* (Oxford University Press Oxford 1961)

Snyman *Criminal law*

Snyman CR *Criminal law* 6 ed (LexisNexis Durban 2014)

Stewart *Fundamental justice*

Stewart H *Fundamental justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Irwin Law Toronto 2012)

Sunstein *Design democracy*

Sunstein CR *Design democracy: what Constitutions do* (Oxford University Press Oxford 2001)

Thayer *John Marshall*

Thayer JB *John Marshall* (Boston and New York Houghton Mifflin and Company 1901)

Thomas Nelson Bibles *The Holy Bible*

Thomas Nelson Bibles *The Holy Bible, New King James Version* (Nashville Thomas Nelson Publishers 1982)

Tomkins *Public Law*

Tomkins A *Public Law* (Oxford University Press Oxford 2003)

Tonry *Sentencing matters*

Tonry M *Sentencing matters* (Oxford University Press Oxford 1996)

Travis and Western (eds) *The growth of incarceration in the United States*

Travis J and Western B (eds) *The growth of incarceration in the United States: Exploring causes and consequences* (National Academies Press Washington 2014)

Tully *Strange multiplicity*

Tully J *Strange multiplicity: Constitutionalism in an age of diversity* (Cambridge University Press Cambridge 1995)

Turner *The King and his courts*

Turner RV *The King and his courts: The role of John and Henry III in the administration of justice* (Cornell University Press Ithaca 1968)

Venter *Constitutional comparison*

Venter F *Constitutional comparison: Japan, Germany, Canada and South Africa as constitutional states* (Juta Claremont 2000)

Vile *Constitutionalism and the separation of powers*

Vile MJC *Constitutionalism and the separation of powers* 2 ed (Liberty Fund Indianapolis 1967)

Von Pufendorf *An introduction to the history of the principal kingdoms*

Von Pufendorf S *An introduction to the history of the principal kingdoms and states of Europe* in Seidler MJ (ed) (Liberty Fund Indianapolis 2013)

Waldron *Law and disagreement*

Waldron J *Law and disagreement* (Oxford University Press Oxford 1999)

Watson *Legal origins and legal change*

Watson A "Legal origins and legal change" (1991) in B Markesinis and J Fedtke (eds) *Judicial recourse to foreign law: a new source of inspiration* (Bloomsbury Publishing PLC London United Kingdom 1991)

Webster and Doob *Searching for Sasquatch*

Webster CM and Doob AN "Searching for Sasquatch: Deterrence of crime through sentence severity" in Petersilia J and Reitz KR (eds) *Oxford handbook on sentencing and corrections* (Oxford University Press New York 2012)

Webster's New World College Dictionary

Webster's New College Dictionary 5 ed (New College World Dictionary 2018)

Wilson *Constitutional government*

Wilson W *Constitutional government in the United States* in Veade M (ed) (Quid Pro Books New Orleans 2011)

Wood *The creation of the American Republic, 1176-1787*

Wood GS *The creation of the American Republic, 1176-1787* (University of North Carolina Press Chapel Hill 1998)

Articles

Abraham 1986 *Political Science Quarterly*

Abraham HJ "Contemporary judicial processes and a democratic society" 1986 10(12) *Political Science Quarterly* 277-288

- Albert 2010 *Int J of Const Law*
 Albert R “Presidential values in parliamentary democracies” 2010 8(2)
International Journal of Constitutional Law 207-236
- Allan 1996 *Oxford JLS*
 Allan J “Bills of Rights and judicial review – a liberal’s quandary” 1996 16(2)
Oxford Journal of Legal Studies 337-352
- Anand 2006 *Constitutional Forum*
 Anand S “The truth about Canadian judicial activism” 2006 15(2) *Constitutional Forum* 87-98
- Anderson 2002 *American Law and Economics Rev*
 Anderson DA “The deterrence hypothesis and picking pockets at the pickpocket’s hanging” 2002 4(2) *American Law and Economics Review* 295-313
- Badenhorst 2015 *De Rebus*
 Badenhorst M “Separation of powers is not constitutional Kryptonite” 2015 549
De Rebus 66-67
- Barak 2002 *Harvard LR*
 Barak A “A judge on judging: The role of a Supreme Court in a democracy”
 2002 116 *Harvard Law Review* 19-162
- Barber 2005 *Western New England LR*
 Barber EG “Judicial discretion, sentencing guidelines, and lessons from
 Medieval England, 1066-1215” 2005 27(1) *Western New England Law Review*
 1-39
- Barnett 2006 *Univ of Cincinnati LR*
 Barnett RE “Scalia’s infidelity: A critique of ‘Faint-hearted’ originalism” 2006 75
University of Cincinnati Law Review 7-24
- Barron 1970 *Duke LR*
 Barron JA “The ambiguity of judicial review: A response to Professor Bickel”
 1970 *Duke Law Journal* 591-604
- Bateup 2007 *Temple Int Comp LJ*
 Bateup C “Expanding the conversation: American and Canadian experiences
 of constitutional dialogue in comparative perspective” 2007 *Temple
 International and Comparative Law Journal* 6-37
- Bellamy 2011 *Int J of Const Law*
 Bellamy R “Political constitutionalism and the Human Rights Act” 2011 9(1)
International Journal of Constitutional Law 86-111

Benedict 2007 *Brooklyn LR*

Benedict BA "Upsetting the balance: Ignoring the separation of powers' doctrine in *Council of New York v Bloomberg*" 2007 72(4) *Brooklyn Law Review* 1261-1301

Bollyky 2002 *SAJHR*

Bollyky T "Judicial remedies of socio-economic rights violations" 2002 18 *South African Journal of Human Rights* 161-200

Botha 2004 *SAJHR*

Botha H "Freedom and constraint in constitutional adjudication" 2004 *South African Journal on Human Rights* 249-283

Botha 2010 *Penn State Int LR*

Botha H "Comparative Constitutional law in the classroom" 2010 *Penn State International Law Review* 531-540

Bowman 2005 *Stanford LR*

Bowman FO "Mr Madison meets a time machine: The political science of federal sentencing reform" 2005 58 *Stanford Law Review* 235-266

Brand 2011 *Stellenbosch LR*

Brand D "Judicial deference and democracy in socio-economic rights cases in South Africa 2011 3 *Stellenbosch Law Review* 614-638

Brennan and Hamlin 1994 *J of Theoretical Politics*

Brennan G and Hamlin A "A revisionist view of the separation of powers" 1994 6(3) *Journal of Theoretical Politics* 345-368

Brickey 1995 *Hastings LJ*

Brickey KF "Criminal mischief: The federalization of American criminal law" 1995 46(4) *Hastings Law Journal* 1135-1174

Bright 1997 *New York Univ LR*

Bright SB "Political attacks on the judiciary: Can justice be done amid efforts to intimidate and remove judges from office for unpopular decisions?" 1997 72 *New York University Law Review* 308-336

Brook 1956 *Fordham LR*

Brook JR "Judicial and executive functions of the legislator in New York" 1956 25(2) *Fordham Law Review* 275-289

Brooks 2017 *Criminal Justice Ethics*

Brooks T "Punitive restoration and restorative justice" 2017 36(2) *Criminal Justice Ethics* 122-140

Bruhn 2011 *Michigan J Race & Law*

Bruhn N "Litigating against an epidemic: HIV/AIDS and the promise of socio-economic rights in South Africa" 2011 181(17) *Michigan Journal of Race & Law* 180-215

Calabresi and Larsen 1994 *Cornell LR*

Calabresi SG and Larsen JL "One person one office: separation of powers or separation of personnel?" 1994 79(5) *Cornell Law Review* 1045-1157

Calabresi *et al* 2012 *Nothwestern Univ LR*

Calabresi SG, Berghausen M and Albertson S 2012 "The rise and fall of the separation of powers" 106(2) 2012 *Nothwestern University Law Review* 527-550

Cavalluzo 2012 *Canadian Labour and Employment J*

Cavalluzo PJJ "The fog of judicial deference" 2012 16(2) *Canadian Labour and Employment Journal* 369-374

Champagne 2001 *Loyola of LA LR*

Champagne A "Interest groups and judicial elections" 2001 34 *Loyola of Los Angeles Law Review* 1391-1409

Chilton and Versteeg 2018 *Univ of Chicago LR*

Chilton AS and Versteeg M "Courts' limited ability to protect constitutional rights" 2018 85(2) *University of Chicago Law Review* 293-336

Choudhry and Hunter 2003 *McGill LJ*

Choudhry S and Hunter CE "Measuring judicial activism on the Supreme Court of Canada: A comment on *Newfoundland (Treasury Board) v NAPE*" 2003 48 *McGill Law Journal* 525-562

Clark 2001 *Texas LR*

Clark BR "Separation of powers as a safeguard of federalism" 2001 79(6) *Texas Law Review* 1321-1459

Claus 2005 *Oxford JLS*

Claus L "Montesquieu's mistakes and the true meaning of separation" 2005 25(3) *Oxford Journal of Legal Studies* 419-451

Cooper 2016 *Texas Rev of Law and Pol*

Cooper CJ "The flaws of *Chevron* deference" 2016 21 *Texas Review of Law and Policy* 307

Corder 2004 *SALJ*

Corder H "Without deference, with respect: A response to Justice O'Regan" 2004 121 *South African Law Journal* 438-444

Davis 2006 *SAJHR*

Davis DM "Adjudicating the socio-economic rights in the South African Constitution: Towards a 'deference lite'" 2006 22 *South African Journal on Human Rights* 301-327

Davis 2006 *Acta Juridica*

Davis DM "To defer and then when? Administrative law and constitutional democracy" 2006 *Acta Juridica* 23-41

Davis and Corder 1988 *SAJHR*

Davis DM and Corder H "A long march: Administrative law and the Appellate Division" 1988 4 *South African Journal on Human Rights* 281

De Ville 2004 *SAJHR*

De Ville JR "Deference as respect and deference as sacrifice: A reading of *Bato Star v Minister of Environmental Affairs*" 2004 *South African Journal on Human Rights* 577-613

Diamond 1978 *Publius*

Diamond M "The separation of powers and the mixed regime" 1978 8(2) *Publius* 33-43

Dixon 2009 *Osgoode Hall LJ*

Dixon R "The Supreme Court of Canada, Charter dialogue, and deference" 2009 47(2) *Osgoode Hall Law Journal* 235- 286

Dixon 2017 *Cardozo LR*

Dixon R "The core case for weak-form judicial review" 2017 38(6) *Cardozo Law Review* 2193-2232

Duclos and Roach 1991 *McGill LJ*

Duclos N and Roach K "Constitutional remedies as 'constitutional hints': A comment on *R v Schachter*" 1991 36(1) *McGill Law Journal* 1-38

Duncan 2016 *Regent Univ LR*

Duncan RF "Justice Scalia and the rule of law: Originalism vs the living Constitution" 2016 29(9) *Regent University Law Review* 9-34

Easterbrook 2008 *Harvard JL and Public Policy*

Easterbrook FH "Originalism and pragmatism: Pragmatism's role in interpretation" 2008 31 *Harvard Journal of Law and Public Policy* 901-906

Entin 1990 *Ohio State LJ*

Entin JL "Separation of powers, the political branches, and the limits of judicial review" 1990 51 *Ohio State Law Journal* 175-227

- Epstein 1986 *Univ Chicago LR*
Epstein R "Was *New York Times v Sullivan* wrong?" 1986 53(3) *University of Chicago Law Review* 782-818
- Epstein and Landes 2012 *California LR*
Epstein L and Landes WM "Was there ever such a thing as judicial restraint?" 2012 100(3) *California Law Review* 557-578
- Eule 1990 *Yale LJ*
Eule JN "Judicial review of direct democracy" 1990 99(7) *Yale Law Journal* 1503-1590
- Evans 2003 *SALJ*
Evans JM "Deference with a difference: Of rights, regulation and the judicial role in the administrative state" 2003 120(2) *South Africa Law Journal* 322-329
- Fabre 2000 *Brit J Pol Science*
Fabre C "A philosophical argument for a Bill of Rights" 2000 30 *British Journal of Political Science* 77-98
- Fagan *Advocate* 2005
Fagan H "Our bursting prisons" 2005 18(1) *Advocate* 33-35
- Fallon 1997 *Harvard LR*
Fallon RH "Implementing the Constitution" 1997 111(1) *Harvard Law Review* 54-152
- Fallon 2008 *Harvard LR*
Fallon RH "The core of an uneasy case for judicial review" 2008 121(7) *Harvard Law Review* 1693-1736
- Farina 1989 *Columbia LR*
Farina CR "Statutory interpretation and the balance of power in the administrative state" 1989 89 *Columbia Law Review* 452-528
- Fish 2008 *Oxford J Legal Stud*
Fish M "An eye for an eye: Proportionality as a moral principle of punishment" 2008 28(1) *Oxford Journal of Legal Studies* 57-71
- Fish 2016 *Univ of California LR*
Fish ES "Choosing constitutional remedies" 2016 63 *University of California Law Review* 322-386
- Fletcher 1988 *Yale LJ*
Fletcher WA "The structure of standing" 1988 98 *Yale Law Journal* 221-291

Frickey 2005 *California LR*

Frickey PP "Getting from Joe to Gene (McCarthy): The avoidance canon, legal process theory, and narrowing statutory interpretation in the early Warren Court" 2005 93(2) *California Law Review* 397-464

Gardbaum 2015 *Columbia J of Transn L*

Gardbaum S "Are strong Constitutional Courts always a good thing for new democracies?" 2015 53(2) *Columbia Journal of Transnational Law* 285-320

Gardbaum 2018 *Duke J Comp and Int L*

Gardbaum S "What makes for more or less powerful Constitutional Courts?" 2018 29 *Duke Journal of Comparative and International Law* 1-40

Gardner 2001 *Am J of Juris*

Gardner J *Legal positivism: 5½ Myths* 2001 46(1) *American Journal of Jurisprudence* 199-227

Gibson 1989 *Alberta LR*

Gibson D "Non-destructive Charter responses to legislative inequalities" 1989 27(2) *Alberta Law Review* 181-190

Ginsburg and Menashi 2016 *New York Univ J of Law and Liberty*

Ginsburg DH and Menashi S "Our illiberal Administrative Procedure Act state" 2016 10 *New York University Journal of Law and Liberty* 475

Gray 2017 *New Criminal LR*

Gray A "Mandatory sentences around the world and the need for reform" 2017 20(3) *New Criminal Law Review* 391-432

Gwyn 1989 *William and Mary LR*

Gwyn WB "The indeterminacy of the separation of powers in the age of the framers" 1989 30(2) *William and Mary Law Review* 263-268

Hamburger 2016 *George Washington LR*

Hamburger P "Chevron bias" 2016 84 *George Washington Law Review* 1187-1251

Hammarberg et al 2016 *Human Reproduction*

Hammarberg K, Kirkman M and De Lacey S "Qualitative research methods: when to use them and how to judge them" 2016 31(3) *Human Reproduction* 498-501

Hartnett 1999 *New York Univ LR*

Hartnett EA "A matter of judgement, not a matter of opinion" 1999 74(1) *New York University Law Review* 123-160

Healy 2013 *Canadian Criminal LR*

Healy P "Sentencing from there to here and from then to now" 2013 17(3) *Canadian Criminal Law Review* 291-304

Heywood 2009 *J Human Rights Practice*

Heywood M "South Africa's Treatment Action Campaign: Combining law and social mobilization to realize the right to health" 2009 1(1) *Journal of Human Rights Practice* 14-36

Hector 2007 *SACJ*

Hector S "Recent cases: Specific crimes" 2007 20(1) *South African Journal of Criminal Justice* 78-98

Hoexter 2000 *SALJ*

Hoexter C "The future of judicial review in South African administrative law" 2000 117 *South African Law Journal* 484- 519

Hogg 2001 *Canadian Bar Rev*

Hogg PW "The law-making role of the Supreme Court of Canada: Rapporteur's synthesis" 2001 80(1) *Canadian Bar Review* 171-180

Hogg and Bushell *Osgoode Hall LJ*

Hogg PW and Bushell AA "The Charter dialogue between courts and legislatures" 1997 35(1) *Osgoode Hall Law Journal* 75-124

Holmes 1870 *Am LR*

Holmes OW "Codes, and the arrangement of the law" 1870 5(1) *American Law Review* 1-13

Huq 2012 *California LR*

Huq A "When was judicial self-restraint?" 2012 100 *California Law Review* 579-606

Hutchinson 2008 *Harvard LR Forum*

Hutchinson A "A 'hard core' case against judicial view" 2008 121 *Harvard Law Review Forum* 57-64

Jackson 2017 *Harvard LR*

Jackson VC "Thayer, Holmes, Brandeis: Conceptions of judicial review, fact-finding, and proportionality" 2017 130 *Harvard Law Review* 2348-2396

Jacobs 2018 *SA J of Bioethics Law*

Jacobs RK "Legalising physician-assisted suicide in South Africa: Should it even be considered?" 2018 11(2) *South African Journal of Bioethics Law* 66-69

Johanningmeier 2007 *Indiana LJ*

Johanningmeier CA "Law & politics: the case against judicial review of direct democracy" 2007 82(4) *Indiana Law Journal* 1125-1152

Kahana 2001 *J Inst Publ Admin of Canada*

Kahana T "The notwithstanding mechanism and public discussion: Lessons from the ignored practice of section 33 of the Charter" 2001 44(3) *Journal of the Institute of Public Administration of Canada* 255-291

Kaufman and Runnels 2007 *Brooklyn LR*

Kaufman A and Runnels MB "The core of an unqualified case for judicial review: a reply to Jeremy Waldron and contemporary critics" 2007 82(1) *Brooklyn Law Review* 163-216

Kavanagh 2004 *Oxford JLS*

Kavanagh A "The elusive divide between interpretation and legislation under the Human Rights Act 1998" 2004 24(2) *Oxford Journal of Legal Studies* 259-285

Kavanagh 2010 *University of Toronto LJ*

Kavanagh A "Judicial restraint in the pursuit of justice" 2010 60(1) *The University of Toronto Law Journal* 23-40

Kavanaugh 2014 *Notre Dame LR*

Kavanaugh BM "Our anchor for 225 years and counting: The enduring significance of the precise text of the Constitution" 2014 89(5) *Notre Dame Law Review* 1907-1927

Kennedy 1973 *J Legal Studies*

Kennedy D "Legal formality" 1973 2(2) *Journal of Legal Studies* 351-398

Kennedy 1976 *Harvard LR*

Kennedy D "Form and substance in private law adjudication" 1976 89 *Harvard Law Review* 1685-1778

Kovacic-Fleischer *Wayne Law Review* 1986

Kovacic-Fleischer C "Remedying underinclusive statutes" 1986 33(39) *Wayne Law Review* 39-95

Kramer 2012 *California LR*

Kramer LD "Judicial supremacy and the end of judicial restraint" 2012 100(3) *California Law Review* 621-634

Krause 2015 *Law and Inequality*

Krause LE "One size does not fit all: The need for a complete abolition of mandatory minimum sentences for juveniles in response to *Roper, Graham and Miller*" 2015 33(2) *Law and Inequality* 481-506

Kurland 1959 *Utah LR*

Kurland PB "The Supreme Court and its judicial critics" 1959 6(4) *Utah Law Review* 457-466

Kurland 1964 *Harvard LR*

Kurland PB "The Supreme Court 1963 term, forward: Equal in origin and equal in title to the legislative and executive branches of government" 1964 78 *Harvard Law Review* 143-176

Kurland 1987 *Saint Louis Univ LJ*

Kurland PB "The Constitution: The Framers' intent, the present and the future" 1987 32(17) *Saint Louis University Law Journal* 17-25

Kyritsis 2007 *Canadian JL and Juris*

Kyritsis D "Principles, policies and the power of courts" 2007 20(2) *Canadian Journal of Law and Jurisprudence* 379-397

LaFrance 1979 *Clearinghouse Review*

LaFrance AB "Problems of relief in equal protection cases" 1979 13 *Clearinghouse Review* 438-462

Lawson 1990 *California LR*

Lawson G "Territorial governments and the limits of formalism" 1990 78(4) *California Law Review* 853-911

Lehavi 2011 *Minnesota LR*

Lehavi A "Judicial review of judicial lawmaking" 2011 96(2) *Minnesota Law Review* 520-583

Lehmann 2006 *Am Univ Int LR*

Lehmann K "In defense of the Constitutional Court: Litigation socio-economic rights and the myth of the minimum core" 2006 22(1) *American University International Law Review* 163-197

Lenta 2004 *SAJHR*

Lenta P "Democracy, rights disagreements and judicial review" 2004 *South African Journal on Human Rights* 1-31

Lenta 2004 *SAJHR*

Lenta P "Judicial restraint and overreach" 2004 *South African Journal on Human Rights* 544-575

Lever 2007 *Pub Law*

Lever A "Is judicial review undemocratic?" 2007 *Public Law* 280-298

Lever 2009 *Pub Law*

Lever A "Democracy and judicial review: are they really incompatible?" 2009 7(4) *Public Law* 805-822

Levi 1976 *Colum LR*

Levi EH "Some aspects of separation of powers" 1976 76(3) *Columbia Law Review* 371-390

Levinson 1987 *Tulane LR*

Levinson S "Could Meese be right this time?" 1987 61 *Tulane Law Review* 1071-1078

Levinson 2006 *Cardozo LR*

Levinson BM "The first Constitution: rethinking the origins of rule of law and separation of powers in light of Deuteronomy" 2006 27(4) *Cardozo Law Review* 1853-1888

Lewans 2012 *Queen's LJ*

Lewans M "Deference and reasonableness since *Dunsmuir*" 38(1) *Queen's Law Journal* 59-98

Lowenthal 1993 *California LR*

Lowenthal GT "Mandatory sentencing laws: Undermining the effectiveness of determinate sentencing reform" 1993 81 *California Law Review* 61-123

Luban 1994 *Duke LR*

Luban D "Justice Holmes and the metaphysics of judicial restraint" 1994 44 *Duke Law Review* 449-523

Macedo 2010 *Boston LR*

Macedo S "Against majoritarianism: democratic values and institutional design" 2010 90 *Boston Law Review* 1029-1042

Mahomed 1998 *SALJ*

Mahomed I "The role of the judiciary in a constitutional state" 1998 *South African Law Journal* 111-115

Manderson and Sharp 2000 *Sydney LR*

Manderson D and Sharp N "Mandatory sentences and the Constitution: Discretion, responsibility and judicial process" 2000 22 *Sydney Law Review* 585-624

Mandiberg 2009 *McGeorge LR*

Mandiberg SF "Why sentencing by a judge satisfies the right to jury trial: A comparative law look at *Blakely* and *Booker*" 2009 40 *McGeorge Law Review* 107-147

Manning 2011 *Harvard LR*

Manning JF "Separation of powers as ordinary interpretation" 2011 124 *Harvard Law Review* 1939-2040

Manning 2017 *Michigan LR*

Manning JF "Justice Scalia and the idea of judicial restraint" 2017 115(6) *Michigan Law Review* 747-782

Manyathi-Jele 2015 *De Rebus*

Manyathi-Jele N "Judge's ruling in assisted suicide case divides South Africa" 2015 553 *De Rebus* 4-7

Maree and Quinot 2016 *TSAR*

Maree PJH and Quinot GEO "A decade and a half of deference (part 2)" 2016 (3) *Tydskrif van die Suid-Afrikaanse Reg SAR* 447-466

McLachlin 2001 *Constitutional Forum*

McLachlin B "Respecting democratic roles" 2001 12(1) *Constitutional Forum* 15-20

Meese 1987 *Tulane LR*

Meese EA "The law of the Constitution" 1987 61 *Tulane Law Review* 45-51

Meese 1998 *Georgia S Univ LR*

Meese EA "Putting the federal judiciary back on the constitutional track" 1998 14(4) *Georgia State University Law Review* 781-794

Mendelson 1977 *Indiana LJ*

Mendelson W "Separation, politics and judicial activism" 1977 52(2) *Indiana Law Journal* 313-322

Merrill 2005 *Constitutional Commentary*

Merrill TW "Originalism, stare decisis and the promotion of judicial restraint" *Constitutional Commentary* 2005 22 271-288

Meyler 2006 *Stanford LR*

Meyler B "Towards a common law originalism" 2006 59(3) *Stanford Law Review* 551-600

- Miller 1985 *Harv Civil Rights Civil Liberties LR*
 Miller BK “Constitutional remedies for underinclusive statutes: A critical appraisal of *Heckler v Mathews* 1985 20 *Harvard Civil Rights Civil Liberties Law Review* 79-151
- Mojapelo 2013 *Advocate*
 Mojapelo PM “The doctrine of separation of powers (a South African perspective)” 2013 *Advocate* 37-46
- Mollema and Terblanche 2017 *SACJ*
 Mollema N and Terblanche SS “The effectiveness of sentencing as a measure to combat human trafficking” 2017 *South African Journal of Criminal Justice* 198-223
- Monaghan 1983 *Columbia LR*
 Monaghan HP “*Marbury* and administrative state” 1983 83(1) *Columbia Law Review* 1-34
- Morton 2003 *Policy Options*
 Morton FL “Can judicial supremacy be stopped?” 2003 *Policy Options* 25-29
- Moses 2011 *Univ Pennsylvania J of Const Law*
 Moses ML “Beyond judicial activism: When the Supreme Court is no longer a court” 2011 14(1) *University of Pennsylvania Journal of Constitutional Law* 161-214
- Nourse 1996 *Texas LR*
 Nourse V “Towards a ‘due foundation’ for the separation of powers: *The Federalist Papers* as political narrative” 1996 74(3) *Texas Law Review* 447-521
- Olivier and Jansen van Rensburg 2009 *Law, Democracy & Development*
 Olivier M and Jansen van Rensburg L “Protection and enforcement of the right to social security” 2009 *Law, Democracy & Development* 87-99
- O’Regan 2004 *SALJ*
 O’Regan K “Breaking ground: Some thoughts on the seismic shift in our administrative law” 2004 121 *South African Law Journal* 424-436
- O’Regan 2005 *PELJ*
 O’Regan K “Checks and balances reflections on the development of the doctrine of separation of powers under the South African Constitution” 2005 8(1) *Potchefstroom Electronic Law Journal* 120-150
- O’Scannlain 2015 *Virginia LR Online*
 O’Scannlain DF “Politicians in robes: The separation of powers and the problem of judicial legislation” 2015 101 *Virginia Law Review Online* 31-49

- Peabody and Nugent 2003 *Am Univ LR*
 Peabody BG and Nugent JD "Toward a unifying theory of the separation of powers" 2003 53(1) *American University Law Review* 1-64
- Pierce 1989 *William and Mary LR*
 Pierce RJ "Separation of powers and the limits of independence" 1989 30 *William and Mary Law Review* 365-373
- Pettit 2004 *Ratio Juris*
 Pettit P "Depoliticizing democracy" 2004 17(1) *Ratio Juris* 52-65
- Phelps 2008 *SALJ*
 Phelps K "A dangerous precedent indeed – A response to CR Snyman's note on *Masiya*: notes" 2008 125(4) *South African Journal of Criminal Justice* 648-659
- Phelps and Kazee 2007 *SALJ*
 Phelps K and Kazee S "The Constitutional Court gets anal about rape – Gender neutrality and the principle of legality in *Masiya v DPP*" 2007 20(3) *South African Journal of Criminal Justice* 341-360
- Pillay 2005 *SALJ*
 Pillay A "Reviewing reasonableness: An appropriate standard for evaluating state action and inaction?" 2005 122 *South African Law Journal* 419-440
- Pillay 2009 *Law, Democracy & Development*
 Pillay K "Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights" 2009 *Law, Democracy & Development* 255-277
- Pomerance 2012 *Canadian Criminal LR*
 Pomerance R "The new approach to sentencing in Canada: Reflections of a trial judge" 2012 17(3) *Canadian Criminal Law Review* 305-326
- Posner 1983 *Indiana LJ*
 Posner RA "The meaning of judicial self-restraint" 1983 59(1) *Indiana Law Journal* 1-24
- Posner 1997 *Chicago-Kent LR*
 Posner R "The rise and fall of administrative law" 1997 72 *Chicago-Kent Law Review* 953-963
- Posner 2012 *California LR*
 Posner RA "The rise and fall of judicial self-restraint" 2012 100(3) *California Law Review* 519-556

Pound 1960 *New York Univ LR*

Pound R "Discretion, dispensation and mitigation: The problem of the individual special case" 1960 35 *New York University Law Review* 925-937

Redish 1990 *DePaul LR*

Redish M H "Separation of powers, judicial authority, and the scope of the article III: the troubling cases of *Morrison* and *Mistretta*" 1990 39(2) *DePaul Law Review* 299-319

Redish and Drizin 1987 *NYU LR*

Redish MH and Drizin KL "Constitutionalism federalism and judicial review: the role of textual review" 62 *New York University Law Review* 62 1987

Rehnquist 1976 *Texas LR*

Rehnquist WH "Notion of the living Constitution" 1976 *Texas Law Review* 693-706

Rehnquist 1994 *Am J of Trial Advocacy*

Rehnquist WH "1993 year-end report on the federal judiciary" 1994 17(3) *American Journal of Trial Advocacy* 571-580

Riley 2010 *Public Interest LJ*

Riley K "Trial by legislature: Why statutory mandatory minimum sentences violate the separation of powers doctrine" 2010 19 *Public Interest Law Journal* 285-310

Roberts *et al* 2007 *Canadian J Crime and Crim Justice*

Roberts JV, Crutcher N and Verbrugge P "Public attitudes to sentencing in Canada: Exploring recent findings" 2007 49(1) *Canadian Journal of Crime and Criminal Justice* 75-107

Rotunda 1989 *Harvard JL & Publ Pol*

Rotunda RD "Interpreting an Unwritten Constitution" 1989 12 *Harvard Journal of Law & Public Policy* 15-22

Roux 2014 *Constitutional Court Rev*

Roux T "The South African Constitutional Court's rights democratic jurisprudence" 2014 (11) *Constitutional Court Review* 33-73

Scalia 1989 *Univ of Chicago LR*

Scalia A "The rule of law as a law of rules" 1989 56(4) *University of Chicago Law Review* 1175-1188

Schauer 1995 *Stanford LR*

Schauer F "Giving reasons" 1995 47 *Stanford Law Review* 633-659

- Schauer 1995 *Supreme Court Rev*
 Schauer F "Answander revisited" 1995 *Supreme Court Review* 71
- Schauer 2006 *Univ of Chicago LR*
 Schauer F "Do cases make bad law?" 2006 73(3) *University of Chicago Law Review* 883-918
- Sharp 1935 *Univ of Chicago LR*
 Sharp MP "The classic American doctrine of 'the separation of powers'" 1935 *The University of Chicago Law Review* 385-436
- Shavell 1995 *J Legal Stud*
 Shavell S "The appeals process as a means of error correction" 1995 24(2) *Journal of Legal Studies* 379-426
- Siegel 2018 *Vanderbilt LR*
 Siegel JR "The constitutional case for *Chevron* deference" 2018 71(3) *Vanderbilt Law Review* 936-993
- Singh and Bhero 2016 *PELJ*
 Singh A and Bhero MZ "Judicial law-making: Unlocking the creative powers of judges in terms of section 39(2) of the Constitution" 2016 19 *Potchefstroom Electronic Law Journal* 1-22
- Sinnot-Armstrong 2003 *Law and Philosophy*
 Sinnot-Armstrong W "Weak and strong judicial review" 2003 22(3/4) *Law and Philosophy* 381-392
- Siyo and Mubangizi 2015 *PELJ*
 Siyo L and Mubangizi JC "The independence of South African judges: a constitutional and legislative perspective" 2015 (18)4 *Potchefstroom Electronic Law Journal* 817-846
- Sloth-Nielsen and Ehlers 2005 *SA Crime Quarterly*
 Sloth-Nielsen J and Ehlers L "Assessing the impact: Mandatory and minimum sentences in South Africa" 2005 14 *SA Crime Quarterly* 15-22
- Snyman 2007 *SALJ*
 Snyman CR "Extending the scope of rape - a dangerous precedent" 2007 *South African Law Journal* 677-687
- Sprott *et al* 2013 *Canadian J Crime and Crim Justice*
 Sprott JB, Webster CM and Doob AN "Punishment and confidence in the criminal justice system" 2013 55(2) *Canadian Journal of Criminology and Criminal Justice* 279-292

- Strauss 1996 *Univ Chicago LR*
 Strauss DA "Common law constitutional interpretation" 1996 63(3) *University of Chicago Law Review* 877-935
- Stuntz 2001 *Michigan LR*
 Stuntz WJ "The pathological politics of criminal law" 2001 100(3) *Michigan Law Review* 505-600
- Sullivan 1992 *Harvard LR*
 Sullivan KM "Foreword: The justices of rules and standards" 1992 106(1) *Harvard Law Review* 22-123
- Taggart 2008 *NZ LJ*
 Taggart M "Proportionality, deference, Wednesbury" 2008 *New Zealand Law Journal* 122-139
- Talmadge 1999 *Seattle Univ LR*
 Talmadge PA "Understanding the limits of power: Judicial restraint in general jurisdiction court systems" 1999 22 *Seattle University Law Review* 695-739
- Terblanche 2001 *SACJ*
 Terblanche SS "Aspects of minimum sentence legislation: Judicial comment and the courts' jurisdiction" 2001 14 *South African Journal of Criminal Justice* 1-19
- Thayer 1983 *Harvard LR*
 Thayer JB "The origins and scope of the American doctrine of constitutional law" 1893 7(3) *Harvard Law Review* 129-156
- Tonry 2009 *Crime and Justice*
 Tonry M "The mostly unintended effects of mandatory penalties: Two centuries of consistent findings" 2009 38 *Crime and Justice* 65-114
- Tremblay 2003 *Oxford JLS*
 Tremblay LB "General legitimacy of judicial review and the fundamental basis of constitutional law" 2003 23(4) *Oxford Journal of Legal Studies* 525-527
- Tremblay 2005 *Int J of Const Law*
 Tremblay LB "The legitimacy of judicial review: The limits of dialogue between courts and legislatures" 2005 3(4) *International Journal of Constitutional Law* 617-648
- Trengove 1999 *ESR Review*
 Trengove W "Judicial remedies for violations of socio-economic rights" 1999 1(4) *ESR Review* 8-10

Tyler 1978 *Hofstra LR*

Tyler HR "Sentencing Guidelines: Control of discretion in federal sentencing" 1978 7(1) *Hofstra Law Review* 1-28

Van der Vyver 1993 *South African Pub Law*

Van der Vyver JD "The separation of powers" 1993 8(2) *South African Public Law* 177-191

Van Zyl Smit 2000 *Punishment and Society*

Van Zyl Smit D "Mandatory sentences: A new conundrum for the new South Africa?" 2000 2(2) *Punishment and Society*

Van Zyl Smit and Ashworth 2004 *Modern LR*

Van Zyl Smit D and Ashworth A "Disproportionate sentences as human rights violations" 2004 67(4) *Modern Law Review* 541-560

Verkuil 1989 *William and Mary LR*

Verkuil PR "Separation of powers, the rule of law and the idea of independence" 1989 30(2) *William and Mary Law Review* 301-341

Wagner 2007 *Georgetown LJ*

Wagner WE "When all else fails: Regulating risky products through tort litigation" 2007 95 *Georgetown Law Journal* 693-732

Waldron 2006 *Yale LJ*

Waldron J "The core of the case against judicial review" 2006 115(6) *Yale Law Journal* 1346-1406

Wallis 2018 *SA Judicial Education J*

Wallis M "Do we need deference?" 2018 1(1) *South African Judicial Education Journal* 97-107

Walter 2006 *Cleveland State LR*

Walter K "Booker and brave new world: The tension among the federal sentencing guidelines, judicial discretion, and a defendant's constitutional right to trial by jury" 2005-2006 53 *Cleveland State Law Review* 657-687

Walters 2001 *Univ of Toronto LJ*

Walters MD "The common law constitution in Canada: Return of *Lex non Scripta* as fundamental law" 2001 51(2) *University of Toronto Law Journal* 91-141

Watkins and Lemieux 2015 *Perspectives on Politics*

Watkins D and Lemieux S "Compared to what? Judicial review and other veto points in contemporary political theory" 2015 13(2) *Perspectives on Politics* 312-326

Webb 1998 *J Const Law*

Webb H "The Constitutional Court of South Africa: Rights interpretation and comparative constitutional law" 1998 1(2) *Journal of Constitutional Law* 205-283

Wiechers 2009 *SA Public Law*

Wiechers M "Guardian of the Constitution - Constitutional review and the South African Constitutional Court" 2009 24(1) *South African Public Law* 136-150

Wright 1968 *Cornell LR*

Wright JS "Role of the Supreme Court in a democratic society-judicial activism or restraint" 1968 54(1) *Cornell Law Review* 1-28

Yoo *Texas Rev Law & Pol*

Yoo J "Judicial supremacy has its limits" 2015 20 *Texas Review of Law & Politics* 1-27

Young 2008 *Oklahoma City Univ LR*

Young RP "A judicial traditionalist confronts Justice Brennan's school of judicial philosophy" 2008 33(1) *Oklahoma City University Law Review* 263-285

Research papers and reports

Archambault *Report of the Royal Commission to investigate the penal system in Canada*

Archambault J *Report of the Royal Commission to investigate the penal system in Canada* (JO Patenaude ISO Ottawa 1938)

Alberta Civil Liberties Research Centre *Striking the right balance*

Alberta Civil Liberties Research Centre *Striking the right balance: implications of expanding executive powers for Canadian democracy* (Alberta Civil Liberties Centre Alberta 2016)

Burton *Striking the right balance*

Burton S *Striking the right balance: Implications of expanding executive powers for Canadian democracy* (Alberta Civil Liberties Research Centre University of Calgary Alberta 2016)

Cameron *Imprisoning the nation*

Cameron E *Imprisoning the nation: minimum sentence in South Africa* (Dean's Distinguished Lecture University of the Western Cape 2017)

- Canadian Sentencing Commission *Sentencing reform: A Canadian approach*
 Canadian Sentencing Commission *Sentencing reform: A Canadian approach: report of the Canadian Sentencing Commission* (Canadian Government Publishing Centre Ottawa 1987)
- Caylor and Beaulne *A defence of mandatory minimum sentences*
 Caylor L and Beaulne GG *A defence of mandatory minimum sentences* (Macdonald-Laurier Institute Ottawa 2014)
- Celliers *Finding a balance*
 Celliers Y *Finding a balance between judicial activism and judicial deference* (Unpublished LLM dissertation University of Pretoria 2014)
- Deziel *The effectiveness of mandatory minimum sentences*
 Deziel J *The effectiveness of mandatory minimum sentences: A comparative study of Canada and South Africa* (Unpublished LLM dissertation University of Cape Town 2013)
- Diala 2007 *Judicial activism*
 Diala AC *Judicial activism in South Africa's Constitutional Court: Minority protection or judicial illegitimacy?* (Unpublished LLM dissertation University of Pretoria 2007)
- Doob, Webster and Gartner *Issues related to harsh sentences and mandatory minimum sentences*
 Doob AN, Webster CM and Gartner R *Issues related to harsh sentences and mandatory minimum sentences: General deterrence and incapacitation* (University of Toronto Centre for Criminology and Sociological Studies Toronto 2014)
- Ekins *Statutory interpretations*
 Ekins R *Statutory interpretations and the separation of powers* (Paper delivered at Georgetown University seminar 1 December 2014)
- Fauteaux *et al Report of a committee appointed to inquire into principles*
 Fauteaux G, Common WB, Edmison JA and McCulley J *Report of a committee appointed to inquire into principles and procedures followed in the remission service of the Department of Justice of Canada* (Queen's Printer Ottawa 1956)
- Hofer *et al Fifteen years of guideline sentencing*
 Hofer PJ, Loeffler C, Blackwell K and Valentino P *Fifteen years of guideline sentencing: An assessment of how well the federal criminal justice system is achieving the goals of sentencing reform* (United States Sentencing Commission Washington DC 2004)

- Irish Law Reform Commission *Hearsay in civil and criminal cases*
Irish Law Reform Commission *Hearsay in civil and criminal cases* (Law Reform Commission Dublin 2010)
- Kohn *The burgeoning constitutional requirement*
Kohn LM *The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?* (Unpublished LLM dissertation University of Cape Town Cape Town 2013)
- Levi *Federalism and constitutional entrenchment*
Levi JT *Federalism and constitutional entrenchment* (Lecture given at Brown University Political Philosophy Workshop 2008) 1-46
- Macfarlane *The Supreme Court of Canada*
Macfarlane E *The Supreme Court of Canada and the judicial role: A historical institutionalist account* (Unpublished PhD thesis Queen's University Ontario 2009)
- Mangat *More than we can afford*
Mangat R *More than we can afford: The cost of mandatory minimum sentencing* (British Columbia Civil Liberties Association Vancouver 2014)
- Mhlanga *An analysis of the impact of the admission of hearsay evidence*
Mhlanga PV *An analysis of the impact of the admission of hearsay evidence on the accused's right to a fair trial* (Unpublished LLM dissertation University of South Africa Pretoria 2016)
- Naidoo *Does the lack of sufficient formulation*
Naidoo SS *Does lack of sufficient formulation and articulation of principles guiding the limits of the Constitutional Court undermine its legitimacy?* (Unpublished LLM dissertation University of Cape Town Cape Town 2014)
- O'Mahoney *The compatibility of mandatory minimum sentence with ICCPR*
O'Mahoney SA *The compatibility of mandatory minimum sentence with ICCPR: Australia in focus* (Unpublished LLM dissertation Lund University Lund 2002)
- Ouimet *Towards unity*
Ouimet R *Towards unity: Criminal justice and corrections, Report of the Canadian Committee on Corrections* (Queen's Printer Ottawa 1969)
- Pypers *South Africa's parliamentary system*
Pypers E *South Africa's parliamentary system: From Westminster to hybrid?* (Briefing Paper 380 for the Southern African Catholic Bishops' Conference Parliamentary Liaison Office Cape Town 2015)

- Raphael and Stoll *A new approach to reducing incarceration*
Raphael S and Stoll MA *A new approach to reducing incarceration while maintaining low rates of crime* (The Hamilton Project Brookings 2014)
- Roberts *Mandatory sentences of imprisonment in common law jurisdictions*
Roberts JV *Mandatory sentences of imprisonment in common law jurisdictions: Some representative models* (Department of Justice Canada Ottawa 2005)
- Roeder, Eisen, and Bowling *What caused the crime decline?*
Roeder O, Eisen L, and Bowling L *What caused the crime decline?* (New York University School of Law New York 2015)
- SALC *Euthanasia*
South African Law Commission (SALC) *Euthanasia and the artificial preservation of life* (South African Law Commission Discussion Paper 71 Project 86 Pretoria 1998)
- SALRC *Sentencing*
South African Law Reform Commission (SALRC) *Sentencing (A New Sentencing Framework) Report Project 82* (SALRC Pretoria 2000)
- Schauer and Zeckhauser *The trouble with cases*
Schauer F and Zeckhauser R *The trouble with cases* (HKS Faculty Research Working Paper Series RW09-025 John F Kennedy School of Government Harvard University Cambridge 2009)
- Steinberg *Prison overcrowding*
Steinberg J *Prison overcrowding and the constitutional right to adequate accommodation in South Africa* (Centre for the Study of Violence and Reconciliation Johannesburg 2005)
- Viljoen *Report of Commission of Inquiry into the penal system*
Viljoen G *Report of the Commission of Inquiry into the penal system of the Republic of South Africa* (Govt Printer RP 78 Pretoria 1976)
- Waldron *Judicial review and judicial supremacy*
Waldron J *Judicial review and judicial supremacy* (New York University Public Law and Legal Theory Working Papers No 495 New York 2014)
- Wells *Current challenges for the doctrine*
Wells D *Current challenges for the doctrine of the separation of powers – the ghosts in the machinery of government* (Lecture given at Queensland University of Technology 2006) 105-117

Yan-lung *Hearsay in criminal proceedings*

Yan-lung W *Hearsay in criminal proceedings* (Law Reform Commission of Hong Kong Report Hong Kong 2009)

Internet sources

Amato <https://www.timeslive.co.za/sunday-times/news/2016-11-13-no-resting-the-case-for-adv-tembeka-ngcukaitobi/> (Date of use: 1 November 2019)

Amato C “No resting the case for Adv Tembeka Ngcukaitobi” <https://www.timeslive.co.za/sunday-times/news/2016-11-13-no-resting-the-case-for-adv-tembeka-ngcukaitobi/> (Date of use: 1 November 2019)

Biography.com Editors <https://www.biography.com/people/john-adams-37967> (Date of use: 4 February 2019)

Biography.com Editors “John Adams Biography” <https://www.biography.com/people/john-adams-37967> (Date of use: 4 February 2019)

Bork <https://www.content.csbs.utah.edu/dlevin/jud.../Has-the-Supreme-Court-Gone-too-Far.pdf> (Date of use 1 July 2019)

Bork RH “Has the Supreme Court gone too far?” <https://www.content.csbs.utah.edu/dlevin/jud.../Has-the-Supreme-Court-Gone-too-Far.pdf> (Date of use: 1 July 2019)

Caher <http://www.heal-online.org/blasts.pdf> (Date of use 20 October 2019)

Caher J “Federal judge blasts mandatory minimum sentences” <http://www.heal-online.org/blasts.pdf> (Date of use: 20 October 2019)

Carson <https://fee.org/article/judicial-monopoly-over-the-constitution-jeffersons-view/> (Date of use: 10 October 2019)

Carson C “Judicial monopoly over the Constitution: Jefferson’s view” 1983 Foundation for Economic Education <https://fee.org/article/judicial-monopoly-over-the-constitution-jeffersons-view/> (Date of use: 1 October 2019)

Clinton <https://www.firstthings.com/article/1999/01/001-how-the-court-became-supreme> (Date of use: 18 February 2019)

Clinton RL “How the Supreme Court became supreme” <https://www.firstthings.com/article/1999/01/001-how-the-court-became-supreme> (Date of use: 18 February 2019)

Collins English Dictionary <https://www.collinsdictionary.com/dictionary/english/deference> (Date of use: 26 November 2019)

Collins English Dictionary “Deference” <https://www.collinsdictionary.com/dictionary/english/deference> (Date of use: 26 November 2019)

- ConstitutionNet <https://www.constitutional-law.net> (Date of use: 11 May 2020)
ConstitutionNet “Constitutional history of Canada” <https://www.constitutional-law.net> (Date of use: 11 May 2020)
- Constitutional Rights Foundation <http://www.crf-usa.org/images/t2t/pdf/14thAmendmentDredScott.pdf> (Date of use: 26 March 2019)
Constitutional right foundation 2016 “The 14th Amendment and due process: Bill of Rights” <http://www.crf-usa.org/images/t2t/pdf/14thAmendmentDredScott.pdf> (Date of use: 26 March 2019)
- Drug Policy Alliance Network <http://www.drugpolicy.org/drugwar/mandatorymin>
(Date of use: 6 November 2019)
Drug Policy Alliance Network “Mandatory minimum sentences” <http://www.drugpolicy.org/drugwar/mandatorymin> (Date of use: 6 November 2019)
- Duhaime’s Law Dictionary <http://www.duhaime.org/LegalDictionary/C-Page4.aspx>
(Date of use: 21 June 2019)
Duhaime’s Law Dictionary “Constitutional supremacy” <http://www.duhaime.org/LegalDictionary/C-Page4.aspx> (Date of use: 21 June 2019)
- EDSITEment! <https://www.edsiteement.neh.gov/lesson-plans/john-marshall-marbury-v-madison-and-judicial-review-how-court-became-supreme> (Date of use: 14 February 2019)
EDSITEment! “John Marshall, Marbury v Madison, and judicial review - How the court became supreme” <https://www.edsiteement.neh.gov/lesson-plans/john-marshall-marbury-v-madison-and-judicial-review-how-court-became-supreme> (Date of use: 14 February 2019)
- Encyclopaedia Britannica <https://www.britannica.com/topic/judicial-activism> (Date of use: 15 March 2019)
Encyclopaedia Britannica “Judicial activism” <https://www.britannica.com/topic/judicial-activism> (Date of use: 15 March 2019)
- Encyclopaedia Britannica <https://www.britannica.com/topic/judicial-independence>
(Date of use: 21 June 2019)
Encyclopaedia Britannica “Judicial independence” <https://www.britannica.com/topic/judicial-independence> (Date of use: 21 June 2019)

Gerber <https://supreme.findlaw.com/legal-commentary/the-legal-professoriates-case-against-judicial-review-why-the-academy-is-wrong-and-why-it-matters.html>
(Date of use: 11 March 2019)

Gerber S “The legal professoriate’s case against judicial review: why the academy is wrong, and why it matters” <https://supreme.findlaw.com/legal-commentary/the-legal-professoriates-case-against-judicial-review-why-the-academy-is-wrong-and-why-it-matters.html> (Date of use: 22 February 2019)

Jones <https://thelawofficeofbrianjones.com/2014/11/17/with-liberty-and-justice-for-some-against-mandatory-minimum-sentencing/> (Date of use: 6 November 2019)

Jones BG “With liberty and justice for some: Against mandatory minimum sentencing” <https://thelawofficeofbrianjones.com/2014/11/17/with-liberty-and-justice-for-some-against-mandatory-minimum-sentencing/> (Date of use: 6 November 2019)

Justice Education Society <http://www.lawlessons.ca/lesson-plans/1.3.overview-of-the-canadian-charter-of-rights-and-freedoms> (Date of use: 18 June 2019)

Justice Education Society “Charter of Rights and Freedoms” <http://www.lawlessons.ca/lesson-plans/1.3.overview-of-the-canadian-charter-of-rights-and-freedoms> (Date of use: 18 June 2019)

Legal Dictionary <https://legal-dictionary.thefreedictionary.com/Bill+of+Rights> (Date of use: 18 June 2019)

Legal Dictionary “Bill of Rights” <https://legal-dictionary.thefreedictionary.com/Bill+of+Rights> (Date of use: 18 June 2019)

Lincoln Home <https://www.nps.gov/liho/learn/historyculture/slavery.htm> (Date of use: 24 July 2019)

Lincoln Home “Lincoln on slavery” <https://www.nps.gov/liho/learn/historyculture/slavery.htm> (Date of use: 24 July 2019)

Makin <https://www.theglobeandmail.com/news/national/judicial-activism-has-gone-too-far-court-says/article22398248/> (Date of use: 15 July 2019)

Makin K “Judicial activism has gone too far court says” <https://www.theglobeandmail.com/news/national/judicial-activism-has-gone-too-far-court-says/article22398248/> (Date of use: 15 July 2019)

McKaiser <https://latitude.blogs.nytimes.com/2012/03/08/south-africas-governing-party-resents-the-constitutional-courts-fierce-independence/> (Date of use: 11 March 2019)

McKaiser E “Democracy and its malcontents” <https://latitude.blogs.nytimes.com/2012/03/08/south-africas-governing-party-resents-the-constitutional-courts-fierce-independence/> (Date of use: 11 March 2019)

Merriam-Webster Dictionary <https://www.merriam-webster.com/dictionary/deference> (Date of use: 26 November 2019)

Merriam-Webster Dictionary “Deference” <https://www.merriam-webster.com/dictionary/deference> (Date of use: 26 November 2019)

Merriam-Webster <https://www.merriam-webster.com/dictionary/rule-of-law> (Date of use: 21 June 2019)

Merriam-Webster “Rule of law” <https://www.merriam-webster.com/dictionary/rule-of-law> (Date of use: 21 June 2019)

Moseneke <https://www.groundup.org.za/article/separation-powers-have-courts-crossed-line-3152/> (Date of use: 18 September 2018)

Moseneke D “Separation of powers: Have the courts crossed the line?” <https://www.groundup.org.za/article/separation-powers-have-courts-crossed-line-3152/> (Date of use: 18 September 2018)

National archives <https://www.archives.gov/press-release/2018/nr18-53> (Date of use: 30 January 2019)

National archives “From Alexander Hamilton to ‘Hamilton’” <https://www.archives.gov/press-release/2018/nr18-53> (Date of use: 30 January 2019)

National archives <https://www.archives.gov/founding-docs/declaration-transcript> (Date of use: 25 March 2019)

National Archives “The Declaration of independence of the: a history/ national archives” <https://www.archives.gov/founding-docs/declaration-transcript> (Date of use: 25 March 2019)

Ramaphosa <https://www.politicsweb.co.za/documents/constitution-a-living-instrument-of-fundamental-tr> (Date of use: 5 April 2019)

Ramaphosa C “Constitution a living instrument of fundamental transformation” <https://www.politicsweb.co.za/documents/constitution-a-living-instrument-of-fundamental-tr> (Date of use: 5 April 2019)

Ramotsho <http://www.derebus.org.za/separation-power-defines-ethical-boundaries-south-africas-law-makers/> (Date of use: 20 June 2019)

Ramotsho K “Separation of power defines ethical boundaries between South Africa’s law makers” 2016 *De Rebus* <http://www.derebus.org.za/separation-power-defines-ethical-boundaries-south-africas-law-makers/> (Date of use: 20 June 2019)

REAL Women of Canada <http://www.realwomenofcanada.ca/wp-content/uploads/2012/07/CurbingThePowerSCC.pdf> (Date of use: 15 March 2019)

REAL Women of Canada “Curbing the power of the Supreme Court of Canada” <http://www.realwomenofcanada.ca/wp-content/uploads/2012/07/CurbingThePowerSCC.pdf> (Date of use: 15 March 2019)

REAL Women of Canada http://www.realwomenofcanada.ca/wp-content/uploads/2012/06/judiciary_final.pdf (Date of use: 19 March 2019)

REAL Women of Canada “The judiciary in Canada” http://www.realwomenofcanada.ca/wp-content/uploads/2012/06/judiciary_final.pdf (Date of use: 19 March 2019)

REAL Women of Canada <http://www.realwomenofcanada.ca/who-is-running-canada/> (Date of use: 19 March 2019)

REAL Women of Canada “Who is running Canada?” <http://www.realwomenofcanada.ca/who-is-running-canada/> (Date of use: 19 March 2019)

Siddiqui <https://dailyasianage.com/news/84675/powers-limitations-and-challenges-of-chief-justice> (Date of use: 15 March 2019)

Siddiqui MS “Powers, limitations and challenges of chief justice” <https://dailyasianage.com/news/84675/powers-limitations-and-challenges-of-chief-justice> (Date of use: 15 March 2019)

Strauss <https://www.law.uchicago.edu/news/living-constitution> (Date of use: 5 April 2019)

Strauss DA “The living Constitution” <https://www.law.uchicago.edu/news/living-constitution> (Date of use: 5 April 2019)

The Catholic University of America <http://counsel.cua.edu/fedlaw/Defense.cfm> (Date of use: 22 February 2019)

The Catholic University of America “Summary of federal laws: The Solomon Amendment” <http://counsel.cua.edu/fedlaw/Defense.cfm> (Date of use: 22 February 2019)

The New Humanitarian <http://www.thenewhumanitarian.org/news/2006/09/27/zuma-slammed-views-homosexuality-same-sex-marriage> (Date of use: 11 March 2019)

The New Humanitarian “Zuma slammed for views on homosexuality, same-sex marriage” <http://www.thenewhumanitarian.org/news/2006/09/27/zuma-slammed-views-homosexuality-same-sex-marriage> (Date of use: 11 March 2019)

The White House <https://www.whitehouse.gov/about-the-white-house/presidents/james-madison/> (Date of use: 12 February 2019)

The White House “James Madison” <https://www.whitehouse.gov/about-the-white-house/presidents/james-madison/> (Date of use: 12 February 2019)

The White House <https://www.whitehouse.gov/about-the-white-house/presidents/thomas-jefferson/> (Date of use: 11 February 2019)

The White House “Thomas Jefferson” <https://www.whitehouse.gov/about-the-white-house/presidents/thomas-jefferson/> (Date of use: 11 February 2019)

Thipanyane www.ffc.co.za/.../48-13-thipanyane-t-the-courts-vs-policy-makers-who-set-the-pace (Date of use: 10 July 2019)

Thipanyane T “Key challenges in the progressive realization of constitutionally mandated basic services (CMBS) in an IGFR system” www.ffc.co.za/.../48-13-thipanyane-t-the-courts-vs-policy-makers-who-set-the-pace (Date of use: 10 July 2019)

Troy <https://www.thedailybeast.com/who-let-the-supreme-court-make-laws> (Date of use: 13 March 2019)

Troy G “Who let the Supreme Court make laws?” <https://www.thedailybeast.com/who-let-the-supreme-court-make-laws> (Date of use: 13 March 2019)

United States History <https://www.u-s-history.com/pages/h367.html> (Date of use: 12 February 2019)

United States History “Alexander Hamilton” <https://www.u-s-history.com/pages/h367.html> (Date of use: 12 February 2019)

USLegal <https://definitions.uslegal.com/j/judicial-restraint/> (Date of use: 21 June 2019)

USLegal “Judicial restraint” <https://definitions.uslegal.com/j/judicial-restraint/> (Date of use: 21 June 2019)

Webster’s New World College Dictionary <https://www.yourdictionary.com/deference> (Date of use: 26 November 2019)

Webster’s New World College Dictionary “Deference” <https://www.yourdictionary.com/deference> (Date of use: 26 November 2019)

Wright <http://edition.cnn.com/2003/LAW/04/09/kennedy.congress/> (Date of use: 20 October 2019)

Wright B “Justice Kennedy criticises mandatory minimum sentences” <http://edition.cnn.com/2003/LAW/04/09/kennedy.congress/> (Date of use: 20 October 2019)

Yacoob <https://www.iol.co.za/news/opinion/the-judiciary-is-the-guardian-of-the-constitution-9253661> (Date of use: 3 May 2019)

Yacoob Z “The judiciary is the guardian of the constitution” <https://www.iol.co.za/news/opinion/the-judiciary-is-the-guardian-of-the-constitution-9253661> (Date of use: 3 May 2019)

Legislation

Bill C-9 (39-1): An Act to amend the Criminal Code (conditional sentence of imprisonment) 31 May 2007

Bill C-10: An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts, Publication No 41-1-C10-E (2011)

Bill C-10 (41-2): An Act to Amend the Criminal Code (Trafficking in Contraband Tobacco) 2nd Session 41st Parliament Canada 2013

Bill C-26: An Act to Amend the Criminal Code, the Canada Evidence Act and the Sex Offender Information Registration Act, to Enact the High Risk Child Sex Offender Database Act and to Make Consequential Amendments to Other Acts 2nd Session 41st Parliament 2014

Bill C-41: An Act to Amend the Criminal Code and Other Acts in Consequence Thereof SC 1995 c 22

Bill Separation of Powers Restoration Act, House of Representative No114-622 (2016)

British North America Act, 1867 (United Kingdom)

Canadian Charter of Rights and Freedoms, 1982

Constitution of Canada, 1982

Constitution of the Republic of South Africa, 1996

Constitution of the Republic of South Africa, Act 200 of 2003

Constitution of the United States 1787

Controlled Drugs and Substance Act (SC 1996 c 19)

Correctional Services Act 111 of 1998

Criminal Justice Act 2003 (UK)

Criminal Law Amendment Act 105 of 1997

Criminal Law (Sexual Offences) Amendment Bill [B 50—2003]

Criminal Procedure Act 51 of 1977

Federal Rules of Criminal Procedure (as amended 1 December 2019)

Human Rights Act 1998 c42 (UK)

Income Tax Act, 1985 (Canada)

Judges' Remuneration and Conditions of Employment Act 47 of 2001
Law of Evidence Amendment Act 45 of 1988
Marriage Act 25 of 1961
New Zealand Bill 51 of 1977
New Zealand Bill of Rights Act 1990 No 109
Old Age Security Act, 1985 (Canada)
Prevention and Combating of Trafficking in Persons Act 7 of 2013
Social Aid Act, 1984 (Canada)
The Declaration of Independence of United States, 1776
The Promotion of Administrative Justice Act 3 of 2000
The Representative of the People Act, 1918
Unemployment Insurance Act, 1971 (Canada)
US Supreme Court Amendment 2072 (West 1982 and Supplement 1989), Rules
Enabling Act

International instruments

European Convention for Human Rights, entered into force on 3 September 1953
International Covenant on Civil and Political Rights (CCPR) (United Nations),
adopted 16 December 1966

Case law

AC v Manitoba 2009 SCC 30
Affordable Medicines Trust v Minister of Health 2005 ZACC 3
Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC)
Almendarez-Torres v United States 523 US 224 (1998)
Anderson v Dunn 19 US (6 Wheat) 204 215 (1821)

Ashwander v Tennessee Valley Authority 297 US 288 341 (1936)

Babcock v Canada (Attorney General) [2002] 3 SCR 3

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC)

Baker v Carr 369 US 186 (1962)

Beauharnais v Illinois 343 US 250 (1952)

Bedford v Canada 2013 SCC 72

Bel Porto School Governing Body and Others v Premier Western Cape and Another 2002 (3) SA 265 (CC)

Bernstein v Bester NO 1996 (2) SA 751 (CC)

Board of County Commissioners, Wabaunsee County, Kansas v Umbehr 518 US (1996)

Califano v Westcott 443 US 76 (1979)

Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources) [1989] 2 SCR 49

Canada (House of Commons) v Vaid [2005] 1 SCR 667

Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation [1979] 2 SCR

Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC)

Chamberlain v Surrey School District No 36 [2002] 4 SCR 710

Chaouli v Quebec (AG) [2005] 1 SCR 791

Chevron USA Inc v National Resources Defence Council 467 US 837 (1984)

Clay v Sun Insurance Office Ltd 363 US 207 (1960)

Cohen v State of New York 720 NE 2d 850 (NY1999)

Compassion in Dying v State of Washington 850 F Supp 1454 (WD Wash 1994)

Compassion in Dying v State of Washington 49 F3d 586 (9th Circ 1995)

Compassion in Dying v State of Washington 85 F3d 1440 (9th Circ 1996)

Cooper v Aaron 358 US 1 (1958)

Cooper v Canada (Human Rights Commission) [1996] 3 SCR 854

County of Sacramento v Lewis 523 US 833 861 (1998)

De Boucherville v State of Mauritius [2008] UKPC 70

De Lange v Smuts NO 1998 (3) SA 785 (CC)

Democratic Alliance v The President of the Republic of South Africa [2012] ZACC 24

Dennis v United States 341 US 494 525 (1951)

Doctors for Life International v The Speaker of the National Assembly and Others 2006 (6) SA 416 (CC)

Dred Scott v Sandford 60 US (19 How) 393 (1857)

Du Plessis NO v De Klerk 1996 (3) SA 850 (CC)

Dunsmuir v New Brunswick [2008] 1 SCR190

Earl of Devon's Case II State Tr 133 136 (1689)

Edwards Books and Art Ltd [1986] 2 SCR 713

Egan and Nesbitt v Canada [1995] 2 SCR 513

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

Ex parte Minister van Justisie: in re S v J en S Von Molendorff 1989 (4) SA 1028 (A)

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC)

Ferreira v Levin NO 1996 (1) SA 984 (CC)

Fraser v Public Service Staff Relations Board [1985] 2 SCR 455

Gosselin v Attorney General of Quebec [2002] 4 SCR 429

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

Gutierrez-Brizuela v Lynch 834 F 3d 11421153 (10th Cir 2016)

Hammer v Dagenhar 247 US 251 (1918)

Harkins and Edwards v United Kingdom [2012] ECHR 45

Heckler v Mathews 465 US 728 (1984)

Helen Suzman Foundation v Judicial Service Commission Case CCT 289/16 [2018] ZACC 8

Hodges v Humkin 2 Bulst 139 140 80 ER 1015, 1016 (KB1615)

Immigration and Naturalisation Service v Chadha 462 US 919 (1983)

In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)

Island County v State 135 Washington 2d 141 146-147 955 P 2d 377 (1998)

Jones v United States 526 US 227 240 (1999)

Kilbourn v Thompson 103 US 168 171 (1880)

Lee v Minister of Correctional Services 2013 (2) SA 144 (CC)

Le Gras v Bailiff of Bishop of Winchester YB Mich 10 Edw II pl 4 (CP1316)

Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Another 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC)

Liyange v The Queen [1967] AC 259

Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA)

M v H [1999] 2 SCR 3

Marbury v Madison 5 US (1 Cranch) 137 2 L Ed 60 (1803)

Mashia Ebrahim v Mahomed Essop 1905 TS 59

Masiya v Director of Public Prosecutions, Pretoria and Another (Centre of Applied Legal Studies and Another, as Amicus Curiae) 2007 (2) SACR 435 (CC)

McPherson v Buick Motor Co 217 NY 382,111 NE 1050 (1916)

Michigan v EPA 135 S Ct 2699 2712 (2015)

Miller v Alabama 132 S Ct 2455 (2012)

Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA)

Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 721 (CC)

Minister of Home Affairs and Another v Fourie and Another 2006 (1) SA 524 (CC)

Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others 2017 (3) SA 152 (SCA)

Miranda v Arizona 384 US 436 (1966)

Mistretta v United States 488 US 361 (1989)

Mithu v State of Punjab [1983] 2 SCR 690

Murray v Netherlands [2016] ECHR 408 (Grand Chamber)

Myers v Bethlehem Shipbuilding Corporation 303 US 41 (1938)

Nancy Rosenberg and Others v The Attorney General of Canada [1998] C22807 (ON CA)

National Cable and Telecommunications Association v Brand X Internet Services 544 US 967 (2005)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)

New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly) [1993] 1 SCR 319

New York Times Company v Sullivan 378 US 254 (1964)

Newfoundland and Labrador Association of Public and Private Employees v Her Majesty The Queen in Rights of Newfoundland (Treasury Board) [2004] 3 SCR 381 SCC

Obergefell v Hodges 135 US 2584 (2015)

Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch) [2001] 2 SCR 781

Omar v Minister of Law and Order 1987 (3) SA 859 (A)

People ex rel Hatzel v Hall 80 NY 117 (1880)

Perez v Mortgage Bankers Association 135 S Ct 1199 1217 (2015)

Pharmaceutical Manufacturers Association of South Africa in re: Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

Planned Parenthood of Southeastern Pennsylvania v Casey 505 US 833 (1992)

Plaut v Spendthrift Farm 514 US 211 1995

Powell v McCormack 395 US 486 (1969)

Premier Province of Mpumalanga and Another v Executive Committee of Governing Bodies of the State-Aided Schools: Eastern Transvaal 1999 (2) SA 91 (CC)

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC)

Prince v President of the Law Society of the Cape of Good Hope 2002 (2) SA 194 (CC)

Provincial Judges Reference [1997] 3 SCR 3

R (Anderson) v Home Secretary [2003] AC 837

R (on the application of ProLife Alliance) v British Broadcasting Corporation [2003] UKHL 23

R v Adamo 2013 MBQB 225

R v Beare; R v Higgins [1988] 2 SCR 387

R v Edwards Books & Art Ltd [1986] 2 SCR 713

R v Ipeelee; R v Ladue 2012 SCC 13

R v Lichniak [2003] 1 AC 909

R v Offen [2001] 1 WLR 253

R v Nur 2011 ONSC (Ont SCJ)

R v Nur [2015] 1 SCR 773

R v Oakes [1986] 1 SCR 103

R v Proulx 2000 SCC 5

R v Sibiya 1955 (4) SA 247 (A)

R v Swanepoel 1945 AD 444

R (Wellington) v Secretary of State for the Home Department [2009] 1 AC 335

Re Supreme Court Special Determination Nos 6 and 7 of 1998 [1999] 2 LRC 579

Reference Re BC Motor Vehicle Act [1985] 2 SCR 486

Reference Re Canada Assistance Plan (British Columbia) [1992] 2 SCR 525

Reference Re Remuneration of Judges of the Provincial Court (Prince Edward Islands) [1997] 3 SCR 3

Reference Re Same-Sex Marriage [2004] 3 SCR 698

Reference Re Secession of Quebec [1998] 2 SCR 217

Regina v Secretary of State for the Home Department Ex Parte Fire Brigades Union
[1995] UKHL 3 (05 April 1995)

Reno v Flores 507 US 227 240 (1999 Rice v Sioux City Memorial)

Reyes v The Queen [2002] 2 AC 235

Rice v Sioux City Memorial Park Cemetery 349 US 70 74 (1955)

RJR-MacDonald Inc v Canada (AG) [1995] 3 SCR 199

Roe v Wade 410 US 113 (1973)

Romer v Evans US 620 632 (1996)

Rumsfeld v Forum for Academic and Institutional Rights (No 04-1152) US Supreme
Court (6 March 2006)

S v Augustine 1986 (3) SA 294 (C)

S v Budaza 1999 (2) SACR 491 (E)

S v Campher 1987 (1) SA 940 (A)

S v Dodo 2001 (3) SA 382 (CC)

S v Fazzie and Others 1964 (4) SA 673 (A)

S v Gibson 1974 (4) SA 478 (A)

S v Ibrahim 1999 (1) SACR 106 (C)

S v Jansen 1999 (2) SACR 368 (C)

S v Jimenez 2003 (1) SACR 507 (SCA)

S v Khumalo and Others 24/83 AV

S v Kibodo 1998 (2) SA 213 (SCA)

S v Kruger 2012 (1) SACR 369 (SCA)

S v Makwanyane and Another 1995 (1) SACR 1 (CC)

S v Malgas 2001 (2) SA 1222 (SCA)

S v Mamabolo (ETV and Others Intervening) 2001 (3) SA 409 (CC)

S v Matyityi (695/09) [2010] ZASCA 127(30 September 2010)

S v Mofokeng 1999 (1) SACR 502 (W)

S v Montgomery 2000 (2) SACR 318 (N)

S v Mpetha 1985 (3) SA 702 (A)

S v Oberholzer 1941 OPD 48

S v Philibert [2007] 274

S v Pillay 1977 (4) SA 531 (A)

S v Rabie 1975 (4) SA 855 (A)

S v RO and Another 2010 (2) SACR 248 (SCA)

S v Sibiya 1955 (4) SA 247 (A)

S v Smith 1973 (3) SA 945 (O)

S v Swartz 1999 (2) SACR 380 (C)

S v Toms 1990 (2) SA 802 (A)

S v Vilakazi 2009 (1) SACR 552 (SCA)

S v Whitehead 1970 (4) SA 424 (A)

S v Wiid 1990 (1) SACR 561 (A)

Satchwell v President of the Republic of South Africa and Another 2003 (4) SA 266 (CC)

Schachter v Canada [1992] 2 SCR 679

Smith v The Queen [1987] 1 SCR 1045

Solem v Hellem 463 US 277 (1983)

Soobramoney v Minister of Health (KwaZulu-Natal) 1998 (2) SA 755 (CC)

Special Constitutional Reference No1 of 1984: Re Minimum Penalties Legislation (1985) LRC (Const) 984 PNGLR 314

Staatspresident v United Democratic Front 1988 (4) SA 830 (A)

Stop the Beach Renourishment Inc v Florida Department of Environmental Protection et al 560 US 702 (2010)

Stransham-Ford v Minister of Justice and Correctional Services and Others 2015
(4) SA 50 (GP)

The State v Likwa [2001] 1 LRC 600

The State v Vries [1997] 4 LRC 1

Thomson Newspapers Co v Canada (AG) [1988] 1 SCR 877

Trs of Dartmouth College v Woodward 17 US (4 Wheat) 518 (1819)

United States v Angelos 345 F Supp 2d 1227 (D Utah 2004)

United States v Farley No1:07-CR-196-BBM (19th Cir 2 September 2008)

United States v Powell 404 F 3d 678 (2d Cir 2005)

United States v Socony-Vacuum Oil Co 310 US 150 (1940)

*Van Rooyen and Others v S and Others (General Council of the Bar of South Africa)
Intervening* 2002 (5) SA 246 (CC)

*Valley Forge Christian College v Americans United for Separation of Church and
State Inc* 454 US 464 (1982)

Vinter v United Kingdom [2013] ECHR 645 (Grand Chamber)

Vriend v Alberta (1996) 181 AR16 116 WAC

Vriend v Alberta [1998] 1 RCS 493

Washington v Glucksberg 521 US 702 (1997)

Weems v United States 217 US 349 (1910)

Worcester v Georgia 31 US 515 (1832)

Youngstown Co v Sawyer 343 US 579 (1952)