Gerhard van der Schyff

Ius Gentium: Comparative Perspectives on Law and Justice 5

Judicial Review of Legislation

A Comparative Study of the United Kingdom, the Netherlands and South Africa

Springer

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JUDICIAL REVIEW OF LEGISLATION

IUS GENTIUM

COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE

VOLUME 5

Foreword

Since Pericles and Ephialtes in 462 BC carried through the Athenian Assembly an act formally depriving the Areopagus – the ancient court of the Archons – of much of their jurisdiction and political influence, the relationship between the judiciary and the legislature has been near the heart of constitutional government in democracies. What are the proper limits on judicial power and how far may the judiciary call the legislature to account? This book with its study of the judicial review of legislation in three jurisdictions shines a light into that heart.

The three jurisdictions studied are well chosen. On the one hand, there is the United Kingdom with its sovereign Parliament that admits no challenge to its authority. So, in principle, in the UK there can be no judicial review of legislation (apart from subordinate legislation made under delegated powers). But there is also the Human Rights Act 1998 which does not allow the courts to quash legislation but does allow the court to scrutinise legislation for compliance with fundamental rights and to declare any incompatibility found leaving it to the elected authorities to remedy the position. There is also the possibility in the UK that the courts will take the bold step and assert a power to review legislation in appropriate circumstances. But this possibility, while supported by some scholars and the occasional *obiter dictum*, finds no echo from the elected representatives of the people. The attempted exercise of such a power would be very controversial and the political consequences impossible to predict.

On the other hand, lies South Africa. Following that country's political transformation it now has one of the most sophisticated and progressive constitutions in the world. Unsurprisingly it provides for wide ranging judicial scrutiny of legislation and the ability to test that legislation both against the Bill of Rights and against wider considerations. This is a marvellous constitutional achievement that compels admiration. But there remain tensions between the judiciary and the other branches of government in South Africa and the future resolutions of these must be awaited with interest.

And then finally there is the Kingdom of the Netherlands. In one sense the Netherlands lies close to the UK with its constitutional provision that provides that the constitutionality of acts of parliament shall not be

reviewed by the courts. But in another sense the pre-eminence accorded to international law where international norms are hierarchically superior to national norms (including constitutional provisions) marks how different the Netherlands is to both the UK and South Africa. But this pre-eminence granted to international law creates the opportunity for judicial review of legislation being grounded in international norms, even if not in national norms. When the Supreme Court of the Netherlands was pressed to change this anomaly and assert a power to review national legislation on the ground that it infringed legal certainty it was understandably cautious. But the debate continues over this anomalous position where the predominance of international norms within the national constitutional order sits awkwardly with the constitutional restriction on judicial review. But it seems clear that reform will not come through judicial assertion of greater powers.

Into this rich tapestry of different constitutional approaches the judicial review of statutes the author brings his insights. And here lies the particular value of the book. As he remarks "parliamentary democracy cannot be treated as a synonym for constitutional governance". The elected representative does not have the final word in the age of fundamental rights. But howsoever this new "bi polar" constitutionalism develops it must do so in a way that is sensible to the constitutional traditions and forms. The insights in these three constitutional orders enriches the reader's understand of his or her own legal system...which is after all the best justification for comparative studies.

University of Cambridge, UK
25 February 2010

Professor Christopher Forsyth

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Tilburg University
10 May 2010

Gerhard van der Schyff

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Setting the Scene

1.1 Emerging Bipolar Constitutionalism

1 The problem of controlling the state is the central question in the strive for constitutionalism. This desire for control implies it is a worthwhile enterprise, as control can obviously not be an end in itself without serving a purpose. With constitutionalism, this purpose is usually found in the pursuit of freedom. It is the violation of freedom that convinces us of the need to control the state and teaches us through hard experience how this can be achieved.[1] Freedom though is multifaceted, often asking the state not only to avoid intruding on the personal sphere, but also to actively help people realise freedom in a socio-economic sense. In achieving this aim, society as the vehicle for all human activity may not be collapsed in the state's needs and aspirations, but must be dutifully governed in the cause of freedom.[2] This entails striking a balance between the state and society, as John Stuart Mill so eloquently put it:

> There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs as protection against political despotism. But though this proposition is not likely to be contested in general terms, the practical question where to place the limit – how to make the fitting adjustment between individual independence and social control – is a subject on which nearly everything remains to be done.[3]

[1] Cf. András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: Central European University Press, 1999), at 12.

[2] Or as Lord Bingham of Cornhill put it: "For there is no task more central to the purpose of modern democracy, or more central to the judicial function, than that of seeking to protect, within the law, the basic human rights of the citizens, against invasion by other citizens or by the state itself", T.H. Bingham, "The European Convention on Human Rights: Time to Incorporate", 109 *L. Quart. Rev.* 390 (1993).

[3] John Stuart Mill, *On Liberty and the Subjection of Women* (New York: Henry Holt, 1879), at 15–16.

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As Mill also recognised, striking this balance has always been difficult, not less so in present times given the complex nature of modern society.

2 In rising to the occasion, the judicial review of legislation has become one of the prime hallmarks of constitutionalism today.[4] The United States of America, with its tradition of review dating back more than two centuries, is no longer the exception to the rule in allowing judiciaries to test legislation in the light of higher norms of law, whether such norms are to be found in constitutions or treaties. Nearly without fail since the Second World War, new democracies such as those emerging from the shadow of Communism choose some form of judicial review, while established democracies like Finland modify or discard their long-held reluctance in putting legislation to a judicial test.[5] After 1945, it was realised that the law could be as much a threat to liberty as its protector. This implied deflating the legislative process and its traditional safeguards in favour of a new appreciation of the judiciary's potential in controlling the law.

This faith in judicial power to control the legislative branch in its treatment of society forms part of the emergence of what may be termed *bipolar* constitutionalism – legislation is no longer simply subject to a legislative pole, but increasingly to a judicial pole as well.[6]

3 Although fast becoming the norm in constitutional democracies, the review of legislation is not without difficulty, as it hides two interrelated questions if not problems. Questions that keep stimulating debate and beg thought to ensure that the aim of controlling state power is continually met.[7] The first relates to whether such review is justified, can it be said that judicial review is desirable to the extent of being part and parcel of "good" constitutionalism? And, secondly, if the *principle* of review is acceptable, how may its *scope* be structured? The design of review and the factors that impact it may not be neglected, because although the principle of review

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[4]Charting this evolution, C. Neal Tate and Torbjörn Vallinder (eds.), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

[5]For overviews, *see* Edward McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review* (Dordrecht: Martinus Nijhoff Publishers, 1986), at 1–9; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003); Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer, 2005).

[6]Tim Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge: Cambridge University Press, 2003), at 247–251. Similarly, Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004), at 1, speaks of a transformation to "juristocracy".

[7]Proving, among others, the living nature of the debate, Jeremy Waldron, "The Core of the Case Against Judicial Review", 115 *Yale L. J.* 1346 (2006); Annabelle Lever, "Is Judicial Review Undemocratic?" *Pub. L.* 290 (2007); Richard H. Fallon, "The Core of an Uneasy Case for Judicial Review", 121 *Harv. L. Rev.* 1693 (2008).

may be accepted, it only becomes an added value to the constitutionalist project once its extent and character suits the needs and conditions of a particular system. Yet, the questions of judicial review's justification *and* its scope are seldom addressed in the same study, thereby making for an inconvenient divorce of these two related avenues of study. To narrow the divide, the object of this work is quite straightforward. Namely, is the idea of judicial review defensible, and what influences its design and scope?

1.2 Selecting Comparative Material

4 Due to the vast field these questions open up, they cannot be considered without a measure of context. Comparing the situation and experience of different legal systems is a very attractive method to study the justifiability of judicial review and the characterisation of its scope. Lorraine E. Weinrib has even come to observe that comparison is nowadays an integral part of the ideas necessary to understand a particular constitutional system.[8] Apart from the rise of the comparative method, recent years have also witnessed a focus on systems other than that of the United States of America in studying judicial review.[9] Although still important to understanding judicial review, the American experience can no longer be considered the one and only benchmark, as the experience of other systems has come to weigh heavy as well. In the words of Ran Hirschl, a "new constitutionalism" has dawned, whose context differs from when America was founded and which stimulates a "living laboratory of constitutional innovation".[10]

In view of the added value diversity brings to the topic of judicial review, three systems have been selected for this study, namely those of the United Kingdom, the Netherlands and South Africa. These systems provide fertile ground for comparison, as they present a spectrum of approaches to judicial review both in their history and present day situations.

5 The United Kingdom inhabits the one end of the spectrum, as it comes closest to full legislative supremacy over a law's ultimate fate. This is because although allowing courts to review acts of parliament in light of the Human Rights Act of 1998 (HRA), the Act does not allow the bench to nullify a law.[11] In other words, the HRA only allows for weak judicial review. Clearly, a very measured approach to bipolar constitutionalism.

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[8]Lorraine E. Weinrib, "Constitutional Conceptions and Constitutional Comparativism", in Vicki C. Jackson and Mark Tushnet (eds.), *Defining the Field of Comparative Constitutional Law* 3 (Westport: Praeger, 2002), at 4.

[9]Ginsburg, *supra* note 5, at 15–17; Hirschl, *supra* note 6, at 222–223.

[10]Hirschl, *supra* note 6, at 223.

[11]Human Rights Act 1998 (c. 42).

South Africa inhabits the other end of the spectrum, as its emergent democracy, in contrast to the other two longstanding democracies, relies on particularly strong judicial review in upholding the Constitution of 1996 in the face of any threatened violation. The Netherlands has been chosen for its interesting brand of judicial review, which places it between the other two systems. On the one hand, Dutch courts may not apply acts of parliament that contradict binding international law, on the other hand they must apply acts of parliament regardless of whether they conflict with national higher law such as the Constitution. Moreover, 2002 saw the tabling of the Halsema Proposal, which aims to amend the Constitution by allowing courts to refuse to apply acts of parliament which are inconsistent with the Constitution.[12] This development signals a possible shift in Dutch constitutional thought away from a relatively dominant majoritarian tradition to greater judicial activity in emulating treaty review.

6 What will not be included, apart from a few apt references, is European Union law. The treaties governing the Union essentially created a new legal order that deserves its own attention and as a consequence should be studied next to the selected systems of review. This is illustrated by the fact that the provisions governing monism in the Dutch Constitution are not interpreted as applying to EU law but only to other treaties such as the European Convention on Human Rights.[13] Including EU law in the enquiry might then confuse matters and hamper a clear exposition and study of judicial review in the legal systems concerned.

7 On the basis of the discussion thus far, the function to be compared has become clear, as well as the material selected for its study. Namely, controlling the state's legislative power by means of judicial review in the United Kingdom, the Netherlands and South Africa. What remains is to be more exact about the extent to which the function of judicial review will be investigated.[14] This is because references to "judicial review" are quite common in literature and can mean a variety of things, thereby highlighting the need for clarity. In this study, the focus is on national courts reviewing legislation against higher law in the context of public law relationships. In what follows, this qualified meaning of judicial review will be refined and explained.

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[12] *Parliamentary Proceedings II*, 2001–2002, 28, 331, no. 2; 2002–2003, 28, 331, no. 9.

[13] Cf. M.C. Burkens, H.R.B.M. Kummeling, B.P. Vermeulen and R.J.G.M. Widdershoven, *Beginselen van de democratische rechtsstaat* (Alphen aan den Rijn: Kluwer, 6th ed., 2006), at 342–346, on the European Union as a new legal order and its implications for national legal orders.

[14] On the meaning of function, *see* K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Oxford: Clarendon Press, 3rd ed., 1998), at 34–36.

1.3 Defining the Function of Judicial Review for Current Purposes

8 At its core, the act of judicial review entails measuring the congruency or compatibility of what may be termed common or ordinary legal norms with higher legal norms.[15] Legal norms cannot only be divided *horizontally* between various categories or topics, such as the law of contract or tort, but also *vertically* in various hierarchies such as between constitutional and non-constitutional norms. From a hierarchical point of view, higher norms are determinative for the validity of lower ordinary norms.

In other words, when it comes to judicial review, the focus is not simply on the judiciary *applying* ordinary norms once they have been posited, but also on *testing* their quality. The key question is whether a contested norm was properly constituted in the light of higher requirements – such an enquiry can obviously touch upon a norm's formal coming about or its substance. This entails that facts and norms cannot be treated as synonyms. To form part of a particular hierarchy, norms cannot simply be factual, but must conform to a higher norm dictating what such a lower norm should look like. All other matters ultimately relate to characterising the scope of such review, such as the judicial fora of review, the modalities of review, the content of review and the consequences of review.[16]

But first the focus of judicial review will be sharpened for current purposes. As it is through this lens that judicial review and the elements of its scope will be studied.

1.3.1 National Courts Applying Higher Law

9 There can obviously be no judicial review where courts lack the requisite power.[17] Turning to examples of the European Court of Human

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[15]For definitions and discussions of the term "judicial review", *see* McWhinney, *supra* note 5, at XI–XVI; Martin Shapiro, "The European Court of Justice", in Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law* 321 (Oxford: Oxford University Press, 1999); Aalt Willem Heringa and Phillip Kiiver, *Constitutions Compared: An Introduction to Comparative Constitutional Law* (Antwerp: Intersentia, 2007), at 95.

[16]On these, *see* Chapters 4 (fora), 5 (modalities), 6 (content), and 7 (consequences), respectively.

[17]The power to conduct review can be expressly created for courts. E.g. s. 5 of the Namibian Constitution (1990) states that the Bill of Rights "shall be enforceable by the Courts". Alternatively, where such unequivocal powers are absent, the judiciary may imply them from the constitutional dispensation, bar evidence to the contrary. E.g. the well-known decision of *Marbury v. Madison*, 1 Cranch 137 (1803), where Marshall C.J. held that courts could strike down laws that were contrary to the demands of the United States Constitution. Similarly, the practice in Belgium of refusing application to laws

Rights and the European Court of Justice, it quickly becomes evident that competent courts do not have to be national courts. Even so, the focus here is on national courts, as they form a common denominator in the three systems to be studied, thereby heightening comparatibility. International benches, for instance, play a very different role in the legal systems of the United Kingdom and the Netherlands, than they do in South Africa. The domestic focus is also justified, because national courts are also closest to society, something which is important in allowing people to control the state. However, choosing national courts over international courts does not mean to say that international jurisprudence will not be looked at. Such an omission would be a mistake, as international jurisprudence influences the laws of each of the three systems chosen for comparison. One only has to think of the importance in the United Kingdom of the European Court of Human Rights' jurisprudence for making sense of the HRA.

Not only the importance of international jurisprudence in interpreting national norms of higher law, such as the HRA, should be recognised, but also the possibility of international norms themselves being applied by domestic courts. The Netherlands is a case in point, because in discharging their powers of review judges must apply binding international norms in judging whether legislation must be applied or not. A proper study of judicial review would therefore have to take into account that national courts can sometimes apply both national and international norms of higher law.

10 The source of higher norms reveals very little about their purpose though. Norms of higher law govern the legality as well as the legitimacy of lower norms. This means that higher law dictates not only the formal coming about of legal norms, the aspect of legality, but also whether the content of such norms is legitimate when measured against fundamental rights.[18] Both legality and legitimacy will be addressed in this enquiry, yet legality as it relates to the division of powers between various levels of government within a state will not be studied. The reason for this is that it makes little sense to compare the possibilities of federal judicial review in South Africa, to systems with a unitary character such as those of the United Kingdom and the Netherlands. Such a comparison would

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that do not conform to directly enforceable international law came about by the Court of Cassation's judgment of 27 May 1971, *Pas.*, 1971, I, 886 (*Le Ski*).

[18] A right, as explained by Alan Gewirth, "Are There Any Absolute Rights?", in Jeremy Waldron (ed.), *Theories of Rights* 93 (Oxford: Oxford University Press, 1984) means that A has a claim to X against B by virtue of Y. A right is thus a construct based on a specific justification, which guarantees its bearer a claim with a particular content and extent, against parties expected to respect such a claim. In the case of *fundamental* rights, we speak of those rights that are deemed essential or basic in order to satisfy the purpose of law as an agent with which to ensure personal autonomy and freedom. Cf. Gerhard van der Schyff, *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (Nijmegen: Wolf Legal Publishers, 2005), at 5.

only result in needless problems, as the division of power between levels of government in unitary systems is more often solved by administrative law means, than by constitutional adjudication as is the case in federal systems.[19] Adding administrative law matters to the equation would also shift the enquiry to the relation between constitutional and administrative law, and this might blur the focus on the justification and design of the judicial review of legislation.

1.3.2 Reviewing Legislation

11 Although bipolar constitutionalism essentially means judicial review of both the legislative and executive functions of government, this enquiry is fixed on legislation. Both these functions are best considered on their own. If only for the sake of investigating the justification for judicial review, as the electoral legitimacy bestowed on the legislative function is usually advanced as a primary argument in denying the judicial review of legislation.[20] An objection that is of little significance where review is confined to executive action without involving its legislative basis in any meaningful way.[21] Consequently, the judicial review of executive actions, as opposed to legislative norms, will only be considered to the extent that it aids the understanding of the justification and scope of reviewing legislation.

12 Legislation cannot be studied without paying at least some attention to its source. Within the separation of powers, legislation is usually the product of *both* legislative and executive organs. The executive then becomes a legislative agent, in addition to its responsibility of applying legislation. This is the case in the United Kingdom, where the Queen is traditionally considered to be "in" parliament when laws are made, and in the Netherlands section 81 of the Constitution defines the "legislature" as

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[19]E.g. unlike in federal systems, there are no real constitutional safeguards for provincial powers in the Netherlands. Once parliament legislates in respect of the provinces, it is up to the courts to uphold the will of parliament. An administrative law doctrine, similar to the United Kingdom's *ultra vires*, then applies to ensure that national and provincial or local bodies do not act outside the powers assigned them by the relevant act of parliament. Cf. Burkens et al., *supra* note 13, at 286–291.

[20]Michel Troper, "The Logic of Justification of Judicial Review", 1 *Int. J. Const. L.* 99 (2003), at 109–121.

[21]E.g. in *R. (Q and Others) v. Secretary of State for the Home Department*, EWCA Civ 364, [2003], 3 WLR 365, it was held that although a statute was not incompatible with the HRA, the way in which it had been implemented in relation to the claimants was nonetheless incompatible with the HRA. For studies of judicial review and the executive, see Marc Hertogh and Simon Halliday (eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004); J.R. de Ville, *Judicial Review of Administrative Action in South Africa* (Durban: LexisNexis Butterworths, 2005).