Is there a fundamental tension between judicial review and constitutional democracy in Canada? On one hand, judicial review allows non-elected judges to influence policy by ruling on laws passed by the democratically elected legislature. On the other, judicial review is the most efficient method of protecting the rule of law and minority rights from potentially unconstitutional but democratic majority rule. In this paper, I provide a solution to this conflict in the form of remedial minimalism. By analyzing the constitutional decisions in Vriend v. Alberta, R. v. Morgentaler, Canada v. Bedford, Carter v. Canada, and Canada v. Khadr, I argue that adopting a judicial remedial minimalist approach allows the Supreme Court of Canada to strengthen the unity between the rule of law and democracy.
Keywords: remedial minimalism, democracy, separation of powers, rule of law, constitutional dialogue theory

Introduction

The Supreme Court of Canada, in its Reference re Succession of Quebec decision, determined four underlying principles of the Canadian constitution: federalism, constitutionalism, and the rule of law, democracy, and the protection of minorities (2 S.C.R. 217, 1998). The principles are fundamental to the liberal democratic society as enjoyed by Canadians. There appears, however, to be a tension between these principles in that federalism and democracy, which grants legitimacy to laws passed by the democratically elected government, conflict with the rule of law and the protection of minorities, as safeguarded by the non-democratically appointed judiciary. On one hand, how can a democracy, which is supposedly ruled by the people, have non-elected judges strike down majority supported laws and influence policy making? On the other, how can the rule of law and minority rights be protected if the majority can impose its will on society through laws passed by the government? It seems the Canadian political system faces a constitutional crisis whereby the three branches of government, instead of working together to effectively govern the Canadian people, are competing against each other for political superiority at the cost of the rights of citizens. The solution to the conflict is remedial minimalism, in which the judiciary strikes down laws that are unconstitutional but does not implement policy-changing remedies itself, thus allowing for parliament to pass new ones that do respect the constitution. The Supreme Court of Canada has traditionally used a flexible and expansive approach to remedies, but recently began to adopt a minimalist approach in regards to constitutional decisions. This paper argues that by adopting a remedial minimalist approach to its decisions, the Supreme Court of Canada strengthens the unity between the protection of rights, the rule of law and constitutional democracy. It should therefore be applied more often to decisions regarding constitutional legislation. This thesis is supported by exploring the judicial impact of the Supreme Court in the backlash of the remedies towards gay rights in Vriend v. Alberta, and remedial minimalism in the recent decisions regarding abortion in R. v. Morgentaler, prostitution in Canada (AG) v. Bedford, and physician-assisted suicide in Carter v. Canada (AG). Finally, the paper will address a counterargument against remedial minimalism raised by the abuse of public power in Canada (Prime Minister) v. Khadr.

Clarifications

Before exploring the role of the remedial minimalist approach adopted by the Supreme Court, a few clarifications are needed. Firstly, the term “judicial remedies” in constitutional law refers to the manner in which a court enforces its decision by declaring a law to be unconstitutional, excluding evidence, and implementing policy by “reading in” to laws to make adjustments (Hausegger et al., 380). The basis of remedial minimalism is that a decision only declares a law to be unconstitutional, allows for deference of the decision so that the other branches of the government can respond, and does not state specific policy implementations. Secondly, remedial minimalism does not necessarily refer to the debate between judicial activism and judicial restraint. Although remedies in Supreme Court decisions can be a very strong form of policy making and may be interpreted as a form of activism, judicial activism in itself refers to a judge’s willingness to strike down laws on the basis of independent, personal, and political views that override the decisions and actions of other branches of the state to create policy

(Hausegger et al., 123). By contrast, judicial restraint refers to judges limiting the exercise of their power by hesitating to strike down laws unless absolutely and blatantly unconstitutional (Hausegger et al., 123). Although the implementation of remedies is linked with activism, judges can still be activist and remedial minimalist if they are very willing to strike down law but not implement remedies. Most cases explored in this paper exhibit activism by invalidating previous laws but have minimal remedies administered. Thirdly, the “Parliament of Canada,” also referred to in this paper as simply “the government,” consists of both the executive branch made up of the Prime Minister and his Cabinet, and the legislative branch made up of the Senate and the House of Commons. Lastly, throughout the paper I make reference to the Section 1 Oakes test. This test enacts Section 1 of the Charter to allow for reasonable limits on Charter rights, so long as it can be “demonstrably justified in a free and democratic society.” Set by the precedence in R. v. Oakes, a violation of the Charter can be justified if it passes the follow criteria: 1) The law which violates the Charter needs to achieve a goal that is both pressing and substantial, and 2) must be proportionate in that it is rationally connected to its goal, causes the most minimal impairment amongst reasonable alternatives, and has proportionate effects where the rights violations costs of enacting the law are not too high in comparison to the benefits. A law that both violates the rights and freedoms of the Charter and is not justifiable under the Oakes test would be struck down.

Section 24 of the Canadian Charter of Rights and Freedoms

Judicial remedies are referenced in the Canadian Charter of Rights and Freedoms under Section 24(1), which states, “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 rem-
edy as the court considers appropriate and just in the circumstances.” While Section 24(1) states any law inconsistent with the Charter is of no effect and can be invalidated by the judiciary, it also allows judges to implement broader remedies and place positive obligations upon a government (Hogg, 2003). Thus, the Charter allows for the judiciary to implement remedies that alter or create policies. The reason behind Section 24(1) is to ensure that the courts have the power to provide those infringed with appropriate remedies and to forcibly “guide” Parliament’s approach to a law in a certain direction. Should the legislature disagree with the ruling, they could always invoke the notwithstanding clause in Section 33 to overrule the Supreme Court’s decision given certain restrictions, such as mandatory legislative review of the law every five years. However, invoking Section 33 would mean ignoring judicial authority and potentially inciting a political power competition. The next sections of the paper will explore why policy implementation by the Supreme Court causes conflict with democracy and the separation of powers. This paper will then explain why the minimalist approach to remedies reinforces the relationship between the parliament and the judiciary by respecting the rule of law while allowing for the democratic process to flourish.

The Backlash of Gay Rights Implementation by the Supreme Court in Vriend v. Alberta

In the 1998 case Vriend v. Alberta, the Supreme Court not only declared that the exclusion of sexual orientation in the Alberta Individual Rights Protection Act was unconstitutional but also “read in” to incorporate new language into the law which the court claimed could not be constitutionally omitted. Major backlash and criticism resulted from the decision, as it was argued that the Court had overstepped its judiciary role by adjusting a law on its own without involving the democratic process. The Court, which did not adopt a remedial minimalist approach but rather exercised a high degree of judicial law-making, had tarnished the principle of democracy by not allowing the Alberta Parliament to create its own laws. Therefore, the Supreme Court had compromised the relationship between the legislative branch and the judiciary.

In 1991, King’s College, a private religious institution in Edmonton, dismissed Delwin Vriend from his position as a lab coordinator solely on the basis that he was homosexual. He was then prevented from making a complaint under the Alberta Individual Rights Protection Act because it did not include sexual orientation as a protected grounds against discrimination (Vriend v. Alberta, par. 3-9). The case was put before the Supreme Court of Canada in 1998, and the Supreme Court found that the omission of sexual orientation was a violation of Equality Rights under Section 15 of the Charter which states that everyone is equal before and under the law with equal benefit and protection (Vriend v. Alberta, par. 3-9). Furthermore, the Court found the law failed the Section 1 Oakes Test because there was no pressing and substantial objective in omitting sexual orientation, no rational connection to protecting against discrimination, and it was not a minimal impairment in regards to violating Section 15 (Vriend v. Alberta, par. 123-7). As a result, the Supreme Court ruled that the act, in its exclusion of sexual orientation, violated the Charter and was thus invalid. Moreover, it enforced an adjustment to the law, determining that sexual orientation must be included on the basis that “judicial intervention [was] warranted to correct a democratic process that has acted improperly.” (Vriend v. Alberta, par. 176).

The dissenting opinions by Justice John C. Major, as well as public and legal expert criticism, were quick to respond. It was argued that the Court had overstepped its boundaries as the judicial branch of Canada by playing a legislative role that should have remained with the Parliament. Constitutional dialogue theory is the concept that the judicial and legislative branches engage in dialogue with each other by responding to each other: the legislature passes a law that is struck down if unconstitutional, insofar as the legislature can create new legislation designed to accomplish similar objectives while respecting the constitution (Forcese and Freeman, 42). This enhances democracy by generating a greater degree of accountability because both branches review the merits of the other. However, with the Court deciding to change the law itself, the dialogue was lost and the democratic process through the legislature was compromised. Additionally, critics argued that the act of creating legislation by the Court had violated the separation of powers and eroded the power of the only truly democratic branch of the government. The role of the judiciary is not to make law and create policy, but to ensure that those laws that are democratically passed do not violate constitutional rights as a check on the other branches of the government. The issue was no longer between parliamentary supremacy and judicial review, but instead judicial supremacy, which goes against all traditions and principles valued in a democratic society. The dissenting Justice and the Alberta government went so far as to consider the use of the notwithstanding clause in Section 33 of the Charter to prove a point; however, the threat was never enacted (Forcese and Freeman, 42-44). The strong backlash against the decision was a direct result of the implementation of remedies that overstepped the Supreme Court’s power and consequently damaged the relationship between ensuring a democratic society and respecting the rule of law. Had the Court decided to apply a more remedial minimalist approach, it would have ensured the democratic process was upheld while also guaranteeing that constitutional rights were being protected. Since Vriend v. Alberta, it appears that the judiciary learned from its mistake.
in other recent constitutional cases and has been adopting a more minimalist approach to remedies.

The Unanswered Abortion Question in R. v. Morgentaler

The case of *R. v. Morgentaler* regarding abortion laws in the Criminal Code was heard by the Supreme Court in 1988, ten years before the backlash of judicial law-making in *Vriend v. Alberta*, but nonetheless exemplifies the importance of remedial minimalism applied by the Supreme Court of Canada. Allowing the Parliament to debate and propose changes to the law ensures that the rule of law and the democratic process are both respected. The democratic process is valuable for a number of reasons. In particular, it allows governance of the people to be legitimate because the people govern themselves through a system of fair participation and consent. It prevents the wills of individuals, such as those of judges, to be imposed without consent on the people being ruled. At the same time, it provides everyone with the opportunity to voice their opinions and come to a decision on how they should be governed. Even though the Parliament of Canada was unable to reach a decision regarding the criminality of abortion following the *Morgentaler* case, the process itself embodied the differing values of the people of Canada and the non-democratically appointed judges did not enforce a law that many people would have disagreed with.

Prior to the *R. v. Morgentaler* decision in 1988, Section 251(4) of the Criminal Code made it illegal for women to receive an abortion unless they had obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital. Dr. Henry Morgentaler, Dr. Leslie Smoling, and Dr. Robert Scott were three doctors that had established an abortion clinic in Toronto for women who were unable to get approval from the hospital committees. They claimed that a woman has the right to decide herself whether to have an abortion. They were arrested and charged with violating the Criminal Code, and the issue was brought before the Supreme Court of Canada as to whether the anti-abortion laws were a violation of Section 7 of the Charter, which guarantees everyone’s right to life, liberty and security except in accordance with principles of fundamental justice. In a 5 to 2 decision, the Court ruled that the law indeed violated Section 7 in that the requirement of approval by a therapeutic abortion committee was manifestly unfair due to its containment of an unreasonable number of potential barriers, including unduly long delays, all-male committees, and geographic and financial differentials in treatment, such that the right to security is violated (*R. v. Morgentaler*). Furthermore, the law had failed all three steps of the Section 1 Oakes test in that the process was arbitrary, beyond necessary for evaluating the conditions for an abortion, and the impairment of compromising a woman’s right to security outweighed the law’s objective of protecting the fetus (*R. v. Morgentaler*). As a result, the three doctors were acquitted of the charges.

Although the Court’s decision did not rule that there existed a right for abortion. Both the majority opinion, with the exception of Justice Wilson, and the dissenting opinion agreed that the judiciary has no role in creating rights that are not explicit in the Charter nor has the duty of interpreting the Charter to protect interests that it was not initially intended to protect (*R. v. Morgentaler*). Additionally, there did not exist a consensus within the Canadian population regarding the right for abortion, and thus to make a decision on such an issue would not respect democracy. By not applying a law-making remedy declaring a right for abortion, the Supreme Court played its role as the check of the Parliament, and allowed the legislative branch to have the issue undergo the democratic process.

In the following years, the Parliament under Prime Minister Brian Mulroney proposed a law under the Criminal Code that allowed abortions only under life and health threatening conditions as approved by a medical practitioner, but the bill was defeated in the Senate after an unprecedented tie vote (Hausegger, 270). Moreover, in another decision concerning Morgentaler, the Supreme Court ruled that Nova Scotia’s attempt to legislate abortion under provincial criminal law was ultra vires to the power of the provincial parliament (Sharpe and Swinton, 142). As of 2015, the Canadian Parliament has not been able to pass another abortion law, meaning that there exists no national criminalization of abortion. This further demonstrates the significant lack of societal consensus on the issue, and that a Court ruling would have raised concerns of the power regarding the Courts in creating law. The *Morgentaler* case illustrates the judiciary’s role in addressing politically contentious issues in criminal law by applying a remedial minimalist approach in striking down an unconstitutional law while preserving the democratic process by not encroaching on the duty of the other branches of the government in making legislation.

The Illegal Prostitution Problem in Canada (Attorney General) v. Bedford

The decision of the Supreme Court of Canada in the 2013 ruling of *Canada (Attorney General) v. Bedford* is another example where the judiciary applied a minimalist method to remedies and deferred the invalidation of the laws by one year. By doing so, the Court had made its judgement on whether the laws were a violation of the Charter, and after deciding they were, allowed the legislative branch to amend the laws rather than doing so itself. Thus, the remedial minimalist approach protects Canadian rights while also respecting constitutional democracy and the legislature’s authority.

Prior to the *Canada (Attor-
ney General) v. Bedford case, the act of prostitution itself was not illegal, but Canadian prostitution laws in the Criminal Code made it illegal to keep or be in a bawdy-house (Section 210), to live off the avails of another’s prostitution (Section 212(1)), and to attempt to stop and communicate with someone in a public place for the purpose of engaging in prostitution (Section 213(1)). Terri-Jean Bedford, Amy Lebovitch, and Valerie Scott were three prostitutes who were charged with violating the three aforementioned laws, but claimed that the laws surrounding prostitution threatened the right to security as protected under Section 7 of the Charter. The case went to the Supreme Court of Canada in 2013, where the Court unanimously ruled that all three of the laws were unconstitutional on the basis of violating the right to security: the prohibition of bawdy-houses prevents prostitutes from working in their own homes, or in a safer regulated area, and instead forces them to work on the streets; the prohibition on living off the avails of another’s prostitution prevented prostitutes from hiring safeguards such as bodyguards, drivers, and receptionists; and the prohibition on communication in a public area for prostitution prevents prostitutes from screening a client for safety concerns in a familiar place (Canada (Attorney General) v. Bedford). Additionally, the laws did not adhere to the fundamental principles of justice under Section 7 nor the proportionality test under Section 1. The laws were consequently deemed invalid but no further remedies were pursued. Furthermore, the Court allowed the legal force of the decision to be deferred by one year to allow for prostitution to continue to be regulated while the legislature is in the process of creating new laws.

In their decision, the Justices determined that it was not the role of the judiciary to implement further remedies by changing the legislation, especially in regards to such a complex and delicate matter, but rather merely to determine the constitutional validity of the laws. The Court stated that “it will be for Parliament, should it choose to do so, to devise a new approach reflecting different elements of the existing regime,” (Canada (Attorney General) v. Bedford). The remedial minimalist approach applied by the Court is one that ensures that the protection of constitutional rights does not contravene with the principle of democracy and the separation of powers, in where the legislature has the prerogative to propose and pass laws. Furthermore, by not granting remedies to the case, the Supreme Court also increased the efficacy of passing legislation regarding prostitution by reducing the limits imposed by remedies. Imposing a legal remedy would constrain the legislature whereas minimizing remedies allows for flexibility in creating new laws. In December 2014, the Canadian Parliament passed Bill C-36, enacting legislation that criminalizes the act of purchasing sex rather than the act of selling sex to shift the illegality away from sex workers (Levitz 2014). Some of these laws, although very controversial, provide sex workers with legal immunity as a method of protection. As a result, the Court’s decision to employ a minimalist method towards remedies strengthened the bond between the judiciary and the Parliament, and as well maintained that the rule of law, constitutional rights, and the democratic process are all recognized.

The Right for Physician-Assisted Suicide in Carter v. Canada (Attorney General)

The recent 2015 decision regarding medically assisted suicide in Carter v. Canada (Attorney General) shares many similarities with the decision addressing prostitution laws in the Bedford case. Again, this case is another example of the Supreme Court utilizing remedial minimalism in its ruling to ensure that constitutional rights are upheld while the separation of powers and the democratic process are honoured. Furthermore, Carter also exemplifies the conjunction of judicial activism and remedial minimalism due to the overruling of a previous Supreme Court decision.

Preceding the Carter case in 2015, the right to assisted suicide was illegal under the Criminal Code sections 14, 21, 22, 222, and 241, and the laws were ruled to be not in violation of Section 7 of the Charter as determined in 1993 by the Supreme Court in Rodriguez v. British Columbia (AG) (Carter v. Canada (Attorney General)). The Carter case began in 2009, when Gloria Taylor was diagnosed with ALS, an irremediable neurodegenerative disease that would cause her body to deteriorate slowly until she died. She wanted to be able to have a physician assist in her death before the disease prevented her from dying peacefully. She challenged the constitutionality of the laws in court, supported by Lee Carter, who had previously helped her mother obtain a physician assisted suicide in Switzerland (Carter v. Canada (Attorney General)). The Supreme Court unanimously found that the laws prohibiting assisted suicide did in fact violate Section 7 of the Charter in all three regards: they violated the right to life in that the prohibition on assisted suicide may lead to people committing suicide prematurely on their own out of fear of being unable to do it when the suffering was intolerable; it violated the right to liberty in that they deny people the right to make decisions concerning their dignity, autonomy, bodily integrity and medical care; and it violated the right to security by leaving people to endure intolerable suffering (Carter v. Canada (Attorney General)). Moreover, the Court determined the laws to not be in accordance with both the fundamental principles of justice of Section 7 and the proportionality requirement of the Oakes test of Section 1. The objective of the law was to protect vulnerable persons, whereas the laws prohibiting assisted suicide were overly broad in proportionality and minimal impairment by including people who were able to properly consent and not vulnerable (Carter v. Can-
ada (Attorney General)). The Supreme Court overruled its decision in the Rodriguez case, and determined that the laws were unconstitutional, thus had no legal force, while allowing the decision to be suspended for a year. It was evident that the Court had adapted to the change in social values since 1993, and that stare decisis “is not a straitjacket that condemns laws to stasis,” (Carter v. Canada (Attorney General), par. 44).

The Court in the Carter case had applied a method similar to the one it used in the Bedford case in regards to striking down the laws and deferring them, but also included two conditions in its remedy. The Court declared as a remedy that the laws are void only insofar as they prohibit physician assisted death for a competent adult who (1) properly consents to the termination of life, and (2) has a grievous and irremediable disease that will cause intolerable suffering (Carter v. Canada (Attorney General), par. 172). Likewise to Bedford, the Court argued that, “it is for the parliament and provincial legislatures to respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons” and issuing further remedies would, “create uncertainty, undermine the rule of law, and usurp Parliament’s role,” (Carter v. Canada (Attorney General), par. 124-5). Withholding any further specific implementation or adjustments to the law, the adoption of the remedial minimalist approach by the Court protects the protection of Section 7 rights under the Charter, and ensures that the separation of powers under the Canadian constitutional democracy is sustained. Additionally, the two conditions set by the court serve as guidelines for the legislature to use as a basis for the creation of new laws surrounding assisted suicide. Had the Court administered a higher degree of remedies to form new laws, there would have been similar backlash as seen in Vriend in that the judiciary would have been criticized for encroaching on the role of the legislature. It is clear that remedial minimalism in the Court’s decision had fostered the relationship between the judiciary and the Parliament in legitimately adapting to new social values into law.

Remedial Minimalist Failure? A Counterargument raised in the Abuse of Public Power in Canada (Prime Minister) v. Khadr

In its 2010 decision regarding the controversial case of Canada (Prime Minister) v. Khadr, the Supreme Court of Canada upheld the separation of powers by not infringing on the federal executive’s responsibility over foreign affairs despite ruling that the federal government had violated Khadr’s Charter rights. Critics have brought the counterargument against judicial minimalism stating that the Court’s insufficient remedies in its decision had caused a failure to protect the fundamental principles of justice and the rule of law by not stopping the executive from abusing its power (MacFarlane 2012). However, this section will address the counterargument by asserting that heavy remedies imposed on the Parliament would have been outside of the Court’s judiciary competency and caused political turmoil between the branches of the Canadian government.

Omar Khadr, a Canadian citizen, was 15 years old in 2002 when he was shot twice in the back and detained by American forces in Afghanistan following a military firefight. By reason of being an “enemy combatant” and facing charges of several war crimes, he was placed in the American Guantanamo Bay military prison where he was subject to various methods of torture including sleep deprivation and physical abuse for purposes of intelligence gathering and interrogation (Canada (Prime Minister) v. Khadr). The Canadian authorities were aware of this and additionally participated in “interviews” that were preceded by torture, as Khadr was interrogated by a number of Canadian Secret Intelligence Service (CSIS) officials as well (Canada (Prime Minister) v. Khadr). In 2006, a US military court determined that the detainees in Guantanamo Bay had suffered from actions that violated US laws and the Geneva Convention against the use of torture, and thus Canada had the right to repatriate Khadr; however, the Canadian federal government under Prime Minister Stephen Harper repeatedly refused (Canada (Prime Minister) v. Khadr). The case was brought to the federal courts which ruled that the interrogation techniques used at Guantanamo Bay by Canadian agents were in fact a violation of Khadr’s right to life, liberty and security guaranteed by Section 7 of the Charter, and that the federal government had the obligation to repatriate Khadr (Canada (Prime Minister) v. Khadr). In a defiant response, the federal government announced that it would not repatriate Khadr and appealed the decision to bring the case before the Supreme Court of Canada, which made its final decision in 2010. In its 9 to 0 decision, the Court upheld the federal court’s ruling that Khadr’s Section 7 rights were grossly violated, but overturned the ruling to order the executive to repatriate Khadr on the basis that Khadr was, at the time, under the control of American authorities and repatriation would have been a political action under the prerogative of the executive (Canada (Prime Minister) v. Khadr). The Court argued that it did not have the competency nor the power under the Constitution in judging and commanding foreign affairs, which is an exclusive power of the executive. As such, it left it up to the federal government to decide which remedies to seek. The federal government continued to refuse to repatriate Khadr until the United States pressured Canada in taking him back after the conviction of his crimes, and Khadr was sent back to Canada to serve the rest of his sentence in 2012.

It is with little doubt that the Canadian government had infringed on Khadr’s Section 7 Charter rights. Furthermore, the Canadian federal government had disregarded the rule of law by abusing its public power and failing to perform its duty of ensuring Canadian
rights, particularly those guaranteed in the Charter, are protected by refusing to repatriate a Canadian citizen undergoing blatant human rights abuses on the basis of political image (Berard 2014). The counterarguments to remedial minimalism are raised by its critics who claim that the lack of remedies applied in the Khadr decision allowed the violation of Charter rights to continue and enabled Stephen Harper’s government to abuse its public power while the Supreme Court stood by and watched (Macfarlane 2012). Thus, the judiciary failed to ensure the executive respected the rule of law and upheld democratic values. To address this counterargument, it is important to note that ordering the federal government to repatriate Khadr would have forced the Court to operate outside of its competency and caused a clash between the branches of the government.

Firstly, a repatriation order from the Supreme Court to the federal government was outside of the Court’s competency and function. To begin, despite the decision that “courts are empowered to make orders ensuring that the government’s foreign affairs prerogative is exercised in accordance with the constitution,” the Court stated that it was incompetent to make a decision regarding the foreign affairs of the federal government (Canada (Prime Minister) v. Khadr, par. 37). In a constitutional democracy such as the one Canadians enjoy, one of the benefits is a clear separation of powers between the judicial, executive, and legislative branches. To force the executive to act in its foreign affairs is for the judiciary to encroach on exclusive executive powers and blur the separation. Additionally, prior to hearing the case, it was the executive branch that had been assessing Khadr’s situation, possessed all the relevant documents, and been in communication with American authorities. For the Court to make a decision while unaware of the complete situation and versed in foreign policy could have unforeseen consequences. Furthermore, repatriation was not necessarily a legal issue, but a political one. It was the United States that had held Khadr under charges of war crimes at the time, and it was the Canadian executive’s burden to enter negotiations for getting Khadr back to Canadian soil. Forcing the federal government into negotiations for repatriation with another country has never been done in any high court in the world. Moreover, for the Court to be entering in what appears to be partisan political issues would be uncharacteristic of its role as the judiciary.

Secondly, an order for the federal government to repatriate Omar Khadr by the Supreme Court would have generated a clash between the judicial and executive branch of the government causing a constitutional crisis. As mentioned in the section of Vriend v. Alberta, such a remedy would change the relationship between parliamentary supremacy and judicial review, as it should be in the Canadian governance, to a conflict of parliamentary supremacy against judicial supremacy. If Parliament acted upon the order to repatriate Khadr not on its own but under threat from the judiciary, it may appear that the judiciary has leverage in influencing executive action. On the other hand, if Parliament ignored the ruling of the Supreme Court, which was very possible considering the extensive backlash and appeals, then the rule of law would be blatantly violated. This is especially problematic because the case involves an executive act, not legislation as was the question in previous cases, whereby there are no legal notwithstanding methods. A noncompliance with the Supreme Court ruling would mean the executive completely ignores judicial authority. Indeed, there were statements made by the Prime Minister and the Minister of Foreign Affairs at the time that suggested the executive would not comply with a Supreme Court judicial order for repatriation (McCharles 2010). A dilemma forms in which either decision made by Parliament on the ruling of repatriating Khadr would have weakened the relationship between the judicial and executive branches of the government, and thus compromises the basis of constitutional democracy. As such, the Supreme Court, to avoid the battle of governmental branches and the loss of legitimacy on either side, did not set a ruling to order the repatriation of Khadr.

It is important to reiterate that it was the executive government that was not respecting the rule of law by ignoring the judicial ruling that there was a clear Section 7 violation. The executive has the autonomous right to decide its actions regarding both the time frame and manner of application. The remedial minimalism used by the Court in declaring the unconstitutional acts of the federal government was completely valid in that it respected constitutional democracy and the separation of powers. It encouraged the executive to properly use their exclusive powers without threat of judicial encroachment, but it was the executive that failed to uphold the rule of law on its end. To clarify, I am not arguing from a normative position that the Supreme Court was absolutely justified in not stepping outside the bounds of jurisdiction to stop the executive from continuing to violate the rule of law. Perhaps the judiciary’s decision to not enact heavier judicial remedies permitted the executive to continue its violation of Khadr’s rights. Rather, I am arguing that the judiciary, taking into consideration its constraints of foreign affairs competency and the constitutional crisis that would have followed if the executive would not comply with the decision, did what it could in finding a balance between democracy and the protection of individual rights. Although not a perfect solution, the Court created a legally binding decision to protect Khadr’s rights by condemning the executive’s actions, while it also allowed the executive to have jurisdiction within its appropriate domain. Had the executive followed through by legitimizing the Court’s condemnation of its actions, neither individual rights
nor the respect for the democratic separation of powers would have been infringed upon.

Conclusion

Through exploring the decisions of the Supreme Court in Vriend, Morgentaler, Bedford, Carter, and Khadr, it is clear that by adopting a remedial minimalist approach in its decision-making, the Supreme Court of Canada has ensured that the protection of rights, the rule of law, and constitutional democracy are respected in unity. The minimalist remedies applied in its decisions foster a strong balance between the judiciary, the legislature and the executive. It allows for dialogue between the different sections of the government and harmony within the different responsibilities they have. As a result, the Canadian political system can avoid a constitutional crisis where the different branches become stuck in a power struggle and instead ensure that efforts aimed at the protection of rights and democratic governance remain complementary rather than in opposition to each other. Controversial legislation will undoubtedly continue to appear. Bill C-51 and its role in Canada’s anti-terrorism laws is a good example of the balance required between national security and individual rights. Armed with the Canadian Charter of Rights and Freedoms, the Supreme Court will continue to play the vital role of protecting Canadians in a free and democratic society.

Cases cited


Works cited


