

PUBLIC LITIGATION AND THE CONCEPT OF “DEFERENCE” IN JUDICIAL REVIEW

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SUMMARY

The Constitutional Court is the highest court in all constitutional matters and thus decides appeals from other courts in disputes involving natural and juristic persons and the state, including criminal matters, if the matter is a constitutional matter or an issue connected with a decision on a constitutional matter. The Court may hear any matter, if the Constitutional Court grants leave to appeal because the matter raises an arguable point of law of general public importance that ought to be considered by that court. The Constitution makes it clear that courts are independent and subject only to the Constitution and the law. All persons to whom and organs of state to which a court order or decision applies are bound by it. It is important that the courts employ a standard of judicial review that is compatible with constitutional principles and values. The Constitutional Court subscribes to a standard of “deference” in judicial review. This principle recognises the need to protect the institutional character of each of the three arms of government in a manner that will prevent their ability to discharge their constitutional role being undermined. The principle of deference concerns the function of the judge in mediating between the law and legislative and executive politics. Around the world, litigation or judicial review has become immensely popular as a treatment for the pains of modern governance. South Africa is no exception to this phenomenon. This activism by litigation consists of efforts to promote, impede, or direct social, political, economic, or environmental change, or stasis. Organisations and individuals often disregard or distrust the political process and approach the courts to advance their own interest and to protect their own rights. Litigants seek to enforce constitutional principles and values that affect others as directly as them and that are valued for moral or political reasons and are independent of economic interests. The relief claimed aims to restructure the public organisation or conduct by the legislature

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and/or executive to eliminate a threat to constitutional principles and values enshrined in the Constitution. The South African Constitution has provided the public litigant with the freedom to bring matters before the courts not possible in terms of the common law. This has led to a departure from the traditional conception of litigation and consequently the remedies that courts have to offer. Courts have the duty to intervene in constitutional violations, but they have a prerogative to decide when and to what extent to intervene when such a violation occurred within the domain of other branches of government. The decision on whether to intervene and then, to what extent, will depend on the standard of judicial review the courts employ. Davis proposes a culture of justification for judicial review that takes into account the democratic prerogative of the elected arms of government to fashion and implement public policy within the framework of the Constitution. This culture accepts that the role of judicial review is to foster a culture of democracy, and that the judiciary must commence from a standpoint that it operates within a governmental system that is based upon a doctrine of separation of powers. Although Davis's work is meant as only as a framework for a coherent theory of judicial review, the question of justification and participation advances other constitutional values such as openness, non-discrimination, accountability and participation to judicial scrutiny. It is submitted that the culture of justification meets the tenets of judicial review as set out by both Mureinik and Dyzenhaus and finds application in an objective interpretation of constitutional provisions and values. The culture of justification ensures that the government justifies its decisions to the governed; it promotes transparent government and allows the citizens to participate in decisions affecting them.

KEYWORDS: Public litigation, private litigation, judicial activism, judicial review, judicial restraint, coherent theory of judicial review, culture of deference, culture of justification.